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 #95	FILED IN THE SUPREME COURT MAY - 7 2010 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Petitioners: ROBERT N. MCLENNAN, KENT SINGER, DAN HODGES and TERRANCE G. ROSS, Objectors vs. **Respondents:** JON GOLDIN-DUBOIS and DAN BUSH, Proponents and **Title Board:** WILLIAM A. HOBBS, SHARON L. EUBANKS, and DANIEL D. DOMENICO	**▲COURT USE ONLY▲**
Attorneys for Petitioner: Douglas J. Friednash, #18128 Christopher J. Neumann, #29831 1200 17th Street, Suite 2400 Denver, Colorado 80202 Tel: (303) 572-6500 Fax: (303) 572-6540 E-mail: FriednashD@gtlaw.com NeumannC@gtlaw.com	Case Number: 10SA140

PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2009-2010 #95 ("RENEWABLE ENERGY STANDARDS")

$ PAID

Petitioners, Robert N. McLennan, Kent Singer, Dan Hodges and Terrance G. Ross (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 #95 ("Renewable Energy Standards").

ACTIONS OF THE TITLE BOARD

Jon Goldin-Dubois and Dan Bush (the "Proponents") proposed Initiative 2009-2010 #95 ("Renewable Energy Standards") (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; and, (2) the title set failed to express the Initiative's true intent and meaning. Also on April 28, 2010, Proponents filed a Motion for Rehearing alleging that 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 two to one.

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.

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
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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 #95 ("RENEWABLE ENERGY STANDARDS")** was placed in the United States mail, postage prepaid, to the following:

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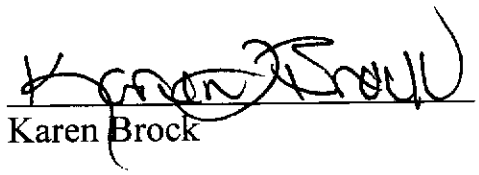

Karen Brock

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 #95".

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

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

SECTION 1. Legislative declaration. It is the intent of the people of this state to ensure that Colorado's renewable energy standard is applied equally to all Colorado utilities and to ensure that all Colorado communities can benefit from Colorado's abundant clean energy resources.

SECTION 2. The introductory portion to 40-2-124 (1), Colorado Revised Statutes, is amended to read:

40-2-124. Renewable energy standard - definitions – net metering - legislative declaration. (1) Each provider of retail electric service in the state of Colorado ~~other than municipally owned utilities that serve forty thousand customers or fewer,~~ 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 PROVIDER OF RETAIL ELECTRIC SERVICE IN THE STATE OF COLORADO MAY OPT OUT OF THE PROVISIONS OF SECTION 40-2-124 WITHOUT APPROVAL FROM 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., the commission shall revise or clarify existing rules to establish the following:

SECTION 3. Severability. If any provision of this section or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

#95 - Final

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Ballot Title Setting Board

Proposed Initiative 2009-2010 #95[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning the application of specified electric resource standards to all providers of retail electric service in the state, and, in connection therewith, removing the existing exemption from the specified standards and from regulation by the public utilities commission for certain municipally owned utilities and cooperative electric associations and prohibiting a provider of retail electric service from opting out of the specified standards without permission from the Colorado public utilities commission.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning the application of specified electric resource standards to all providers of retail electric service in the state, and, in connection therewith, removing the existing exemption from the specified standards and from regulation by the public utilities commission for certain municipally owned utilities and cooperative electric associations and prohibiting a provider of retail electric service from opting out of the specified standards without permission from the Colorado public utilities commission?

Hearing April 21, 2010:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 2:47 p.m.

[1] Unofficially captioned **"Renewable Energy Standards"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 #95 ("Renewable Energy Standards")

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 #95 ("Renewable Energy Standards") 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 seven separate subjects wrapped up in the broad theme of "electric resource standards":

1. **Repeals small utility exemption:** Repeals the exemption from PUC implementing regulations under C.R.S. § 40-2-124 for small municipally owned utilities. To the extent the affected municipalities are home rule municipalities, this measure addresses the subject of the self-governing powers vested in municipalities under the Colorado Constitution. The measure reallocates local governmental authority and control with respect to renewable energy portfolio decisions affecting municipally owned electric utilities.

