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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

November 13, 2007

The Committee on Legal Services met on Tuesday, November 13, 2007, at 9:10 a.m. in HCR 0112. The following members were present:

- Senator Veiga, Chair
- Senator Brophy
- Senator Groff (present at 10:47 a.m.)
- Senator Shaffer (present at 9:19 a.m.)
- Representative B. Gardner
- Representative Labuda
- Representative Levy
- Representative McGihon, Vice-chair
- Representative Roberts

Senator Veiga called the meeting to order. She said Tom Morris, who is the staff person on the first agenda item, is stuck in traffic from Boulder, so we're going to have to rearrange the schedule briefly. She welcomed new members, Senator Brophy, Representative Labuda, and Representative Levy. The Committee started with item 1b on the agenda, rules of the Colorado state board of education concerning the summer school grant program.

Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Colorado State Board of Education, Department of Education, concerning the summer school grant program, 1 CCR 301-50.

Mr. Brackney said this concerns the summer school grant program, which the General Assembly set up back in 2006. What it does is allow the state to give grants to school districts and charter schools to help out students who received an unsatisfactory score on the CSAP test. It has to do with who is eligible for these grants. Section 22-7-802 (3), C.R.S., says that an eligible student for the

summer school grant program is one who will begin 4th, 5th, 6th, 7th, or 8th grade. So, 4th through 8th graders are eligible for these grants under the summer school grant program. However, I have 3 rules for you where the board's rules do not include 4th graders. Rule 2207801-R-2.00 (3) defines eligible student in the rules concerning the summer school grant program. It says that a student who will begin 5th, 6th, 7th, or 8th grade is eligible. There are no 4th graders there. Similarly, Rule 2207801-R-2.00 (4) does the same thing in that it talks about services to students entering the 5th through 8th grades. Finally, rule 2207801-R-2.01 (2), concerning the application procedures for these grants, similarly says that it's for students who are entering the 5th through 8th grades. Because these rules fail to include 4th graders among those eligible for the summer school grant program, they conflict with the requirements of section 22-7-802 (3), C.R.S., and should not be extended.

Representative Labuda asked what was the intended impact of these rules and would the correction occur by just changing the rules to include 4th graders? Why would the rules pass if they're not important now basically? Mr. Brackney said I believe someone from the department is here who can probably speak to that better than I can, but I believe there is a problem with the timing of the results of the CSAP test for 4th graders, so they quite intentionally did not include them. They can explain that in more detail. The problem is, of course, that the statute requires that they be included and so that's why we brought these rules to you today.

Senator Veiga said that sort of raises an interesting issue, which is that you cannot have a rule that complies with the statute. In other words, because the 4th grade kids don't get the CSAP results back in time, you couldn't include them. From a legal services perspective, how are we supposed to address an implementation of a rule that can't actually technically comply with the statute we've passed? Mr. Brackney said I think you do have to follow the statute and the statute would require, in my opinion, getting rid of these rules and then, in a perfect world next session, there would be a bill that would correct the statute that would probably omit 4th graders from it.

Representative Levy said it occurred to me that there are maybe 2 possible ways that you actually could reconcile the statute with the rule. One of which is that the statute states who is eligible for summer school, and that would include 4th grade, but I don't think it has to be read necessarily to require all eligible students to be included in the program. The other way is to say that they are eligible if they've received an unsatisfactory score for the CSAP in the preceding academic year in which the test was given. Part of the problem is

that kids don't take all tests all years. I guess the question I have might be more for the department as to is there a way to pick up these 4th grade kids and give them the services their test scores may seem to indicate they need.

Jeanette Cornier, Assistant Commissioner, Department of Education, testified before the Committee. She said, as mentioned, the problem is the conflicting language in the legislation is about the preceding academic year. We're talking about students who are entering 4th grade would have been 3rd graders and the preceding year would have been 2nd graders. We don't have state assessments in reading, writing, and math in 2nd grade, so we do not have preceding year assessment results for those 4th grade students. That's where the conflicting language comes from. We were considering pursuing a statutory change in this legislative session to address that issue of the conflicting language.

Representative Gardner said it seems to me that if we square the regulation with the statute, we still won't be doing anything for 4th graders because the statute talks about preceding academic year test scores and those don't exist. We can really do a great thing here today: We can square the regulation with the statute, but are we going to be able to help 4th graders when we're done? Ms. Cornier said no. For those students entering 4th grade, we would not have the scores to include them in this summer school program. We would be looking for a change that would begin this grant funding program with students who are entering 5th grade.

Representative Gardner asked Mr. Brackney isn't that really the problem here we can square? I think these things do matter from a separation of powers standpoint, but it looks to me like what we can end up doing is making sure that the regulation is consistent with the statute, but what was probably the intent of the legislature to start with, to provide assistance to 4th graders, isn't going to happen when we're done and we're going to need a bill. If that's what the legislature indeed wants to do, we're going to need some legislative changes. Am I reading that right? Mr. Brackney said yes, that's what I think, too.

Representative Levy said to follow up on Representative Gardner, if I understand the memo, the only way to square the regulation with the statute is to have no regulation at all and therefore nobody gets services. Based on the Office's interpretation, they are completely irreconcilable. How would the department propose to reconcile them in a way that provides services to 4th graders? Is there any conceivable way to do that? Ms. Cornier said none that we're aware of.

Representative Levy said I don't want to strike down the rule and have no services when the statute provides a means to give services. It seems that if the statute is set up to create the entire class of eligible students and the department has elected to serve a subset of eligible students, that's not a direct conflict. Mr. Brackney said keep in mind that even with the Committee vote today to get rid of these rules, they will still be around until next May 15. By then, again in a perfect world, we will have a bill through and signed by the governor that will change the statute and then there is no problem at all.

Representative Levy asked how the statute would be changed? What would you propose? Mr. Brackney said I assume the thing to do would be to drop 4th graders from the eligible student list and make it 5th through 8th graders.

Senator Veiga said I understand that's where the department is going. I appreciate Representative Levy's concern that you don't want 4th graders to be excluded from the eligible students for the program. As legislation moves through, if that's the will of the legislature, we could craft some sort of alternative by which 4th graders are admitted under some other standard, possibly not the CSAP. That's also a possibility, but that would again occur through the legislative session.

Representative Labuda said if I understand correctly, if we vote to delete this rule, it will be in effect for at least a year and during that interim you will be providing services to 5th through 8th graders. Is that correct? Ms. Cornier said that's correct and we calculate with the 4th through 8th grade students there are 78,000 students who are eligible and only \$1 million, or approximately 2,000 students, can be served by this particular grant.

9:28 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rules 2207801-R-2.00 (3), 2207801-R-2.00 (4), and 2207801-R-2.01 (2) of the State Board of Education be extended and asked for a no vote. The motion failed on a 0-8 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Shaffer, and Senator Veiga voting no.

Tom Morris, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Public Utilities Commission, Department of Regulatory Agencies, concerning rules regulating electric utilities, 4 CCR 723-3.

Mr. Morris said the rules regulate electric utilities and, in particular, the renewable energy standard. Some of you may remember we passed a statute last year concerning this. The essential issue I'm going to be talking about today is whether a rule can substitute an average over several years for a statutory minimum. Amendment 37 was adopted by the voters back in 2004. It enacted a series of statutory deadlines that required qualifying retail utilities to generate or cause to be generated a stated percentage of their electricity from eligible energy resources. That minimum percentage increases every few years according to that statutory schedule. This past session the General Assembly adopted House Bill 07-1281 that extended that schedule and increased the percentages. That statute is section 40-2-124 (1) (c), C.R.S. The statute provides only 2 methods for the qualifying retail utilities to comply with this deadline. The utility has to either generate or cause to be generated a sufficient amount of eligible electricity by the deadlines. So, a total amount of electricity generated by that deadline is the same under either of those 2 options no matter who generates it. If it's relatively more expensive for a utility to generate it themselves, they can cause it to be generated by somebody else, who presumably is more efficient and they can do it cheaper than the utility, and so they have an option of a credit and they can buy and trade those credits. But, in any event, the total amount of electricity generated within Colorado by the statutory deadline is the same, it's just who is doing the generating. The portion of the statute that sets out the renewable energy credits is fairly general in section 40-2-124 (1) (d), C.R.S. It says the commission has to adopt a rule establishing a system of tradable renewable energy credits that may be used by the utilities to comply with the standard. It also says the commission shall not restrict the qualifying retail utility's ownership of renewable energy credits if the qualifying retail utility complies with the electric resource standard of paragraph (c). Subparagraph (I) of paragraph (c) is what I'm going to focus on. It essentially says that you have to generate or cause to be generated a certain amount of electricity in the following minimum amounts. I'll emphasize the word minimum because I think that's important. I think what the rule does is sticks the word "average" in there somehow. For instance, if you look at sub-subparagraph (B) of subparagraph (I), it says 5% of its retail electricity sales in Colorado for the years 2008 through 2010. For the rule to work in the statute you need to say something like 5% of its retail electricity sales in Colorado averaged for the years 2008 and 2010. Rule 3654 (i) (I) and (k) talks about something called a borrow forward method. The rule says that a utility may generate or cause to be generated and count eligible energy for compliance for the compliance year immediately preceding the compliance year during which it was generated. In other words, if you don't generate it until a following year, you can count it in the preceding year, so energy hasn't actually been generated yet.

It's a little bit more explicit under subsection (k), which says for the first four compliance years the utility may borrow forward eligible energy generated during the following 2 compliance years. Then it specifies that any borrowed eligible energy has to be made up and then it defines those terms. The term "borrow forward" means that a qualifying retail utility may count eligible energy that it has not yet generated or caused to be generated. The term "made up" means that any counting of eligible energy resources by a utility in a compliance year that it had not actually generated nor caused to be generated shall be actually generated or caused to be generated in a subsequent year. As an example to hopefully make this quite clear, looking at the years 2011 through 2013, the statutory requirement for all three of those years is 10%. In the year 2011, the amount actually generated by the utility is only 6%. In the year 2011, under the rule, the utility could borrow forward 4%. They don't make up anything in that year because they're obviously borrowing it that year. Under the rule, they will have generated or caused to have generated 10%. Nothing happens in the year 2012, you're at 10% all the way across, there's no borrowing or making up, but in the year 2013, the utility anticipates that it will actually generate or cause to be generated 14%, so they make up the 4% there.

