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MEMORANDUM

February 13, 2004

TO: Robin Hubbard
Greg Casini

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #87, concerning renewable energy standard.

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments to you regarding your proposed amendment, a copy of which is attached.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in drafting the language of their proposal and to make the public aware of the contents of the proposal. Our first objective is to be sure we understand your intent and objective in proposing the amendment. We hope that the statements and questions in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To develop and utilize renewable energy resources to the maximum practicable extent;
2. To require the Colorado public utilities commission to promulgate certain rules establishing a specified renewable energy standard;
3. To require the rules to include specified definitions, deadlines, extra credit multipliers, a standard buydown offer program, policies for cost recovery, and annual reporting by providers to the commission;

4. To allow the commission to adopt rules as necessary for the administration and enforcement of the renewable energy standard;
5. To require certain large providers of retail electrical service to comply with the renewable energy standard, either through credits, energy savings, or by the acquisition of renewable electric energy generation capacity;
6. To prohibit the providers from exercising eminent domain over real estate to site a generation facility used to comply with the standard; and
7. To specify a December 1, 2004, effective date.

Comments and Questions

The form and substance of the proposed amendment raise the following comments and questions:

Technical questions:

1. Article V, section 1 (8), of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by initiative:

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

Would the proponents consider adding an enacting clause at the beginning of the proposed measure?

2. It is unclear whether the proponents intend to amend Colorado's constitution or the Colorado Revised Statutes. It is also unclear where in the constitution or statutes the proponents intend to codify the initiative. Would the proponents consider specifying their intent through the use of an amending clause such as the following:

(to amend the Colorado Revised Statutes)

"**SECTION 1.** ___-__-___, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW (ARTICLE/PART/SECTION) to read:"

or

(to amend the Colorado Constitution)

"**SECTION 1.** Article ___, Section _ of the Constitution of the State of Colorado is amended BY THE ADDITION OF A NEW (ARTICLE/SECTION) to read:"

3. It is unclear whether the proponents intend the first two paragraphs of the draft initiative to function only as an explanation of the initiative and thus do not intend the paragraphs to be codified, or

whether the proponents intend these paragraphs to be codified either as a declaration of intent or as substantive law. Would the proponents consider either removing the paragraphs if they are not intended to be codified, or specifying whether they are intended to be declaratory or substantive through the use of an amending clause with a head note such as "**Declaration of intent.**", if appropriate, or another head note to signify a substantive meaning, such as "**Renewable energy standard.**".

4. To conform to standard drafting practices regarding the form of proposed amendments, would the proponents:
 - a. Show all of the substantive text of the proposed initiative (everything except the enacting clause, the amending clause, and the bold-faced type head notes) in "LARGE AND SMALL CAPITAL LETTERS" to indicate that the text is new language?
 - b. Begin the first word of each new subdivision with a capital letter?
 - c. Consider using the following standard numbering format throughout the proposed measure? The various subdivision of law are generally organized to provide consistency in the law and to aid the reader. The constitution is organized by article and then section. The Colorado Revised Statutes are organized by title, article, part, and then section. For both the constitution and the statutes, sections are divided into numbered subsections, which can be subdivided into lowercase lettered paragraphs, which can be subdivided into subparagraphs that are numbered with capitalized Roman numerals, which can be further subdivided into uppercase lettered sub-subparagraphs (i.e., (8) (d) (I) (A)). Also, typically these subdivisions are not organized through the use of indent, but rather left tabs;
 - d. Consider using the standard citation format of describing each subdivision of the citation individually (for example, the citation at the top of page 2, line 2, if recast according to the standard numbering format mentioned above (assuming the initiative enacts a single new section), would be phrased "subparagraph (I) of paragraph (b) of subsection (2) of this section")?
 - e. Consider spelling numbers rather than using numerals (e.g., "one hundred thousand" rather than "100,000", "ten percent" rather than "10%", "two dollars" rather than "\$2.00")?
 - f. Consider reorganizing the citation of paragraph located in the middle of page 2 that begins "(a) To the extent that . . .". Typically, the statutory style followed in Colorado indicates that there must be at least two similarly-denominated subdivisions of a provision of law for a provision to be subdivided. Here, the paragraph denoted (4) has but one subdivision. Would the proponents consider reorganizing these provisions to conform to conventional format by citing the main subdivision as "(4) (a) A standard buydown offer . . ." and the second subdivision as "(b) To the extent that . . ." or, if recast according to the standard numbering format mentioned above and assuming the initiative enacts a single new section,

