

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p>DATE FILED: May 5, 2022 12:16 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>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”)</p> <p>Petitioner: Raymond Gifford</p> <p>v.</p> <p>Respondents: Jon Caldara and Jake Fogleman</p> <p>and</p> <p>Title Board: Theresa Conley, Ed DeCecco and Kurt Morrison</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioner:</p> <p>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</p>	<p>Case Number:</p>
<p>PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2021-2022 #93 (“PERCENTAGE OF UTILITY RATES PAID BY INVESTOR-OWNED UTILITIES”)</p>	

Raymond Gifford (“Petitioner”), registered elector of the State of Colorado, through his undersigned counsel, respectfully petitions this Court pursuant to C.R.S. § 1-40-107(2), to review the actions of the Title Setting Board the (the “Title Board” or “Board”) with respect to the title, ballot title, and submission clause set for Initiative 2021-2022 #93 (“Percentage of Utility Rates Paid by Investor-Owned Utilities”).

STATEMENT OF THE CASE

A. Procedural History of Proposed Initiative 2021-2022 #93.

Jon Caldara and Jake Fogleman (the “Proponents”) proposed Initiative 2021-2022 #93 (the “Proposed Initiative”). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, the Proponents submitted final versions 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 titles were set for 2021-2022 #93. On April 27, 2022, Petitioner Raymond Gifford filed a 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 titles which are misleading and incomplete as they do 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 the Title Board made minor amendments to the title and denied it in all other respects.

B. Jurisdiction

Petitioner is entitled to a review before the Colorado Supreme Court pursuant to C.R.S. § 1-40-107(2). Petitioner timely filed the Motion for Rehearing with the Title Board. *See* C.R.S. § 1-40-107(1). Additionally, Petitioner timely filed this Petition for Review within seven days from the date of rehearing. C.R.S. § 1-40-107(2).

As required by C.R.S. § 1-40-107(2), attached to this Petition for Review are certified copies of: (1) the final text of the measure; (2) the ruling on the Motion for Rehearing as reflected by the titles set by the Board (3) the original titles set by the Board; (4) the Motion for Rehearing filed by Petitioner; and (5) the Fiscal Summary for the measure. Petitioner believes that the Title Board erred in denying certain aspects of the Motion for Rehearing. The matter is properly before this Court.

GROUNDS FOR APPEAL

The titles set by the Title Board violate 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 titles set by the Board violate the “clear ballot title” requirement by misstating or omitting critical elements of the measure and will mislead voters. The following is an advisory list of issues to be addressed in Petitioner’s brief:

I. The titles fail to inform voters of two central elements of the measure.

The titles omit the following two central elements of the measure:

1. The titles set by the Board are legally flawed because they fail to specify to whom payments required by the measure would be made.
2. The titles set by the Board are legally flawed because they fail to inform voters that there may be a substantial delay in implementation of the measure.

II. 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.

The measure is so incomplete that it is impossible to comprehend or understand. “[I]f 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). The Proposed Initiative requires investor-owned utilities to “pay a percentage of all rates from their profits” but fails to specify to whom those payments would be made. This failure renders the measure impossible to comprehend or understand and it cannot be forwarded to the voters.

PRAYER FOR RELIEF

Petitioner respectfully requests that, after consideration of the parties’ briefs, this Court determine that:

1. The titles are legally flawed and direct the Title Board to return the Proposed Initiative to the designated representatives.
2. In the alternative, that the titles must be corrected to address the deficiencies outlined in Petitioner’s briefs.

Respectfully submitted this 5th 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 **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2021-2022 #93 (“PERCENTAGE OF UTILITY RATES PAID BY INVESTOR-OWNED UTILITIES”)** was sent electronically via Colorado Courts E-Filing this day, May 5, 2022, to the following:

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

And via E-Mail and U.S. Mail to:

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

/s Erin Holweger _____



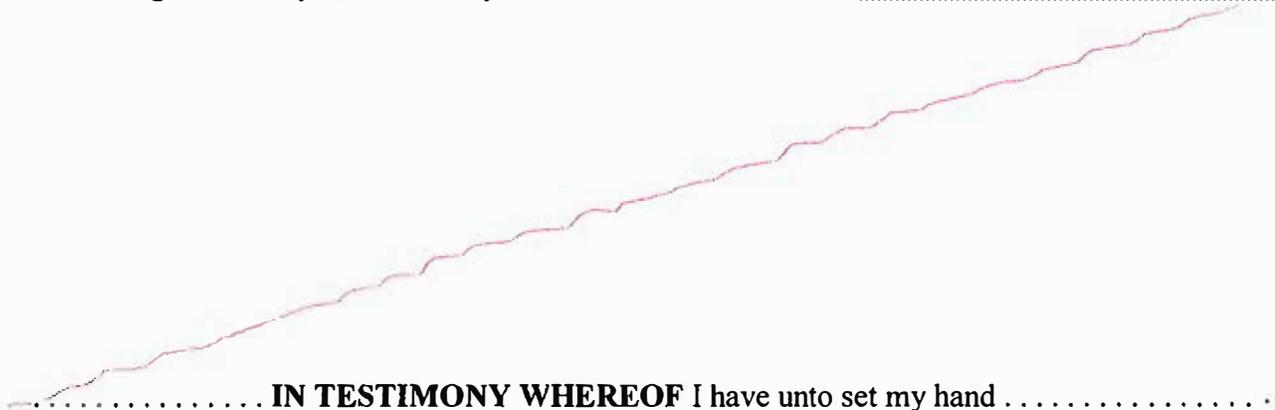
STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **JENA GRISWOLD**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, fiscal impact statement and abstract, motion for rehearing, and the rulings thereon of the Title Board for Proposed Initiative "2021-2022 #93 'Percentage of Utility Rates Paid by Investor-Owned Utilities'"



..... **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 2nd day of May, 2022.

