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July 21, 2009

The Honorable Bernie Buescher
Secretary of State
State of Colorado
Department of State
1700 Broadway, Suite 250
Denver, CO 80290

RE: Comments on Notice of Proposed Rulemaking Issued May 29, 2009

Dear Secretary Buescher:

The law firm of Brownstein Hyatt Farber Schreck, LLP represents Public Service Company of Colorado, doing business under the name Xcel Energy ("Xcel Energy"), in connection with the Notice of Proposed Rulemaking ("Notice") issued by your office on May 29, 2009. On July 6, 2009 we submitted Comments in support of the Preliminary Draft of Proposed Rules. At that time, the Denver District Court had not yet issued its decision in the matter of *Dallman, et al v. Ritter*, Case Number 09CV1188.

In anticipation of the Court's written Order, you had asked that I opine upon the Secretary of State's jurisdiction to promulgate rules with respect to definition of "Sole Source Government Contract" as that term is defined in Article XVIII, Section 14.4 of the Colorado Constitution, based upon a working assumption that the Court would enjoin Section 15 of Amendment 54 but not enjoin Section 16. Section 16 creates a database of Sole Source Government Contracts and imposes reporting requirements on holders of Sole Source Government Contracts. On Friday, July 17, 2008, Judge Lemon issued her written Order which was largely consistent with the working assumption.

Amendment 54 provided a definition of Sole Source Government Contract that is now set forth in Article XXVIII, Section 2(14.4) of the Colorado Constitution. Clarification of that definition as set forth in the Proposed Rule is consistent with the proper role of the Secretary of State's constitutional and statutory role and jurisdiction.

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The Court's written Order is helpful in understanding the continuing jurisdiction of the Secretary of State to promulgate a rule clarifying the definition of Sole Source Government Contract. As discussed below, we believe that your office continues to have jurisdiction based upon, (1) the explicit constitutional grant of authority, (2) the Secretary of State's statutory authority to promulgate rules with respect to election laws, and (3) the inherent and practical considerations of Amendment 54.

THE COURT'S WRITTEN ORDER

In *Dallman*, the Court concluded that the Plaintiff had met the burden of proving beyond a reasonable doubt that Amendment 54 is unconstitutional. The Court granted the Plaintiff's request for a preliminary injunction, as follows:

THEREFORE, the Court enjoins the enforcement of Amendment 54 (except section 16 thereof) because, on its face, it violates the rights of free speech and association guaranteed by the First Amendment to the Constitution of the United States.

The Court's written Order addressed Section 16 of Amendment 54 on page 26 of the written Order. The Court noted:

The court has struggled with whether section 16 of the amendment, which creates a state list of all sole source government contracts with detailed information about each, should be severed and allowed to stand on its own. On the one hand, the only overbreadth it suffers from is the very broad definition of sole source government contract, transparency is a listed purpose in the Blue Book and section 16 does not burden free speech interests. On the other hand, by its own language, it is included in Amendment 54 only "to aid in enforcement of this measure..." Thus, it was not intended to have any life of its own and the court's ruling regarding the rest of the amendment leaves nothing to enforce. Balancing these considerations, and giving deference to the fact that transparency is a listed purpose of Amendment 54 in the Blue Book, upon which the electorate relied in passing the amendment, the court determines that section 16 is closely drawn to serve the important state interest of transparency in government contracting and excepts it from the operation of this preliminary injunction.

In its Order, the Court also addressed the definition of Sole Source Government Contract on page 23 of the written Order. The Court held that:

Amendment 54 is overbroad in the following major respects, among others...

It defines sole source contract far more broadly than the normal meaning of that term and in such a way that it subjects to its sweeping ban on campaign

contributions those who have government contracts that are not appropriate for competitive bidding and even those whose contracts could not be competitively bid.

THE SECRETARY OF STATE HAS RULEMAKING JURISDICTION

1. The Secretary of State has specific constitutional jurisdiction to address any matter set forth in Article XXVIII of the Colorado Constitution.

Article XXVIII, Section 9 (1)(b) of the Colorado Constitution gives the Secretary of State authority to promulgate rules "as may be necessary to administer and enforce any provision of [Article XXVIII of the Colorado State Constitution]." As noted above, Amendment 54's definition of Sole Source Government Contract is set forth in Article XXVIII, specifically at Section 2(14.4).

In the last sentence of Section 16, the Executive Director of the Department of Personnel is given authority to promulgate rules to facilitate the provisions of Section 16. Presumably that authority is granted to address the technical aspects of the database the Department is required to maintain. However that grant of authority does not give exclusive rulemaking jurisdiction to the Department of Personnel. Section 16 does not invalidate Article XXVIII, Section 9 (1)(b) and does not preclude the Secretary's jurisdiction with respect to the entirety of Article XXVIII. That grant of authority does not extend beyond Section 16 to the definitional provisions set forth in Article XXVIII, Section 2(14.4).

