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CALIFORNIA INITIATIVE REVIEW

Proposition 7

RENEWABLE ENERGY GENERATION. INITIATIVE STATUTE.

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I. Executive Summary

Proposition 7 is an alternative energy, statutory initiative, formally known as *The Solar and Clean Energy Act of 2008*. Ambitious in its goals, Proposition 7 seeks to spur renewable energy production in California, curb greenhouse gas emissions, and accelerate the growth of the state's green economy.

Proposition 7 requires that half of California's electricity production come from renewable sources such as solar, wind, geothermal, and biomass. Utility companies will be required to meet a 50% Renewables Portfolio Standard by the year 2025. By 2010, current California law expects investor owned utilities to reach a 20% renewable energy goal. Proposition 7 will require the California Energy Commission and the Public Utilities Commission to impose penalties on energy companies who do not meet specified goals along the way.

In an effort to jump start production of large scale solar energy plants, Proposition 7 will establish "Solar and Clean Energy Zones" where solar fields producing more than 30 mega-watts may be approved in an expedited manner.

Proposition 7 builds on legislative efforts to increase alternative energy requirements by making changes to the Public Utilities Code and the Public Resources Code.

Proponents argue that current laws are not stringent enough to adequately address climate change and that Proposition 7 is good for the economy. Proponents include Nobel Laureates Walter Kohn, Alan Heeger, and Herbert Kroemer; S. David Freeman; Dr. Donald Aitken; Senator Martha Escutia, Former Chair of the State Senate Energy Committee, and Alicia Wang, Vice-Chair of the California Democratic Party. Opponents argue that Proposition 7 will threaten energy reliability and stifle renewable technology development. Opponents include the California Republican and Democratic Parties, the California League of Conservation Voters, PG&E Corporation, and Southern California Edison Company.

Proposition 7 may be the most expensive contest on the 2008 ballot.

The proponents and opponents have each received major donations and subsequently spent that money to advance their message. Peter Sperling, the son of University of Phoenix founder John Sperling, provided the largest share of funding for the Yes on Proposition 7 campaign. Sperling personally donated \$5,250,000 as of October 1. The No on 7 campaign has received \$29.5 million from Pacific Gas and Electric, Southern California Edison, and Sempra combined.

The official committees for and against Proposition 7 filed lawsuits claiming the other side made false and misleading arguments in their respective ballot pamphlet arguments. The judge denied all the requests, finding that each side could reasonably make the arguments they set forth.

II. The Law

a. Existing Law

Current law establishes the Renewables Portfolio Standard (RPS) whereby all retail sellers of electricity are required to increase their renewable energy procurement each year by at least 1% of total sales until a specified goal is met. Public Utilities Code § 399.11 (2002). SB 1078 (Sher) established the RPS in 2002, setting a requirement that 20% of energy sales come from renewable resources by 2017. Sen. Bill No. 1078 (2002). In 2006, SB 107 (Perata, Simitian, Levine) accelerated the RPS to a 20% renewables requirement by the year 2010. Sen. Bill No. 107 (2006).

Also in 2006, the Legislature passed and the Governor signed AB 32 (Núñez, Pavley), the California Global Warming Solutions Act of 2006, setting an absolute standard for greenhouse gas (GHG) emissions reduction to 1990 levels by 2020. Asm. Bill No. 32 (2006). The Assembly Committee on Utilities and Commerce asserts that 80% of GHG is released by the burning of fossil fuels, a significant portion of which is emitted during electricity generation. *Bill Documents: Analysis*, (Jul. 2, 2007), http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0401-0450/sb_411_cfa_20070629_141314_asm_comm.html.

b. Legislative Status

During the 2007-08 legislative session Senators Perata and Simitian and Assemblyman Levine introduced SB 411 to again change the RPS. Sen. Bill No. 411 (2007). This bill would have required all investor-owned utilities (IOUs) to procure at least 33% of their electricity from renewable resources by 2020. *Id.* SB 411 failed passage when it was held under submission in the Assembly Appropriations Committee. *Bill Documents: Status*, http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0401-0450/sb_411_bill_20080930_status.html. Bills held under submission are presumably held in the Legislature's Appropriations committees due to a bill's excessive costs. The Assembly Appropriations Committee analysis noted that expanding the RPS to 33% by 2020 would "require the PUC to (a) maintain staff in the base program until 2020 at an ongoing special fund cost of about \$380,000 and (b) add three positions in 2007-08 related to program expansion, including additional transmission planning, at an annual special fund cost of about \$290,000. *Bill Documents: Analysis* (Aug. 22, 2007), http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0401-0450/sb_411_cfa_20070821_124834_asm_comm.html.

