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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
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▲**
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PETITIONER'S ANSWER 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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s/ Thomas M. Rogers III
Thomas M. Rogers III
Attorney for Petitioner

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INTRODUCTION

Both the Title Board and Proponents make a fundamental mistake when they argue that the measure would require investor-owned utilities to make payments *for the benefit of ratepayers.* The measure is silent on the question of who the payments would benefit. Their efforts to fill this gap in the measure with the Proponents' statements of intent, in the measure's declaration and through statements made to the Board, must fail. The gaps in the measure are too large and the statements of intent cannot add new provisions that would save the measure. It is simply too incomplete to be comprehended and cannot be forwarded to votes.

Even if the measure could be understood and a title could be set, the title set by the Board omits two critical aspects of the measure. First, the titles fail to inform voters who will receive payments from investor-owned utilities or that the measure leaves the PUC to choose a beneficiary of the payments. Second, while the title informs voters that the measure only applies to future, not current, rates, it does not inform them that payments may not be made for years for this reason and because the PUC may wait for as long as a year before adopting rules required before implementation.

LEGAL ARGUMENT

I. The measure is so incomplete that it is incomprehensible and thus the Board should not have set a title.

Both the Board and Proponents base their argument that the measure is sufficiently comprehensible to be forwarded to voters on the assumption that payments made by investor-owned utilities would *benefit ratepayers*. *Respondent's Opening Brief* at 8; *Title Board's Opening Brief* at 6. However, the text of the measure simply does not support this assumption and without support in the text, the Proponents' statements of intent, in the measure's declaration and in statements made before the Board, is an insufficient basis for such an interpretation. Even if these indications of intent could add new provisions to the measure, they do not support the position of the Board or the Proponents.

A. Proponents' expressions of intent cannot be used to add absent provisions absent some grounding in the text of the measure.

It is well established that when interpreting a statute, courts first look to its plain language. *Colo. Dep't of Revenue v. Creager Mercantile Co.*, 395 P.3d 741, 744 (Colo. 2017). Here, the text of the measure provides only that certain "[i]nvestor-owned utilities…shall pay a percentage of all rates from their profits as determined by the Public Utilities Commission…" The measure provides no indication as to who would be paid. More importantly, the text of the measure does

not indicate who would benefit from the payments. While the Board and Proponents argue that the payments would benefit ratepayers, the operative section of the measure does not even mention consumers or ratepayers. The Board also assert that the payments are intended to reduce the payments to be made by consumers, but the measure says nothing on this point. *Title Board's Opening Brief* at 6. Instead, again, the only support for that concept is found only in Proponents' expressions of intent.

Courts have held, in the context of statutory interpretation, that expressions of intent "in no way anchored in the text of the statute" cannot be given effect. *Shannon v. United States*, 512 U.S. 573, 583-584 (1994) (holding that to give effect to legislative history on a matter not referenced in the text of the statue "we would have to abandon altogether the text of the statute as a guide in the interpretative process"). Courts cannot give effect to expressions of intent that have "no statutory reference point." *International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO* v. *NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (refusing to consider legislative history where the statute under consideration made no reference to the matter addressed therein). This Court applies a similar rule of construction, that a court will not add words or supply missing language to a statute. *People v. Diaz*, 347 P.3d 621. As in these cases, here, the Board and

Proponents lean on expressions of intent for too much. While the text of the measure merely requires investor-owned utilities to make a payment, Proponents' statements of intent are required to add new provisions to the measure that determine the beneficiary of the payments and the concept that those payments would reduce the rates to be paid by ratepayers.

B. Even if Proponents' statements of intent could be used to supply absent provisions to the measure, they do not sufficiently do so.

Even if Proponents' statements of intent could be relied upon to fill the gaps in the text of the measure, here, they fail to fill those gaps as intended by Proponents. Proponents assert that language in the measure's declaration declaring it the policy of the state that investor-owned utilities must "bear their fair share of all utility rates" means that payment made by the investor-owned utilities would benefit ratepayers, but concede that the measure provides no definition or indication about the meaning of the term. *Respondents' Opening Brief* at 14. Instead, Proponents argue that the PUC must define the term. *Id.* at 15. This makes Objector's point: the measure does not answer the question of who the investor-owned utility payment will benefit. It leaves that issue to the PUC. The measure is so incomplete that it specifies no beneficiary for the payments. If this fundamental question is not resolved by the measure itself, voters cannot be expected to

understand the meaning of their vote for or against the measure. The measure cannot be forwarded to 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) (an incomprehensible measure cannot be forwarded to the voters).

Both the Board and Proponents note that the Board understood the measure well enough to set a title. *Respondent's Opening Brief* at 8; *Title Board's Opening Brief* at 5-6. On the contrary, the Board accepted Proponents' statements of intent without considering whether they were supported by or consistent with the text of the measure. Indeed, if the Board had given those statements of intent the proper consideration, it would have recognized that the measure cannot be sufficiently comprehended to allow it to be submitted to voters.

For these reasons, the measure is so incomplete as to be incomprehensible and thus cannot be forwarded to the voter.

II. The title omits central features of the measure.

A. The title fails to inform voters who payments would benefit or that that decision may be left to the PUC.

Both the Board and Petitioners take the position that the measure would require investor-owned utilities to make payments *for the benefit of ratepayers* and

that the details of how that will happen is to be determined by the PUC and need not be included in the title. The flaw in this reasoning, as set forth in detail above, is that the measure does not provide that payments made under the measure would be *for the benefit of rate-payers*. Instead, the measure leaves the question of who would benefit from the payments open for resolution by the PUC. This fact must be communicated to voters to equip them to "determine intelligently whether to support or oppose the proposal." *Hayes v. Spaulding*, 369 P.3d 565, 568 (Colo. 2016). If the title fails to do so, voters may be surprised if the measure passes and is implemented, that an issue as fundamental as who benefits from the investor-owned utilities payments has been left to the PUC, especially if the PUC decides those payments will not benefit ratepayers.

The title set for the Proposed measure must inform voters who will benefit from the investor-owned utility payments or at least that this issue will be left to the PUC.

B. The reference to "future" rates is insufficient notice to the public that payments may not be made under the measure for years after passage.

The Board and Proponents argue that the Board's reference to "future" rates gives voters sufficient notice that payments required under the measure may not commence for years after passage. It does not. The reference to "future" rates merely

notifies voters that the measure applies to future, not current, rates. It does not inform voters that the measure gives the PUC up to a year to make rules necessary for implementation or that new rates that would trigger payments may not be adopted for years after passage of the measure.

The Board and Proponents also argue that giving voters this important information would make the title longer than necessary. The title for this measure is quite short. Adding a few words to notify voters that payments may be delayed by years would still leave the title quite short while fulfilling the Board's obligation to include the measure's central features in the title. *In re Title, Ballot Title and Submission Clause for 2007-2008 Initiative #61*, 184 P.3d 747, 752 (Colo. 2008) (title bust clearly and concisely summarize the measure's central features).

The title set for the Proposed Measure is flawed in that it fails to inform voters of potential years of delays before payment may commence. The measure must be returned to the Board to correct this deficiency.

CONCLUSION

For the reasons stated, 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 15th day of May 2022.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #93 ("PERCENTAGE OF UTILITY RATES PAID BY INVESTOR-OWNED UTILITIES")** was sent electronically via CCEF this day, May 15, 2022, to the following:

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