Mr. Morris said the rules, in our opinion, lack statutory authority because they allow the utilities a third compliance option. Rather than generating or causing to be generated an excess amount of electricity by a statutory deadline, it can promise to generate it in the future. In terms of an example, a 17-year-old walks into the division of motor vehicles and wants a license. They say the statute says you have to be 18, but he says I promise I'll be 19 two years from now. Well, the statute says you have to be 18 and it doesn't matter that some time later you're going to be able to average these things out. If you look at the statute, it says they have to produce in the minimal amounts for those years, not averaged over those years. There's a couple other portions of the rules that incorporate this process of borrowing forward and making up. Rule 3659 (a) (VII) lists the borrow forward concept as a type of renewable energy credit, and rule 3662 (a) (III), (a) (IV), and (a) (V) require the utilities to list their use of "borrow forward" and "made up" credits in their annual compliance reports. Because they incorporate these concepts, those rules also lack statutory authority and therefore those rules should not be extended.

Barbara Fernandez, Chief of Staff, Public Utilities Commission, Department of Regulatory Agencies, testified before the Committee. Also present are Paul Gomez who is commission counsel, Chris Lines, the department legislative liaison, and Frank Shafer who is the staff member who is the expert in renewable rules.

Frank Shafer, Financial Analyst, Department of Regulatory Agencies, testified before the Committee. He said I was a staff team leader for the original Amendment 37 rules. That meant I worked directly with the commissioners in establishing the rules. I was also the staff co-team leader for House Bill 1281 and making the revisions to the renewable energy rules as a result of that statutory change. I've had over 19 years experience with the commission. I would like to suggest for your consideration that one of the statutes that the commission had to develop rules for was ambiguous. As a result, the commission was within its discretion in adopting the borrow forward concept. We ask that the borrow forward concept continue. As a format for today's presentation, I would like to suggest instead of reading out loud the memo I provided to you, just to walk through the highlights, which we think will facilitate your decision-making process today. Beginning on page 1 of the memorandum, we've reproduced for you the statutory language that was originally adopted with Amendment 37. Section 40-2-124 (1) (c) (I) (A), C.R.S., says for the years 2007 through 2010. That statutory language does not say for each of the years. We interpret that to mean it's a block of time. It does not say by the years or in the years. Again, we felt that the statutory language was ambiguous. If you look at the bottom of page 1, here is the statutory language as it's been modified by House Bill 1281. They've specifically identified 2007 as an individual year in sub-subparagraph (A), but it continued with the phrase for the years 2008 through 2010 in sub-subparagraph (B), again the block of time. Turning to page 2 of the document, we talk about the discretion granted the commission by Amendment 37 and House Bill 1281. To us, the important part of this process is that the agency is delegated the discretion to interpret the ambiguous provisions in a manner that furthers the overall objectives of the provisions in question. At the bottom of page 2 is a discussion about the rule-making process. During the rule-making, there were two camps toward an interpretation of this statute. One group, which was generally the utilities, said that the commission should look at this as a block of time. The other group, and I don't mean this in a derogatory sense, was the environmental community, saying you should interpret that as an annual requirement for each of the years. What the commission ultimately adopted were the consensus rules that were put together by a group of the participants in the rule-making. It's rule 3654 (k), which incorporates this borrow-forward concept. The next part of the memorandum discusses an analysis of this rule. Mr. Morris' table in his memorandum did a nice job of showing you numerically how the borrowed forward would work. I won't reiterate that for you. The question for you may be why did the commission adopt the consensus rules? I'd like to provide a little more insight into that. There were concerns expressed by the parties during the rule-making proceeding that it was going to be difficult for launching the on-site solar

programs under the law. Amendment 37 and the renewable energy standard are structured such that there are 3 general categories of renewables. The first general category I'll call the nonsolar. You can think of those as the wind facilities, the hydroelectric facilities, the biomass, etc. The other 2 categories are subsets of solar. The first solar category is called on-site solar, and those are generally the homeowners and the small businesses that put panels on their houses. The second solar category are the central solar facilities, and you can think of that as the facility down in Alamosa that SunEdison is installing. I'd like to discuss with you some of the consensus parties. The first 3, Public Service, Aquila, and the Office of Consumer Counsel, are the ones you would expect to see in a commission rule-making proceeding. It's the next four I want to emphasize to you. The first one is Western Resource Advocates. The gentleman negotiating for Western Resource Advocates was Mr. Rick Gilliam. He was the author of the ballot initiative for Amendment 37. The next group is the Colorado Renewable Energy Society. The next is Colorado Solar Energy Industries Association, which is a trade association for the solar installers. Next is American Wind Energy Association, a trade association for the wind energy companies. I would like to suggest to you that not only did we have a diverse group of people negotiating these rules, we also had the right people negotiating these consensus rules. In the next body of the memo, we talk about the need for flexibility in starting the on-site solar program. Unlike the other categories, the nonsolar and the central solar in which the utility commission RFP required those resources, the on-site solar depends on customers who are willing to make the investment to install solar panels either on their homes or on their businesses. Those factors a customer would consider, or that we would consider, in installing this are the general health of the economy, the ability for someone to spend somewhere between \$10,000 and \$40,000 to install panels, the continuation of the federal tax credit, which is \$2,000 for residential customers, the participation of market developers that bring together the financing to help customers pay for facilities to install, and price and availability of solar panels. As you are probably aware, solar panels have become quite a popular item and the raw material, which is poly crystalline silicon, is in short supply. The simple laws of economics explain that when there is an increase in demand and a short supply, the price goes up. One thing the commission would like you to consider is if someone installs solar panels on their house, you can actually consider that as an investment of someone prepaying their electric bills for some period of time. What would a rational person think of as a way to measure whether that's a good decision, whether to prepay your panels? One analysis would be a simple payback. How long will it take me to recoup my investment? In the middle of this document, Public Service prepared that analysis for us during their 2007 compliance plan. In Colorado, the payback period is 20 years, California has

the least at 16 years, and the city of Austin has a payback period of 23 years. With that, you can conclude that Colorado is right in the middle. The next portion of the memo shows you the relevant portions of the commission's decision where we adopted the rules. Those portions speak for themselves and I won't reiterate those for you. On the top of page 7, in the spirit of full disclosure, the commission did actually receive an appeal to the borrow forward concept. The commission ultimately denied that, but we wanted to provide the full record for your consideration. In the last portion of our memorandum, we discuss the possible effects if the borrow forward provision is eliminated. In our opinion, it will likely drive up the cost to the utilities for compliance, which could result in less, rather than more, renewable energy being required over time, which would be a direct opposite intent of the public policy goals of the voters and the General Assembly. You might ask yourself why would the cost rise? Currently, the rebate and renewable energy credit payments for public service pay about 50% of the installed cost of a system. At this 50% threshold level, Public Service and Aquila are not enticing enough customers to install panels on their houses. The most likely way they will be able to entice more customers to participate is to raise the incentive payment from 50% to maybe 55% or 60%. However, there are cost causes because of that. There's a 2% rate cap involved with Amendment 37, so as you raise the rebate, you take away the available funds that can be used to promote renewable energy and thus that could thwart the ability to get more renewables. Lastly, the commission understands that setting these incentive payments is a delicate situation and we want to encourage the utilities to be very cost-effective with the moneys spent under the renewable energy standard and that there are many moving parts in your decision in setting these rebate or incentive levels. There's the mandatory 2% cap that we talked about and that impacts the customer bills. Next is the trend toward lower system costs over time. As part of Public Services' 2007 compliance plan, they were required under our rules to do 2 solicitations for solar facilities, one in June and one in December. The general trend was that the prices for these projects were lower in December as compared to June. You can see in the parenthetical statement a very important part. As a result of this, under the borrow forward concept, a utility could actually "payback" these solar generation facilities at a lower cost if this cost trend continues. The third part within this memorandum is the desire to have the markets take over and be the efficient vehicle that we hope they will be. When you start a program, naturally you'll need ways to induce people to change their behavior and we feel that setting a rebate at a reasonable level will do that, but hopefully over time the market efficiencies of scales of economy will kick in and thus entice more customers to install panels. Lastly, there's the preference for a steady build-out of the program. What this is designed to do is avoid the boom/dust cycles that may occur. That's a nice

segway into the graph we provided for you. What the graph is intending to show you is the renewable energy standard step-ups, the blue line changes from 5% to 10% and so forth. What we've done next in the pink color is to impose a gradual ramp-up line so you can see and what happens with that is you have arrows where you'll have an excess or a deficiency in terms of the renewable energy credit. What we asked Public Service to do was superimpose onto this graph where they believe they are currently and that's what the green line represents. The challenge becomes at the start of this graph. You can see that Public Service is below the blue line, which indicates to me that Public Service will most likely need to borrow forward to be in compliance with the standard. My understanding in talking with Aquila is they're in that same position and will need to borrow forward. That concludes my prepared comments and on behalf of the department and the commission, I thank you for this opportunity.

Representative Gardner said perhaps this is better for counsel. I understand and appreciate all the policy analysis about what is good public policy or bad public policy. I had my concerns about the statute from the get-go, as to whether or not it was even good public policy in concept, but that's beside the point to that. The commission implemented some regulations, but as I understand the commission's authority, they don't get to legislate. They can fill in the gaps, they can clarify and so forth. Can you explain to me why Mr. Morris' analysis of this statute is not correct, that somehow the commission was permitted to implement a regulation that allowed this within the 4-year period, because I see the word minimum in there and it must mean something? I need somebody to make this case to me. Mr. Shafer said Mr. Gomez would be the best person to answer that because he is commission counsel on legal interpretation. The concept is "for the years" represents a block of time.

