IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00859-WJM-BNB

AMERICAN TRADITION INSTITUTE and
ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL, in his official capacity only,
JAMES TARPEY, in his official capacity only, and
PAMELA PATTON, in her official capacity only,

Defendants,

and

ENVIRONMENT COLORADO,
CONSERVATION COLORADO EDUCATION FUND,
SIERRA CLUB,
THE WILDERNESS SOCIETY,
SOLAR ENERGY INDUSTRIES ASSOCIATION, and
INTERWEST ENERGY ALLIANCE,

Defendant-Intervenors.

DEFENDANTS AND DEFENDANT-INTERVENORS'
EARLY MOTION FOR SUMMARY JUDGMENT ON CLAIMS 1 AND 2

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INTRODUCTION

In 2004, Colorado voters approved Amendment 37, which established a Renewable Energy Standard for the State of Colorado (the "Colorado RES" or "RES"). The Colorado RES requires electric utilities to provide a percentage of their retail electricity sales from certain forms of eligible energy sources, such as wind, solar, methane captured from coal mines, and recycled energy (collectively, "renewable energy"). Providing a percentage of electricity from renewable energy resources—rather than coal, oil, or natural gas—significantly benefits the electric power system, the environment, and the economy. Since Amendment 37's passage, the Colorado General Assembly has amended the RES three times to increase the amount of renewable energy utilities must provide.

Plaintiffs American Tradition Institute and Rod Lueck (collectively, "ATI") ask the Court to strike down the RES on dormant Commerce Clause grounds. The crux of ATI's case involves Claims 1 and 2 of the Second Amended Complaint, which challenge the RES's central requirement that utilities provide a certain amount of renewable energy. ATI asserts that the RES provisions challenged in Claims 1 and 2 (the "Renewable Energy Mandate"): (1) discriminate against interstate commerce, (2) improperly regulate commerce outside Colorado, and (3) fail the dormant Commerce Clause's "Pike balancing test" because they unduly burden interstate commerce.

ATI's claims are meritless. First, the undisputed facts show that the Renewable Energy Mandate does not discriminate against interstate commerce because it treats in-state and out-of-state interests the same. Second, the Mandate does not regulate extraterritorially because it merely establishes standards that Colorado utilities must meet. Out-of-state entities are free to

sell renewable and non-renewable energy into Colorado and elsewhere. Third, the Mandate does not unduly burden commerce between Colorado and other states.

ATI does not allege that the impacts of the Renewable Energy Mandate provisions fall more heavily on out-of-state companies, or that they disrupt commerce between Colorado and other states. Instead, ATI claims that the Mandate increases electricity rates, decreases electricity reliability, and hurts the fossil fuel industry generally. ATI's concerns amount to nothing more than a policy dispute over the value of renewable energy and Colorado's decision to support it. They do not allege a cause of action under the dormant Commerce Clause.

The undisputed facts show that Defendants and Defendant-Intervenors Environment Colorado, Conservation Colorado Education Fund, Sierra Club, The Wilderness Society, and Interwest Energy Alliance (collectively, the "Defendants") are entitled to judgment on Claims 1 and 2 of ATI's Second Amended Complaint.[1]

MOVANTS' STATEMENT OF MATERIAL FACTS

A. Amendment 37: Colorado Voters Create The Colorado Renewable Energy Standard

1. In 2004, Colorado voters passed Amendment 37, a ballot initiative creating the Colorado RES. See Legislative Council of the Colo. Gen. Assembly, Analysis of the 2004 Ballot Proposals 13–17, 38–44 (2004) (the "2004 Bluebook") (Ex. 1 to Michael A. Hiatt Decl.) (all exhibits cited below are exhibits to the Hiatt declaration). At that time, sixteen other states had already passed renewable energy requirements. Id. at 13. Colorado, however, was the first

[1] Defendant-Intervenors Environment Colorado, Conservation Colorado Education Fund, Sierra Club, and The Wilderness Society also support the early summary judgment motion filed by Defendants and Defendant-Intervenor Solar Energy Industries Association, which shows that Plaintiffs do not have standing to litigate any of the claims in the Second Amended Complaint.

state to enact a RES through popular vote. U.S. Dep't of Energy, Database of State Incentives for Renewables & Efficiency, Colorado (Ex. 2).

