BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Raymond Gifford, Objector,

vs.

Jon Caldara and Jake Fogleman, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #93
("Percentage of Utility Rates Paid by Investor-Owned Utilities")

Raymond Gifford ("Objector"), a registered elector of the State of Colorado, through his undersigned counsel, submits this Motion for Rehearing on Initiative 2021-2022 #93 ("#93"), pursuant to C.R.S. § 1-40-107, and states:

The Title Board (the "Board") set the following ballot title and submission clause (the "title") for Initiative 2021-2022 #93 on April 21, 2022:

Shall there be a change to the Colorado Revised Statutes concerning a requirement that investor-owned utilities pay a percentage of all rates from their profits as determined by the public utilities commission?

The title fails to meet the requirements of C.R.S. § 1-40-106, as interpreted by the Colorado Supreme Court, in the following respects.

A. The measure is so incomplete that it is incomprehensible and thus a title cannot be set.

To set a title, the Board must understand the measure before it. Indeed, "if the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). Because #93 is so incomplete that it cannot be comprehended, the Board cannot set a title for the measure, and it cannot be forwarded to the voters.

The measure requires certain investor-owned utilities to "pay" an indeterminate "percentage of all rates from their profits" but fails to state to whom payments would be made or who they would benefit. There is nothing in the measure itself that might help the Board determine who would receive the payments or who they would benefit. Perhaps the payments would be made to the Public Utilities Commission (the "PUC"), the entity that would be charged under the measure with determining the percentage to be paid. Perhaps the payments would be made to the State of Colorado of which the PUC is part.

Perhaps the payments would be made to the investor-owned utilities themselves. The measure's declaration notes that investor-owned utilities should bear their fair share of utility rates. As "rates" appears to be a reference to the price of gas and electricity, and it is the investor-owned utilities that supply gas and electricity, one may logically conclude that the investor-owned utilities must pay their fair share of the price to the seller of the products, the investor-owned utilities themselves. Indeed, in its on-line dictionary, Merriam-Webster defines the word "pay" to mean "to make due return for services rendered or property delivered" or "to give in return for goods or services." *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/pay, viewed April 25, 2022. As it is the investor-owned utilities selling gas and electricity, only they may be "paid" in return.

Proponents may argue the payments would be made to ratepayers, but the measure certainly doesn't say that. Indeed, the operative section of the initiative makes no mention of ratepayers. Moreover, it defies logic that a seller of a product would pay a portion of the purchase price of a product it is selling to another. Had the Proponents intended the payments to be made to, or to benefit, ratepayers they could have mentioned that in their measure. They did not. Instead of requiring the investor-owned utilities to "pay," Proponents might have required them to give ratepayers a "discount" or "rebate." They did not. Certainly, it makes no sense for investor-owned utilities to pay ratepayers. Ratepayers are not selling anything to investor-owned utilities for which they could be paid.

The measure includes a declaration, but it provides no comprehensible guidance. The declaration provides that investor-owned utilities "shall bear their fair share of all utility rates" but offers no definition of "fair share," no hint as to what the clause means, or any guidance on what standard the PUC should apply in determining what a "fair share" is. In fact, the *raison d'etre* of the PUC is to set regulated utility rates that are "just and reasonable." C.R.S. § 40-3-101(1). The PUC's "just and reasonable" standard is roughly synonymous with "fair." It is incomprehensible that the measure would require the PUC, having already set just and reasonable utility rates, to determine a "fair share" payment which, if paid to a third party, would necessarily leave regulated utilities with less than the PUC determined to be just and reasonable. In any event, the declaration does not specify who should receive payments from the investor-owned utilities or who should benefit from those payments.

At the Board's initial hearing on #93, Proponents offered little explanation of their measure other than to repeat the "fair share" clause from the declaration and to defer to the PUC's rulemaking charge. Even if Proponents had offered a cogent explanation of their intent, the utter failure of the measure to indicate who would receive payments is fatal. *Gonzalez-Estay v. Lamm*, 138 P.3d 273, 282 (Colo. 2006) (rejecting title where the "facial vagueness" of an initiative made it "impossible for a voter to be informed as to the consequences of his or her vote"). Here, because the measure is silent on the question of the recipient or beneficiary of payments, it is impossible for the Board to set a title that would help a voter to understand what he or she is voting for, regardless of what the Proponents intended.

The measure's failure to specify the recipient or the beneficiary of payments renders it incomprehensible, and the board must decline to set a title for it.