Paul Gomez, Legal Counsel for Public Utilities Commission. Attorney General's Office, testified before the Committee. He said, in answer to Representative Gardner's question, the issue was the ambiguity that exists in the statute as it's worded. For the statute as it existed after the passage of Amendment 37, as you'll note, it says 3% of its retail electricity sales in Colorado for the years 2007 to 2010. It has the same language for 6%, 6% of its retail electric sales in Colorado for the years 2011 to 2014. Ten percent of its retail electricity sales in Colorado for the years 2015 and thereafter. There's nothing in the statute that provides that those compliance amounts must be met in a particular year or by a particular year. It merely says for the years 2000 to 2010. Given the fact that the ambiguity existed, the commission, through the course of the consensus rule-making process and including the author of Amendment 37, made the determination that it could be reasonably interpreted

to mean an average rather than a year-by-year compliance.

Representative Gardner asked where's the ambiguity? Mr. Gomez said the statute says 3% for the years 2007 to 2010. The question was does that mean 3% for each year 2007, 2008, 2009, and 2010, or did that mean an average for those years?

Representative Gardner asked what do I do with this word "minimum" here that Mr. Morris is talking about? Mr. Gomez said I believe that adds to the ambiguity. It says in " minimum amounts" of 3% for those years, but does that mean a minimum amount of 3% for each year? That's what is not clear. As I said earlier, there is nothing there that indicates it was 3% for each year, 3% in a year by a year. It just says minimum amounts of 3%, 6%, and 10% for a grouping of years. It wasn't clear at that time whether it was intended to mean each and every year or an average over the course of those years.

Representative McGihon said she's very sympathetic and appreciative of the fact that all the parties of interest got together and negotiated a rule, but the problem is that the statutory language doesn't say what I think supports the rules. I wonder if this is not like the board of education problem, where we need to not extend the rule now and go back and have a statutory fix to the legislation and insert the word "average". We're pretty good at saying what we mean and if we meant average we would have included it in the statute. I'm concerned when agencies go beyond the scope of the statute and interested parties and everyone negotiates, and the problem is they forget that the statutory language doesn't allow them to do a particular thing and that's why we do rule review. I think also that the blue line on the chart is somewhat misleading. It is only what is mandated, it's not what is possible in terms of the minimums. It could average out. I'm very sympathetic to what's contained in the rules, but I'm very concerned that the parties need to come back to the legislature and say we need to fix the statute in order to reach our goals, which is a great goal. It's the way to go. I know there are concerns about whether or not there is infrastructure to support the rule as well, but again, I'm concerned about the statutory authority.

Senator Shaffer said it is my recollection that last year a lot of the conversation around increasing these standards took place in the House and by the time it got to the Senate, most of this was already hammered out. I didn't hear a lot of the debate, either in committee or on the floor of the Senate regarding the language that was adopted during the 2007 session. I'm wondering, and it's kind of incredible to me if this didn't take place, if there was a conversation around this very issue when this was being negotiated and if so, does anybody

remember the legislative history behind what we did during the 2007 legislative session? Mr. Morris said I was the drafter on House Bill 1281. I don't recall the concept of borrow forward being brought forth. I will say that these are existing rules. They came in during Amendment 37 and I would imagine everybody presumed they were valid. So, when they talked about these increases, that was what was in their mind, that it was an average, but when the commission promulgated this series of rules that is in front of you today, they changed some of this language because House Bill 1281 changed the percentages and changed the years, etc. That's why this portion of the rule is in front of you, but the basic idea of borrow forward is a preexisting rule. I don't recall that issue coming up. I don't know if the legislators were aware of it. It was a surprise to me when I read it. I didn't read the original rule when it came through because somebody else had reviewed that rule, so when I saw it I thought it was news to me.

Senator Veiga said she would add that she carried the bill in the Senate for implementation of Amendment 37 after it passed. I can tell you that the issue was not one we even contemplated at the time. It just didn't come up in terms of whether there was ambiguity or not or how it should be interpreted, whether it was an average over a period of years, or whether it was year-specific.

Senator Shaffer said maybe this is inappropriate, but I'm trying to figure out what the intention actually was. Do you remember? Do you recall what the intention was when you looked at that language? Senator Veiga said I can only recall that we didn't think about it. Obviously, it was just not an issue.

Representative Levy said to Mr. Morris that the last piece of information, that the rule was in existence when House Bill 1281 came forward, is significant to me, because I think that indicates that the parties intended that this averaging would work, otherwise I think we would have put "minimum" for each of the years. I have to confess I'm conflicted on this given that new information prior to you indicating that. I thought "minimum" was pretty clear and I think this is an instance in which it's not just a little glitch in the statute. I think it's a significant policy difference between averaging over 3 years and having a minimum in place at the beginning of the multi-year period. I think that's a significant policy difference and I would not be inclined to allow an averaging without discussion of that in the legislature. I don't know what to do with the fact that the averaging was in place and the statute wasn't clarified to say that's not what we intended. I'm on the transportation and energy committee in the House and we had lengthy hearings over several days, I believe, on this bill and it did not come up at all.

Mr. Morris said I would say that the "minimum amounts" and "for the years" hasn't changed between when Amendment 37 first came in and under House Bill 1281. That hadn't changed and so if the rule was unauthorized then, it's unauthorized now. If it was authorized then, it's authorized now.

Representative Gardner asked if Mr. Morris could clarify. Amendment 37 was passed and there were a set of rules promulgated by the commission. Were those rules reviewed? I'm getting a nod yes, so let me continue. If they were reviewed, did we not challenge this issue at the time? Mr. Morris said yes, we did not raise that issue with the Committee at the time, so the rules went into effect and were extended. There is a provision of the "State Administrative Procedure Act" (APA) that specifically states that the extension of a rule is not proof of its validity and there is nothing, under the APA it's very explicit, that prevents the Committee from now looking at the validity of the rule.

Representative Labuda said I just wanted to add to what has been said. We had a lot of debate about this on the floor, and I never remember anything about pay forward coming out in that discussion. It just wasn't there.

Senator Veiga said I hear from my colleagues they think that the language is reasonably clear, and I don't. I guess I look at it and I can read it either of 2 ways, which I think is where the commission was coming from when they adopted the rules. Is it your belief that your reading is the most logical reading of the statutes and do you acknowledge that there could be 2 ways to read the statute or do you just not believe there could not be 2 ways to read the statute? Mr. Morris said I don't think the statute is ambiguous in the same way that when we say you have to be 18 to have a driver's license that doesn't allow a 17 year old to come in and say I'm going to be 19 and over the average of a 3-year period I'll be 18 and therefore I should have a license.

Senator Veiga asked wouldn't you agree that it could easily have said minimum amounts for each year beginning 2008 through 2010, as opposed to "for the years"? To me, the phrase "for the years" implies something other than for each year, or at least could imply something other than for each year. Mr. Morris said I think that the plain meaning there is that for the year 2011, you have to have the minimum amount of 6%, for 2012 you have to have the minimum amount of 6%. It doesn't change for those years. The minimum amount does not change and that minimum applies in the first year as well as the last year.

Senator Veiga said I guess I'm reminded of those pictures where one person sees something in the object and somebody sees something else.

Representative McGihon said I appreciate your seeing that it could be read 2 ways, but I'm very concerned if there were no discussions with regard to average. "Minimum" means "minimum". What the statute doesn't say is minimum across the 3 years. It says minimum in the years, which means 10% for each of those years. I have a larger concern about preserving our legislative body's authority in terms of what the statutory language means as opposed to the rule-making department. Again, I suggest the solution is to not extend the rule and have a statutory fix and take the rule out of the bill, if that is appropriate, after both the House and Senate have had a full discussion on the averaging issue.

Representative Roberts said I also see ambiguity in here. I think the words "for each of" the years 2008 through 2010 would have made it very clear to me. This is filling in some blanks that the legislature or the statute didn't provide generally. I guess my question is how often does the commission need to do something of this nature, in part because we as legislators aren't embedded in this day-to-day? So, is this a total outlier in terms of what the commission has done, or do you do this with other statutes as well? Mr. Gomez said from my perspective I would answer that the commission, when there is a legislative change, does go back to review their rules to determine what changes are necessary. From year-to-year, they make that analysis and make those changes when necessary. This year was an especially active one for rule changes in the commission because of the significant legislation that came out this past year. Particularly with renewable energy there were quite a few changes that were made.

Representative Roberts said as I read the memo yesterday, we're getting to the same place, is that not correct? We're not changing the ultimate goals of the statute, it's how we get there. Mr. Gomez said I believe that's correct. The intent of the rules was to get to the intent of the legislation, which was to meet those standards in each of those sets of years.

Representative Levy said I have 2 additional points to support my original conclusion that I think the rule isn't authorized. One is that the statute actually provides 2 ways in which to meet this standard. You either generate or cause to be generated. If you can't generate it yourself, you go out and buy that power elsewhere. It didn't say, generate, cause to generate, or, as Mr. Morris pointed out, borrow from future years. The second point is we reach the 20% for the years 2020 and thereafter. That's an open-ended period of time. It uses the same language, however. So, if you were allowed to borrow, say you're not at 20% by the year 2020, you'd have to borrow forward for some indeterminate period of time. You don't, so I actually think the statute itself

is quite clear to me that you meet that minimum for the first year of the multi-year period and during that multi-year period, you're bringing additional renewable energy on-line so that you're ready to meet it at the first year of the succeeding period.

Senator Veiga asked Mr. Morris to clarify. I understood the rule to be in effect for the first 4-year period and that's it. Mr. Morris said I would defer to the commission. I don't know exactly how that works, but the rule talks about limitations on the use of the borrow forward period. It's only during the first four compliance years and so when there is a new period, you can't borrow in between those deadlines. That's my understanding of how that works. I do have another response to Representative Roberts' point. On the chart, at the end of the line, we're at the same place, but there's a significant difference between the lines of how we get there. There are environmental consequences of taking the pink line versus the green line. The point of the renewable energy standard is to avoid some of the dependence on foreign sources of fossil fuel and the environmental effects of burning fossil fuels. That has a consequence on how you get there, not just that you get to that point. Do you get there quicker or do you get there slower?