In each RPS bill passed by the Legislature and signed by the Governor, publicly owned utilities (POUs) were exempted. When the initial RPS legislation was passed in 2002, POUs contracting ability was limited by restrictions on direct access. *Bill Documents: Analysis* (Aug. 17, 2002), http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1051-1100/sb_1078_cfa_20020817_171341_asm_comm.html. Later legislation dealing with the RPS did not push to have POUs inserted. Instead, current law directs each POU to establish and enforce its own RPS and allows each POU to define the electricity sources that it counts as renewable. *Bill Documents: Analysis*, (Jul. 2, 2007). No state agency enforces POU compliance or places penalties on a POU that fails to meet the renewable energy goals it has set for itself.

Legislative Analysts Office, Proposition 7, http://www.lao.ca.gov/ballot/2008/7_11_2008.aspx (accessed Sept. 13, 2008).

c. Proposed Changes

Proposition 7 amends and extends the Renewables Portfolio Standard (RPS) goals and imposes penalties for non-compliance.

Proposition 7 reaches beyond investor owned utilities (IOUs) and adds local publicly-owned electric utilities (POUs) to the RPS mandate. Proposition 7, § 7-8 (2008). All retail sellers (IOUs and POUs) must meet newly-imposed RPS standards of 20% renewable energy by 2010, 40% by 2020 and 50% by 2025. POUs will have an additional three years to comply with the 2010 standard. *Id.* at § 6.

The California Energy Commission (Energy Commission) is given expanded power to impose penalties for non-compliance with the revised-RPS. *Id.* at § 3(f). The Public Utility Commission's (PUC's) enforcement mechanisms are also expanded to include new rate-setting and penalty authority. *Id.* at § 3(i). Specifically, Proposition 7 expands the PUC's current RPS-related enforcement mechanisms over IOUs to encompass Electric Service Providers (companies that provide electricity service directly to customers who have chosen not to receive service from the utility that serves their geographic area). The enforcement mechanisms include review and adoption of renewable resources procurement plans, related rate-setting authority, and penalty authority.

The Energy Commission will identify "Solar and Clean Energy Zones" (zones), primarily in the desert, to jump-start clean power plants. *Id.* at § 3(j). Proposition 7 allows for "fast-tracking" of approval for new renewable energy plants if they are located within the designated zone. Renewable-energy plants with a capacity over 30 mega-watts may be built inside a zone. *Id.* at § 7. The Energy Commission will designate the size and location of any zone; the Energy Commission then must approve or deny any plant with a completed application within six months. However, the commission is not required to issue the permit within the six-month time frame if there is evidence that the facility would cause significant harm to the environment, or the electrical system, or in some way does not comply with legal or other specified standards. Legislative Analysts Office, Proposition 7, http://www.lao.ca.gov/ballot/2008/7_11_2008.aspx (accessed Sept. 13, 2008).

Proposition 7 requires publicly-owned and investor-owned utilities to enter into 20-year-minimum contracts with renewable plants. Proposition 7, § 3(g). Retail sellers are required to accept all bilateral offers of electricity generated by eligible renewable energy resources that are less than or equal to market price, unless the retail seller has met its RPS target for the year. *Id.* at § 10. The Energy Commission may not approve or disapprove of any retail seller's contracts for renewable energy or of any provision therein. *Id.*

Proposition 7 creates the Solar and Clean Energy Transmission Account. All penalties assessed on non-compliant retail sellers are deposited into this account. In order to develop the transmission infrastructure necessary to achieve the RPS and to provide access for renewable energy to the grid, account funds will be used to purchase property or rights-of-way and to

construct transmission facilities. The account, and all property rights, will be held by the Energy Commission. *Id.* at § 3(j).

Utilities are prohibited from passing along penalties incurred through noncompliance to their electric rate-payers. *Id.* at § 3(h).

d. Costs

According to the non-partisan Legislative Analyst and the Director of the California Department of Finance, passage of Proposition 7 will result in state administrative costs of up to \$3.4 million annually. Costs will be incurred mostly from the Energy Commission and the California Public Utilities Commission. Proposition 7, *Official Title and Summary*, <http://voterguide.sos.ca.gov/title-sum/prop7-title-sum.htm>.

III. Findings and Declarations

Rationales for increasing California's current RPS goals are set out in Section 2 of the measure, entitled "Findings and Declarations." Proposition 7, § 2. The measure emphasizes the urgency of addressing global warming and subsequently California's reliance on fossil fuels. By passing Proposition 7, the people of the State of California would find and declare that global warming is a real crisis and we are at a tipping point. To address this, it is the people's intent that the California Renewable Portfolio Standard Program be implemented to obtain the stated renewable targets for the purposes of increasing the diversity, reliability, public health and environmental benefits of the energy mix to address global warming and climate change. *Id.* Proposition 7 also finds and declares that the initiative will encourage investment in solar and clean energy sources that in the long-run are cheaper and are located here in California, and in the short term, California's investment in solar and clean energy will result in no more than a 3 percent increase in electric rates—a small price to pay for a healthier and cleaner environment." Proposition 7, § 2(e). However, Proposition 7 includes no specific provisions to implement or enforce the 3% cap found in the "Findings and Declarations" section of Proposition 7.

