

SUPREME COURT OF COLORADO

101 West Colfax Avenue, Suite 800
Denver, CO 80202

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2010)

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE FOR 2009-
2010 #58

Petitioners:

ROBERT N. MCLENNAN, KENT SINGER and
DAN HODGES,
Objectors

vs.

Respondents:

BOB KENNEDY and KURT OVERTURN,
Proponents

and

Title Board:

WILLIAM A. HOBBS, SHARON L. EUBANKS,
and DANIEL D. DOMENICO

Attorneys for Petitioner:

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FILED IN THE
SUPREME COURT

MAY - 7 2010

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case Number:

10SA141

**PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING
BOARD CONCERNING PROPOSED INITIATIVE 2009-2010 #58 ("UTILITY
EXEMPTION FROM RENEWABLE ENERGY")**

\$ PAID

Petitioners, Robert N. McLennan, Kent Singer and Dan Hodges (the “Petitioners”), each registered electors of the State of Colorado, through their counsel, Greenberg Traurig, LLP, pursuant to Colo. Rev. Stat. § 1-40-107(2), respectfully submit this petition for review to appeal the decision of the Title Board in setting the title for Proposed Initiative 2009-2010 #58 (“Utility Exemption from Renewable Energy”).

ACTIONS OF THE TITLE BOARD

Bob Kennedy and Kurt Overturn (the “Proponents”) proposed Initiative 2009-2010 #58 (“Utility Exemption from Renewable Energy”) (the “Initiative”). On April 6, 2010, the directors of the Colorado Legislative Council and the Office of Legislative Legal Services submitted a Memorandum to the Proponents in compliance with Colo. Rev. Stat. § 1-40-105(1). On April 9, 2010, designated representatives of the Offices of Legislative Council and Legislative Legal Services held a review and comment hearing on the Initiative to address technical and substantive comments and questions concerning the Initiative.

On April 9, 2010, the Proponents submitted a final version of the Initiative to the Secretary of State.

On April 21, 2010, the Title Board held a public hearing in order to establish the Initiative’s single subject and set a title.

On April 28, 2010, Petitioners filed a Motion for Rehearing alleging that: (1) the Initiative violated the single subject requirements of Colo. Const. art. V, § 1(5.5) and the Colo. Rev. Stat. § 1-40-106.5; (2) the title set failed to express the Initiative's true intent and meaning; and, (3) the proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services. Also on April 28, 2010, Jon Goldin-Dubois and Richard Kuehn filed a Motion for Rehearing alleging that: (1) the Initiative violated the single subject requirements of Colo. Const. art. V, § 1(5.5) and the Colo. Rev. Stat. § 1-40-106.5; and, (2) the title set by the Title Board was unclear.

The Motions for Rehearing were heard at the next meeting of the Title Board on April 30, 2010. In response to the Motions for Rehearing and oral argument, the Title Board revised the ballot title by, among other things, changing the term, "electric resource standards," to, "renewable energy requirements." The Motions for Rehearing were otherwise denied by a vote of three to zero.

This timely appeal followed.

ADVISORY LIST OF ISSUES PRESENTED

1. Whether the Initiative violates the single subject requirement of the Colo. Const. art. V, § 1(5.5) and the Colo. Rev. Stat. § 1-40-106.5.

2. Whether the Initiative's title, ballot title, and submission clause are misleading, confusing, unclear, and fail to accurately and fairly reflect the Initiative's true meaning and intent.

3. Whether the proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services.

SUPPORTING DOCUMENTATION

As required by Colo. Rev. Stat. § 1-40-107(2), Petitioners have submitted a certified copy of the Initiative, a certified copy of Petitioners' Motion for Rehearing, and a certified copy of the title set with this Petition. *See Exhibit A.* Petitioners have also attached the April 6, 2010 Legislative Council and the Office of Legislative Legal Services Memorandum. *See Exhibit B.* Petitioners have also included the transcript from the Title Board hearing on April 21, 2010, *see Exhibit C*, and the transcript from the Motion for Rehearing on April 30, 2010, *see Exhibit D.*

RELIEF REQUESTED

Petitioners respectfully request that, after consideration of the parties' briefs, this Court reverse the actions of the Title Board with directions to decline to set a title and return the Initiative to the Proponents.

Respectfully submitted this 7th day of May 2010.