B. The title is legally flawed because it fails to inform voters of central elements of the measure.

1. The title must inform voters that the measure requires investor-owned utilities to make payments to themselves.

As set forth in Section A, the measure is fatally flawed because it fails to specify to whom payments would be made. As a result, the Board cannot set a title for the measure. However, if the Board rejects that argument and decides to set a title, it must specify a payee, specifically, the investor-owned utilities themselves.

It is the duty of the Board to set a title that expresses the purpose of a measure such that voters can "determine intelligently whether to support or oppose the proposal." *Hayes v. Spaulding*, 369 P.3d 565, 568 (Colo. 2016). The title set for #93 fails to meet this standard. The title notes that the measure requires investor-owned utilities to "pay" an indeterminate "percentage of all rates from their profits" but fails to state to whom payments would be made. A voter's decision about how to vote on the measure might very well turn on who would receive the proposed payments and who would benefit from them. A voter may support a measure that directs money to ratepayers, but not a measure that directs money to the PUC. Another voter may only support a measure that directs payments to the PUC. In any event, the title must tell voters how payments under the measure would be directed so that they may intelligently determine whether to support or oppose it.

While the title set for #93 closely tracks the language of the initiative, that "does not rule out the possibility that the title could cause voter confusion." *Robinson v. Dierking*, 413 P.3d 151, 154 (Colo. 2016) (rejecting title for failure to satisfy the clear title requirement even though title substantially tracked the language of the measure). Here, #93 is so incomplete that it is incomprehensible—it simply does not specify who would receive payments from investor-owned utilities—but this fact does not permit the Board to set a deficient title if it decides to set a title for the measure.

There is a single interpretation of #93 that, while it does not save the hopelessly flawed measure, is more reasonable than the others. That interpretation is that payments under the measure would be made to the investor-owned utilities themselves. As noted above, interpreting the measure as requiring investor-owned utilities to make payments to themselves is consistent with the fact that only the investor-owned utilities, as sellers of gas and electricity, can receive payment.

This interpretation is also consistent with current statute. Requiring the PUC to determine the percentage of rates investor-owned utilities must pay to themselves would be consistent with its obligation to set just and reasonable utility rates. Any other interpretation—requiring payment to ratepayers or another third party—would result in investor-owned utilities receiving less than PUC-established just and reasonable rates, creating a conflict between statutes.

Moreover, interpreting the measure as requiring investor-owned utilities to pay themselves is the only interpretation that may render it constitutional. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Section 15 of article II of the Colorado Constitution includes a similar provision. Here, #93 requires investor-owned utilities to make a payment of at least five percent of all rates from their profits to an unspecified payee. If the measure is interpreted to require those payments to be made to ratepayers, the PUC, or the State of Colorado, without just compensation, it would clearly constitute a taking, without just compensation, in violation of both the United States and Colorado Constitutions. This outcome was suggested in the review and comment memorandum for the measure, but Proponents failed to revise it cure the infirmity. Only if the measure is interpreted as requiring the investor-owned utilities to pay themselves can the measure be interpreted in a manner that would avoid a constitutional violation. "Where a statute is susceptible to different constructions, only one of which complies with constitutional requirements, the constitutional construction must be adopted." *Exotic Coins, Inc. v. Beacom,* 699 P.2d 930, 948-950 (Colo. 1985).

For these reasons, the title for #93 must be amended to inform voters that payments would be made by investor-owned utilities to themselves.

2. The title fails to inform voters the measure builds in up to one year of delay before implementation and that the measure only requires payments on rates approved or modified after its effective date.

The title informs voters that #93 requires investor-owned utilities to pay (to an undisclosed recipient) a percentage of their rates from their profits. The title fails to disclose that there may be a substantial delay in implementation of the measure, for two reasons. First, the measure only requires payment of a percentage of rates "approved or modified after the effective date" of the measure. If the rates of a particular investor-owned utility remain unchanged for years after the effective date of the measure, it will not be required to make payments. Moreover, the measure gives the PUC twelve months after the effective date of the measure to adopt implementing rules. No payments would be required until the PUC adopts its rules. The title should be amended to inform voters that the payments required by the measure may not commence for up to a year after its effective date and that payments will only be made on rates approved or modified after the effective date of the measure.

The Objector requests that a rehearing be set pursuant to C.R.S. § 1-40-107 to consider issues raised by this Motion.

Respectfully submitted this 27th day of April 2022.

s/ Thomas M. Rogers III
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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the Motion for Rehearing for Initiative 2021-2022 #93, was sent this 27th day of April 2022 by U.S. Mail, postage prepaid, to the proponents at:

Jon Caldara
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A copy has also been sent to Proponents' counsel, by email, at:

Shayne Madsen
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s/ Erin Holweger