IV. Drafting Issues

a. Pre-Election Challenges

This proposition was challenged in court already by both the proponents and the opponents. Challenges were based on statements made by both sides in the ballot pamphlet. Ultimately, the court allowed the arguments presented in the pamphlet to stand.

The state ballot pamphlet, prepared by the Secretary of State (Secretary) and distributed prior to an election to registered voters, gives citizens information to assist them in evaluating the intended purpose and likely consequences of proposed ballot issues, including proposed constitutional amendments, bond measures, initiatives, and referenda. Cal. Elec. Code § 9081. Any voter or group of voters may, at any time within the time limit, prepare and file with the Secretary of State an argument for or against any measure as to which arguments have not been prepared or filed. This argument shall not exceed 500 words in length. Cal. Elec. Code § 9064.

When the Secretary has received the arguments that will be printed in the ballot pamphlet, she/he shall, within five days of receipt, send copies of the arguments in favor to the opponents and send copies of the arguments against to the proponents. The authors may prepare and submit rebuttal arguments not exceeding 250 words, or may authorize in writing any other person or persons to prepare, submit, or sign the rebuttal argument. Cal. Elec. Code § 9069.

On or about July 8, 2008, the supporters and opponents of Proposition 7 submitted their initial arguments in favor or against the initiative to the Secretary of State, and on or about July 17, 2008, both sides submitted rebuttal arguments. In the arguments in support of the proposition, proponents asserted, among other things: (1) that the proposition contained a 3% price cap on rate increases; (2) that the proposition would create 370,000 new jobs; and (3) that provisions of the proposition would prohibit utilities from passing penalties for non-compliance on to the rate payers. Opponents argued in their statement that the proposition would prohibit small renewable energy providers from selling to utilities because the energy supplied by such providers would not count toward the RPS set out in the measure. These statements were all challenged as false or misleading.

Pursuant to Cal. Elec. Code § 9092, on July 22, 2008, Proposition 7 proponents filed a Verified Petition for Writ of Mandate which requested a writ ordering the Secretary to delete “verifiably false and misleading statements” contained in the ballot arguments in opposition to Proposition 7. Verified Pet. for Writ Mandate Pursuant to Cal. Elec. Code § 9092, *Gonzalez v. Bowen*, No. 34-2008-00016638 (Jul. 22, 2008.) Opponents of Proposition 7 subsequently filed a Cross-Petition challenging statements in the initial and rebuttal arguments in favor of Proposition 7. *Id.*

California Elections Code § 9092 provides that any elector may seek a writ of mandate requiring any text to be amended or deleted from the ballot pamphlet, but a writ of mandate shall be issued *only* upon “clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of [the code].” Cal. Elec. Code § 9092. In making this determination, courts must be mindful that the ballot argument portion of the ballot pamphlet is a limited public forum implicating the right of free speech. Thus, in reviewing ballot arguments, courts must distinguish false or misleading assertions of fact from “the typical hyperbole and opinionated comments” that are – regrettably – “common to political debate.” *S.F. Forty-Niners v. Nishioka*, 75 Cal. App. 4th 637, 649-650 (1st Dist. 1999). Even when confronted with assertions of fact, courts must exercise appropriate caution so as not to substitute the judgment of the court for the judgment of the electorate. *Id.* When factual assertions are reasonably subject to dispute, courts ordinarily should not interfere with the political process. *Id.* There is a high ‘clearing and convincing proof’ standard that must be met before a court may interfere with a ballot argument. “The Legislature went out of its way to emphasize the narrowness of the scope of any proper challenges by appending the word ‘only’ in front of the evidentiary standard.” *Huntington Beach City Council v. Super. Ct.*, 94 Cal. App. 4th 1417, 1428 (4th Dist. 2002). Only when factual assertions are shown to be conclusively and objectively false or misleading should a writ be issued. *S.F. Forty-Niners*, 75 Cal. App. 4th at 649-650.

The Proposition 7 proponents attacked the opponent’s ballot argument assertion that the law has a “30 megawatt minimum requirement” for power plants to be eligible to sell electricity to utilities and thus contribute to the 50% Renewable Portfolio Standard, stating that the opponents

rely on “a tortured misreading of the new law that contradicts the plain and ordinary meaning of its terms.” Reply Br. in Support of Verified Amended Pet. for Writ of Mandate, *Gonzalez*, No. 34-2008-00016638 (Aug. 6, 2008.) The heart of the proponent’s argument is that “Proposition 7 replaces the term ‘electric generating facility’ in Public Utilities Code § 399.12(c) with the term ‘solar and clean energy facility.’ *Id.* at 1 – 3. This term, ‘solar and clean energy *facility*,’ is not specifically defined, unlike the wholly distinct term, solar and clean energy *plant*, which is defined, but which is used in an unrelated provision of an entirely different Code (i.e. Public Resources Code).” *Id.* In order to make the claim on the ballot argument that small renewable energy providers will be ‘shut out of the market,’ Proposition 7 opponents assert that the undefined term solar and clean energy *facility* must mean solar and clean energy *plant* or else it will be rendered meaningless. *Id.* Proponents counter that because ‘solar and clean energy facility’ does not have a defined meaning, it should be given the plain meaning, i.e. a building or place that generates electricity through solar and clean energy sources. *Id.*

