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Colorado General Assembly

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MEMORANDUM

TO: Kristi Burton Brown and Michael Tsogt
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 15, 2024
SUBJECT: Proposed initiative measure 2023-2024 #225, concerning consumer 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 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.

This initiative was submitted with a series of initiatives including proposed initiatives 2023-2024 #226 and 2023-2024 #227. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2023-2024 #226 and 2023-2024 #227, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Comments and questions in this memorandum are new.

Purposes

The major purposes of the proposed amendment to the Colorado Constitution appear to be:

1. To ensure the right to energy choice; and
2. To ensure that the right to energy choice includes the right to choose products and services that are powered by an energy supply currently in common use, such as solar, wind, electricity, natural gas, and propane.

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. The proposed initiative adds section 17 to article XXVIII of the Colorado Constitution; however, article XXVIII deals with campaign and political finance. Did you mean to add section 17 to article XVIII, which covers "miscellaneous" topics?
3. For the definition of "energy" in subsection (1)(a) of section 1 of the proposed initiative, you might consider providing additional context to the definition to help readers better understand what is meant by "generation" and "fuel source." Alternatively, because "energy" is used in the proposed initiative as a modifier, you might consider instead defining the term "energy supply."
4. For the definition of "consumer" in subsection (1)(b) of section 1 of the proposed initiative:
 - a. The word "as" is unnecessary in the sentence and should be removed. The remaining language would read "'[c]onsumer' means any person who...."
 - b. When referencing "the buyer or user of a product" in the definition, you might consider adding "or service" after "product," because subsection (2) of section 1 of the proposed initiative references "a right to choose products and services."

- c. Certain energy sources, such as solar panels, may be leased instead of purchased. You might consider adding "leaseholder" to the definition so that it would read "...any person who is the buyer, leaseholder, or user...."
 - d. The word "person" is used in the definition of "consumer." You might consider also defining "person" or further specifying the types of persons to which you intend the proposed initiative to apply.
 - i. In section 2-4-401 (8), C.R.S., "person" is broadly defined for all statutes to mean "any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity." You might consider copying that definition into the proposed initiative if you intend "person" to broadly apply to any individual, business entity, government entity, or other legal entity.
 - ii. From the language used in subsection (2)(a) of section 1 of the proposed initiative that refers specifically to "a home or business," it appears that you might intend for "person" to narrowly apply to any individual or business entity. If so, you might consider adding a definition of "person" to indicate that narrow application regarding who is considered a "consumer."
5. Temporal words such as "currently" or "future," when used in the Colorado Constitution or Colorado Revised Statutes, are ambiguous because it is unclear if they are intended to be in reference to the date when the language became effective or the date when the language is being read and interpreted, which date could be decades after the effective date. With respect to the use of the words "currently," "current," and "future" in subsection (2) of section 1 of the proposed initiative:
- a. Do you intend that the word "currently" refers to the time of the effective date of the proposed initiative, so that it would be interpreted to mean an energy supply in common use around 2024-25?
 - b. If you intend that the word "currently" refers to the effective date of the proposed initiative, you might consider changing the phrase "currently in common use" to "in common use on the effective date of this section" to clarify that the relevant time for considering common usage is the time that the proposed initiative takes effect.

- c. If you instead intend that the word "currently" refers to the time when the language is being read and interpreted, which may be decades after the effective date of the proposed initiative, you might consider simply striking the word "currently" so that the language reads "powered by an energy supply in common use," which language would be interpreted to mean "in common use" at the time it is being read.
 - d. For the phrase "current and future energy service connections," regardless of whether you intend the phrase to relate to the time of the effective date of the proposed initiative or the time that the language is being read and interpreted, you might consider changing the phrase to "energy service connections made, proposed, or applied for on or after the effective date of this section" so that, on the effective date of the proposed initiative and at any later date that the proposed initiative is in effect, the phrase would apply to existing connections and possible future connections.
6. Regarding the phrase "in common use" in subsection (2) of section 1 of the proposed initiative, how do you intend "common use" to be interpreted?
- a. When compared to other energy supplies, is there a threshold percentage of the market that would make an energy supply be considered "in common use"? If so, what is that threshold percentage?
 - b. If you do not intend that "in common use" be interpreted as requiring a threshold percentage of the market when compared to other energy supplies, how do you intend the phrase to be interpreted? E.g., do you mean "in common use *in Colorado*"?
7. For energy supplies that are not in common use, do you intend that a consumer has the right to choose those energy supplies as well? For example, hydrogen fuel cells used to power vehicles have very limited market availability at the time of the proposed initiative so would likely not be considered "in common use." Under the proposed initiative, would the right to choose an energy supply at the time of the effective date of the proposed initiative apply to vehicles powered by hydrogen fuel cells?
8. In subsection (2)(a) of section 1 of the proposed initiative, the phrase "in a home or business" is used. By use of that phrase, do you intend the right to choose an energy supply to exclude government agencies, civic organizations, and nonprofit entities?