GREENBERG TRAURIG, LLP



Douglas J. Friednash, #18128

Christopher J. Neumann, #29831

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Dan Hodges
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May 2010, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2009-2010 #58 ("UTILITY EXEMPTION FROM RENEWABLE ENERGY")** was placed in the United States mail, postage prepaid, to the following:

Mario D. Nicolais, II
Hackstaff Gessler LLC
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Maurice G. Knaizer
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 6th Floor
Denver, Colorado 80203



Karen Brock

Exhibit A



STATE OF COLORADO

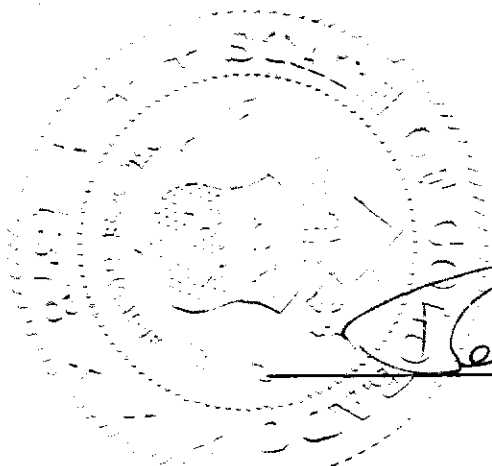
DEPARTMENT OF
STATE

CERTIFICATE

I, **BERNIE BUESCHER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2009-2010 #58".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 5th day of May, 2010.



Bernie Buescher

SECRETARY OF STATE

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PROPOSED INITIATIVE 58 - REVISED, CLEAN VERSION

Colorado Secretary of State

Be it enacted by the People of the State of Colorado:

Article 2 of title 40, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

40-2-128. Procedure for exemption – election. (1) SUBJECT TO THE REQUIREMENTS OF SUBSECTION (6) OF THIS SECTION ANY QUALIFYING RETAIL UTILITY AS DEFINED IN SECTION 40-2-128, C.R.S., OR ITS SUCCESSOR SECTION, COOPERATIVE ELECTRIC ASSOCIATION, OR MUNICIPALLY OWNED UTILITY MAY, BY THE AFFIRMATIVE VOTE OF A MAJORITY OF ITS CUSTOMERS OR MEMBERS CASTING BALLOTS, EXEMPT ITSELF FROM ALL OR PART OF THE REQUIREMENTS OF SECTION 40-2-124, C.R.S., OR ITS SUCCESSOR SECTION, AS WELL AS ALL ASSOCIATED STANDARDS FOR APPROVAL OF ADDITIONAL GENERATION OR ENERGY RESOURCES.

(2) THE QUALIFYING RETAIL UTILITY, COOPERATIVE ELECTRIC ASSOCIATION, OR MUNICIPALLY OWNED UTILITY SHALL CONDUCT AN ELECTION AT WHICH ITS MEMBERS OR CUSTOMERS MAY VOTE TO EXEMPT IT FROM ALL OR PART OF THE REQUIREMENTS OF SECTION 40-2-124, C.R.S., OR ITS SUCCESSOR SECTION IF:

(a) ITS BOARD OF DIRECTORS OR GOVERNING BOARD PASSES A RESOLUTION OR MOTION TO HOLD AN ELECTION SEEKING AN EXEMPTION; OR

(b) FIVE PERCENT OF ITS CUSTOMERS OR MEMBERS SIGN A PETITION REQUESTING AN ELECTION SEEKING EXEMPTION.

(3) **Petition requirements.**

(a) EACH PETITION SHALL INCLUDE THE NAMES AND ADDRESSES OF TWO PROPONENTS, WHO SHALL REPRESENT THE CUSTOMERS OR MEMBERS SIGNING THE PETITION. PROPONENTS SHALL BE ELIGIBLE TO VOTE ON THE QUESTION OF EXEMPTION.

(b) EACH PETITION SECTION SHALL CONTAIN:

(I) THE PROPOSED QUESTION OF EXEMPTION;

(II) A STATEMENT THAT ONLY CUSTOMERS OR MEMBERS OF THE UTILITY OR ASSOCIATION MAY SIGN THE PETITION; AND

(III) A STATEMENT ENCOURAGING SIGNERS TO READ THE QUESTION OF EXEMPTION, AND INFORMING SIGNERS THAT BY SIGNING THE PETITION THEY ARE INDICATING THAT THEY WISH THE PROPOSED QUESTION OF EXEMPTION TO BE VOTED UPON.

(c) EVERY SIGNER SHALL INCLUDE HIS OR HER NAME, SIGNATURE, STREET ADDRESS, AND CITY. EACH SIGNATURE SHALL ALSO BE DATED.

(d) EVERY SIGNATURE SHALL BE WITNESSED BY A PETITION CIRCULATOR. THE PETITION CIRCULATOR SHALL SWEAR OR AFFIRM THAT HE OR SHE WITNESSED THE PERSON'S SIGNATURE ON THE DATE AFFIXED TO EACH SIGNATURE.