The proponents of Proposition 7 responded to the argument that the law would shut out small producers of renewable energy, offering to stipulate to the record that the law is not intended to exclude small renewable providers. At the hearing for this litigation, the proponents stated to the trial court that if the opponents

if the opponents are concerned that it will be applied this way, to restrict competition, and we’re saying as drafters, that it is not, the solution is very simple. Let’s all stipulate to the record right now that that’s not what its intended to mean, that’s now how its going to apply, and it will be used in future litigation, if there ever is over this issue, as legislative history and collateral estoppel on the issue. *Gonzalez v. Bowen* Hrg. Transc. 41: 23-28, 42:1-4 (Aug. 6, 2008.)

The Sacramento Superior Court, citing the “necessarily high” standard that must be met before a court can intervene in the statements made by proponents and opponents of a ballot initiative, denied the petition by concluding that “the parties have two opposing interpretations of certain amendments contained in Proposition 7,” and that “each party’s interpretation has some support in the initiative’s text.” *Gonzalez v. Bowen; Smutny-Jones v. Bowen*, Case No. 34-2008-00016638, Cal. Sup. Ct. (Aug. 7, 2008).

The proponents’ petition was denied based upon the court’s application of the above referenced necessarily high standard which has been applied to encourage the broadest possible debate.

In their cross-petition, Proposition 7 opponents point to three claims in the proponent’s ballot argument that they assert are false and misleading. Opponents argued that the “guaranteed 3% price cap” statement is verifiably false, that the “370,000 jobs” is intentionally misleading, and that it is “cynically misleading to represent that ratepayers served by publicly owned electric utilities will not be responsible for payment of penalties.” Cross-Petr’s Reply to Cross-Real Parties’ Opposition to Cross-Pet., *Gonzalez*, No. 34-2008-00016638 (Aug. 6, 2008).

The opponents argued that Proposition 7 has no mechanism to enforce the 3% price cap, and therefore is a false statement. The court noted however that the opponents failed to present the court with clear and convincing evidence demonstrating the fact is false, because it looked to

“future events outside the parameters of the initiative” to conclude that rate increases above 3% might occur. *Gonzalez* at 3.

The opponents also took issue with the proponents claim that 370,000 jobs would be created by Proposition 7, stating that a ‘job’ must be 15 years in duration to qualify, and since Proposition 7 has no guarantees that the jobs created will last 15 years each, they must reflect that by changing the ballot language to job *hours*. *Gonzalez* Hrg. Transc. 41: 23-28, 42:1-4. More specifically, the 370,000 figure “merely reflects that there will be 370,000 years of employment created by the initiative, not 370,000 employment positions.” *Gonzalez* at 3. Proponents responded that the 370,000 figure reflects construction jobs, which are shorter in duration. *Id.* at 4. The court concluded that because the term “job” can refer to short as well as long term positions, it could not say that the “370,000” jobs statement was demonstrably misleading. *Id.*

Finally, the opponents argued that the “penalty pass-on” statement is misleading because it does not exempt public utilities, who, according to the opponents, will not be able to comply with Proposition 7’s prohibition on passing on penalty costs to consumers, as they have no source of revenue from which to pay penalty costs, other than rates paid by customers. *Id.* The court concluded that this was another situation of the two sides of Proposition 7 finding opposing interpretations, “each of which is plausible.” *Id.*

The opponent’s petition was also denied in its entirety, citing the same necessarily high standard of review.

b. Post Election Issues

If Prop. 7 passes, and a person or entity attempts to preclude a small renewable provider from qualifying for the RPS using the rationale set forth by the opponents of Prop. 7, litigation is likely to ensue. If this occurs, a future court will be asked to interpret the term “solar and clean energy facility” found in Public Utilities Code § 399.12, as either having the same meaning as “solar and clean energy plant” found in Public Resources Code §25137 or something different.

To construe a statute, courts begin with the probable intent of the Legislature or in the case of a proposition, the people acting as the Legislature. The goal of statutory interpretation is to “ascertain the intent of the Legislature . . . to effectuate the purpose of the law.” *Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal. 3d 1379 (1987). It is irrelevant that the voters rather than a legislative body enacted the statute. *Citizen’s Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). The first step in determining the Legislature’s intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. *Songstad v. Super. Ct.*, 93 Cal. App. 4th 1202 (4th Dist. 2001). Where the language of a statutory provision is susceptible to two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. Stated differently, where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. A court should not adopt a statutory construction that will lead to results contrary to the legislature’s apparent purpose. *W. Oil & Gas Ass’n v. Monterey Bay Unified Air Pollution Control District*, 49 Cal. 3d 408 (1989). This has been called the Golden Rule of statutory

construction. *Armstrong v. County of San Mateo*, 146 Cal. App. 3d 597, 615 (1st Dist. 1983). When an enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language.

