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Colorado General Assembly

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MEMORANDUM

TO: Jon Caldara and Jake Fogleman
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 25, 2022
SUBJECT: Proposed initiative measure 2021-2022 #93, concerning Percentage of Utility Rates Paid by Investor-owned Utilities

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 the appended proposed initiative.

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

Purposes

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be to require investor-owned utilities providing electric or gas service, or both, to residential, commercial, or industrial users in Colorado to pay a percentage of all rates from the investor-owned utilities' profits.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Section 2 of the proposed initiative refers twice to an "effective date." While the second reference specifies "the effective date of this measure," the first reference does not specify. Do you intend both references to refer to the effective date of the measure? If so, you might consider making that clear in the language of the proposed initiative.
3. In section 2 of the proposed initiative, what is intended by the phrase "public utilities law"? Do you intend this to mean the sections of title 40 of the Colorado Revised Statutes and the public utilities commission's rules adopted pursuant to title 40? If so, you might consider specifically referencing that title and the public utilities commission's rules.
4. It appears that the requirement for an investor-owned utility to pay a percentage of all rates from its profits would apply to any rates approved or modified on or after the effective date of the measure. However, the public utilities commission is tasked with determining the percentage and with adopting rules to implement the measure within 12 months after the effective date of the measure. If the public utilities commission does not adopt rules setting the percentage until 12 months after the measure becomes effective, how would the measure apply to rates that are approved or modified after the effective date of the measure, but before the public utilities commission has adopted rules?
5. What does it mean for an investor-owned utility to pay a percentage of all rates from the investor-owned utility's profits?
 - a. What form do you intend the payments to take? Do you intend the payments to be made directly to customers? Do you instead intend the payments to be made through a discount applied to customers' utility bills?
 - b. Do you intend the public utilities commission, in its rules, to require an investor-owned utility to make the payments equally between all of its customers? If not, could the public utilities commission adopt rules allowing the investor-owned utility to make greater payments to one or

more classes of customers, for example, allowing the investor-owned utility to make greater payments to residential customers than to commercial customers or to make greater payments to income-qualified customers than to all other customers?

- c. Do you intend that the public utilities commission could authorize an investor-owned utility to make payments exclusively to one or more classes of customers and not make any payments to one or more other classes of customers?
 - d. Depending on how the payments are made, it is possible that payments made to an income-qualified customer would be factored in as part of the customer's income, thus possibly rendering some customers, who would otherwise be eligible, to be ineligible for low-income energy assistance programs established pursuant to article 8.7 of title 40, Colorado Revised Statutes. Do you intend that the proposed initiative have such effect?
6. Assuming that an investor-owned utility applies, and the public utilities commission approves, different rates for different types of customers, meaning, for example, that a residential customer and a commercial customer are subject to different rates for their utility bills, do you intend that the public utilities commission may establish a different rate percentage for calculating the required payment for each of the investor-owned utilities' distinct rates? If so, you might consider specifying that authority in the proposed initiative.
7. How would profits be determined under the proposed initiative?
- a. If an investor-owned utility provides both electric and gas service in Colorado, do you intend that its cumulative profits for both electric and gas service be counted for determining a percentage of its profits? Or do you intend that the investor-owned utility's profits from electric service be separately calculated as profits for determining a percentage of profits for its electric rates and that its profits from gas service be separately calculated as profits for determining a percentage of profits for its gas rates?
 - b. If the investor-owned utility also serves other states, do you intend that its profits be determined based on its nationwide profits? Or do you intend that its profits be determined based only on its profits in the state?

- c. Assuming that an investor-owned utility reports quarterly profits, do you intend that the investor-owned utility's payment of a percentage of all rates based on its profits could fluctuate on a quarterly basis? If so, how would the public utilities commission address the fluctuations in its rules and in its review of the investor-owned utility's rate tariffs?
8. A number of sections of title 40 of the Colorado Revised Statutes, such as section 40-5-101 (4)(a), Colorado Revised Statutes, allow an investor-owned utility to recover from its ratepayers certain costs that it prudently incurs through use of a rate adjustment. It is not clear if the reference in section 2 of the proposed initiative to "all rates" would include such rate adjustments. Is it your intent that rate adjustments made to recover an investor-owned utility's prudently incurred costs would be "rates" that the investor-owned utility would be required to pay a percentage of from their profits?
9. Under section 40-3-101 (1), Colorado Revised Statutes, the public utilities commission is charged with setting utility rates that are "just and reasonable." The Colorado Supreme Court has interpreted that phrase to mean that the "fixing of 'just and reasonable rates' involves a balancing of investor and consumer interests" and that the commission "must also consider the reasonableness and fairness of rates so far as the public utility is concerned."¹ Rates must be set to ensure that the public utility has "adequate revenues for operating expenses and to cover the capital costs of doing business. The revenues must be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."²
 - a. How, if at all, would the proposed initiative affect the public utilities commission's ability to set "just and reasonable" utility rates that balance investors' interests and provide adequate revenues for an investor-owned utilities' operating expenses to cover its capital costs?
 - b. Given the need for the public utilities commission, when fixing a "just and reasonable" rate, to consider the public utility's revenue and capital needs and its investors' interests, could the proposed initiative have the effect of requiring the public utilities commission to set higher rates than