The Secretary of State's constitutional jurisdiction specifically covers all of Article XXVIII, including the definition of Sole Source Government Contract set forth in Section 2(14.4). The constitutional jurisdiction of the Secretary of State to clarify matters within Article XXVIII is clear and explicit.

2. The Secretary of State has statutory jurisdiction to address the proper administration of election laws.

C.R.S. 1-1-107(2) authorizes the Secretary of State to promulgate rules necessary for the proper administration and enforcement of the election laws. This statutory authority is designed to achieve uniform and proper administration of campaign and political finance laws.

In that context, the Court's consideration of Section 16 is instructive. In analyzing Section 16, the Court notes that, "the only overbreadth [Section 16] suffers from is the very broad definition of sole source government contract...." The Court singled out that the "overbreadth" of Section 16 is the Section 2(14.4) definition of Sole Source Government Contract. Implicit is the Court's recognition that the definition of Sole Source Government Contract needs clarification.

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The Court also notes that, "[B]y its own language, it is included in Amendment 54 only 'to aid in enforcement of this measure....' Thus, it was not intended to have any life of its own...." The primary purpose of Amendment 54 presented to the voters is set forth in the Ballot Title. The Ballot Title makes no reference whatsoever to the database or any other requirement set forth in Section 16.¹

The definition of Sole Source Government Contract must be viewed in the context of the scope and purpose of Amendment 54. Amendment 54 is an election law. Its clear purpose is to govern certain contributions made during the election process. Amendment 54, while preliminarily enjoined, is an election law for which the Secretary of State is given specific statutory jurisdiction to promulgate rules in accordance with C.R.S. Section 1-1-107(2)(a).

3. The Secretary of State is the proper authority to clarify the definition of Sole Source Government Contract.

The Proposed Rule issued on May 29th specifically addresses the definition of Sole Source Government Contract as that term is defined in Article XXVIII, Section 2(14.4). With due respect to the Department of Personnel, clarification of that term is best addressed by the Secretary of State.

Without repeating the Comments set forth in our July 6, 2009 letter to you, the analysis of the definition is best addressed in the context of the election laws and Article XXVIII concerning campaign and political finance. Rulemaking jurisdiction over those matters has always been in the Secretary of State's office. The Secretary of State's office has the experience and the expertise to address such matter. It's your job and you're good at it.

CONCLUSION

It goes without saying that the Court's written order is a preliminary injunction and the Court has not conducted a full trial on the merits. Whether the next procedural step is a trial on the merits or an appeal of the Court's Order, the constitutionality and enforceability of Amendment 54 has not been finally determined.

¹ The Ballot Title presented to the Voters was, "Shall there be an amendment to the Colorado constitution concerning restrictions on campaign contributions, and, in connection therewith, prohibiting the holder of contracts totaling \$100,000 or more, as indexed for inflation, awarded by state or local governments without competitive bidding ("sole source government contracts"), including certain collective bargaining agreements, from making a contribution for the benefit of a political party or candidate for elective office during the term of the contracts and for 2 years thereafter; disqualifying a person who makes a contribution in a ballot issue election from entering into a sole source government contract related to the ballot issue; and imposing liability and penalties on contract holders, certain of their owners, officers and directors, and government officials for violations of the amendment."

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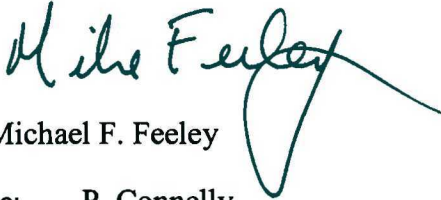
The purpose of the May 29th Notice of Proposed Rulemaking was well stated by your office:

The proposed revisions to these rules are necessary to answer questions arising under the implementations of amendments to Article XXVIII of the Colorado Constitution made by Amendment 54, as adopted by the people at the November 2008 general election. In particular, the amendments to these rules are proposed to clarify the definition of "sole source government contract" as used in Article XXVIII of the Colorado Constitution.

See, Proposed Statement of Basis, Purpose , and Specific Authority, Page 1, Issued May 29, 2009.

The need to "answer questions" remains. Your office is the appropriate agency to answer those questions and your jurisdiction to do so is clear. Thank you for your attention to this issue and if I can answer any question, please do not hesitate to call.

Sincerely,

A handwritten signature in blue ink that reads "Mike Feeley". The signature is written in a cursive style with a long, sweeping underline that loops back under the name.

Michael F. Feeley

cc: P. Connelly
M. Knaizer
A. Gyger

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