2. **Repeals cooperative electric association "opt-out" exemption:** Repeals the exemption from PUC implementing regulations under C.R.S. § 40-2-124 for cooperative electric associations that have voted to exempt themselves from commission jurisdiction pursuant to C.R.S. § 40-9.5-104. The general assembly has authorized cooperative electric associations to self-regulate and exempt themselves from PUC regulation under C.R.S. § 40-9.5-101. The measure addresses the subject of self-governance under Article 9.5 of the Public Utilities Law by

reallocating control with respect to renewable energy portfolio decisions affecting cooperative electric associations.

3. **Invalidates "opt-out" actions:** Inasmuch as the measure is vague as to whether and how it would apply to cooperative electric associations who have already opted out of PUC regulation, it purports to repeal or invalidate actions lawfully taken by cooperative electric associations pursuant to the Public Utilities Law at C.R.S. § 40-9.5-104 to exempt themselves from PUC regulation implementing the renewable energy standard at C.R.S. § 40-2-124.

4. **Grants PUC new authority:** Creates new authority for the PUC over entities over which it has limited authority, *i.e.*, cooperative electric associations exempted from PUC authority under C.R.S. § 40-9.5-104 and municipally owned utilities exempted from PUC authority under Article XXV of the Colorado Constitution.

5. **Modifies adopted Renewable Energy Standards ("RESs"):** Purports to modify any RESs already adopted by municipally owned utilities or cooperative electric associations under their separate authorities.

6. **Retroactive obligations:** Addresses the subject of retroactivity and *ex post facto* laws by having the immediate effect of placing all municipally owned utilities and cooperative electric associations who do not meet the statutory RES, which began in 2007, in violation of PUC regulations and subject to enforcement.

7. **Grants full Article 2 regulation:** Purports to subject municipally owned utilities and cooperative electric associations to regulations established under all of Article 2, Title 40, and not just the renewable energy standard at C.R.S. § 40-2-124. The measure provides that "Each qualifying retail utility shall be subject to the rules established **under this article** by the commission." *See* Final Text, proposed § 40-2-124(1) (emphasis added). To make all qualifying

retail utilities subject to the renewable energy standard, the measure should only have made such utilities subject to "**this section**," or C.R.S. § 40-2-124. Article 2, Title 40 contains 29 sections, and speaks, *inter alia*, to the PUC's general rulemaking authority over qualifying retail utilities, incentives for distributed generation, natural gas regulation, new energy technologies, eminent domain restrictions, transmission facilities and community energy funds. *See* C.R.S. §§ 40-2-108, 109.5, 122, 123, 125, 126, 127.

During the underlying hearing to set the title for this measure, the Title Board's decided to construe the proposed amendment to C.R.S. § 40-2-124 to avoid constitutional infirmities by deciding that the plain language "under this article" in the proposed measure really meant "under this section." This action was improper. It is true the Colorado Supreme Court has explained that in seeking to determine legislative intent, "we are guided by the rubric that the legislature intends a statute to be constitutional and we should construe it in a manner avoiding constitutional infirmity, if possible." *Board of Directors, Metro Wastewater Reclamation Dist. v. National Union Fire Insur. Co.*, 105 P.3d 653, 656 (Colo. 2005) (en banc). However, we are not dealing with a statute enacted by the Colorado Legislature, but instead a citizen initiative; and this is not a case where the statute is ambiguous. The proponents' language is clear: "article" means "article." As the Colorado Supreme Court further explained in *Metro Wastewater*: "**In determining the legislature's intent, we look first to the language of the statute and apply its plain and ordinary meaning, if possible.**" *Id.* at 657 (emphasis added). Petitioners respectfully submit the Title Board should not seek to construe the proposed measure's unambiguous plain language. On its face, the proposed measure subjects municipally owned utilities and cooperative electric associations to regulations established under all of

Article 2, Title 40, and not just the renewable energy standard at C.R.S. § 40-2-124. This regulation is a separate subject from "electric resource standards."

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 regulation and implementation of renewable energy standards from self-regulating municipally owned utilities and cooperative electric associations to the PUC. Second, the measure purports to

invalidate opt out actions, modify already-adopted RESs, make utilities retroactively subject to RESs and subject municipally owned utilities and cooperative electric associations to full regulation under all 29 sections of Article 2, Title 40 by the PUC (and not just the renewable energy standard at C.R.S. § 40-2-124). 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 is misleading, unfair and unclear in that it suggests all utilities in the State of Colorado are subject to the same renewable energy standard, when municipally owned utilities and cooperative electric associations are subject to different standards than other qualifying retail utilities.