The term ‘solar and clean energy facility’ replaced the term ‘electric generating facility’ in section 7 of Proposition 7. The proponents do not define ‘solar and clean energy facility,’ nor do they explain in the text of Prop. 7 why they made that change, making the term’s meaning ambiguous. The proponents argued in court that the intent of the authors was *not* for the meaning of ‘solar and clean energy facility’ to be the same as ‘solar and clean energy plant’ as found in section 14 of Prop. 7. *Gonzalez Hrg. Transc.* 41: 23-28, 42:1-4. If litigation over this issue should arise, the rules governing statutory interpretation described above will be invoked to resolve this ambiguity. A court will consider the plain and ordinary meaning of the term ‘solar and clean energy facility,’ which in its commonsense meaning does not invoke a size restriction. A court will also consider which interpretation will render the ambiguous term ‘reasonable, fair, and harmonious’ to the purpose of the measure, avoiding interpretations that would ‘produce absurd consequences.’ The stated purpose of Proposition 7 is to ‘encourage investment in solar and clean energy sources’ by ‘requiring all electric utilities to produce 50% of their electricity from clean energy sources like solar and wind by 2025,’ and by encouraging ‘new technology to produce electricity.’ Proposition 7, § 2(E),(F) and (G). A court will also consider the proponent’s court room statements regarding their intent. A court may also consider the fact that neither the Legislative Analyst’s Office or the Attorney General’s office identified the interpretation of Prop. 7 put forth by opponents of the measure as potential issues in their analyses, and the fact that small renewable producers account for 60% of renewable energy contracts in the State of California. (available at <http://www.smartvoter.org/2008/11/04/ca/state/prop/7/>). These factors combined, a court will likely find that the interpretation asserted by the opponents, that small renewable energy producers should be excluded, would produce ‘absurd consequences’ inconsistent with the text and intent of Prop. 7.

Another ambiguity emerges from the text of Proposition 7 which gives the Energy Commission two new responsibilities which currently are carried out by the Public Utilities Commission (PUC) —namely, defining the market price of electricity and permitting IOU-related transmission lines. Legislative Analysts Office, Proposition 7. Proposition 7 explicitly shifts the responsibility for determining the market rate of electricity from the PUC to the Energy Commission. Proposition 7, § 5(c). The California Constitution defines the scope of the PUC jurisdiction and duties. Cal. Const. art. XII. The Legislature has plenary power, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain. Cal. Const. art. XII § 5. Language in the California Constitution recognizing the authority of the Legislature to take specified action generally is interpreted to encompass the exercise of such legislative power either by the Legislature or by the people through the initiative process. *Independent Energy Producers Assn. v. McPherson*, 38 Cal. 4th 1020 (2006). The power of the people to enact statutes through the statutory initiative is *coextensive* with the power of the Legislature. *Legislature of the Cal. v. Deukmejian*, 34 Cal. 3d 658 (1983). The California Constitution and case law are quiet as to the specific issue of whether the authority of the PUC can be *removed* by voters in the initiative process. However,

voters can amend the Constitution through the initiative process. Cal. Const. art II § 8. The power of the Legislature to shift authority from the PUC to the Energy Commission is not precluded in the language of the Constitution. Therefore, no Constitutional issues are raised by Proposition 7's provision shifting the rate-setting authority of the PUC to the Energy Commission.

However, Proposition 7 gives the Energy Commission authority to permit IOUs to construct new transmission lines within the electricity transmission grid, currently a responsibility solely of the PUC at the state level, without clarifying whether the PUC retains that responsibility as well. Legislative Analysts Office, Proposition 7. Accordingly, there is concern that post-election litigation will arise either between the agencies or by a third party over which agency may permit transmission lines. Nancy Vogel, *A charged debate over Prop. 7 renewable energy plan*, Los Angeles Times, Oct. 2, 2008. The Legislative Analyst's Office has stated that it believes that this is not a major problem and one that can be resolved through administrative procedures if Proposition 7 passes. Interview with Jay Dickenson, Resources & Environmental Protection Fiscal & Policy Analyst, Legislative Analyst's Office (Oct. 4, 2008)(notes on file with University of the Pacific, McGeorge School of Law Capital Center for Government Law and Policy) . However, by not explicitly precluding the PUC from authority over the permitting process of transmission lines, potential for confusion regarding respective responsibilities between the agencies is likely. It is not possible to predict how the agencies will deal with the overlapping jurisdictions.

c. Amendments

The Legislature may amend or repeal an initiative statute; however, any proposed legislative action becomes effective only when approved by the voters, unless the initiative statute permits amendment or repeal without voter approval. Cal. Const. art. II, § 10(c). Proposition 7 includes such a provision, which would allow it to be amended by a two-thirds vote of both houses of the State Legislature, so long as the amendment is to carry out the act's purpose and intent. Proposition 7, § 32.

d. Preemption

Proposition 7 will not immediately be preempted by federal law. The Supremacy Clause of Article VI of the U.S. Constitution resolves conflicts of state and federal law in favor of the federal government. U.S. Const. amend. VI. Proposition 7 makes changes to state law effecting energy policy consistent with actions previously taken by the California State Legislature. Sen. Bill No. 1078 (2002), Sen. Bill No. 107 (2006), *Asm. Bill No. 32 (2006)*. Those laws have not been preempted to date. If the federal government undertakes a comprehensive energy policy reform, provisions enacted by Proposition 7 may be subject to preemption.

v. Conflicting Measures.