2. Amendment 37 required certain Colorado electric utilities to provide 10% of their retail electricity sales from renewable energy sources by 2015. 2004 Bluebook at 13. Amendment 37 also included provisions to limit increases to residential electric bills and provide financial incentives for utility customers to invest in renewable energy. Id. at 13–14.

3. When voters approved Amendment 37, the Colorado legislature's official "Bluebook" describing the 2004 ballot initiative presented the "arguments for" and "arguments against" the RES's renewable energy mandate. Id. at 15–16. The arguments for adopting the RES included increasing Colorado's energy diversity; reducing the State's vulnerability to volatile fossil fuel prices; reducing air, water, and greenhouse gas pollution; reducing water consumption; increasing the stability and security of Colorado's electricity supply; and boosting the State's rural economies. Id. at 15.

4. The Bluebook "arguments for" the RES are consistent with the conclusions reached by numerous studies. The U.S. Department of Energy, the U.S. Environmental Protection Agency, and other researchers have concluded that generating electricity from renewable energy sources provides significant benefits to the electric power system, the environment, and the economy. See, e.g., Debra Lew et al., Nat'l Renewable Energy Lab. ("NREL"), The Western Wind and Solar Integration Study Phase 2 (2013) (Ex. 3); Ryan Wiser et al., Lawrence Berkeley Nat'l Lab. & NREL, Recent Developments in the Levelized Cost of Energy from U.S. Wind Power Projects (2012) (Ex. 4); U.S. Envtl. Prot. Agency, Assessing the Multiple Benefits of Clean Energy (2011) (Ex. 5); Jordan Macknick et al., NREL, A Review of

Operational Water Consumption and Withdrawal Factors for Electricity Generating Technologies (2011) (Ex. 6); NREL, Western Wind and Solar Integration Study Phase 1 (2010) (Ex. 7); U.S. Dep't of Energy, 20% Wind Energy by 2030 (2008) (Ex. 8).

5. Many of the objections ATI raises to the RES in this lawsuit were previously presented in the 2004 Colorado Bluebook's "arguments against" Amendment 37. These include claims that electricity from renewable energy may be more expensive than fossil fuel-generated electricity, that Colorado consumers may pay more for electricity after the RES's passage, that the RES may decrease the reliability of Colorado's electricity, and that the use of renewables "should be a choice not a mandate." 2004 Bluebook at 16; 2d Am. Compl. ¶¶ 72–92 (ECF No. 163).

6. Fifty-four percent of Colorado voters voted to approve Amendment 37 in 2004. Colo. Sec'y of State, Official Publication of the Abstract of Votes Cast for the 2003 Coordinated, 2004 Primary, and 2004 General Election 139–40 (Ex. 9).

7. After Amendment 37's passage, in 2005 the General Assembly codified the RES at Colo. Rev. Stat. § 40-2-124. See 2005 Colo. Legis. Serv. Ch. 63 (S.B. 05-143) (West).

B. 2007, 2010, And 2013 RES Amendments: The General Assembly Repeatedly Strengthens The Renewable Energy Mandate

8. The centerpiece of the RES is its Renewable Energy Mandate, which requires Colorado utilities to provide a percentage of their retail electricity sales from renewable energy sources.[2] See 2d Am. Compl. ¶¶ 137–41 (citing RES sections that impose the Mandate); ATI

[2] The RES allows utilities to meet the Renewable Energy Mandate either by (1) generating or buying renewable power directly, or (2) purchasing Renewable Energy Credits ("RECs"). Colo. Rev. Stat. § 40-2-124(1)(d). A REC is "a contractual right to the full set of non-energy attributes, including any and all credits, benefits, emissions reductions, offsets, and allowances . . . directly

Early Summ. J. Mot. at 18 (ECF No. 180) (describing requirement as the RES's "central functional mandate"). Since voters approved Amendment 37 in 2004, the General Assembly has amended the RES three times to increase the Renewable Energy Mandate.