(4) **Duties of utility or association.**

(a) THE UTILITY OR ASSOCIATION SHALL APPROVE THE PETITION FORMAT PRIOR TO THE CIRCULATION OF PETITION SECTIONS OR COLLECTION OF SIGNATURES. APPROVAL MAY NOT BE UNREASONABLY WITHHELD.

(b) THE UTILITY OR ASSOCIATION SHALL REVIEW ALL SIGNATURES TO DETERMINE THE SIGNERS' ELIGIBILITY, THE VALIDITY OF EACH SIGNATURE, AND THE NUMBER OF INDIVIDUAL SIGNATURES.

PROPOSED INITIATIVE 58 - REVISED, CLEAN VERSION

(c) IN REVIEWING SIGNATURES, SUBSTANTIAL COMPLIANCE SHALL BE ALL THAT IS NECESSARY FOR APPROVAL OF SIGNATURES.

(d) PROPONENTS MAY SUBMIT SIGNATURES UP TO SIX MONTHS FOLLOWING THE DATE OF THE UTILITY OR ASSOCIATION'S APPROVAL OF THE PETITION FORMAT.

(5) Conduct of elections.

(a) ANY ELECTION SHALL BE HELD NO LESS THAN SIXTY AND NO MORE THAN ONE HUNDRED TWENTY DAYS AFTER THE BOARD OF DIRECTORS PASSES A RESOLUTION OR MOTION, OR AFTER RECEIPT OF A VALID PETITION.

(b) THE UTILITY OR ASSOCIATION SHALL CONDUCT THE ELECTION BY MAIL. EACH CUSTOMER OR MEMBER SHALL RECEIVE AND BE ENTITLED TO VOTE ONE BALLOT FOR EACH ELECTRIC METER FOR WHICH THE CUSTOMER HAS AN ACCOUNT WITH THE UTILITY.

(c) EACH BALLOT SHALL INCLUDE THE FOLLOWING:

(I) A NOTICE EXPLAINING IN PLAIN TERMS THE STATUTORY REQUIREMENTS AT ISSUE.

(II) THE QUESTION OF EXEMPTION. THE QUESTION SHALL SET FORTH IN PLAIN LANGUAGE WHETHER THE UTILITY SHOULD BE EXEMPT FROM THE REQUIREMENTS OF SECTION 40-2-124, C.R.S. OR ITS SUCCESSOR SECTION, OR SUCH SPECIFIC REQUIREMENTS IDENTIFIED BY THE RESOLUTION, MOTION, OR PETITION CALLING THE ELECTION. THE QUESTION OF EXEMPTION SHALL BE IN A FORM THAT MAY BE ANSWERED "YES" TO SUPPORT THE QUESTION OF EXEMPTION OR "NO" TO OPPOSE THE QUESTION OF EXEMPTION.

(III) A STATEMENT OF NO MORE THAN THREE HUNDRED WORDS SUPPORTING THE QUESTION OF EXEMPTION. IN THE CASE OF A RESOLUTION OR MOTION, THE STATEMENT IN SUPPORT SHALL BE PROVIDED BY THE BOARD OF DIRECTORS OR GOVERNING BOARD. IN THE CASE OF A PETITION, THE STATEMENT IN SUPPORT SHALL BE PROVIDED BY THE PROPONENTS OF THE PETITION.

(IV) A STATEMENT OPPOSING THE QUESTION OF EXEMPTION. THIS STATEMENT SHALL BE THE ARGUMENTS FOR AMENDMENT 37 CONTAINED IN THE "ANALYSIS OF 2004 BALLOT PROPOSALS" PUBLISHED BY THE LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, RESEARCH PUBLICATION NO. 527-8.

(6) NO EXEMPTION MAY TAKE EFFECT UNLESS TWENTY PERCENT OR MORE OF ALL ELIGIBLE BALLOTS ARE CAST IN THE ELECTION.