The California Constitution provides that if provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail. Cal. Const. art. II, § 10(b). Proposition 7 contains the following clause in the event that both Proposition 7 and a conflicting initiative on the November 4th, 2008 ballot pass.

This measure is intended to be comprehensive. It is the intent of the People that in the event that this measure and another initiative measure relating to the same subject appear on the same statewide election ballot, the provisions of the other measure or measures are deemed to be in conflict with this measure. In the event this measure shall receive the greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and all provisions of the other measure or measures shall be null and void. Proposition 7, § 33(a).

Proposition 7 also addresses the possibility that a competing measure passes but is later invalidated. Section 33(b) states: “If this measure is approved by voters but superseded by law by any other conflicting ballot measure approved by the voters at the same election, and the conflicting ballot measure is later held invalid, this measure shall be self-executing and given full force of law.” *Id. at* § 33(b).

Voters will have to opportunity to vote on another proposition relating to renewable energy on the November ballot - Proposition 10, the California Alternative Fuels Initiative. *Yes on 10*, <http://prop10yes.com> (accessed Sept. 7th, 2008.) The initiative authorizes \$5 billion in bonds paid from the state’s General Fund, allocated partially to create incentives for the research, development, and production of renewable energy technology, as well as incentives to purchase renewable energy technology. *Initiative No. 07-0101, Cal. Atty. Gen. Title and Summary* (July 14, 2008).

In determining whether two measures have competing provisions, California courts have looked to whether the provisions affect the same sections of California codes. For example, in *Yoshisato v. Super. Ct.*, 2 Cal. 4th 978 (1992) the court considered whether two successful ballot measures that amended the same section of the California Penal Code were competing or complimentary. In *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.*, 51 Cal. 3d 744 (1990), the issue was whether two successful ballot measures amending the same sections of the Government Code were competing. Therefore, the threshold question in determining whether two measures on a state ballot are competing is whether they will affect the same code(s) of California law.

The provisions of Proposition 7 and Proposition 10 have no overlap in California law. Proposition 7 amends and adds to the Public Resources Code and Public Utilities Code. Proposition 10 adds a new section to Section 26410 of the Public Resources Code, which is a provision that is not affected by Proposition 7.

Specifically, the Public Resource Code sections amended by Proposition 7 are §§ 25107, 25110, 25137, 25502, 25517, 25522, 25531, 25540.6, 25541, 25541.1, 25740, and 25743. These provisions are all included in Division 15 of the Public Resources Code, deemed “Energy Conservation and Development.” Proposition 7 also adds sections 25550, 25740.1, 25745, 25751.5, and Chapters 6.6 and 8.9 of Division 15. These provisions above collectively provide a regulatory scheme for the citing and approval process for renewable energy facilities and transmission lines.

Proposition 10 adds a section to Division 16 of the Public Resources Code. Proposition 10, §4. This section, entitled the California Alternative Energy and Advanced Transportation Financing Authority Act, provides a statutory scheme for state financing for the research and development

of certain renewable energy projects. This division is distinguishable from division 15, because division 15 provides for the regulation and approval of renewable energy facilities, while division 16, with the proposed addition of Proposition 10, offers a panoply of state financing options for the development and encouragement of renewable energy generally.

Given that Propositions 7 and 10 affect different sections of the Public Resource Code and address distinguishable segments of renewable energy policy, it is unlikely that a court in the future would consider these ballot measures competing.

VI. Public Policy Considerations

a. Arguments in support

Proponents of Proposition 7 frequently quote Dr. Martin Luther King when addressing this initiative. “We are now faced with the fact, my friends, that tomorrow is today. We are confronted with the fierce urgency of now.” *Yes on 7*, <http://www.yeson7.net> (accessed September 12, 2008). They contend that California “should not continue an incrementalist (however meritorious) approach to climate change, global warming, and energy independence.” Ltr. From Jim Gonzalez, Proponent and Campaign Chair, to Edward A. Mainland and Jim Metropulos, Sierra Club, 5 – 6 (Feb. 20, 2008). Proponents point to leading scientific research that shows “a massive switch from coal, oil, natural gas, and nuclear power plants could supply 69% of the U.S.’s electricity and 35% of its total energy by 2025.” *Id.*