9. In 2007, the General Assembly doubled the Renewable Energy Mandate in Amendment 37 from 10% to 20% renewables by 2020. 2007 Colo. Legis. Serv. Ch. 60 (H.B. 07-1281) (West). The 2007 amendments also expanded the Mandate's scope to apply to additional types of utilities. In addition to the investor-owned utilities (e.g., Xcel Energy) covered under Amendment 37, the 2007 amendments extended the Mandate to cooperative electric associations ("cooperatives") (e.g., Intermountain Rural Electric Association) and large municipally-owned utilities (e.g., Colorado Springs Utilities).[3] The expanded 20% renewables by 2020 mandate applied to investor-owned utilities, while the 2007 amendments required the newly-covered cooperatives and large municipal utilities to provide 10% of their electricity from renewable sources by 2020.

10. In 2010, the General Assembly again increased the RES's Renewable Energy Mandate by increasing the mandate for investor-owned utilities to 30% renewables by 2020. 2010 Colo. Legis. Serv. Ch. 37 (H.B. 10-1001) (West).

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attributable to a specific amount of electric energy generated from a renewable energy resource. One REC results from one megawatt-hour of electric energy generated from an eligible energy resource." 4 Colo. Code Regs. § 723-3-3652(t). The choice of purchasing RECs or directly acquiring renewable energy gives utilities additional flexibility in complying with the Mandate and encourages commerce both in and out of Colorado. For purposes of this motion, "renewable energy" refers both to the purchase of energy directly from a renewable source and the purchase of RECs.

[3] A cooperative electric association is a non-profit corporation or other association that sells electricity at retail to end-use consumers. See, e.g., Colo. Rev. Stat. §§ 40-9.5-101, 40-9.5-102.

11. In 2013, the General Assembly increased the RES's Renewable Energy Mandate a third time by raising the requirements for large cooperatives and making other changes. 2013 Colo. Legis. Serv. Ch. 414 (S.B. 13-252) (West). The 2013 amendments require cooperatives serving 100,000 or more electric meters to provide 20% renewable energy by 2020 to their customers. Smaller cooperatives serving fewer than 100,000 meters and large municipal utilities remain subject to the existing mandate of 10% renewables by 2020.

12. In sum, the RES's Renewable Energy Mandate currently includes three distinct requirements that vary depending on the type and size of the electric utility. Investor-owned utilities like Xcel must provide renewable energy to supply 30% of retail electricity sales by 2020. Colo. Rev. Stat. § 40-2-124(1)(c)(I)(E). Cooperative electric associations serving 100,000 or more meters must provide renewable energy to supply 20% of their electricity sales by 2020. Id. § 40-2-124(1)(c)(V.5). Cooperatives serving fewer than 100,000 meters and large municipal utilities must provide renewable energy to supply 10% of retail sales by 2020. Id. § 40-2-124(1)(c)(V)(D).

13. Because the RES gradually phases in its renewable energy percentages, the current requirements are lower than what will be required by 2020. From 2011 through 2014, investor-owned utilities must provide 12% of retail electricity sales from renewables. Id. § 40-2-124(1)(c)(I)(C). During this same time period, smaller cooperatives and large municipal utilities must provide 3% of retail electricity sales from renewable energy sources. Id. § 40-2-124(1)(c)(V)(B).[4]

[4] Xcel Energy, Colorado's largest electric utility, is ahead of schedule in meeting the 30% renewables by 2020 mandate. Xcel Energy, 2014 Renewable Energy Standard Plan Section 1, Page 3 (2013) (Ex. 10). In addition, Xcel recently announced plans to purchase significant

14. Today, thirty states and the District of Columbia have mandatory renewable energy standards with various renewables requirements. U.S. Energy Info. Admin., Most states have Renewable Portfolio Standards (Ex. 12).