(7) IF A UTILITY OR ASSOCIATION HAS EXEMPTED ITSELF FROM ALL OF SECTION 40-2-124, C.R.S., OR ITS SUCCESSOR SECTION, THE PROMOTION OF ELIGIBLE ENERGY RESOURCES AS DEFINED IN SECTION 40-2-124(1)(a), C.R.S., OR ITS SUCCESSOR SECTION SHALL NOT BE A CONSIDERATION IN ANY DECISION MADE BY THE COMMISSION REGARDING THE ACQUISITION OF ADDITIONAL GENERATION OR ENERGY RESOURCES, INCLUDING ACQUISITION OF ENERGY BY CONTRACT, REBATE, OR SUBSIDY FOR THAT UTILITY OR ASSOCIATION. IF A UTILITY OR ASSOCIATION HAS EXEMPTED ITSELF FROM ONLY PART OF SECTION 40-2-124, C.R.S., OR ITS SUCCESSOR SECTION, THE COMMISSION MAY ONLY CONSIDER STANDARDS CONSISTENT WITH THE EXEMPTION REGARDING THE ACQUISITION OF ADDITIONAL GENERATION OR ENERGY RESOURCES, INCLUDING ACQUISITION OF ENERGY BY CONTRACT, REBATE, OR SUBSIDY.

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Kurt Overturf
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Please have any correspondence sent to our offices, though. Thank you.

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COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 #58 ("Utility Exemption from Renewable Energy")
ELECTIONS
SECRETARY OF STATE

JOINT MOTION FOR REHEARING

On behalf of Robert N. McLennan, Kent Singer and Dan Hodges, each registered electors of the State of Colorado, the undersigned hereby files this Joint Motion for Rehearing in connection with Proposed Initiative 2009-2010 #58 ("Utility Exemption from Renewable Energy") 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 ten separate subjects wrapped up in the broad theme of “exemption from electric resource standards”:

1. **New authority for investor-owned utilities regarding Renewable Energy Standard (“RES”)**: The measure authorizes the board of directors or governing board of investor-owned utilities, upon passage of a resolution or motion, to hold a binding election seeking a permanent exemption from all or part of the RES and associated standards for approval of additional generation or energy resources.

2. **New authority for municipally owned utilities regarding RES**: The measure authorizes the board of directors or governing board of municipally owned utilities, upon passage of a resolution or motion, to hold a binding election seeking a permanent exemption from all or part of the RES and associated standards for approval of additional generation or energy resources.

3. **New authority to cooperative electric associations regarding RES**: the measure authorizes the board of directors or governing board of cooperative electric associations, upon passage of a resolution or motion, to hold a binding election seeking a permanent

exemption from all or part of the RES and associated standards for approval of additional generation or energy resources.

4. **New restriction on Public Utilities Commission (PUC) authority and decision making:** The measure diverges from its focus on internal electric utility decision-making regarding an exemption from the RES to impose explicit restrictions on the PUC regarding its decision-making in connection with a utility's acquisition of additional generation resources. This restriction will require the PUC to promulgate revisions to its rules regulating electric utilities.

5. **New petition authority for investor-owned utilities:** The measure requires an investor-owned utility to conduct an election to determine whether to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources upon request by petition signed by five-percent of its customers.

6. **New petition authority for municipally owned utilities:** The measure requires a municipally owned utility to conduct an election to determine whether to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources upon request by petition signed by five-percent of its customers.

7. **New petition authority for cooperative electric associations:** The measure requires a cooperative electric association to conduct an election to determine whether to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources upon request by petition signed by five-percent of its members.

8. **Creates irreversible decision-making regarding RES:** The measure contains no mechanism for reversing the decision to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources.

9. **Creates procedural requirements for petitions:** The measure contains a section addressing procedural requirements for petitions, including imposing on investor-owned utilities, municipally owned utilities, and cooperative electric associations the obligation to review and approve the petition format and the validity of each petition signature.

10. **Creates procedural requirements for elections:** The measure contains a section addressing procedural requirements for elections, including imposing on investor-owned utilities, municipally owned utilities, and cooperative electric associations the obligation to conduct the election and setting forth requirements pertaining to ballots.

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 conduct of municipal elections from city council to the board of municipally owned electric utilities. Second, the measure purports to create new authorities and obligations regarding elections for investor owned utilities, municipally owned utilities and cooperative electric associations, and purports to impose restrictions on the decision-making of the PUC as it relates to utilities’ acquisition of additional generation or energy resources. 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 addresses three types of electric utilities: qualifying electric utilities, cooperative electric associations, and municipal owned utilities. These entities operate differently and are subject to different statutory and regulatory requirements, and the voters should be informed that the measure applies to all of these entities.
2. The Title fails to mention that the measure prohibits the promotion of eligible energy resources as a consideration in decisions made by the PUC regarding acquisition of additional generation or energy resources by utilities that have become exempt.
3. The Title fails to mention that the exemption is permanent, and there is no provision for reversing the exemption.
4. The Title fails to mention that the election may be prompted by either a resolution by the utility's board of directors or governing board or a petition signed by at least five-percent

of the utility's customers. A key provision of the measure is the trigger for the election, and the voters should be made aware of these triggers.