Senator Veiga said I guess that depends on what the statute means.

Senator Brophy said he thinks the statute is sufficiently ambiguous and I think the question is did the authors of Amendment 37 and then House Bill 1281 intend the ramp up to occur during the 3- and 4-year windows that are laid out or did they intend the ramp up to come prior to that window. That's what it really comes down to. Did we intend this ramp up to be over the 3-year period listed here or did we intend for you to have your minimum ramped up to before you get to that new window? The fact that the author of Amendment 37 didn't disagree with these rules while they were being drafted a couple years ago gives me a reason to feel that they were secure that the intent was to ramp up during that period, as opposed to prior to that period. I actually think this rule is okay as written.

Senator Veiga said she would add that to the extent that we're having to go back and try to determine what the intent is of the drafters of Amendment 37, it's because we feel the language is ambiguous, otherwise the intent would be clear from the statutory language.

Representative Gardner said, despite my pressing people about the ambiguity, I'm not sure the case has been made as well as it could be made. I find it significant that post- Amendment 37 there were a set of rules and they were in

existence at the time that the statute was then passed. It seems to me they created the legal landscape and regulatory landscape against which the statute was passed. I think that, in and of itself, creates some ambiguity. I agree with Senator Brophy and Senator Veiga about this.

Paula Connelly, Assistant General Counsel, Xcel Energy, testified before the Committee. Ms. Connelly said we're here to testify in support of the commission rule. I'd like to start with answering some of the questions that were posed by the Committee members to the commission representatives. I think we can provide further information that might go to answering some of your questions. We're very sympathetic with the concept raised by one of the members that you folks are experts in drafting legislation and that you usually say what you mean and that the commission must follow your statutory language. But, what we start with here is not your statutory language. What we start with is a ballot amendment that was not put together by the General Assembly. It was put together by environmental activists who asked the people of Colorado if the people of Colorado wanted a renewable energy standard. These folks might not have all the drafting expertise that you folks have, nor did they have the advantage of legislative legal counsel assisting them with ambiguities, but they put forth this ballot amendment that has the language that we're all wrestling with here. The commission was charged by this ballot amendment to establish rules. In section 40-2-124 (1) (c), C.R.S., the commission was to establish rules that established the electric resource standard. Then there was some guidance in the ballot amendment as to what the electric resource standard meant, but the commission, in our mind, was given broad discretion in how it defined the specifics of the electric resource standard, so long as it complied with the language that's in this rule. Now, we did have the good fortune in the rule-making proceeding to have the folks who claimed that they were the drafters of the ballot amendment, and there was a lot of discussion in the rule-making proceeding with those drafters as to exactly how to implement the renewable energy standard in a way that makes sense. Because what we had here, if you look at the diagram, is we had a standard that contemplated step changes over time as to the level of renewable resources the utility would be required to obtain. There was also one very important limiting factor that all of the folks working in this rule-making had in mind, and that is that the ballot amendment and then ultimately House Bill 1281 had a statutory cap on how much could be spent. There is a cap in the legislation that originally allowed utilities only to spend 1% for renewables above what they would have spent for nonrenewables, or ultimately with House Bill 1281, that was increased to 2%. There was significant concern about how programs could be designed to get the maximum amount of renewable resources within this limited budget. That concern centered around

how to ramp up these on-site solar programs without having to spend too much money to get the solar programs in the door, because if we had to spend too much money, we would run into the cap and we wouldn't be able to meet the standard. So, the consensus that was reached was to allow utilities to ramp up during the first four years, because we have to attract participation from folks who want solar panels on their homes and businesses, and to give utilities the flexibility to design rebates to attract participation and respond to the market, during those first four years. That's when the borrow forward rule applies, only those first four years. Then, by the time we get to 2011, the thought was by that time, these programs will be more mature, people will know about them, and we will be able to go forward and actually have a year-by-year standard. The question before this body is whether or not the statutory language is flexible enough to allow the commission to enact the rule it did. We maintain it is flexible enough and we also believe the commission thought so and all the parties participating in the rule-making thought so. The flexibility arises from the fact that there is no specific requirement that any annual standard be met. There is no specific requirement that the electricity or renewable energy credits be generated in a particular year. There is no specific requirement that the 3% or the 6% be met by a particular year. The language merely says that the utility must generate or cause to be generated resources in the following minimum amounts for the years. That created the flexibility for the group to propose to the commission and for the commission to adopt a program that made good public policy sense and allows utilities to actually get more renewable resources because we can be flexible in how we will allow these programs, which we believed was the overall intent of Amendment 37, to get as much renewable energy as we could for the limited budget allowed by that statute. Now, there was a question raised about what does the word "minimum" mean. The minimum, we take to mean, minimum of 3%. You, in effect, could have some flexibility over the years 2007 through 2010 and end up with 4%. Then you've at least met the minimum for that block of time, but you still have the flexibility to reach it. I think in the chart you'll see that Xcel Energy actually is ahead of the game on our solar program for the first couple of years. We are above the minimum, but we are facing issues like tax credits. Tax credits are going to potentially expire at the end of 2008 and we may see a very significant drop in participation at the end of 2008. They may be renewed in, say, 2009 or 2010. We need to be able to have the flexibility to respond to these market conditions, at least while we're trying to ramp up the programs, and the commission rule gives us that flexibility. We really don't see anything in Amendment 37 that restricted the commission from using that flexibility to achieve this public policy objective. We don't see restrictive language along the lines as interpreted by your counsel. Now, procedurally what happened was the commission passed its

rule and all the utilities started developing their programs in reliance on that rule. It turned out that it looked like Xcel Energy was going to out perform the rule, so we worked with a group then, on House Bill 1281, which actually increased the percentages that would be required. All of that work was done with the underlying assumption that the commission rule was authorized, and that the commission rule gave the utilities the flexibility in the first 4 years, as to how we were going to meet that requirement. The commission rule had been passed and there had been no challenge by the Office. Again, we don't see any restrictions in the rule, so all of that work on House Bill 1281 was done with the assumption that the flexibility was there, and the operative language that we're all relying on and the absence of restrictions that we're all relying on was not changed by House Bill 1281. We would respectfully request that this body allow this rule to continue and vote for extension of the rule. After I answer any legal questions, Ms. Chacon can give you more of a sense of exactly what kind of market forces we are facing and that we advised the commission we were facing when they made the public policy call to provide the flexibility, which we believe the statute entitles them to use.

Representative McGihon said I am startled that I heard Representative Levy say that in all of the discussions in committee of House Bill 1281, there was no discussion of averaging, and that Ms. Connelly is saying that she relied upon on it in the commission rule. Can you explain why you failed to discuss at committee or in the bill in House Bill 1281 the notion of averaging, because I haven't heard an explanation of it? Ms. Connelly said we would have discussed the concept of averaging if we knew at the time that anyone was challenging it.

Representative McGihon said that's what I'm saying. I haven't heard a reasonable reason. If you relied on that rule and you put this language in the bill, why didn't you talk about that rule at committee? Why didn't you talk about averaging? Why didn't you use the word averaging in the bill if you were an integral part of drafting it? Ms. Connelly said House Bill 1281 just changed the percentages for the years, it really didn't change the fundamental structure of the law as it was passed by the voters. At the time we were negotiating House Bill 1281, there had been no challenge raised by the Office or by anyone. No one in the House, no one in the Senate, was asking questions about the commission rule that was already in effect that allowed the averaging. We just didn't know it was on the radar screen. If we had known, we would have addressed it and clarified it then.

Representative McGihon said what I'm saying to you is if you testified on House Bill 1281 and you talked about raising it, why didn't you talk about the

current commission rule? Why didn't you talk about the effect of what you wanted was to have an average, because I don't hear that there was ever a discussion of averaging? Regardless of whether or not you think it was on the table or not, if you're now coming back and explaining that the 10% is an average, why wasn't that part of your testimony on the initial bill itself? Ms. Connelly said I apologize if I'm repeating myself, but there was substantial discussion of averaging over the course of a year before the commission, with a lot of pleadings going back and forth and ultimately resulting in the consensus rule that the commission adopted. By the time we got to House Bill 1281, we thought that was basically a done decision and we didn't realize that the General Assembly may have a different view, or that the Office might have a different view. No one really brought it up in the context of the discussion of House Bill 1281. We didn't realize it was an issue, or no longer an issue. It had been a large, important issue at the commission.

Representative Gardner said I am inclined to extend this rule, but I'm very conflicted about it. It seems that the borrow forward provisions were part of the regulatory landscape at the time that House Bill 1281 was passed. I get nods from both of you [meaning Ms. Connelly and Beth Chacon]. I am very sorry that there is not someone from Xcel, a corporate executive, sitting in your chair today, so that I can talk directly to them. I'm going to ask you to play the role of counsel for them as you do, and take this message back. We are here, as far as I'm concerned, because Xcel, when House Bill 1281 was in the legislature - and this is my view and it could be completely wrongheaded, or it may be right on - failed to advocate in a strong way for its ratepayers and shareholders with respect to this whole issue of how we were going to go about renewable energy. Instead, what I found when I had an expectation, because of my concerns about these programs and how they adversely affect ratepayers, shareholders, investors, and pension funds, what I really got from Xcel was we're just fine with this Representative Gardner, and we want you to vote for it. It had problems. That statute had problems. It had problems that I was not familiar with but if I had been a year at the commission doing all of this, I think I would have been very inclined to make sure that the ability to statutorily borrow forward, or the regulatory authority of the commission to do what they did, was preserved in statute. I'm very conflicted about this, but I think the biggest problem I have with it is if Xcel is not going to see to the interests of its own ratepayers and shareholders, it makes it very difficult for the rest of us to. That's kind of where I am on this and what my concern about it is. Ms. Connelly said I'll convey your message as you requested, but let me state that we are concerned about the impact this program has on our customers and our shareholders. There's a very important feature in this law that limits the impact of it to 2% on the bills. We are a strong supporter of

keeping the bills as low as possible. I would state, though, that the flexibility that is allowed us by the borrow forward rule allows us to keep the rates lower than if that rule were thrown out. If that rule was thrown out, then in order to meet the annual targets, we would have to actually give greater subsidies to people who want to put solar panels on their homes quicker rather than wait for technological advances or extensions of tax credits and that kind of thing to help pay for this program. I think that, if I'm understanding where you're going, your policy goals would actually be furthered by allowing this rule to stay in place.