citing the main subdivision as "(d) (I) A standard buydown offer . . ." and the second subdivision as "(II) To the extent that . . ."

5. The second line of subdivision (I) on page 1 has a comma after the word "annually" that appears to be unnecessary. Would the proponents consider deleting it?
6. Subdivision (I) on page 1 refers to regulatory authority "herein" contained, but the scope of the term "herein" is unclear. Would the proponents consider specifically identifying where this authority is contained—this article, section, subsection, etc?
7. Generally, Colorado law capitalizes only proper names of places, for example "Colorado". The proposed measure initially capitalizes the following words and phrases: "State of Colorado", "Public Utilities Commission", "Article", and "Title". Would the proponents consider beginning these words and phrases with lower-case letters, for example, "state of Colorado" and "public utilities commission" or "commission"?
8. Subdivision (II) (1) states that certain technologies "must" be "in-service" by a certain date.
 - a. "Must" is often construed as being directory rather than mandatory, while mandatory provisions are indicated by "shall". To conform to convention, would the proponents consider rephrasing this as "shall"?
 - b. "In-service" appears to be an adjective although it is functioning in this sentence as both a preposition and a noun. To conform to convention, would the proponents consider rephrasing this as "in service"?
9. Subdivision (II) (2) (c), at the top of page 2, contains the internal subdivisions (i), (ii), and (iii). Typically Colorado law does not contain internal subdivisions such as this. Would the proponents consider placing a colon after the word "either" and placing subdivisions (i), (ii), and (iii) as sub-subparagraphs separated by hard returns and left tabs? The last sentence of subdivision (II) (2) (c) would then become its own subparagraph.
10. Subdivision (II) (4) contains inconsistent singular-plural references to "customer". would the proponents consider changing "customers" in line 3 of the subdivision to "a customer's"?
11. The draft initiative uses the phrase "and/or" in the subdivision entitled "(a)" at the top of page 3. Would the proponents consider using one term or the other, or perhaps using "or" and ending the sentence with a phrase such as "or any combination of such methods"?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. Taking into account the requirements of the proposed initiative, what is the single

subject of the proposed initiative?

2. What defines "retail electric service" providers? For example, does it include only investor-owned utilities, or are cooperative electric associations and municipal utilities intended to be covered as well? Which providers have retail sales in excess of 100,000 megawatt-hours annually? Why is 100,000 megawatt-hours used as a threshold?
3. Is it the proponents' intent that the public utilities commission define "eligible electric generation technologies?" What are possible examples of "eligible" and "ineligible" electric generation technologies—*e.g.*, solar, biomass, geothermal, hydroelectric, etc. (section 24-82-601 (3), C.R.S.)? Must the commission include in that definition any technology based on the "eligible renewable resources" listed in the measure, *i.e.*, solar electric, wind, geothermal, and biomass?
4. Is it your intent that the definition of "renewable energy" in your initiative have the same definition as the definition of "renewable energy" found in statute, section 40-1-102 (6), C.R.S.? What is "eligible" renewable energy?
5. Subdivision (II) (1) states that certain technologies must be in service "no earlier than January 1, 2003." Since that date has already passed, do the proponents intend this limitation to exclude from counting toward the renewal resource standard all electricity that is generated from technology that was put into service before January 1, 2003?
6. In subdivision (II) (1) (a), "tree" is mentioned in addition to "plant". Because trees are a type of plant, what do the proponents intend by this reference?
7. What is the proponents' intent in requiring each specified provider to "generate, displace, or otherwise acquire on a competitively bid basis, electricity from eligible electric generation technologies?" Does the phrase "competitively bid" preclude consideration of a technology that receives a government subsidy or tax incentive?
8. How were the "minimum amounts" referred to in subdivision (II) (2) (a) of the proposed initiative determined?
 - a. For these minimum amounts, why is 5% to be derived solely from solar energy and not other renewable energies? Does the 5% function as an upper limit, a minimum, or both?
 - b. Does the 5% figure represent 5% of the provider's total portfolio, thus amounting to half of the 10% specified for the years 2012 through 2021 and one-quarter of the 20% specified for the years 2022 and thereafter? Or does the 5% represent only 5% of those 10% and 20% portions, respectively?
9. In subdivision (II) (2) (c), what is a "requirements contract" between a provider of retail electric service and an electric supplier?