¹ *Public Service Co. v. Public Utilities Comm.*, 644 P.2d 933, 939 (Colo. 1982).

² *Id.*

it would set without the proposed initiative to provide for the public utilities' revenue needs and its investors' interests?

- c. The Colorado Supreme Court notes that a public utility must have sufficient revenue to attract capital. If, under the proposed initiative, a certain percentage of an investor-owned utility's profits would be required to be paid to cover rates and could not be used to pay back investors or leverage additional investments, could the proposed initiative have the effect of jeopardizing the financial integrity of the investor-owned utility?
10. The proposed initiative could limit the return on investments made by an investor-owned utility's investors. If a court were to determine that such diminished return on investments constitutes a regulatory taking of private property that warrants just compensation under the Fifth Amendment of the United States Constitution and section 15 of article II of the Colorado Constitution, how should just compensation be provided to the investor-owned utility's investors? What financial resources of the state should be used to provide the just compensation?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Section 1 of the proposed initiative is titled "Legislative Declaration"; however, that term is used when the information in the declaration sets out the will of the legislature. In this case, the declaration sets out the will of the people so alternative language should be used or simply the word "Declaration."
2. Section 1 of the proposed initiative refers to the Public Utilities Law. Since that is a short title that refers to statutory law, a statutory cross reference should be used to specify where the "Public Utilities Law" is located.
3. Capitalization:
 - a. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:

- i. The first letter of the first word of each sentence;
 - ii. The first letter of proper names such as "Colorado," "South Platte river," "Pike's Peak community college"; however not the names of government agencies; and
 - iii. The first letter of each word in a statutory short title that is set out in Colorado law.
 - b. In sections 1 and 2 of the proposed initiative "public utilities commission" should not be capitalized since it is a government agency.
 - c. In sections 1 and 2 of the proposed initiative "Public Utilities Law" is a statutory short title, therefore the first letter of each word should be capitalized.
- 4. Statutory short titles should be enclosed in quotation marks. In sections 1 and 2 of the proposed initiative, "Public Utilities Law" should have quotation marks at the beginning and end of the short title.
- 5. The statutory section number at the beginning of a section should be in bold-faced type.
- 6. The word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Section 2 of the proposed initiative states that "such percentage shall be at least five percent"; it would be preferable if the "shall" in that sentence were changed to a "must" because it is stating that a thing, a percentage of all rates, must meet a condition.
- 7. When referring to when something will occur in relation to a specific date, the word "after" is preferred to the word "of" because "of" can mean either before or after the date.
- 8. Internal references in the Colorado Revised Statutes:
 - a. Guidelines for statutory citations:
 - i. When you are referencing the section you are currently in, the section number does not need to be referenced. For example:

1-1-105.5. District elections. (1) (b) Except when a contestor to elector qualifications has been timely initiated as described in this section, **this section** validates ... (**Emphasis added**)

- ii. The number or letter of what you're referencing needs to be specified for every other level of reference, even when you're referring to a provision within the same:
 - 1. Title: "this title 1"
 - 2. Article: "this article 1"
 - 3. Part: "this part 1"
 - 4. Subsection: "this subsection (2)"
 - 5. Paragraph: "this subsection (2)(a)"
 - 6. Subparagraph: "this subsection (2)(a)(I)"
 - 7. Sub-subparagraph: "this subsection (2)(a)(I)(b)"
- b. In Section 2 of the proposed initiative, at the end of section 40-3-111 (3), the language "the effective date of this measure" is used. To be clear about what it is referring to, the language should say "the effective date of this subsection (3)."
- 9. In Section 2 of the proposed initiative, at the end of section 40-3-111 (3), the word "the" should be inserted before "public utilities law" for correct grammar.
- 10. The word "section" should not be abbreviated in the effective date section of the proposed initiative.