Representative Gardner said I want to make it very clear I have, with some reluctance, come to the conclusion that this rule ought to be extended and there is enough ambiguity and enough power in the commission, and sort of particularly in public utilities regulation, for the extension. I am just more than a little incensed that this issue was kind of allowed to sit there in the background. I know there are caps on what ratepayers have to bear, but I think I can economically show, although it would glaze everyone over, that ultimately the impact on ratepayers is greater than 2%. I am mindful that there are shareholders out there that are individuals and pension fund holders and others. I understand that what you're advocating is good public policy. My issue is I wish that those who had a stake in this and an interest in this when House Bill 1281 was on the table, instead of sort of saying oh great let's jump on the bandwagon, would've put a stake in the ground and said this really does matter and we can only accept these things if we have some flexibility and we need it in statute. Ms. Connelly said I just want to point out that the group of parties that were participating in the rule-making that supported this borrow forward rule did include 2 of the largest customers that we have on our system - CF&I Steele and Climax Molybdenum, and their chief concern in the whole rule-making proceeding was to try to keep rates for their industries as low as possible. I think we did have a good cross-spectrum of parties trying to hammer out what was the best way to implement this rule, within the language that was passed by the voters and within the flexibility given to the commission and I think their voice was heard and respected as well.

Representative Levy said I wonder if Ms. Connelly could address my question about, if your interpretation of the language is correct, what do you do when you get to the year 2020? Say you've succeeded in generating 15% of your electricity retail sales through 2019 and the calendar rolls over to 2020 and you have to be at 20%. Do you contend that you have a borrow forward period for an indefinite period of time at that point? Ms. Connelly said the borrow forward rule, by its terms, only applies in the first four years. Beginning in 2011, what the commission rule requires is an annual standard, so by 2020, we

would have to have 20%.

Representative Levy said I understand that's what the rule, as enacted, states, but your contention must be that all this language authorizes that borrow forward, and if it's authorized for the years 2011 through 2014, then therefore it must be authorized for the period 2020 and thereafter. Ms. Connelly said this, of course, was a huge issue in the rule-making proceedings and Public Service and Xcel Energy did take the position similar to what you're describing, that the ballot amendment language gave greater flexibility to the commission. We had another group of folks that were talking about interpreting the statute in the way Mr. Morris has interpreted it, requiring a year-by-year meeting of the minimum standard. What happened was that we entered into, in effect, a settlement agreement, saying this statute is susceptible to a number of interpretations. This group of parties agrees that the appropriate way to interpret this statutory language is through a rule that we will propose to the commission that presented that compromise. It allowed the borrow forward only for the first four years and thereafter created an annual standard. As far as Xcel Energy is concerned, we are not going to be promoting the borrow forward extension beyond the current rule. We, in effect, reached a compromise solution with a number of parties to support the rule that the commission actually adopted. Should the commission change its mind in the future, I suppose it has that prerogative, but our company is not going to be advocating for that.

Representative Levy said I appreciate that restraint on your part, but there are other utility companies that are subject to this rule that may have a different view of it. That's a rhetorical comment, you don't need to respond. I do have another question that perhaps is maybe more for Mr. Gomez and that would be what do we do with this language in section 40-2-124 (1), C.R.S., that states the scope of the authority of the commission? It says in accordance with article 4 of title 24, C.R.S., the commission shall revise or clarify existing rules to establish the following, and the preceding sentence specifies no additional regulatory authority other than that specifically contained in this section is provided or implied. What does that mean? Ms. Connelly said I have a comment. I think that sentence, no additional regulatory authority of the commission other than that specifically contained in this section is provided or implied, should be interpreted in the following context: At the time that this ballot amendment was passed, the existing rules of the commission required utilities to obtain resources under a strict least-cost rule that was fuel-neutral. We had to come in every four years with resource plans that looked at resources only by cost and did not take into account any environmental attributes. I view Amendment 37 that was passed by the voters saying no, we

don't want you to go solely on least cost, we want to assure that there is a certain minimum amount of renewable energy in your supply portfolio, but don't spend more than 1% more. Then ultimately when House Bill 1281 was passed, same concept. Those minimums were increased, but don't spend more than 2% more. I think that sentence should be read in that context, that we're not giving the commission carte blanche, but we're saying you need to look to change your least-cost resource acquisition approach along the lines set forth in the statute, and in particular I think it meant don't spend more than the retail rate impact cap that's set forth in this legislation. That's how I interpret it, although it also has the ring of statutory boiler plate to me.

Mr. Morris said there are a lot of attorneys I see on this panel and I think they all probably know this, but a court looking at that would perhaps entertain some of the back story that Ms. Connelly explained, but if the statute itself isn't ambiguous, you just look at the words of the statute. If it has a plain meaning that doesn't lead to an absurd result, you take the plain meaning. I think in this case, this sentence is pretty plain, that the commission is on a tight leash in terms of implied authorities with regard to rule-making. No, they shouldn't do that under this language.

Senator Shaffer said I've been struggling with this as well for a variety of reasons. Ms. Connelly stated at the beginning of her talk that this was a citizen initiative, implemented after the voters voted on it. I think it makes it all the more important for us to actually get it right and not to take liberties in one direction or another. I asked the staff to find a blue book about this, to give us some indication of what the average voter out there thought. I'm an attorney as well and I can put my attorney cap on and see some ambiguity in the language, but what would an average person on the street interpret the language to mean? The blue book explanation says the proposal requires Colorado utilities with 40,000 or more customers to generate or purchase a percentage of their electricity from renewable sources according to the following schedule: 3% from 2007 through 2010; 6% from 2011 to 2014; and 10% by 2015 and thereafter. If you continue to read, it says nothing about a borrow forward concept. I believe that an average person who would read this would think that by 2007, 3% of energy produced by such a utility would be from renewable sources. I believe that an average person would think that by 2011, 6% would be from renewable sources, and 10% and thereafter from renewable sources in 2015. I don't think that there is a concept of borrowing forward incorporated in the blue book plain language explanation of what Amendment 37 was intended to do. I appreciate the fact that the drafter of Amendment 37 and the coalition behind it was at the table negotiating the rules. That's all fine and well. In my mind, since this was a citizen proposal,

we should look at the materials that were presented to the citizens, and what they actually voted on. I don't think they ever voted on a borrow forward concept and as a result, I have a hard time seeing this concept as something that was permissible under Amendment 37's language.

Ms. Connelly said I don't have the blue book in front of me, but I think the language Senator Shaffer read said from the years 2007 to 2010. What did it say? Senator Shaffer said I read it verbatim. It said 3% from 2007 through 2010.

Ms. Connelly said I think that also creates the concept of a block of years. It doesn't say for each year, it just refers to a block of years, and so I think that the concept and the ambiguity is there in the blue book as well as in the actual statutory language that was passed by the ballot amendment. Again, reasonable people can differ on this. You don't see ambiguity, I think Mr. Morris doesn't, but I think we do. Again, I would like to emphasize that what people were voting for was to try to get as much renewable energy as we could get within the statutory cap and what the group that developed the consensus rule believed and what the commission believed was by giving flexibility in the first four years we would end up with more renewable energy for the budget amount or we would meet the standard for lower cost, either of which furthered the statutory intent and the voters' intent and was not contrary to that intent.

Senator Shaffer said I have 2 points. First, I do see ambiguity. I see it both in the blue book and I also see it in the language, but I have to put on my lawyer hat and try to come up with an argument. If I were just to read it straight and try to explain it back to somebody, I would have to come up with the plain meaning interpretation that Mr. Morris has articulated. I think that's what the plain meaning of this is. I think we can read it a different way, but it takes an effort in order to read it a different way. I forget the other point, so I won't go there.

Representative Labuda said I put on my legislative hat also and I remember our discussions on the floor about this and when I voted on this, I understood it to say what the plain language says. I was not thinking in the back of my legislative head, I also mean "such and such", but I'm not going to put "such and such" in there. That's not the way legislation passes.

Beth Chacon, Environmental Policy Area and previously in the Marketing Program for Solar Rewards Program, Xcel Energy, testified before the Committee. She said there was a lot of discussion about some of the market

forces that affect program participation. As you know, solar rewards is a voluntary program. We talked about the dip in economies and about the fact that if tax credits are not extended in the year 2008, that can also cause a dip in market participation. Another thing that does effect the program participation is there are significant construction periods for large projects. We've got a couple dozen large projects over 100 kW in size and these have a 6-month period from when the customer signs a contract to when it's installed. With that type of cycle, it's hard to ramp up program participation within a given year if participation does not perform as anticipated. I'd also like to point out that tax credits for businesses are lucrative. There are 30% investment tax credits, so that can really influence participation if the tax credits are not extended. Again, we collaborated to develop the ramp up periods, because we saw that flexibility as a very good method of managing cost reduction as we're acquiring renewable energy credits, and we've been able to manage our plans to meet the renewable energy standards while keeping our incremental costs within the 2% spending target. A big part of that was the flexibility to borrow forward, so that we didn't have to acquire renewable energy credits at a higher cost than anticipated.