2. The Title is misleading, unfair and unclear in that it suggests that municipally owned utilities and cooperative electric associations are not presently subject to any renewable energy standard, and that the measure purports to demand that such utilities meet the same standard as all other qualifying retail utilities in the State of Colorado. In fact, many municipally owned utilities and cooperative electric associations are subject to, and have implemented renewable energy standards.

3. The Title fails to mention that municipally owned utilities are exempt from regulation by the PUC not only by statute, but by Article XXV of the Colorado Constitution, and that the measure purports to repeal both statutory and constitutional exemptions from PUC regulation.

4. The Title fails to mention that it applies retroactively and constitutes an unlawful *ex post facto* law inasmuch as it purports to hold municipally owned utilities and cooperative electric associations to renewable energy standards which took effect beginning in 2007.

5. The Title fails to mention that the implementation of renewable energy standards for municipally owned utilities and cooperative electric associations is presently addressed by

such utilities, and not by the PUC; and that the measure purports not only to create a new renewable energy standard, but to give the PUC new authority to implement this standard.

6. The Title fails to mention that the measure purports to make all qualifying retail utilities subject to regulation under all of Article 2, Title 40, and not just the renewable energy standard set forth at C.R.S. § 40-2-124.

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

Respectfully submitted this 28th day of April 2010.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2010, a true and correct copy of the foregoing **JOINT MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

Mark G. Grueskin
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Denver, Colorado 80202

Denise Coale

BALLOT TITLE BOARD

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE FOR 2009-2010 # 95 ("Renewable Energy Standards")

The Proponents of Proposed Initiative for 2009-2010 # 95 ("Renewable Energy Standards"), 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 this initiative at the Title Board hearing on April 21, 2010.

1. The removal of exemptions for electric utilities proposed by this initiative is applicable to the entirety of C.R.S. §40-2-124, rather than just the "electric resource standards" of paragraph (1)(c) thereof as stated in the current title.

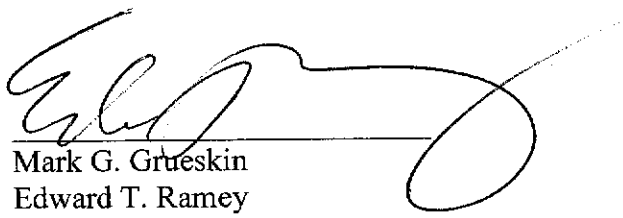
2. The terminology "electric resource standards" has no commonly understood meaning for the voters.

3. The commonly understood terminology by which the voters identify the compendium of provisions of C.R.S. §40-2-124 – to which this initiative is applicable – 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).

4. In light of the considerations set forth above, the Proponents request the following revision to the title to this initiative (with a conforming revision to the ballot title and submission clause):

> An amendment to the Colorado Revised Statutes concerning the application of ~~specified electric resource standards~~Colorado's renewable energy standard to all providers of retail electric service in the state, and, in connection therewith, removing the existing exemption from the specified standards and from regulation by the public utilities commission for certain municipally owned utilities and cooperative electric associations and prohibiting a provider of retail electric service from opting out of the ~~specified~~ renewable energy standards without permission from the Colorado public utilities commission.

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

(B) A current return on the utility's capital expenditures during construction at the utility's weighted average cost of capital, including its most recently authorized rate of return on equity, during the construction, startup, and operation phases of the eligible energy resource.

(V) If the commission approves the terms and conditions of an eligible energy resource contract between the qualifying retail utility and another party, the contract and its terms and conditions shall be deemed to be a prudent investment, and the commission shall approve retail rates sufficient to recover all just and reasonable costs associated with the contract. All contracts for acquisition of eligible energy resources shall have a minimum term of twenty years; except that the contract term may be shortened at the sole discretion of the seller. All contracts for the acquisition of renewable energy credits from solar electric technologies located on site at customer facilities shall also have a minimum term of twenty years; except that such contracts for systems of between one hundred kilowatts and one megawatt may have a different term if mutually agreed to by the parties.

(VI) A requirement that qualifying retail utilities consider proposals offered by third parties for the sale of renewable energy or renewable energy credits. The commission may develop standard terms for the submission of such proposals.