Proponents also point out that existing law simply doesn’t do enough. At present, the Legislature and Governor have only been able to establish “goals and targets,” not statutes and requirements, beyond the renewable target enacted for 2010. Other countries around the world have adopted far more ambitious Renewables Portfolio Standards (RPS). Further, current law only applies to investor owned utilities. Municipally owned utilities (including Los Angeles Department of Water and Power, which relies on out of state coal to generate 48% of its electricity) are not included under the RPS mandate. *Id.*

Proponents note that the Legislature has been ineffective at addressing the climate change crisis. During the 2007-08 legislative session, Senators Perata and Simitian and Assemblyman Levine introduced SB 411 to again change the RPS. This bill would have required all investor-owned utilities (IOUs) to procure at least 33% of their electricity from renewable resources by 2020. SB 411 failed passage when it was held under submission in the Assembly Appropriations Committee. Sacramento Bee, *Editorial: For Next Year, Some Unfinished Business*, <http://www.sacbee.com/110/story/1214393.html> (accessed Sept. 12, 2008.)

An economic study commissioned by Proposition 7 determined that it will create 370,000 high wage construction jobs and grow California's economy. Construction and maintenance workers on clean energy plants will be paid a prevailing wage. Solar electric plants generate between 160% and 720% more jobs than a natural gas fired plant. *Yes on 7*, <http://www.yeson7.net/index-1.html> (accessed September 12, 2008). At the same time, Proposition 7 will keep in place all environmental protections, such as the Desert Protection Act, so sensitive wildlife habitats will not be harmed by new renewable electric power plant construction. *Id.*

Proposition 7 strengthens existing law pertaining to utilities that refuse to comply with the clean energy requirements. The existing penalty is no more than a regulation which makes it highly questionable if it will ever be enforced. Proposition 7 makes the penalties actual codified law; utilities will be held liable for non-compliance. Proposition 7 removes the existing cap on fines (\$26 million) and makes the penalties automatic. *Ltr. From Jim Gonzalez, Proponent and Campaign Chair, to Edward A. Mainland and Jim Metropulos, Sierra Club, 5 – 6* (Feb. 20, 2008).

Proposition 7 is supported by three Nobel Laureates, who collectively have stated that “Proposition 7, if made into law, would represent a very significant step forward, which merits your support.” *Yes on 7*, <http://www.yeson7.net/index-1.html> (accessed Oct. 12, 2008). S. David Freeman (former energy advisor to President Jimmy Carter and former director of Los Angeles Department of Water and Power and Sacramento Municipal Utilities District), and Dr. Donald Aitken (one of the original proponents of the Renewables Portfolio Standard) both support Proposition 7. *Id.* The measure also has the support of leaders in the Democratic Party, climate change scientists, environmentalists, labor leaders, and religious groups. Among the key supporters of Proposition 7 are Senator Martha Escutia, Former Chair of the State Senate Energy Committee; Alicia Wang, Vice-Chair of the California Democratic Party; Christine Pelosi, former Executive Director of the California Democratic Party; and Dolores Huerta, co-founder of the United Farm Workers. *Yes on 7*, <http://www.yeson7.net> (accessed Sept. 12, 2008). Proponents note that Proposition 7 also enjoys wide popular support among Californians. An independent Field Poll released on July 22, 2008 showed Proposition 7 with 63% support and 24% opposition. *Id.*

b. Arguments in Opposition

Opponents of Proposition 7 assert that California already leads the nation with its tough environmental laws and regulations, and that passage of Prop. 7 will unravel much of the progress that has been made in renewable energy development. The official committee opposing Prop. 7 is “Californians Against Another Costly Energy Scheme: No on 7, major funding from PG&E Corp. and So. Cal. Edison, a coalition of environmentalists, renewable energy companies, taxpayers, and labor.”

The No on Prop. 7 campaign has widely stated that Prop. 7 is ‘well-intentioned but fatally flawed.’ Opponents have argued that Prop. 7 will actually ‘slam the brakes on renewable energy.’ They believe that the shortcomings of Prop. 7 will:

Hurt Current Renewable Efforts. Proposition 7 creates an overlapping jurisdictional regime with two state agencies sharing control over the transmission permitting process. Because of this, it is believed that the initiative would ultimately hurt development of wind, solar, biomass, geothermal and other renewable energy sources. California Public Utility Commission, Memorandum (accessed Sept. 11, 2008) <http://docs.cpuc.ca.gov/PUBLISHED/REPORT/88422.htm>

Make market conditions ripe for another energy crisis. In television commercials, the No on 7 campaign asserts that Californians are still paying over \$1 billion per year – “nearly \$100 per every electricity consumer - to pay off the last energy crisis.” *Californians Against Another*

Costly Energy Scheme – No on 7, <http://www.noprop7.com/index.html> (accessed Sept. 29, 2008).