5. The Title fails to mention that the measure imposes on electric utilities requirements regarding petitions.

6. The Title fails to mention that the measure creates new authority in municipally owned utilities to conduct elections, upon resolution by the utility's governing board, to determine whether to permanently exempt the utility from all or part of the RES. Although a municipality may conduct elections, municipally owned utilities currently have no authority to call or conduct elections separate and apart from their municipalities.

7. The Title is vague and unclear where it refers to "statutory and associated regulatory electric resource standards." First, the title would be clearer by referring to what is commonly known as the Renewable Energy Standard. Second, it is misleading inasmuch as "associated regulatory electric resource standards" does not reflect the true effect of the measure with regard to the PUC rules, *i.e.*, it restricts the Commission's decision-making in connection with the acquisition of generation and energy resources.

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 which were not in response to the directors' comments, 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 prohibited both the PUC and the “governing board of any utility or association” from considering the promotion of eligible energy resources in decision-making. *See Original Text, proposed § 40-2-128(5)*. In the comment memorandum provided to proponents by the directors, the applicability of this prohibition to the governing board of any utility or association was not the subject of any comment. The only mention of this provision was in the statement of the measure’s purpose, which stated this prohibition as the measure’s second purpose.

In the initiative submitted to the Title Board, the proponents modified the provision restricting consideration of the promotion of eligible energy resources in decision-making such that it only applied to the PUC. The proponents deleted the provision’s reference to “the governing board of any utility or association” even though the directors did not comment on this issue.

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. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d at 251. However, the directors neither have such an instruction, nor commented on this issue. The directors accepted the provision as stated and incorporated it into their statement of the measures purposes. The change of this provision by the proponents changes the persons to whom the

prohibition applies. This is a substantive change. The proponents must re-file 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.

GREENBERG TRAURIG, LLP

By: 

Douglas J. Friednash, #18128
Christopher J. Neumann, #29831

Petitioners' Addresses:

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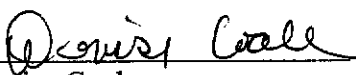
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Dan Hodges
121 S. Tejon Street
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Colorado Springs, CO 80947

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:

Mario D. Nicolais, II
Hackstaff Gessler LLC
1601 Blake Street, Ste. 310
Denver, Colorado 80202


Denise Coale

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BALLOT TITLE BOARD

APR 28 2010 4:21



ELECTIONS
SECRETARY OF STATE

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE FOR 2009-2010 # 58 ("Utility Exemption from Renewable Energy")

Jon Goldin-Dubois and Richard Kuehn, being registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Motion for Rehearing, pursuant to C.R.S. §1-40-107(1), concerning the title and ballot title and submission clause set for Proposed Initiative for 2009-2010 # 58 ("Utility Exemption from Renewable Energy") at the Title Board hearing on April 21, 2010.

1. Proposed Initiative for 2009-2010 # 58 contains multiple subjects in violation of Colo. Const. art. V, §1(5.5) and C.R.S. §1-40-106.5. In addition to establishing provisions by which an electric utility may conduct an election of its customers or members for the purpose of exempting itself from various statutory requirements related to Colorado's renewable energy standard, the proposed initiative constrains the decision-making process and criteria to be considered by the Colorado Public Utilities Commission in the context of evaluation of public convenience and necessity for permitting the acquisition of generation and energy resources by electric utilities.

2. The second subject discussed in paragraph 1, above, is not disclosed in the title or ballot title and submission clause.

3. The title and ballot title and submission clause, as presently set, refer to an exemption from "specific electric resource standards." This phrase is unclear, incomplete in terms of the subject matter of the initiative, does not fairly express the true and complete intent and meaning of the initiative, and is substantially misleading as to the content of the initiative.

a. The text of the initiative refers to an exemption "from all or part of the requirements of section 40-2-124, C.R.S., or its successor section." C.R.S. §40-2-124 contains, at a minimum, "requirements" for "electric resource standards" – para. (1)(c) – a mandated "standard rebate offer program" for solar generation on a customer's premises – para. (1)(e) – a "retail rate impact rule" – para. (1)(g) – a resource purchase mandate applicable to wholesale energy providers and their wholesale customers– subpara. (1)(g)(II) – an annual report requirement – para. (1)(h) – a separate "renewable energy standard" for municipally owned electric utilities – subsec. (3) – and interconnect and credit requirements applicable to "customer-generators" and "municipally owned utilities" – subsec. (7). The title omits reference to all but the first of these items and affirmatively indicates that the subject exemptions would only have

applicability to the "electric resource standards" of para. (1)(c) of C.R.S. §40-2-124.

b. The terminology "electric resource standards" has no commonly understood meaning for the voters. And, as described above, to the extent it may be accurately understood by any voters, it is affirmatively incomplete and misleading as to the actual scope of the content of the initiative.

