Comments in Support of House Bill 12-1121 – Ratepayers' Bill of Rights

House Transportation Committee

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Honorable Representatives of the House Transportation Committee: Thank you for affording this opportunity for public comment on House Bill 12-1121 concerning a utility Ratepayers' Bill of Rights. My goal in these comments is to not only enthusiastically support this legislation, but to present data indicating why it is needed and to alert you to additional concerns which indicate that perhaps it does not go far enough.

From November 2005 through December 2011, I was a Professional Engineer on the Staff of the Public Utilities Commission. I participated in numerous litigated proceedings as an expert witness before the Commission involving primarily the state's two investor owned electric utilities: Black Hills Colorado Electric Company (BHCE) and Public Service Company of Colorado (PSCo) also known as Xcel Energy. As a Senior Authority on Renewable Energy for the Commission, I focused primarily on dockets involving renewable energy generation but also participated in more general utility rate cases and electric resource plan proceedings. I was also involved in a number of rule makings at the PUC and most recently led the rule making required to implement last year's Solar Gardens legislation.

I would first like to address a couple of items mentioned specifically in HB12-1121 and then go on to address what is needed, but not there. In Section 1, proposed statute §40-3-106.5(1), C.R.S., the Bill speaks to the need to adequately recognize and, indeed, hold paramount the interests of utility consumers. In §40-3-106.5(1)(c), C.R.S., the Bill would prohibit investor-owned public utilities (IOU) from charging ratepayers for research and development costs. This, in my opinion, is one of the most important aspects of this proposed legislation. For most businesses, R&D is an expense that reduces net income, in other words, the business's profits. A return is earned when that R&D yields benefits that consumers are willing to pay for. I know of no other business that believes that it can recoup its R&D costs directly from customers irrespective of the success or failure of the

project. Yet that is precisely what we have in Xcel's attempts to obtain cost recovery for what is clearly R&D of questionable benefit to its customers.

The disastrous and aborted Smart Grid City project with which everyone is familiar is only one example, albeit perhaps the most well known one. Of lesser notoriety is the utility's so-called Innovative Clean Technology Program that was approved by the PUC. The first project approved by the PUC under that program was a failed experiment to co-fire the Cameo Generating Station with concentrating solar troughs at a cost to ratepayers of approximately $6 million and for which ratepayers received no benefit.

In my experience, monopoly utilities, be they electric utilities or other do not possess either the market acumen or experience to successfully manage R&D projects. That is why they participate in industry consortia such as the Electric Power Research Institute (EPRI) or, in the case of the old regulated telephone industry, Bellcore, whose focus is industry R&D. One need only look at the enormous cost overruns associated with Smart Grid City to see that a utility that believes it can get cost recovery for every dime spent, regardless of how poorly, does not know when to pull the plug.

The second critically important section of HB12-1121 is subparagraph (d) of the same section which prohibits IOUs from passing on costs for complying with proposed environmental regulations until they have actually been enacted. I assume that this is to prevent the collection of some of the costs incurred by the utility, and approved by the PUC, that result from the Clean Air Clean Jobs Act. But, it is not clear how this differs from the modifications to §40-2-123, C.R.S. proposed in HB12-1172 (which is before the Agriculture, Livestock, and Natural Resources Committee) that requires the Commission to consider only the EXISTENCE of environmental regulation rather than just its likelihood. In my experience with utility resource planning dockets, this may be a distinction without a difference. Whether it is additional costs that the utility incurs due to proposed regulations, or the skewing of the resource selection process, due for instance to a carbon adder, the result is the acquisition of resources that are more expensive than those actually required by current regulations with the commensurate costs ultimately being passed on to ratepayers.

Finally, subparagraph (e) of HB12-1121 prohibits the collection of attorney fees and other costs incurred in pursuing rate increases. This should be a no-brainer but appears necessary for a utility for which the word "no" never means no.

So much for the items that are delineated in HB12-1121. Now for the items that are critically important but not addressed in this Ratepayers' Bill of Rights. You are aware, I'm sure, of an ongoing investigation by the Legislative Audit Committee into the activities of two PUC Commissioners: former Chairman Ron Binz and sitting Commissioner Matt Baker. That investigation, unfortunately, deals with only the tip of the iceberg concerned with how well the PUC does or does not consider the best interests of consumers in its decision making. Along with a former colleague from the PUC, we have analyzed the *ex parte* disclosures that must be filed by Commissioners and which have been posted to the PUC website. I am distributing to you two spreadsheets summarizing that analysis.

Our analysis of these disclosures indicates that the public has not been the primary interest of the PUC commissioners. These disclosures are supposed to be timely filed but, as you can see from the first spreadsheet, for two commissioners in particular (Binz and Baker) there was a considerable lag in the time between when a meeting occurred and the date it was disclosed. A substantial portion of the disclosures occurred more than a month after the meeting occurred. Combined with the rather sparse information contained in each disclosure, one wonders about how helpful to the public these disclosures really are.

Of greater concern, perhaps, is the breakdown of the types of parties that get the ear of the commissioners. Overall, only 12% of these meetings took place with parties representing consumers. Just under 10% were with other government officials and an incredible 68% were with utilities or their suppliers. After removing the disclosures related to personal meetings, more than three quarters of commissioner meetings have been with entities concerned with passing on costs to ratepayers.

But our concern for how well the PUC considers the public welfare extends beyond the commissioners themselves to the management of the agency. I assume you are aware, though the general public may not be, that the Staff of the agency does not report to the commissioners.

I personally have been disciplined on more than one occasion for my attempts to get at and report on the cost of utility acquisitions. Because of the nature of my position, these most often were related to costs associated with the Renewable Energy Standard and you may have seen an op-ed piece in The Denver Post only yesterday on this topic. What you may not be aware of is that agency retaliation – not the commissioners per se but the

agency – for my attempts at serving the public interest have resulted in two pending Whistleblower actions, one of which is now before the Colorado Court of Appeals (Case 2011CA2117) and the other of which is before the State Personnel Board (Case 2012B061).

These whistleblower complaints directly implicate PUC Director Doug Dean and one of his section heads, Jeff Ackermann. The nature of the information in these disclosures also concerns costs being assumed by ratepayers that, in this case, it is the agency management that has sought to keep from disclosure. Both concern the costs of the renewable program but they are not the only ones. I can also point you to an audit I conducted of Xcel's Windsource program ~~I conducted~~ in 2008 that Director Dean sought to embargo because it illustrated the fact that the utility was charging its Windsource customers for a product that it knew it could not deliver. Rather than allow a complaint to proceed, he offered the company an opportunity to come in with an application to restructure the program to avoid such scrutiny. Just as with the commissioner analysis shown previously, you should be seriously concerned with how well the management of the PUC as an agency serves the public interest.

The PUC, as a division of the Department of Regulatory Agencies, is arguably one of the most technology intensive regulatory agencies in state government. Yet its leadership – and I use the term loosely – is wholly unqualified to lead such technical professionals and is unsuited to the task. In my career spanning more than 35 years, I have never encountered an organization with lower morale. How can this agency ensure that the interests of consumers are held paramount – or even be "adequately recognized" to use the language in the bill – when both the commission itself and the management of the agency are more concerned with appeasing the politically connected utilities and the businesses that serve their political agenda?

Members of the Committee, this Ratepayer Bill of Rights is worthy of your support, but it must go farther than the efforts contained in this bill. It is time to put the PUBLIC back in the Public Utilities Commission.