Senator Shaffer said your comments made me think of my second point. My second point is the borrow forward concept might be good policy. In fact, it probably is for all the reasons that you just explained. I'm just not sure it's contained in the statutory language.

Mr. Morris said Ms. Chacon's comments raise the issue that is addressed in the rule. It's not in the memo because I didn't challenge it. I thought it was a difficult point. Right after subsection (k) in the rule, there is a subsection (l) and it says for the first four compliance years 2007 through 2010, no administrative penalties shall be assessed against an investor-owned qualifying retail utility if the failure to meet the renewable energy standard results from events beyond the reasonable control of the qualifying retail utility which could not have reasonably been mitigated by the qualifying retail utility. The argument that it's difficult because we're relying on third parties to get this solar piece in place I think has already been contemplated in the structure of what is the percent minimum of solar that is required and what are the deadlines, but also there's a significant amount of enforcement discretion that the commission has put into its rule.

Representative McGihon asked do the compliance years for borrow forward match up with the years set up in both Amendment 37 and the statute? In other words, can you only borrow forward in those years of certain percentages? Mr. Morris said I think the answer is you're right in your understanding, but I

would defer to either the commission or someone from Xcel.

Representative McGihon said I guess the answer is yes, you can only borrow forward in those years? Mr. Morris said within a compliance period.

Representative McGihon said I guess what I don't understand is in the first four compliance years, you can borrow forward in the following 2 compliance years. I don't read it that way. That's why I asked you. Mr. Morris said I'm not the expert on this. The example that I chose puts it all within a single compliance period. I think that's my understanding of the rule and how it works.

Steve Denman, Regulatory Attorney, Aquila, Inc., testified before the Committee. He said Aquila is, in comparison to public service companies, a small electric and gas utility. Aquila serves about 92,000 customers in the Arkansas valley area from Canyon City to the edge of La Junta. The biggest cities are Canyon City and Pueblo in our electric service territory. I'm here today to support the commission's rule and we recommend that you extend the rules. There are other ambiguities in the statute, and you've touched on a number of them. It is very important to keep in mind that this was an initiated statute, written mainly by a nonlawyer, Rick Gilliam. While he had some attorneys in the renewable community who helped him, the ambiguity of this statute was a very difficult problem during the commission's rule-making. I actually participated in negotiating the consensus rules. I'm not sure the other witnesses you heard today were involved in those discussions and negotiations. We were headed toward a very serious legal fight in the rule-making over what the term of years meant, and whether it was annual or a 4-year period. The compromise that was reached was the borrow forward rule that allowed the averaging. It's true that the word average does not appear in the statute. The focus for legal analysis in determining whether or not these rules are authorized by the statute should be on the entire statutory scheme. The scheme delegated to the commission the requirement to make rules to implement the goals of the statute. Aquila believes very strongly that the borrow forward rule participates in advancing the goals of the statute, not just of Amendment 37, but also of House Bill 1281. The commission had to make rules and it had to allow for ways when renewable energy would be generated so as to comply with the standard. The focus should be on the words in the statute to generate or cause to be generated. Your counsel has focused on those words and tied them with the minimum amounts. While the minimum amounts in the statute, from your counsel's point of view, focuses on the years, we focused in the commission rule-making, and Aquila focuses in its interpretation of the statute, on the percentages. The statute does not say that the utility shall generate or

cause to be generated in certain years, or by certain years, renewable energies in those minimum amounts. Rather, the statutory scheme allows the commission to fashion rules to determine how the utility may cause to be generated the renewable energy necessary to comply to the portfolio standard. A significant way in which those utilities can comply is in the use of renewable energy credits. In the part of the statute on renewable energy credits, the statute doesn't express or require that the renewable energy credits must be generated or cause to be generated in any particular year. The other way the utility satisfies the standard is through the standard rebate. The statute explicitly requires that electricity generated under the rebate program should be eligible for the utilities compliance with the standard. Again, the statute doesn't expressly require that the solar energy has to be generated or caused to be generated in any particular year or by any particular year. Our point of view is, when you look at the entire statutory scheme, the commission was allowed the authority and the discretion in making these rules to determine what it meant for the renewable to be caused to be generated. The borrow forward rule is how the commission chose to do that, adopting the compromise that we reached in negotiating the rules. Aquila, because it's a small utility, is in an area that has fewer customers and those customers perhaps aren't as economically advantaged as the broad customer base the Public Service Company enjoys. The satisfaction of the solar requirements is the most difficult challenge for Aquila and its service territory because we must get customers who can spend the money to develop on-site solar resources. I will also mention we have relied on these rules in complying with the statute and with the commission's standards. We have relied in 2007 and we have relied on these rules in 2008 in our compliance plan that is pending before the commission now.

10:51 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rules 3654 (i) (I) and (k), 3659 (a) (VII), and 3662 (a) (III), (a) (IV), and (a) (V) of the Public Utilities Commission be extended and asked for a no vote. Representative McGihon said for the integrity of the body, I do urge a no vote. There will be plenty of more opportunity to have discussion on this rule regardless of which way the vote goes. Senator Veiga said I will urge a yes vote on the motion to extend. Maybe this is just however one looks at the rule, but my initial reading of it, and frankly nothing has changed after hearing the testimony here today, is that there is ambiguity in the rule. One reasonably could read it either one of 2 ways. Mr. Morris, I appreciate where you came down and I'm not going to suggest that's an unreasonable reading of the rule. Senator Shaffer, I appreciate your comments about the blue book and the fact

that you think the voters were led to believe or at least would have an impression of how this would be interpreted. Yet, I guess I still come back to the focus of the role of this Committee, which from my perspective, is that our job is to look at the rule and to see whether there is statutory authority. From my perspective, if there is ambiguity, that is statutory authority. That gives the executive branch the authority to do what they did under these circumstances. Even though I don't disagree with your analysis relative to the blue book, I think your first point that the rule is ambiguous and could clearly be read 2 ways means that we as a legislative body, as the legal services committee, should give deference to the executive branch and their rule-making in this fashion. I think they did their jobs and that's why I would urge a yes vote. Senator Brophy said I appreciate that and the other thing that is specific in the blue book, if I recall, and certainly in the statute, is that the commission is directed to keep the cost of these increases in line, 1% under Amendment 37 and 2% now under House Bill 1281. I think that really leads me to believe that we need to adopt this rule as it was, giving them the ability to ramp it up over time, still achieving the 20% goal by the deadline. The motion passed on a 5-4 vote, with Representative Gardner, Representative Roberts, Senator Brophy, Senator Groff, and Senator Veiga voting yes and Representative Labuda, Representative Levy, Representative McGihon, and Senator Shaffer voting no.

Julie Pelegrin, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the State Board of Education, Department of Education, concerning administration of the "Public School Finance Act of 1994", 1 CCR 301-39.

Ms. Pelegrin said the agenda refers to rules concerning the administration of the public school finance act but it's not really school finance. We'll be talking about dual enrollment programs. The agenda also indicates it's contested and it also says the next agenda item is contested, but really they're not contested. I talked with folks from the department today and they're present to answer questions if need be, but they don't have a burning need to testify unless somebody wants to talk to them about it. Let's start with the dual enrollment programs rule. The rule that we're talking about is rule 2254-R-5.19 (3). Let's start first by talking about the statute. The "Postsecondary Enrollment Options Act" (PSEO) allows students who are under the age of 21 and enrolled in the 11th or 12th grade to simultaneously enroll in higher education courses while they're still in high school. School districts have interpreted this in the past several years to create what are called 5th-year or dual enrollment programs that allow students to remain enrolled in 12th grade while they continue taking higher education courses, so that they can eventually and simultaneously graduate with both their high school diploma and either an associates degree

or a certificate in technical and career education. Basically, they end up staying in 12th grade for 1, 2, or 3 years. Obviously, they have to finish by the time they are 21. During that time they continue to be counted within the pupil enrollment for purposes of school finance. In 2001, the state auditor reviewed the PSEO and there was an audit report that noted the existence of these dual enrollment programs and questioned the legality of them and recommended that the state board and the Colorado commission on higher education work together in determining whether they actually needed a statutory change. Really, the basis for the programs was to interpret the fact that they're enrolled in 12th grade and the school district gets to decide how long they're enrolled in 12 grade. Shortly after the recommendation of the audit, the state board adopted rule 2254-R-5.18 (1), which prohibited funding for students in 5th-year programs and prohibited 5th-year programs.

Ms. Pelegrin said in 2007, the General Assembly enacted the "Fast College Fast Jobs Act", which allows school districts with a graduation rate below 75%, or school districts that previously had a dual enrollment program, to participate in what's called a fast college fast jobs education program. Under these programs, a student starts when they're in the 9th grade, they take a schedule of courses in high school and then in higher ed, which is designed to complete their dual degree within 5 years, so 9th, 10th, 11th, 12th, 12th plus one. The school district gets to continue counting the student for full per pupil revenues until the student is enrolled in 12 or more higher education courses as of October 1 of any year, and then they're counted at 85% of the per pupil revenues. In response to the passage of the fast college fast jobs act, in the spring, the state board repealed rule 2254-R-5.18 (1), which was the prohibition on 5th-year programs, and adopted rule 2254-R-5.19. That rule goes into how you count the kids that enrolled in fast college fast jobs. Subsection (3) of that rule talks about an eligible school district that had a previously existing dual degree program can continue to count pupils enrolled in that program regardless of their grade for purposes of determining pupil enrollment under sections 5.18 (1) and (2). That "5.18" must be a typo because it was in 5.19 (1) and (2) where they talk about counting fast college fast jobs. The problem we see with the rule is that basically they're grandfathering in kids from previous programs and allowing them to count them under fast college fast jobs, even though they may not meet the program requirements I just outlined. The kids didn't start in 9th grade, because it says regardless of what grade they're enrolled in. It appears to be trying to expand fast college fast jobs and the funding for that to cover these other programs. For that reason, we would recommend that rule 2254-R-5.19 (3) not be extended. There is still the question of what about all these other dual degree programs that were operating under the PSEO? Since the rule that prohibited such

programs in general is gone, I think again it's up to school districts to interpret what that means. There is no further guidance under the rules I'm aware of that defines that.