Jena Griswold

SECRETARY OF STATE



2021-2022 #93 Percentage of Utility Rates Paid by Investor-Owned Utilities FINAL Text

PROPOSED INITIATIVE 2021-2022 #93 Percentage of Utility Rates Paid by Investor-owned Utilities

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

SECTION 1. Declaration. The People of the State of Colorado find and declare that it shall be the public policy of the State of Colorado that investor-owned utilities providing electric or gas service or both to residential, commercial or industrial users in Colorado shall bear their fair share of all utility rates set by the public utilities commission under the “Public Utilities Law” as defined in article 1 of title 40.

SECTION 2. In Colorado Revised Statutes, 40-3-111, **add** (3) as follows:

40-3-111. Rates determined after hearing.

(3) INVESTOR-OWNED UTILITIES THAT SUPPLY ELECTRIC OR GAS SERVICE OR BOTH IN COLORADO SHALL PAY A PERCENTAGE OF ALL RATES FROM THEIR PROFITS AS DETERMINED BY THE PUBLIC UTILITIES COMMISSION; SUCH PERCENTAGE SHALL BE AT LEAST FIVE PERCENT OF THE TOTAL RATES APPROVED OR MODIFIED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (3). THE PUBLIC UTILITIES COMMISSION SHALL ADOPT RULES IMPLEMENTING THIS STANDARD WITHIN TWELVE MONTHS OF THE EFFECTIVE DATE OF THIS SUBSECTION (3) PURSUANT TO THE “PUBLIC UTILITIES LAW” AS DEFINED IN ARTICLE 1 OF THIS TITLE.

SECTION 3. Effective date. This act shall take effect upon proclamation by the governor pursuant to Section 1(4) of Article V of the Colorado Constitution and shall be self-executing.

Ballot Title Setting Board

Proposed Initiative 2021-2022 #93¹

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

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.

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

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?

Hearing April 21, 2022:

Single subject approved; staff draft amended; title set.

Board members: Theresa Conley, Ed DeCecco, Kurt Morrison

Hearing adjourned: 5:04 P.M.

Rehearing April 28, 2022:

Motion for Rehearing (Movant) granted only to the extent that the Board made changes to the titles.

Board members: Theresa Conley, Ed DeCecco, Kurt Morrison

Hearing adjourned: 12:53 P.M.

¹ Unofficially captioned “#93 - Percentage of Utility Rates Paid by Investor-Owned Utilities” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Ballot Title Setting Board

Proposed Initiative 2021-2022 #93¹

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

A change to the Colorado Revised Statutes requiring investor-owned utilities to pay at least 5% of all electric and gas service rates from their profits as determined by the public utilities commission.

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

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

Hearing April 21, 2022:

Single subject approved; staff draft amended; title set.

Board members: Theresa Conley, Ed DeCecco, Kurt Morrison

Hearing adjourned: 5:04 P.M.

¹ Unofficially captioned “#93 - Percentage of Utility Rates Paid by Investor-Owned Utilities” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Raymond Gifford, Objector,

vs.

Jon Caldara and Jake Fogleman, Proponents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted this 27th day of April 2022.

s/ Thomas M. Rogers III
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

Objector's Address:

2138 W 32nd Avenue
Suite 300
Denver, CO 80211

CERTIFICATE OF SERVICE

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

Jon Caldara
727 E. 16th Avenue
Denver, CO 80203

Jake Fogleman
727 E. 16th Avenue
Denver, CO 80203

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

Shayne Madsen
shayne@i2i.org

s/ Erin Holweger _____



Legislative
Council Staff

Nonpartisan Services for Colorado's Legislature

Initiative 93

Fiscal Summary

Date:	April 18, 2022	Fiscal Analyst:	Christina Van Winkle (303-866-6289)
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LCS TITLE: PERCENTAGE OF UTILITY RATES PAID BY INVESTOR-OWNED UTILITIES

Fiscal Summary of Initiative 93

This fiscal summary, prepared by the nonpartisan Director of Research of the Legislative Council, contains a preliminary assessment of the measure's fiscal impact. A full fiscal impact statement for this initiative is or will be available at www.colorado.gov/bluebook. This fiscal summary identifies the following impact.

State expenditures. By requiring the Public Utilities Commission to adopt rules and determine rates of profits to be paid by investor-owned utilities, Initiative 93 will increase workload for the Department of Regulatory Agencies and the Department of Law to account for this in case filing with the Public Utilities Commission.

State revenue. By increasing the administrative costs incurred by the Public Utilities Commission, Initiative 93 will increase fee revenue by a minimal amount to the Department of Regulatory Agencies. Administrative costs are paid from the Fixed Utility Fund, which receives an annual assessment on the state's regulated utilities, which must be raised to cover additional administrative expenses.

Economic impacts. By requiring investor-owned utilities to pay a percentage of all rates from their profits, gas and electric rates for consumers may decrease if all other rate-setting factors are held constant, which would increase available money for consumers to spend elsewhere in the economy and decrease profits retained by investor-owned utilities. The amount of any savings will depend on decisions made by the Public Utilities Commission and how it accounts for the required percentage paid from profits as part of the broader rate setting process for investor-owned utilities.