

# STATE OF COLORADO

## Colorado General Assembly

Natalie Castle, Director  
Legislative Council Staff

**Colorado Legislative Council**  
200 E. Colfax Ave., Room 029  
Denver, Colorado 80203-1716  
Telephone 303-866-3521  
Facsimile 303-866-3855  
Email: lcs.ga@coleg.gov



Sharon L. Eubanks, Director  
Office of Legislative Legal Services

**Office of Legislative Legal Services**  
200 E. Colfax Ave., Room 091  
Denver, Colorado 80203-1716  
Telephone 303-866-2045  
Email: olls.ga@coleg.gov

## MEMORANDUM

**TO:** Jon Caldara and Jake Fogleman  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** March 31, 2023  
**SUBJECT:** Proposed initiative measure 2023-2024 #33, concerning investor-owned utility charges

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 another initiative addressing the same topic, proposed initiative 2023-2024 #34. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memorandum for proposed initiative 2023-2024 #34, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in that memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

## **Purposes**

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

1. Prohibiting investor-owned utilities supplying electric or gas service, or both, to residential, commercial, or industrial ratepayers in Colorado from including certain charges, including fees and costs for attorneys, expert witnesses, utility consultants, lobbying, campaign contributions, and marketing and public relations, in rates or charges approved by the public utilities commission; and
2. Requiring the public utilities commission to adopt rules implementing these restrictions within twelve months after the proposed initiative becomes effective.

## **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. Have you considered a limit on the amount of money that can be recovered on the costs listed in the proposed initiative rather than an outright prohibition on recovery for the costs listed?
3. In requests for new base rates, investor-owned utilities have included "hearing costs" and "customer noticing" in their requested allowance for rate case expenses. Do you intend to prohibit inclusion of these items in any rates set by the proposed initiative?
4. The office of the utility consumer advocate, housed within the Colorado department of regulatory agencies, has intervened in Colorado public utilities commission rate adjustment hearings to propose that investor-owned public utilities absorb half the expenses in rate cases.<sup>1</sup> Have you considered this rather than an outright prohibition on recovery for the costs listed?

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<sup>1</sup> Colorado Public Utilities Commission Decision No. R13-1307, p. 222 (October 22, 2013).

5.
  - a. How do you intend for the costs listed in the proposed initiative—attorney fees and costs, expert witness fees and costs, expenses for utility consultant fees and costs, lobbying fees and costs, campaign contributions, and marketing and public relations fees and costs—to be absorbed?
  - b. The public utilities commission has noted in rate adjustment decisions that "recovery of rate case expenses [is] a normal and legitimate activity for a regulated utility."<sup>2</sup> Further, a number of sections of title 40 of the Colorado Revised Statutes, such as section 40-5-101 (4)(a), Colorado Revised Statutes, allow an investor-owned utility to recover from its ratepayers certain costs that it prudently incurs through use of a rate adjustment, which is approved through a rate case. Some of the prohibited expenses – namely, attorney fees and costs, expert witness fees and costs, and expenses for utility consultant fees and costs—will include expenses paid to these individuals for their assistance in rate cases. If investor-owned utilities may not include these expenses in rates, how do you intend for these rate case expenses to be absorbed?
6. Under section 40-3-101 (1), Colorado Revised Statutes, the public utilities commission is charged with setting utility rates that are "just and reasonable." The Colorado Supreme Court has interpreted that phrase to mean that the "fixing of 'just and reasonable rates' involves a balancing of investor and consumer interests" and that the commission "must also consider the reasonableness and fairness of rates so far as the public utility is concerned."<sup>3</sup> Rates must be set to ensure that the public utility has "adequate revenues for operating expenses and to cover the capital costs of doing business. The revenues must be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."<sup>4</sup>
  - a. How, if at all, would the proposed initiative affect the public utilities commission's ability to set "just and reasonable" utility rates that balance investors' interests and provide adequate revenues for an investor-owned utilities' operating expenses to cover its capital costs?
  - b. Given the need for the public utilities commission, when fixing a "just and reasonable" rate, to consider the public utility's revenue and capital

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<sup>2</sup> Colorado Public Utilities Commission Decision No. C09-1446, p. 60 (December 1, 2009).

<sup>3</sup> *Public Service Co. v. Public Utilities Comm.*, 644 P.2d 933, 939 (Colo. 1982).

<sup>4</sup> *Id.*

needs and its investors' interests, could the proposed initiative have the effect of requiring the public utilities commission to set equal or higher rates than it would set without the proposed initiative to provide for the public utilities' revenue needs and its investors' interests?

7. The proposed initiative could limit the return on investments made by an investor-owned utility's investors. If a court were to determine that such diminished return on investments constitutes a regulatory taking of private property that warrants just compensation under the Fifth Amendment of the United States Constitution and section 15 of article II of the Colorado Constitution, how should just compensation be provided to the investor-owned utility's investors? What financial resources of the state should be used to provide the just compensation?
8. In the last sentence of section 1 of the proposed initiative, it requires the public utilities commission to adopt rules "pursuant to the 'Public Utilities Law' as set forth in article 1 of this title."
  - a. The portion of the statutes that comprises the "Public Utilities Law" includes articles 1 through 7 of title 40, Colorado Revised Statutes. Proponents should consider stating "as set forth in articles 1 to 7" to accurately reflect the "Public Utilities Law" cited.
  - b. If proponents wish instead to cite only to the portion of the statutes that authorize the public utilities commission's rule-making authority, the proponents may cite to section 40-2-108 (1), Colorado Revised Statutes, which authorizes the public utilities commission to "promulgate such rules as are necessary for the proper administration and enforcement of this title ...".
9. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty." For example:
  - a. "...rates or charges...shall not include..."
    - i. "Rates or charges" are inanimate objects, and therefore, cannot "have a duty."
  - b. "Such charges shall not be deemed..."

- i. "Such charges" are inanimate objects, and therefore, cannot "have a duty."
- c. "The public utilities commission shall adopt rules..."
  - i. "The public utilities commission", in this case, is able to "have a duty to" adopt rule.

## **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. Capitalization in the enacting clause should follow typical initial capitalization guidelines: "*Enacted*" should be capitalized as shown.
2. In accordance with standard drafting practice, only subsections being amended, repealed, or added—as noted in the amending clause—need to be shown in the initiative text. For example, only subsection (4) is being added to section 40-3-101, Colorado Revised Statutes, so subsections (1) through (3) do not need to be shown.
3. "Commission" is defined as "the public utilities commission of the state of Colorado" in section 40-1-102, Colorado Revised Statutes, for all of articles 1 through 7 of title 40. "Public utilities commission" in the new language of subsection (4) should be shortened to "commission" in order to use the defined term.
4. In accordance with standard drafting practice, "attorney's fees", as written in the proposed initiative, is typically written as "attorney fees."
5. For clarity purposes, when referencing a period of time within which an action must occur, it is preferable to use "after" instead of "or." For example: "The commission shall adopt rules implementing these restrictions within twelve months after the effective date of this subsection (4)...".
6. In the last sentence of section 1 of the proposed initiative, "Public Utilities Law" is cited as "article 1 of this title."

- a. Citations to titles within the Colorado Revised Statutes should include the title number. In this case, the citation at the end of the new subsection (4) should read "of this title 40."