11:00 a.m.

Hearing no further discussion or testimony, Senator Brophy moved that rule 2254-R-5.19 (3) of the State Board of Education be extended and asked for a no vote. Senator Veiga said the Committee will stand in recess for a brief moment while Representative Levy is located.

11:01 a.m.

The Committee recessed.

11:06 a.m.

The Committee returned from recess. The Committee skipped to the next rule on the agenda.

Julie Pelegrin addressed agenda item 1d - Rules of the State Board of Education, Department of Education, concerning administration of the "Educator Licensing Act of 1991", 1 CCR 303-37.

Ms. Pelegrin said there are a couple rules in here that are actually out of cycle, so for the newer members of the Committee that means these are rules that have already been extended, but in the course of reviewing the packet they sent of the new rules, it included the older ones and we review them all. There were some issues that came up in some existing rules, so even though they're out of cycle, I went ahead and brought them. The motion for those is a little bit different in that they would need to be repealed instead of not extended. These are issues that came up earlier, we talked with the department, and we thought there was going to be a statutory change, and there was, but it either got vetoed or didn't pass at the last minute and so they've kind of been hanging in the books.

Ms. Pelegrin said let me explain quickly a basic concept that underlies a couple of the rules that we're bringing. There's teacher license, special services license, principal license, and administrator license. To get an initial license of any of those 4 types, you have to go through a preparation program. The traditional path is to go through a preparational program that's in higher education. I go through the program, I pass the test, I get my initial license,

and I work under that initial license for 3 years, during which I do an induction program, which is a program provided by my employer that is a sort of on-the-job introductory training. At the end of that 3-year stint on the initial license and successful completion of the induction program, I'm then eligible for a professional license. That's the traditional track for all 4 types of licenses. However, there is of course a nontraditional track. To get on the nontraditional track, I may be coming out of another field, I may be a manager somewhere or in the military. I obtain authorization either to work as a teacher or principal and under that authorization, I receive on-the-job training and I go through an alternative preparation program that could be specifically styled to my needs and what I need to learn to be able to successfully get the next level of license. Under the current statutes, for a principal, you can skip the initial license. If I successfully complete my individualized alternative preparation program under my authorization, I can go straight to a professional license. A couple of the rules we have coming up here kind of deal with this traditional and nontraditional and how does it all sort out under the statutes and under the rules. First, rules 2260.5-R-3.03 (2) (a), 2260.5-R-3.06 (1), and 2260.5-R-4.17 (7) talk about the principal preparation programs. Read together, they basically all provide that a person who goes through an alternative principal preparation program, the nontraditional path, still has to get an initial principal license. That person cannot go straight to a professional license under the rules. However, under the statute, sections 22-60.5-111 (14) (e) (II) and 22-60.5-301 (1) (b) (I.5), we show that a person who successfully completes a preparation program for a principal can go directly to a professional principal license. The statute allows them to go directly to professional, the rules do not. We would therefore recommend that the rules not be extended.

Ms. Pelegrin said the next rule, rule 2260.5-R-3.06 (1) (c), talks more specifically about the induction program. I mentioned after you get your initial license, you do an induction program, and then you can do a professional license. Under the statute, you can also complete an induction program while operating under an authorization. If I don't have my initial license and there's an emergency, like a lack of teachers or principals in a school district, and I'm "this close" to getting it and I just need to take my test, there's an authorization you can get that allows you to work and be employed by the school district without having actually obtained your initial license. Under sections 22-60.5-301 (1) (b) (I) (C) and 22-60.5-111 (7) (b), C.R.S., if I complete the induction program while I'm working under an emergency authorization, a principal authorization, or an interim authorization, I don't have to do the program again under my initial license if I go ahead and get an initial license at that point. I just don't have to do it twice, basically. Rule 2260.5-R-3.06 (1) (c) conflicts with the statute because it only recognizes doing an induction

program under the emergency principal authorization, which I believe is just an emergency authorization of a principal, or an interim authorization. It doesn't recognize the principal authorization. We recommend rule 2260.5-R-3.06 (1) (c) not be extended.

Ms. Pelegrin said now let's move into administrator licenses. This next rule I'm going to talk about is out of cycle, but it's very similar to the issues that were under the principal one. Under rule 2260.5-R-3.07 (1), in order to get a professional administrator license, I have to have a valid initial administrator license. However, under the statute, if I've been working under an emergency authorization or a temporary educator eligibility authorization and I completed my induction, I can go straight to the professional license. Again, there's a conflict between the statutes and the rules, and we recommend rule 2260.5-R-3.07 (1) be repealed.

Ms. Pelegrin said rule 2260.5-R-3.07 (1) (d) talks about completing the induction program. Similar to the principal program, if, under the statute, I'm working under an emergency authorization, a temporary educator eligibility authorization, or an interim authorization, and I complete an induction program, I don't have to do it again under the initial license. Under the rule, it only recognizes the emergency administrator authorization or the interim authorization, so it left one out again. We would recommend that rule 2260.5-R-3.07 (1) (d) not be extended.

Ms. Pelegrin said now for something slightly different with rule 2260.5-R-4.13 (4). Section 22-60.5-111 (5), C.R.S., sets out the requirements for getting a temporary educator eligibility authorization. In addition to having your bachelor's degree and being enrolled in an alternative program or a special ed program, it would also allow you to get this authorization based on evidence that documents compliance with requirements specified by rule of the state board. Unfortunately, when the state board adopted rule 2260.5-R-4.13 (4) (c), it also said that you could get this authorization based on evidence which documents compliance with specified requirements. However the rule does not specify any requirements. They mirrored the language in the statute too well this time. While technically there is not a conflict with the statute, it does fail to meet the intent of the statute because it does not state what those requirements would be.

Representative Roberts said on page 6 of the memo, there's a line that says special services provider initial license but who has not yet met the requirements. I'm curious to know what requirements they have not yet met. Is that what you're saying that is not defined anywhere, what those

requirements are? Ms. Pelegrin said actually, those are not the requirements that are specified. The requirements are specified in statute for being able to get the applicable initial educator license. However, if you look on the bottom of page 6 over to page 7, section 22-60.5-111 (5) (b) (III), C.R.S., says that rather than being enrolled in an alternative preparation program, you could be approved for temporary educator eligibility authorization if you can show evidence that you have complied with other requirements that have been specified by the state board. Those are the other requirements the state board never specified. Therefore, we recommend that rule 2260.5-R-4.13 (4) (c) not be extended.

Ms. Pelegrin said next up is our other out-of-cycle rule, and this goes to the requirements for a principal authorization. Rule 2260.5-R-4.17 (1), (2), and (3) talks about who would be eligible to get a principal authorization. Section 22-60.5-111 (14), C.R.S., specifies that a person can obtain a principal authorization if they don't hold a principal license but have an earned baccalaureate or higher degree from an accepted institution of higher education, they're going to be employed by a school district under this authorization if they get it and they're going to then go through their own principal preparation program. That's the only eligibility requirement specified in statute. In the rule, the state board also requires that a person who is applying for this authorization has 3 years experience as a teacher, either licensed or unlicensed, or have 3 or more years of full-time successful management experience. The statute doesn't limit the program that way in terms of requiring people to show this level of experience. Therefore, we ask that rule 2260.5-R-4.17 (1), (2), and (3) be repealed.

Ms. Pelegrin said now the area we are in concerns the grounds for denying, suspending, revoking, or annulling an educator license. We're just going to call it taking action against a license. Section 22-60.5-107, C.R.S., specifies certain crimes for which the state board must take action against a license and other kinds for the conviction of which the state board may choose to take action against the holder of the license. One of those that's in the "must take action" is a felony offense involving unlawful sexual behavior as defined under section 16-22-102 (9), C.R.S., which includes the crime of sexual exploitation of a child. Rule 2260.5-R-15.00 (2) (d), lists the crimes for which action may be taken against a license and it lists a misdemeanor sexual exploitation of children, which basically is possession of child pornography. In 2006, the General Assembly amended that section of the statute and the crime itself and upped it to a level 6 felony, so they don't have misdemeanor sexual exploitation of children anymore. Therefore, we would recommend the rule not be extended.

Ms. Pelegrin said finally, rule 2260.5-R-15.00 (2) (j) is about the circumstances under which the state board may take action against a license. Section 22-60.5-107 (7), C.R.S., specifies that the state board may take action if the holder, without good cause, resigns or abandons his or her contracted position. Rule 2260.5-R-15.00 (2) (j) states the state board may take action if a holder resigns or abandons the contracted position or if the holder fails or refuses to perform required services pursuant to an employment contract with a school district. That's not listed as one of the grounds in the statute under which they may take action against a license. We therefore recommend the rule not be extended.

Representative Gardner said, with respect to the sexual exploitation issue, while I understand that in 2006 the General Assembly amended the criminal statute to make that always a felony, I'm pondering whether there might be a case of a prior conviction not yet discovered that was a misdemeanor and if we repealed this regulation we would be leaving a gap. Ms. Pelegrin said it changed in 2006. Every person, when they apply for a license, submits their fingerprints and there is a background check done then. They redo the background check on renewal of licenses so that would be 3 years after you get your initial license and then after you get a professional license it's every 5 years. I guess I'm thinking, unless you claimed an accident, it can come up that way, otherwise I think it's going to be covered and they're going to know about it. Mike Dohr and I talked about this in terms of whether there would be something that simply hadn't been discovered or prosecuted yet, and there's only an 18-month statute of limitations on this level of misdemeanor, so I think we're out of the statute of limitations period at this point. I think it's less likely that there would be something falling through the gap. Also, if there is, I am pretty sure, and I can double check, in rules there is some language that they can look at somebody's license if there is evidence of unprofessional conduct, if there's evidence of some broader terms, I'm pretty sure that would apply too.

