SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 10, 2022 4:38 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #93 ("Percentage of Utility Rates Paid by Investor-Owned Utilities") **Petitioner:** Raymond Gifford **v.** **Respondents:** Jon Caldara and Jake Fogleman **and** **Title Board:** Theresa Conley, Ed DeCecco and Kurt Morrison	**▲COURT USE ONLY▲**
Attorneys for Petitioner: Mark G. Grueskin, #14621 Thomas M. Rogers III, #28809 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) trey@rklawpc.com mark@rklawpc.com	Supreme Court Case No: 2022SA126

PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #93 ("PERCENTAGE OF UTILITY RATES PAID BY INVESTOR-OWNED UTILITIES")

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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X It contains 2,922 words.

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X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Thomas M. Rogers III
Thomas M. Rogers III
Attorney for Petitioner

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INTRODUCTION

Proposed Initiative #93 would require investor-owned utilities to "pay" an indeterminate "percentage of all rates from their profits" but fails to state to whom payment would be made or who they would benefit. Given the opportunity to address this issue at rehearing, the proponents of the measure confirmed that the measure fails to provide this critical information and said that the answer will be provided by the Public Utilities Commission (the "PUC"), through rulemaking, after the measure becomes law. Proponent's response confirms that the measure is so incomplete that it is incomprehensible and thus cannot be forwarded to the voters under C.R.S. § 1-40-106 and applicable precedent established by this Court.

Even if the measure could be understood and a title could be set, the title set by the Board violates the "clear ballot title" requirement by misstating or omitting critical elements of the measure and will mislead voters. First, the title set by the Board fails to identify who investor-owned utilities must pay. Second, the title fails to inform voters that there may be a substantial delay in implementation of the measure.

ISSUES PRESENTED

1. Whether the Title Board should not have set a title for #93 because the measure is so incomplete that it is incomprehensible, and its meaning cannot be ascertained.

2. Whether the title fails to inform voters of two central elements of the measure:

   a. The title set by the Board is legally flawed because it fails to specify to whom payments required by the measure would be made; and

   b. The title set by the Board is legally flawed because it fails to inform voters that there may be a substantial delay in implementation of the measure.

STATEMENT OF THE CASE

A. Statement of Facts

Jon Caldara and Jake Fogleman (the "Proponents") proposed Initiative 2021-2022 #93 (the "Proposed Initiative"). The measure requires certain investor-owned utilities to "pay" an indeterminate "percentage of all rates from their profits" but fails to state to whom payments would be made or who they would benefit, instead leaving the answer to this critical question to the PUC.

B. Nature of the Case, Course of Proceedings, and Disposition Below

A review and comment hearing was held on the Proposed Initiative before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, the Proponents submitted the final version of the Proposed Initiative to the Secretary of State for purposes of submission to the Board, of which the Secretary or her designee is a member.

A Title Board hearing was held on April 21, 2022, at which time a title was set for 2021-2022 #93. On April 27, 2022, Petitioner Raymond Gifford filed a timely Motion for Rehearing, alleging that Initiative #93 is so incomplete that it is incomprehensible and thus cannot be forwarded to the voters under C.R.S. § 1-40-106 and applicable precedent established by this Court, and that the Title Board set a title which is misleading and incomplete as it does not fairly communicate the true intent and meaning of the measure and will mislead voters. The rehearing was held on April 28, 2022, at which time the Title Board granted the Motion for Rehearing to the extent it made minor amendments to the title and denied it in all other respects.

The Board set the following title for the Proposed Initiative:

> Shall there be a change to the Colorado Revised Statutes requiring investor-owned utilities to pay at least 5% of all future electric and gas service rates from their profits as determined by the Public Utilities Commission?

SUMMARY OF ARGUMENT

The title set by the Title Board violates the legal requirements imposed on it because the Proposed Initiative is so incomplete that it is incomprehensible and thus cannot be forwarded to the voters under C.R.S. § 1-40-106 and applicable precedent established by this Court, and because the title set by the Board violates the "clear ballot title" requirement by misstating or omitting critical elements of the measure and will mislead voters.

LEGAL ARGUMENT

I. Standard of review and preservation of issue below.

A. Standard of review.

The Title Board must set titles that "correctly and fairly express the true intent and meaning" of the proposed initiative and 'unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(b). This Court's duty is to ensure that titles "fairly reflect" the proposed initiative so petition signers and voters will not be misled into supporting or opposing a measure due to the words employed by the Title Board. *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Burlington*, 830 P. 2d 1023, 1026 (Colo. 1992).

If the title clearly and concisely summarizes the measure's "central features," the Title Board will be deemed to have done its job, and the title will be upheld. *In re Title, Ballot Title and Submission Clause for 2007-2008 Initiative #61*, 184 P.3d 747, 752 (Colo. 2008). Where, however, the Board has omitted reference to, or mischaracterized, a central element of the measure, the title is legally deficient because voters will be misled, and the title must be sent back to the Board to be corrected. *See Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 34-35 (Colo. 1993).

Titles, standing alone, should be capable of being read and understood, capable of informing the voter of the major import of the proposal, but need not include every detail. They must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the Title Board and this Court fail in their respective functions. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 217 (Colo. 2002).