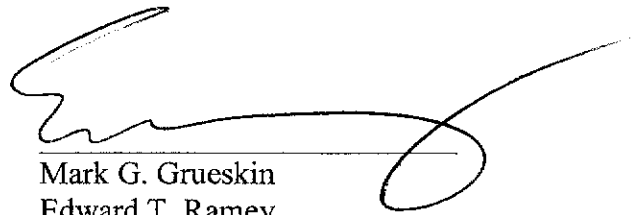
c. The commonly understood terminology by which the voters identify the compendium of provisions of C.R.S. §40-2-124 – from all or any part of which the ability to obtain an electoral exemption is sought by this initiative – is "renewable energy standard." "Renewable energy standard" is the headnote to the entirety of C.R.S. §40-2-124 (Ex. 1). "Renewable Energy Standard" was the headnote to Amendment 37 by which C.R.S. §40-2-124 was presented to and adopted by the voters in 2004 (Ex. 2). "Concerning Increased Renewable Energy Standards" was the title to House Bill 07-1281 passed by the General Assembly to amend C.R.S. §40-2-124 in 2007 (Ex. 3).

d. At a minimum, to avoid misstating and affirmatively misrepresenting to the voters the contents and effect of the initiative, it is submitted that an amendment to the title (with a conforming amendment to the ballot title and submission clause) consistent with the following format is necessary:

An amendment to the Colorado Revised Statutes concerning elections for customers to exempt electric utilities from ~~electric resource~~Colorado's renewable energy standards, and, in connection therewith, authorizing members or customers of an electric utility to approve by majority vote the exemption of the utility from ~~statutory Colorado's renewable energy standard, and associated regulatory electric resource standards;~~ and specifying procedures for calling and conducting an election, and prohibiting the Colorado Public Utilities Commission from considering such exemption in any decision regarding the acquisition by a utility of additional generation or energy resources.

4. Subparagraph (5)(c)(IV) of the initiative, though an implementation measure, carries sufficient implications to the rights of voters, proponents, and opponents under the First Amendment to the Constitution of the United States, both in terms of the imposition of restrictions upon political speech and the involuntary compulsion of political speech, that the voters are entitled to be apprised of its existence in the title and ballot title and submission clause.

Respectfully submitted April 28, 2010.



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Ex. 1

40-2-124. Renewable energy standard - definitions - net metering.

(1) Each provider of retail electric service in the state of Colorado, other than municipally owned utilities that serve forty thousand customers or less, shall be considered a qualifying retail utility. Each qualifying retail utility, with the exception of cooperative electric associations that have voted to exempt themselves from commission jurisdiction pursuant to section 40-9.5-104 and municipally owned utilities, shall be subject to the rules established under this article by the commission. No additional regulatory authority of the commission other than that specifically contained in this section is provided or implied. In accordance with article 4 of title 24, C.R.S., on or before October 1, 2007, the commission shall revise or clarify existing rules to establish the following:

(a) Definitions of eligible energy resources that can be used to meet the standards. "Eligible energy resources" means recycled energy and renewable energy resources. "Renewable energy resources" means solar, wind, geothermal, biomass, new hydroelectricity with a nameplate rating of ten megawatts or less, and hydroelectricity in existence on January 1, 2005, with a nameplate rating of thirty megawatts or less. The commission shall determine, following an evidentiary hearing, the extent to which such electric generation technologies utilized in an optional pricing program may be used to comply with this standard. A fuel cell using hydrogen derived from an eligible energy resource is also an eligible electric generation technology. Fossil and nuclear fuels and their derivatives are not eligible energy resources. For purposes of this section:

(I) "Biomass" means:

(A) Nontoxic plant matter consisting of agricultural crops or their byproducts, urban wood waste, mill residue, slash, or brush;

(B) Animal wastes and products of animal wastes; or

(C) Methane produced at landfills or as a by-product of the treatment of wastewater residuals.

(II) "Recycled energy" means energy produced by a generation unit with a nameplate capacity of not more than fifteen megawatts that converts the otherwise lost energy from the heat from exhaust stacks or pipes to electricity and that does not combust additional fossil fuel. "Recycled energy" does not include energy produced by any system that uses energy, lost or otherwise, from a process whose primary purpose is the generation of electricity, including, without limitation, any process involving engine-driven generation or pumped hydroelectricity generation.