9. In subsection (2)(b) of section 1 of the proposed initiative, what is meant by "small power" equipment? You might consider adding a definition of the term in subsection (1) of section 1 of the proposed initiative.
10. In subsection (2)(b) of section 1 of the proposed initiative, do you intend that snowblowers and leaf blowers would be included in "lawn equipment"? You might consider adding a definition of the term "lawn equipment" in subsection (1) of section 1 of the proposed initiative.
11. In subsections (2)(b) and (2)(c) of section 1 of the proposed initiative, the phrase "purchase and use" is used with respect to various products and services. Some of the products and services, such as vehicles and home appliances, may be leased instead of purchased. You might consider changing the phrase to "purchase or lease and use" in both subsections.
12. In subsection (2)(c) of section 1 of the proposed initiative, the phrase "outdoor cooking appliances and grills" is used. Because grills are a type of outdoor cooking appliance, you might consider changing the phrase to "outdoor cooking appliances, including grills." Please also see technical comment #7.
13. Various regulations related to permitting, taxation, safety, labor standards, or utility service could be viewed as affecting the right to energy choice because the regulations might affect the siting, cost, availability, or ease of use of an energy supply. Do you intend that the proposed initiative would prohibit or limit the enactment or implementation of the following types of regulations:
 - a. Land-use, environmental, or other permit applications and approvals;
 - b. Taxation regulations, including application of property taxes and tax incentives such as tax credits;
 - c. Safety regulations, such as requirements to adhere to electrical and building codes;
 - d. Labor standards, such as requirements for service connection projects to comply with apprenticeship program requirements similar to the labor standards set forth in section 40-3.2-105.5, C.R.S., for gas demand-side management projects and in section 40-3.2-105.6, C.R.S., for beneficial electrification projects; and
 - e. Utility service, such as interconnection requirements related to electric utilities connecting distributed energy resources to the electric grid or fuel cost-sharing requirements for gas utilities?

14. Do you intend that the right to energy choice in the proposed initiative includes a private right of action against a private actor, such as a utility, homeowners' association, or landlord, that acts in a manner that could be considered to limit a consumer's choice with regard to energy service connections; the purchase and use of vehicles, agricultural equipment, or power or lawn equipment; or cooking appliances, heating and cooling systems, and home appliances?

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:

SECTION 1. In the constitution of the state of Colorado, **add** section 17 to article XXVIII as follows:

However, please see substantive comment #2.

2. The headnote for the new section 17 added by the proposed initiative should include the section number:

SECTION 17. Energy choice – definitions.

3. Definitions are listed in alphabetical order. Please reorder "consumer" as subsection (1)(a) of section 1 of the proposed initiative and "energy" as subsection (1)(b) of section 1 of the proposed initiative.
4. Although the text of the proposed initiative is, correctly, in small capital letters, the first letter of the first word of each provision should be initial-capitalized as well. For example:

(a) CURRENT AND FUTURE ENERGY SERVICE...;

5. To conform to drafting conventions, in the introductory portion of subsection (2) of section 1 of the proposed initiative, please add a comma between "natural gas" and "propane" in the phrase that currently reads "such as solar, wind, electricity, natural gas and propane."
6. Per drafting conventions, consider adding an "and" or an "or" after the semicolon at the end of subsection (2)(b) of section 1 of the proposed initiative.

Use "and" to connect applications when all must occur. Use "or" to connect applications when only one or more, but not all, must occur.

7. Substantive comment #12 asks you to consider changing the phrase "outdoor cooking appliances and grills" in subsection (2)(c) of section 1 of the proposed initiative to "outdoor cooking appliances, including grills." If you make this change, consider also replacing the commas after "grills" and "systems" to semicolons to more clearly separate each category in the list. The sentence would read "[P]urchase and use of indoor and outdoor cooking appliances, including grills; heating and cooling systems; and home appliances."