10. Is it the intent of the proponents to allow providers of retail electric service an option of: (1) purchasing energy credits; (2) verifying energy savings through energy efficiency and conservation programs; or (3) a combination of both to meet the electricity resource standard should the amount of eligible generation be limited by a requirements contract with an electric supplier?
11. What are the extra credit multipliers referred to in subdivision (II) (3)? Would they be affected by a future amendment to section 39-30-103, C.R.S.?
12. What is meant by a "standard buydown offer program" as found in subdivision (II) (4) of the initiative? How would this program work for the retail electric service providers and their customers? Does this buydown only pertain to solar energy? Is this a generally accepted practice in other states where renewable energy is generated by electricity customers? What are "interconnection requirements" found in subdivision (II) (4) of the initiative, and why are some considered unreasonably burdensome? What is the intent of subdivision (II) (4) (a)? What is the definition of "nameplate rating?"
13. What is an example of a "tradable renewable energy credit" that could be used by a provider to comply with the proposed electric resource standards?
14. What is the proponents' intent regarding the recovery of costs incurred by retail electric service providers due to this electric resource standard? Does this allow the retail providers to recover the costs incurred in creating and implementing such standards by establishing new retail electricity rates?
15. Subdivision (II) (6) on page 2 refers to the "effective date of this electric resource standard". The proposal does not specify a date by which the commission must promulgate the rule, but does specify in subdivision (IV) on page 3 that "this article" shall be effective on December 1, 2004.
 - a. Article V, section (1) (4), of the state constitution states in part that initiated measures "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." Do the proponents intend that the proposal's reference to the December 1, 2004, effective date control over the provisions of article V, section (1) (4)?
 - b. Alternatively, do the proponents intend that subdivision (II) (6)'s reference to the effective date of the standard mean the effective date of the commission's rules implementing the program?
16. Is it the intent of the proponents to have retail electric service providers submit an annual report to the public utilities commission to determine how the providers are complying with the proposed renewable energy standards?
17. Subdivision (II) (7) (i) (IV) refers to a "qualified energy recovery system", but does not define the

term or provide any context for its meaning. Do the proponents intend the commission to define this term, or would the proponents consider providing either a definition or a context to supply its meaning?

18. What types of rules of "enforcement mechanisms" do the proponents believe are required to enforce these electric resource standards? Who would enforce these rules? What body would determine noncompliance by the providers? Is it the intent of the proponents that the administrative penalties not be recoverable from Colorado electric retail customers?
19. Subdivision (II) (8) (b) refers to penalties but does not specify the fund to which the penalties should be credited or the use to which the penalties may be put. Would the proponents consider specifying these issues? If the penalties are not credited to the general fund, do the proponents intend that interest earned on the investment and deposit of the penalties accrue to a specific fund?
20. Is it the intent of the proponents to prohibit providers from exercising the power of eminent domain with regard to locating the generation facilities of the renewable energy system? If suitable locations cannot be found without the exercise of eminent domain, would the providers be exempt, wholly or in part, from the requirements imposed by this measure?