(b) Standards for the design, placement, and management of electric generation technologies that use eligible energy resources to ensure that the environmental impacts of such facilities are minimized.

(c) Electric resource standards:

(I) Except as provided in subparagraph (V) of this paragraph (c), the electric resource standards shall require each qualifying retail utility to generate, or cause to be generated, electricity from eligible energy resources in the following minimum amounts:

(A) Three percent of its retail electricity sales in Colorado for the year 2007;

(B) Five percent of its retail electricity sales in Colorado for the years 2008 through 2010;

(C) Ten percent of its retail electricity sales in Colorado for the years 2011 through 2014;

(D) Fifteen percent of its retail electricity sales in Colorado for the years 2015 through 2019; and

(E) Twenty percent of its retail electricity sales in Colorado for the years 2020 and thereafter.

(II) (A) Of the amounts in subparagraph (I) of this paragraph (c), at least four percent shall be derived from solar electric generation technologies. At least one-half of this four percent shall be derived from solar electric technologies located on-site at customers' facilities.

(B) Solar generating equipment located on-site at customers' facilities shall be sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the consumer at that site. For purposes of this sub-subparagraph (B), the consumer's "site" shall include all contiguous property owned or leased by the consumer, without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.

(III) Each kilowatt-hour of electricity generated from eligible energy resources in Colorado shall be counted as one and one-quarter kilowatt-hours for the purposes of compliance with this standard.

(IV) To the extent that the ability of a qualifying retail utility to acquire eligible energy resources is limited by a requirements contract with a wholesale electric supplier, the qualifying retail utility shall acquire the maximum amount allowed by the contract. For any shortfalls to the amounts established by the commission pursuant to subparagraph (I) of this paragraph (c), the qualifying retail utility shall acquire an equivalent amount of either renewable energy credits; documented and verified energy savings through energy efficiency and conservation programs; or a combination of both. Any contract entered into by a qualifying retail utility after December 1, 2004, shall not conflict with this article.

(V) Notwithstanding any other provision of law but subject to subsection (4) of this section, the electric resource standards shall require each cooperative electric association and municipally owned utility that is a qualifying retail utility to generate, or cause to be generated, electricity from eligible energy resources in the following minimum amounts:

(A) One percent of its retail electricity sales in Colorado for the years 2008 through 2010;

(B) Three percent of retail electricity sales in Colorado for the years 2011 through 2014;

(C) Six percent of retail electricity sales in Colorado for the years 2015 through 2019; and

(D) Ten percent of retail electricity sales in Colorado for the years 2020 and thereafter.

(VI) Each kilowatt-hour of electricity generated from eligible energy resources at a community-based project shall be counted as one and one-half kilowatt-hours. For purposes of this subparagraph (VI), "community-based project" means a project located in Colorado:

(A) That is owned by individual residents of a community, nonprofit organization, cooperative, local government entity, or tribal council;

(B) The generating capacity of which does not exceed thirty megawatts; and

(C) For which there is a resolution of support adopted by the local governing body of each local jurisdiction in which the project is to be located.

(VII) (A) For purposes of compliance with the standards set forth in subparagraph (V) of this paragraph

(c), each kilowatt-hour of renewable electricity generated from solar electric generation technologies shall be counted as three kilowatt-hours.

(B) Sub-subparagraph (A) of this subparagraph (VII) applies only to solar electric technologies that begin producing electricity prior to July 1, 2015. For solar electric technologies that begin producing electricity on or after July 1, 2015, each kilowatt-hour of renewable electricity shall be counted as one kilowatt-hour for purposes of compliance with the renewable energy standard.

(VIII) Each kilowatt-hour of electricity from eligible energy resources may take advantage of only one of the methods for counting kilowatt-hours set forth in subparagraphs (III), (VI), and (VII) of this paragraph (c).

(d) A system of tradable renewable energy credits that may be used by a qualifying retail utility to comply with this standard. The commission shall also analyze the effectiveness of utilizing any regional system of renewable energy credits in existence at the time of its rule-making process and determine whether the system is governed by rules that are consistent with the rules established for this article. The commission shall not restrict the qualifying retail utility's ownership of renewable energy credits if the qualifying retail utility complies with the electric resource standard of paragraph (c) of this subsection (1) and does not exceed the retail rate impact established by paragraph (g) of this subsection (1).