(g) Retail rate impact rule:

(I) Except as otherwise provided in subparagraph (IV) of this paragraph (g), for each qualifying utility, the commission shall establish a maximum retail rate impact for this section of two percent of the total electric bill annually for each customer. The retail rate impact shall be determined net of new alternative sources of electricity supply from noneligible energy resources that are reasonably available at the time of the determination. If the retail rate impact does not exceed the maximum impact permitted by this paragraph (g), the qualifying utility may acquire more than the minimum amount of eligible energy resources and renewable energy credits required by this section.

(II) Each wholesale energy provider shall offer to its wholesale customers that are cooperative electric associations the opportunity to purchase their load ratio share of the wholesale energy provider's electricity from eligible energy resources. If a wholesale customer agrees to pay the full costs associated with the acquisition of eligible energy resources and associated renewable energy credits by its wholesale provider by providing notice of its intent to pay the full costs within sixty days after the wholesale provider extends the offer, the wholesale customer shall be entitled to receive the appropriate credit toward the renewable energy standard as well as any associated renewable energy credits. To the extent that the full costs are not recovered from wholesale customers, a qualifying retail utility shall be entitled to recover those costs from retail customers.

(III) Subject to the maximum retail rate impact permitted by this paragraph (g), the qualifying retail utility shall have the discretion to determine, in a nondiscriminatory manner, the price it will pay for renewable energy credits from on-site customer facilities that are no larger than one hundred kilowatts.

(IV) For cooperative electric associations, the maximum retail rate impact for this section is one percent of the total electric bill annually for each customer.

(h) **Annual reports.** Each qualifying retail utility shall submit to the commission an annual report that provides information relating to the actions taken to comply with this article including the costs and benefits of expenditures for renewable energy. The report shall be within the time prescribed and in a format approved by the commission.

(i) Rules necessary for the administration of this article including enforcement mechanisms necessary to ensure that each qualifying retail utility complies with this standard, and provisions governing the

imposition of administrative penalties assessed after a hearing held by the commission pursuant to section 40-6-109. The commission shall exempt a qualifying retail utility from administrative penalties for an individual compliance year if the utility demonstrates that the retail rate impact cap described in paragraph (g) of this subsection (1) has been reached and the utility has not achieved full compliance with paragraph (c) of this subsection (1). Under no circumstances shall the costs of administrative penalties be recovered from Colorado retail customers.

(1.5) Notwithstanding any provision of law to the contrary, paragraph (e) of subsection (1) of this section shall not apply to a municipally owned utility or to a cooperative electric association.

(2) (Deleted by amendment, L. 2007, p. 257, § 1, effective March 27, 2007.)

(3) Each municipally owned electric utility that is a qualifying retail utility shall implement a renewable energy standard substantially similar to this section. The municipally owned utility shall submit a statement to the commission that demonstrates such municipal utility has a substantially similar renewable energy standard. The statement submitted by the municipally owned utility is for informational purposes and is not subject to approval by the commission. Upon filing of the certification statement, the municipally owned utility shall have no further obligations under subsection (1) of this section. The renewable energy standard of a municipally owned utility shall, at a minimum, meet the following criteria:

(a) The eligible energy resources shall be limited to those identified in paragraph (a) of subsection (1) of this section;

(b) The percentage requirements shall be equal to or greater in the same years than those identified in subparagraph (V) of paragraph (c) of subsection (1) of this section, counted in the manner allowed by said paragraph (c); and

(c) The utility must have an optional pricing program in effect that allows retail customers the option to support through utility rates emerging renewable energy technologies.

(4) For municipal utilities that become qualifying retail utilities after December 31, 2006, the percentage requirements identified in subparagraph (V) of paragraph (c) of subsection (1) of this section shall begin in the first calendar year following qualification as follows:

(a) Years one through three: One percent of retail electricity sales;

(b) Years four through seven: Three percent of retail electricity sales;

(c) Years eight through twelve: Six percent of retail electricity sales; and

(d) Years thirteen and thereafter: Ten percent of retail electricity sales.

(5) **Procedure for exemption and inclusion - election.**

(a) (Deleted by amendment, L. 2007, p. 257, § 1, effective March 27, 2007.)

(b) The board of directors of each municipally owned electric utility not subject to this section may, at its option, submit the question of its inclusion in this section to its consumers on a one meter equals one vote basis. Approval by a majority of those voting in the election shall be required for such inclusion, providing that a minimum of twenty-five percent of eligible consumers participates in the election.

(5.5) Each cooperative electric association that is a qualifying retail utility shall submit an annual