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Colorado General Assembly

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MEMORANDUM

TO: Suzanne Taheri and Steven Ward
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 2, 2024
SUBJECT: Proposed initiative measure 2023-2024 #116, concerning Consumer Choice in Energy Choice

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

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

Purposes

The major purpose of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To require state and local governments to allow consumer choice in current and future energy use in a home or business.

Substantive Comments and Questions

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

1. Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Regarding the definition of the word "energy" in subsection (1)(A) of the proposed initiative:
 - a. The definition references the "method of generation or the fuel source used to provide or supply utility service to a consumer" It appears from the context of the proposed initiative that "utility" is intended to mean an electric or gas utility and does not include a water utility, telephone utility, common carrier, or other type of utility, as described in section 40-1-103, C.R.S. Consider adding a definition for "utility" that specifies the types of utilities to which the proposed initiative applies.
 - b. The list of energy source uses following the "included, but not limited to" language includes the broad phrase "and other services." What are some of the types of energy source uses that the proponents intend the phrase "other services" to encompass?
 - c. The "including, but not limited to" phrase is placed after the word "consumer." This means that the phrase is best understood as modifying the word "consumer." Is that the intention? If not, consider making this phrase a new sentence with a subject that repeats the word or phrase being modified. An example might be: "'Energy" includes energy sources used for electricity'
 - d. The list of energy sources has a list, "electricity, cooking, heat," followed by a broad catchall "other services." A rule of statutory construction, known as ejusdem generis, requires a court to not interpret a catchall phrase literally when it is preceded by a list. Instead, this rule requires the catchall phrase to be narrowed so that it applies only to things that are of the same type or class as the things in the list. For example, a court may decide that electricity, cooking, and heat have nothing to do with solar-water systems or gas-powered refrigeration and exclude

sources of energy for those sources. Do the proponents intend the list to be used to narrow the phrase "other services"? If so, what is the intended class? If not, consider replacing the list with one term or phrase that describes the sources.

- e. Is there a difference between providing and supplying utility service? If so, would the proponents please explain the difference?
3. Regarding the definition of the word "consumer" in subsection (1)(B) of the proposed initiative:
 - a. The most feasible way to implement the proposed initiative is probably for utilities to buy different forms of energy on the wholesale market and resell this energy to consumers. The definition of consumer includes "any person who is the buyer ... of a product." If utilities end up buying and reselling energy on the wholesale market, this definition would, therefore, cover the utilities. Consider removing the word "buyer" and adding a sentence that excludes utilities.
 - b. How does a person lease electricity or natural gas? If that's not known, consider deleting the word "lessee" from this definition.
 4. Consider changing the word "must" in subsection (2) of the proposed initiative to "shall" because the intent appears to be to impose a duty on the state and on local governments. The word "shall" is defined in section 2-4-401 (13.7), C.R.S., to mean "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., means "that a person or thing is required to meet a condition for a consequence to apply." Furthermore, the definition states that "'must' does not mean that a person has a duty."
 5. Various state and local government regulations related to permitting, taxation, safety, or labor standards could be viewed as affecting consumer choice in energy because the regulations might affect the siting, cost, availability, or ease of use of an energy source. Do the proponents intend that the proposed initiative would prohibit the enacting or implementation of such state or local government regulations related to permitting, taxation, safety, or labor standards?

6. Under article XXV of the Colorado Constitution and articles 1 to 7 of title 40, C.R.S., referred to as the "Public Utilities Law" in section 40-1-101, C.R.S., the public utilities commission regulates the facilities, service, rates, and charges of public utilities. This authority includes the power to issue an investor-owned utility a certificate of public convenience and necessity pursuant to article 5 of title 40, C.R.S. This certificate affords the investor-owned utility the exclusive authority to provide utility service in its certificated area. The public utilities commission's authority to regulate facilities, service, rates, and charges and to grant an investor-owned utility the exclusive authority to provide utility service in its certificated area could be viewed as limiting consumer choice in current and future energy use.
 - a. Is the intent of the proposed initiative, therefore, to limit the authority granted to the public utilities commission in article XXV of the Colorado Constitution and in the "Public Utilities Law" to regulate the facilities, service, rates, and charges of public utilities?
 - b. If the proposed initiative passes, would the state retain its authority to issue an investor-owned utility the exclusive right to provide utility service in a certificated area through the issuance of a certificate of public convenience and necessity?
7. The words "current" and "future," when used in statute, are ambiguous because what is "current" when a law passes quickly becomes the past and what is in the "future" when a law passes quickly becomes "current." Moreover, pursuant to the rule of statutory construction codified in section 2-4-104, C.R.S., "[w]ords in the present tense include the future tense." For these reasons, consider deleting the reference to "current and future" in subsection (2) of the proposed initiative so that the language reads "... allow consumer choice in energy use"
8. Is the phrase "in a home or business" intended to limit the users of energy that are afforded consumer choice? Is the intention, for example, to exclude government agencies, civic organizations, or nonprofit entities? If there is no intention to limit applicability of the provision, consider deleting the phrase "in a home or business."

Technical Comments

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

1. The amending clause should read "In Colorado Revised Statutes, **add** article 44 to title 40 as follows:".
2. When adding a new article to the Colorado Revised Statutes, add an article heading. For example:

Article 44 Energy Choice

3. The headnote for section 40-44-101 of the proposed initiative includes the word "declaration," but the section does not appear to include language that declares an intent. Please consider removing the word from the headnote.
4. In the introductory portion of subsection (1) of the proposed initiative, the word "the" is missing before the word "context."
5. The paragraphs that follow the introductory portion in subsection (1) of the proposed initiative should be in lowercase letters:
 - (a) "ENERGY" ...
 - (b) "CONSUMER" ...
6. In subsection (1)(B) of the proposed initiative, consider rephrasing the definition to be consistent with drafting convention and the phrasing of the definition in subsection (1)(A):

"CONSUMER" *MEANS* ANY PERSON ...
7. In the Colorado Revised Statutes, a comma is used between the penultimate item in a list of three or more items and a conjunction such as "and" or "or"; this is commonly called an Oxford comma. Please consider adding an Oxford comma after:
 - a. The word "heat" in subsection (1)(A) of the proposed initiative, so that the list reads, "electricity, cooking, heat, and other services."; and
 - b. The word "lessee" in subsection (1)(B) of the proposed initiative, so that the list reads, "buyer, lessee, or user"

8. Although the text of proposed statutory language in the proposed initiative is correctly in small capital letters, the first word of each provision still requires a capital letter. At the beginning of subsection (2) of the proposed initiative, please capitalize the letter "s" in the word "state."