(e) A standard rebate offer program, under which:

(I) Each qualifying retail utility, except for cooperative electric associations and municipally owned utilities, shall make available to its retail electricity customers a standard rebate offer of a minimum of two dollars per watt for the installation of eligible solar electric generation on customers' premises up to a maximum of one hundred kilowatts per installation. Such offer shall allow the customer's retail electricity consumption to be offset by the solar electricity generated. To the extent that solar electricity generation exceeds the customer's consumption during a billing month, such excess electricity shall be carried forward as a credit to the following month's consumption. To the extent that solar electricity generation exceeds the customer's consumption during a calendar year, the customer shall be reimbursed by the qualifying retail utility at its average hourly incremental cost of electricity supply over the prior twelve-month period unless the customer makes a one-time election, in writing, to request that the excess electricity be carried forward as a credit from month to month indefinitely until the customer terminates service with the qualifying retail utility, at which time no payment shall be required from the qualifying retail utility for any remaining excess electricity supplied by the customer. The qualifying retail utility shall not apply unreasonably burdensome interconnection requirements in connection with this standard rebate offer. Electricity generated under this program shall be eligible for the qualifying retail utility's compliance with this article.

(II) Sales of electricity to a consumer may be made by the owner or operator of the solar electric generation facilities located on the site of the consumer's property if the solar generating equipment is sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the consumer at that site. For purposes of this subparagraph (II), the consumer's site shall include all contiguous property owned or leased by the consumer, without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way. If the solar electric generation facility is not owned by the consumer, then the qualifying retail utility shall not be required by the commission to pay for the renewable energy credits generated by the facility on any basis other than a metered basis. The owner or operator of the solar electric generation facility shall pay the cost of installing the production meter.

(III) The qualifying retail utility may establish one or more standard offers to purchase renewable energy credits generated from the eligible solar electric generation on the customer's premises so long as the

generation meets the size and location requirements set forth in subparagraph (II) of this paragraph (e) and so long as the generation is five hundred kilowatts or less in size. When establishing the standard offers, the prices for renewable energy credits should be set at levels sufficient to encourage increased customer-sited solar generation in the size ranges covered by each standard offer, but at levels that will still allow the qualifying retail utility to comply with the electric resource standards set forth in paragraph (c) of this subsection (1) without exceeding the retail rate impact limit in paragraph (g) of this subsection (1). The commission shall encourage qualifying retail utilities to design solar programs that allow consumers of all income levels to obtain the benefits offered by solar electricity generation and shall allow programs that are designed to extend participation to customers in market segments that have not been responding to the standard offer program.

(f) Policies for the recovery of costs incurred with respect to these standards for qualifying retail utilities that are subject to rate regulation by the commission. These policies shall provide incentives to qualifying retail utilities to invest in eligible energy resources in the state of Colorado. Such policies shall include:

(I) Allowing a qualifying retail utility to develop and own as utility rate-based property up to twenty-five percent of the total new eligible energy resources the utility acquires from entering into power purchase agreements and from developing and owning resources after March 27, 2007, if the new eligible energy resources proposed to be developed and owned by the utility can be constructed at reasonable cost compared to the cost of similar eligible energy resources available in the market. The qualifying retail utility shall be allowed to develop and own as utility rate-based property more than twenty-five percent but not more than fifty percent of total new eligible energy resources acquired after March 27, 2007, if the qualifying retail utility shows that its proposal would provide significant economic development, employment, energy security, or other benefits to the state of Colorado. The qualifying retail utility may develop and own these resources either by itself or jointly with other owners, and, if owned jointly, the entire jointly owned resource shall count toward the percentage limitations in this subparagraph (I). For the resources addressed in this subparagraph (I), the qualifying retail utility shall not be required to comply with the competitive bidding requirements of the commission's rules; except that nothing in this subparagraph (I) shall preclude the qualifying retail utility from bidding to own a greater percentage of new eligible energy resources than permitted by this subparagraph (I). In addition, nothing in this subparagraph (I) shall prevent the commission from waiving, repealing, or revising any commission rule in a manner otherwise consistent with applicable law.

(II) Allowing qualifying retail utilities to earn an extra profit on their investment in eligible energy resource technologies if these investments provide net economic benefits to customers as determined by the commission. The allowable extra profit in any year shall be the qualifying retail utility's most recent commission authorized rate of return plus a bonus limited to fifty percent of the net economic benefit.

(III) Allowing qualifying retail utilities to earn their most recent commission authorized rate of return, but no bonus, on investments in eligible energy resource technologies if these investments do not provide a net economic benefit to customers.

(IV) Considering, when the qualifying retail utility applies for a certificate of public convenience and necessity under section 40-5-101, rate recovery mechanisms that provide for earlier and timely recovery of costs prudently and reasonably incurred by the qualifying retail utility in developing, constructing, and operating the eligible energy resource, including:

(A) Rate adjustment clauses until the costs of the eligible energy resource can be included in the utility's base rates; and