Stifle Technology Development. By forcing utilities to sign 20-year contracts, the utility will be locked into a technology which may not be the best available source of clean energy 10 years from now. *Id.*

Discriminate Against Small Solar. Opponents argue that because Prop. 7 does not define “solar and clean energy facility” in Section 7, which amends Public Utilities Code § 399.12, a future court will interpret it to have the same definition as the term “solar and clean energy plant,” which is defined in Section 24 adding Public Resources Code § 25137 to create a citing process for large plant production. Opponents therefore believe that a court will read the definition relating to which plants qualify for approval in zones intended for large scale production, found in the Public Utilities Code, into the Public Resources Code section describing which plants qualify towards the RPS. Opponents also believe that Prop. 7 discriminates against small renewable producers because it allows the Energy Commission to expedite approval of large scale solar plants in the desert. The initiative does not give the same treatment to rooftop solar.

Threaten Reliability. Opponents believe that renewable sources of energy are more volatile. They point out that the wind is not always blowing; the sun is not always shining. Opponents suggest that having to back up intermittent power such as wind with more intermittent power is a recipe for a return to the 2001 energy crisis. *Californians Against Another Costly Energy Scheme – No on 7*, <http://www.noprop7.com/index.html> (accessed Sept. 13, 2008).

Increase Consumer Electric Bills. The No on Prop. 7 campaign commissioned the Forward Observer to analyze the cost of Prop. 7. Adopting the opponent’s assumption that small renewable providers would be precluded from the RPS, it issued a memorandum stating that if Prop. 7 passes, the average California household will see its utility bill increase by more than \$300 dollars a year. Memo. From Justin L. Adams, Ph.D and Paul M. Thoma, Forward Observer, Fiscal Impact Study: Revised Scenario (June 30, 2008) (available at http://noprop7.com/downloads/CAAREP_econ_study.pdf).

Is Unfair To Good Actors. Opponents charge that Prop. 7 changes the rules and the playing field in the middle of the game. The proactive utilities which are fulfilling their obligation under the RPS did not have the benefit of streamlined approval for projects. Malcome Maclachlan, *Ballot language battle could be key for Prop. 7*, Capitol Weekly, August 6, 2008.

RPS Targets Are Arbitrary. Opponents also believe that the RPS percentage goals and date targets are arbitrary. *Id.* There is no scientific basis for increasing the RPS to, or limiting it at, 50% by 2025. *Id.*

Allows Power Contracts to Count for RPS. Provisions of Proposition 7 would allow utilities to count signed contracts towards their renewable-energy goals, even before they bring the power online. A signed contract is not the same as realized renewable energy. *Id.*

Harms the Desert Environment. Many environmentalists worry about the effect that 121-square-mile solar power plant would have on sensitive desert areas. *Id.*

Proposition 7 is opposed by the California Republican Party, the California Democratic Party, environmental groups like California League of Conservation Voters, renewable energy providers like the California Solar Energy Industries Association, consumer groups like California Alliance for Consumer Protection, and labor organizations like California Labor Federation AFL-CIO and American Federation of State, County and Municipal Employees (AFSCME). *Californians Against Another Costly Energy Scheme*, <http://www.noprop7.com/oursupporters.html> (accessed Sept. 8, 2008). It is also opposed by California Taxpayers' Association, Congress of California Seniors, California Chamber of Commerce, California Black Chamber of Commerce, League of California Cities, PG&E Corporation, and Southern California Edison Company. *Id.*

VII. Financial Support

Proposition 7 will be one of the most expensive fights on the November ballot. As of the October 13, 2008, reporting deadline *No on 7* had spent \$24,740,597.84. The three major utilities, Pacific Gas & Electric, Southern California Edison, and Sempra contributed \$29.5 million to defeat the measure. Also as of the September 30, 2008, reporting deadline *Yes on Proposition 7* had spent \$5,528,210.00. Billionaire activist Peter Sperling contributed \$7 million toward passage. (available at <http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1303161&session=2007>).

VIII. Conclusion

Proposition 7 would require all utilities in California to produce 50% of their electricity from solar and clean energy resources in the following percentages: 20% by 2010, 40% by 2020, and 50% by 2025. It would expand RPS requirements to include municipally owned utilities, which under current law do not have to comply with renewable energy laws. Proposition 7 removes the cap on fines that utilities can be penalized with for non-compliance with the Renewables Portfolio Standard (RPS), and prohibits utilities from passing these fines onto ratepayers. The measure would direct the California Energy Commission to create "Solar and Clean Energy Zones," primarily in the desert, to jump start construction of clean energy plants.

Proposition 7 has pitted environmentalists and renewable energy advocates against each other, each having opposing interpretations of what the impact of Proposition 7 will be. Legal challenges by both the 'yes on 7' and 'no on 7' campaigns were thrown out by a judge, allowing each side to continue asserting very different arguments about what Proposition 7 would do if passed.

Proponents argue that global climate change is a crisis that calls for urgent action and that Proposition 7 is a visionary and practical way to help our state and nation move more rapidly into renewable energy. Opponents argue that proposition is a poorly written initiative that will do more harm for renewable energy than good. Opponents also argue that Proposition 7 could shut out many renewable energy producers and significantly raise consumer electricity bills. If passed, the California Legislature may amend Proposition 7 with a 2/3rds vote, consistent with its purpose.