Representative Roberts said in that same little section, something that caught my eye because I have a constituent issue that revolves around this in rule 2260.5-R-15.00 (2) (d), the words "has ever received deferred sentence". My question is, if somebody was a perpetrator as a juvenile, and was adjudicated for a sexual offense, and later became a teacher or an educator, does this mean that information would be made available even if the person had committed the offense as a juvenile and received an adjudication? Ms. Pelegrin said it's my understanding there are certain offenses for which you may be adjudicated as a juvenile but would come up under this and I think that would include sexual offenses. Others I don't think so, because I think as a juvenile after a certain period of years it's sealed. Again, I would need to double check the

statutes for that.

Representative Roberts asked Ms. Pelegrin to check that, especially on the sexual offense.

11:26 a.m.

Senator Brophy reinstated his motion from before. He moved that rule 2254-R-5.19 (3) of the State Board of Education be extended and asked for a no vote. The motion failed on a 0-7 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting no.

11:27 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rules 2260.5-R-3.03 (2) (a), 2260.5-R-3.06 (1), and 2260.5-R-4.17 (7); 2260.5-R-3.06 (1) (c); 2260.5-R-3.07 (1) (d); 2260.5-R-4.13 (4) (c); and 2260.5-R-15.00 (2) (d) and (2) (j) of the State Board of Education be extended and asked for a no vote. The motion failed on a 0-7 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting no.

11:28 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rules 2260.5-R-3.07 (1) and 2260.5-R-4.17 (1), (2), and (3) of the State Board of Education be repealed and asked for a yes vote. The motion passed on a 7-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting yes.

Jerry Barry, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1e - Rules of the State Board of Human Services, Department of Human Services, concerning the traumatic brain injury program, 12 CCR 2512-2.

Mr. Barry said the traumatic brain injury program provides services to persons who have suffered a traumatic brain injury. It is funded through a surcharge on certain traffic offenses, that is drug and alcohol offenses, speeding offenses, and offenses for a person under the age of 18 for failure to wear a helmet while

operating a motor vehicle and certain other vehicles on a highway. The rule establishes a lifetime limit of one year for which services may be provided. Our concern is that we're not aware of any other rule or any other time that, by administrative rule, we have attempted to establish a lifetime limit on when a person may receive governmental services. There are several other instances within programs from the state board where there is a lifetime limit and each time those have been established by statute, rather than by rule. Therefore, we recommend that rule 12.540 C. and D. of the rules of the state board not be extended.

Youlon Savage, Chair, State Board of Human Services, testified before the Committee. He said, given very limited funding and given the large number of people with traumatic brain injuries, the question becomes is it better public policy to provide open-ended long-term care for a few people or to establish limits so more people can be served. We realize that the resolution lies in increased funding and/or a change in the statute. We know that is not within the purview of this Committee. I just wanted to make that statement and I have no other comments.

Representative Levy said the rule does indicate a problem with lack of resources. In the absence of a rule establishing a lifetime limit, with more demand than there are resources, how would the department allocate or prioritize who receives those services and how much services they receive? Mr. Savage said that is part of the difficulty. The numbers are so overwhelming. The inclination, the obvious choice appears to be to provide some services to the larger number of people. It means that even with that, a larger number of people don't receive any services at all. There isn't any other solution other than more funds or statutorily authorized restrictions.

Representative Levy asked Mr. Barry if it's his position that any method that the department comes up with to distribute scarce resources is valid except a lifetime cap? Is there something different about a lifetime cap from any other way that you might make those sorting decisions? Mr. Barry said our concern really is establishing a lifetime cap, which has never before been done through an administrative rule. We think there would be other restrictions available to the department. Indeed, there is a waiting list for this program. You could provide those services for a year and then tell the person to go to the end of the line on the waiting list, but that doesn't, in and of itself, prohibit a person from forever again receiving these governmental services in the way we're really concerned about.

Representative Gardner said assuming that we do not extend the rule, what do

we need to do legislatively to make the program work? Mr. Savage said one approach would be to create a different vehicle for funding the program. Another would be to statutorily permit restrictions.

11:34 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rule 12.540 C. and D. of the State Board of Human Services be extended and asked for a no vote. The motion failed on a 0-7 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting no.

Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 2 - Discussion of Office of Legislative Legal Services Process for Legal Opinions.

Mr. Pike said I just wanted to put this on the agenda and it may have been Representative Gardner who suggested it as well. We had the coincidence of 2 things during the last session that I wanted to tell you about. As the informal kind of approach to doing legal opinions, our Office would indicate to members that we thought it would take 2 weeks to do a legal opinion. Representative Gardner had, in fact, requested a legal opinion of our Office and I suspect we said something very similar to that. I don't think we got the opinion done in as timely a fashion as we could have under those circumstances. I think it's probably inappropriate for us to try to set a specific time frame for doing legal opinions. I think we ought to try to endeavor to do legal opinions as quickly as we can, particularly during a session if it's on something that is in the process. I'm confessing error in that situation and indicating that we will try to do better in terms of turning legal opinions around. No guarantees, of course, that we won't take 2 weeks to do an opinion, but that should be based on the complexity of the issues and the availability of the persons who will do it. As you all know, during session that's the most difficult time for us to try to allocate resources to doing an opinion while at the same time the drafter who is likely to be doing the opinion is still trying to do amendments and go to committee meetings, etc. I think that's kind of the short form on why this was on the agenda, unless Representative Gardner has other things he'd like to add.

Representative Gardner said I appreciate that. Actually, my concern as raised to discuss this item wasn't to have anyone come in and say mea culpa about the length of time to do the opinion. I appreciate the length of time it took to do

an opinion. I do, however, have some concern. I don't work inside your Office, so I don't know the dynamics, but I found that when some very complex opinions with rather high profile requesters were requested, one would see that opinion in 2-3 days, perhaps, and I don't know what happened inside the Office. When minority freshmen asked for opinions, 2 weeks was hopeful. I don't know what the facts of that are. That wasn't so much the reason I wanted to put it on the agenda, because no one knows better than I about political realities, but because some issues, simply because of the nature of them, are going to need to be turned around. But I wanted to explore the question of legal opinion versus memorandum and I know there's reluctance in your Office to distinguish between what might be a full-blown legal opinion and something less than that. I know when my clients come to me, they say they want an opinion and I say wait a minute, there are a couple of different things here. If you want me to write you a memo about what I in general think the law is and give you some guidance and so forth, that's one thing and I can get that done pretty quickly. If you want an opinion that you're going to take to bond counsel and so forth, that's a different thing. I guess, in light of these timelines and recognizing there is an incredible workload on the part of your staff who I respect immensely, I just wonder if there is some way to make a distinction on that.

Mr. Pike said I think there probably is. I suspect attorneys in the Office may very well occasionally do that kind of thing, to offer an informal opinion on the basis of very limited research, more a reaction than a formal opinion. The situations where we really do take more time is where the legal issues are complex and the issue involves an institutional issue, a prerogative of the General Assembly. In those instances, we try to be as good as we can in terms of coming out with what is, in our view at least, the best approach to answering that kind of a question. I would certainly hope that there is never any indication that's on the basis of any party affiliation, and I suspect you know that. In the instances that I can recall, the timeliness of opinions has been on the basis of the availability of the person to do it and the review process that has to go through in our Office. If something is going to be formally released and distributed to folks other than the member who has asked for it, we want to be sure it's correct and we have a review process for those kinds of opinions. It should be based on the availability of the individual, the complexity of the issue, and how quickly we can get it out.

Representative McGihon said you all keep records of opinions you've written in the past and have been able to rely on those sometimes for timeliness as well. I have a little bit more of a comment. I think Representative Gardner is referring to when the Attorney General's opinion came out last year, and so

sometimes, it seems to me, it's incumbent upon your Office for the protection of the institution. It's not with regard to who is in the majority and minority, but it is with regard to protection of the institution and the timeliness may also have to be speeded up because of the protection of the institution. Am I right? Mr. Pike said I suspect that could be the case in answer to your second part. On the first part, if the opinion is really a rehash of something we've already done, those kinds of things we ought to be able to turn around fairly quickly. Similarly, where we have the same kind of request from 2 different members, that's happened often, where we would be working on them almost simultaneously and we'll try to do it in a way that we get the same work product to both members at the same time. Certainly, if we've already done something and done a substantial portion of the research, that should expedite turning it around.

Representative Gardner said I appreciate that Mr. Pike put this item on the agenda and have the discussion. I do not believe that these opinions and so forth are driven by party differences. I wonder sometimes if being a freshman of either party might cause one to have to pound the desk a little harder and so forth. Again, my purpose in asking this to be on the agenda was not really to have that discussion as much as whether during the course of the session if there aren't better vehicles to get information to members because legislation moves very quickly. To clarify, the particular instance I had was that an opinion was in the works for quite some time. I got the opinion the day after it mattered. That's somewhat frustrating and so I don't know what all played a role in that. I just want to say I have the utmost respect for the attorneys and other staff in your Office and their professionalism and commitment to this institution. As an attorney, it's been gratifying to me to see legal colleagues as dedicated as your staff is and as you are. I don't want there to be any misunderstanding about that.

Mr. Pike said thank you, I appreciate that. I do think that we may have the ability to respond in a much more informal way to legal questions presented by members, but I do want to express there's often some difficulty surrounding that approach. If the attorney is kind of shooting from the seat of their pants, what we've run into in the past and one of the reasons I think the two-week formula developed, was that an attorney would provide a member with a very informal answer without conducting a thorough review and having it vetted through the Office, and that opinion would end up being utilized in the process one way or the other, simply because of the need for the member to rely on something to respond to criticism being presented on the bill. In some instances, we felt like that kind of locked us into a situation that we weren't entirely comfortable with. That kind of is, in short, one of the reasons why we

have been reluctant to give seat of the pants opinions without vetting it. I think there are instances where we can do that and where it's appropriate.

11:48 a.m.

The Committee adjourned.