B. Preservation of issues below.

The issues raised in this brief were presented to the Title Board in Petitioner's Motion for Rehearing, were considered at rehearing, and are preserved for review. *See Motion for Rehearing on Initiative 2021-2022 #93*.

II. Initiative #93 is so incomplete that it is incomprehensible, its meaning cannot be ascertained, and it cannot be forwarded to voters.

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

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

Perhaps the payments would be made to the investor-owned utilities themselves. The measure's declaration notes that investor-owned utilities should

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

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

investor-owned utilities to pay ratepayers. Ratepayers are not selling anything to investor-owned utilities for which they could be paid.

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

At the Board's initial hearing on #93, Proponents offered little explanation of their measure other than to repeat the "fair share" clause from the declaration and to defer to the PUC's rulemaking charge. Even if Proponents had offered a cogent explanation of their intent, the utter failure of the measure to indicate who

would receive payments is fatal. *Gonzalez-Estay v. Lamm*, 138 P.3d 273, 282 (Colo. 2006) (rejecting title where the "facial vagueness" of an initiative made it "impossible for a voter to be informed as to the consequences of his or her vote"). Here, because the measure is silent on the question of the recipient or beneficiary of payments, it was impossible for the Board to set a title that would help a voter to understand what he or she is voting for, regardless of what the Proponents intended.

At rehearing, Proponents conceded that the measure simply does not explain who investor-owned utilities would pay, but instead leaves that decision to the PUC. In responding to the Motion for Rehearing, counsel for the Proponents explained:

> "But again, these are complicated issues that an administrative agency like the Public Utilities Commission will flesh out. There is no need here, at this point in time, to identify where the payment goes. The Public Utilities Commission in rulemaking with their expertise and their staff will make that determination."
>
> *Recording of Title Board Rehearing on Proposed Initiative #93*, April 28, 2022, at 1:16:20,

https://csos.granicus.com/player/clip/316?view_id=1&redirect=true, reviewed May 10, 2022.

This admission confirms the concern raised by Mr. Gifford in his Motion for Rehearing and in this appeal: the measure simply does not explain where the required investor-owned utility payments will go. The proponents either don't know or won't say, but in either event, have drafted a measure that leaves the public – and as is relevant here, the Title Board – in the dark. Without this information, voters cannot make an intelligent decision about whether to support the measure or not. Proposed Initiative #93 is so incomplete that it cannot be understood. For this reason, a sufficient title cannot be set and the measure cannot be sent to voters.

III. Even if the measure could be understood well enough for the Board to set a title, it erred by setting a title that fails to inform voters about certain central elements of the measure and which would mislead voters.

A. The title fails to inform voters who would be paid under the measure.

As set forth above, the measure is fatally flawed in that it fails to specify to whom payments would be made. As a result, the Board should not have set a title for the measure. However, even if a clear title could be set for the measure, the

Title Board failed to do so. The title fails to state to whom investor-owned utilities must make payments. At a minimum, the title should inform voters that the PUC will determine who will receive payments under the measure.

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

While the title set for #93 closely tracks the language of the initiative, that "does not rule out the possibility that the title could cause voter confusion." *Robinson v. Dierking*, 413 P.3d 151, 154 (Colo. 2016) (rejecting title for failure to satisfy the clear title requirement even though title substantially tracked the language of the measure). Here, #93 is so incomplete that it is incomprehensible—it simply does not specify who would receive payments from investor-owned utilities—but this fact did not relieve the Board of its obligation to set a clear title for the measure once it decided it could set a title. No conjecture is necessary in order for the Court to put itself in the shoes of a voter whose "yes" vote or "no" vote depends on whether the utility's payment is going to consumers, the government, or the utility itself. For this reason, the Court's precedent makes clear that the measure must be clear – or at least clear enough to understand what the measure proposes to do and how, if at all, that change in the law will affect the voter's circumstance. Initiatives can be detailed or not; that is a judgment that the proponents make. But the Title Board cannot set a title for a measure it knows holds a hidden surprise for the public in the aftermath of an election. The proponents can make revisions and offer their measure at a subsequent election, but voters should not be forced to decide whether to change the state's laws when there is an absence of clarity around a proposed amendment.

The title set for the Proposed Measure is flawed in that it fails to inform voters who investor-owned utilities must pay or at least that the PUC will make this decision. The measure must be returned to Board to correct this deficiency.

B. The title fails to inform voters that implementation would of the measure would be substantially delayed.

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

The title set for the Proposed Measure is flawed in that it fails to inform voters of these substantial delays before payments would be made under the measure. The measure must be returned to Board to correct this deficiency.

CONCLUSION

The Court should vacate the title and remand with instructions to return the Proposed Initiative to proponents or, in the alternative with instructions to correct the deficient title.

Respectfully submitted this 10th day of May, 2022.

s/ Thomas M. Rogers III
Mark G. Grueskin, #14621
Thomas M. Rogers III, #28809
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
mark@rklawpc.com
trey@rklawpc.com
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #93 ("PERCENTAGE OF UTILITY RATES PAID BY INVESTOR-OWNED UTILITIES")** was sent electronically via CCEF this day, May 10, 2022, to the following:

Counsel for the Title Board:
Michael Kotlarczyk
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

And served via e-mail and overnight delivery service to:

Counsel for Proponents:
Shayne Madsen
727 E. 16th Avenue
Denver, CO 80203
shayne@i2i.org

/s Erin Holweger