C. ATI's Dormant Commerce Clause Claims

15. ATI filed this lawsuit on April 4, 2011. ECF No. 1. At the time, ATI's lead counsel described the goal of the case as "to put wind [energy] on trial."[5]

16. Claims 1 and 2 of ATI's Second Amended Complaint allege that the RES's Renewable Energy Mandate violates the dormant Commerce Clause by discriminating against interstate commerce and imposing an undue burden on interstate commerce. 2d Am. Compl. ¶ 138; see also id. ¶¶ 2, 57–114. ATI describes the Renewable Energy Mandate as the "central functional" part of the RES. ECF No. 180 at 18.[6]

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quantities of wind and solar energy that are above and beyond the RES's requirements because wind and solar are "the most reliable and most cost-effective resources" today. Jeff Stanfield, Xcel Energy asks Colo. PUC to approve solar as cost-competitive with gas plants, SNL Financial, Sept. 10, 2013 (Ex. 11).

[5] David Schnare, Putting Wind on Trial, Jefferson Policy Journal (Mar. 31, 2011) (Ex. 13).

[6] This motion does not seek summary judgment on Claims 3 through 6 of ATI's Complaint, which involve two peripheral RES provisions. Claims 3 and 4 address the requirement that a small part (currently 1.25%) of investor-owned utilities' retail electricity sales be generated from smaller-scale, non-centralized renewable energy sources known as "distributed generation." Colo. Rev. Stat. § 40-2-124(1)(c)(I)(C); 2d Am. Compl. ¶¶ 142–46 (Claims 3 and 4). Distributed generation often consists of solar panels installed on-site at residences and businesses, and benefits utilities and consumers by reducing energy losses through transmission. See, e.g., Colo. Rev. Stat. § 40-2-124(1)(a)(VIII). Claims 5 and 6 challenge an RES provision affecting how renewable energy requirements are calculated for cooperatives and municipally-owned utilities. 2d Am. Compl. ¶¶ 147–51; Colo. Rev. Stat. § 40-2-124(1)(c)(IX). Regardless of this lawsuit, that provision will expire on December 31, 2014. Id. While they present issues of fact, Claims 3-6 are meritless for the reasons discussed in Defendants' response to Plaintiffs' summary judgment motion.

17. ATI claims the RES's Renewable Energy Mandate discriminates against interstate commerce because it requires minimum percentages of retail electricity sales in Colorado to be generated or purchased from renewable energy sources, rather than from coal, natural gas, and other fossil fuels. 2d Am. Compl. ¶¶ 57–59, 65. According to ATI, "nonrenewable interstate electricity generating sources may not compete for the renewable set-aside portion" of the Colorado electricity market. Id. ¶ 138.

18. On their face, none of the Renewable Energy Mandate provisions challenged in Claims 1 and 2 distinguish between in-state and out-of-state energy sources. Id. ¶¶ 137–41; Colo. Rev. Stat. §§ 40-2-124(1)(c)(I), (1)(c)(V), (1)(c)(V.5), (3), (4).

19. ATI does not allege that the Renewable Energy Mandate has the effect of favoring Colorado fossil fuel generating sources (i.e., coal or natural gas-fired power plants) over out-of-state fossil fuel plants. See 2d Am. Compl. ¶¶ 2, 59; ATI Resp. to Interrog. 1, Aug. 28, 2013 (Ex. 14) (providing no substantive answer to interrogatory seeking information on whether fossil fuel-generated power plants outside Colorado have been affected by the RES "to a greater degree, or in a different manner than" their in-state counterparts).

20. In its motion for early summary judgment, ATI concedes that "the RES'[s] practical effect has been to allow utilities to use out-of-state renewable generation to meet the Colorado renewable quotas." ECF No. 180 at 19; see also id. at 4.

21. ATI also claims the RES has the purpose of discriminating against interstate commerce. 2d Am. Compl. ¶¶ 60–64. In support of this allegation, ATI cites the legislative declaration of intent for Amendment 37, which lists purposes that include attracting new businesses and jobs, promoting rural economic development, and diversifying Colorado's energy

resources. Id. ¶ 60. ATI's summary judgment motion cites similar statements by the Colorado Public Utilities Commission, and supporters of the 2013 RES amendments, expressing the view that renewable energy development yields economic benefits to Colorado. ECF No. 180 at 6–7. ATI has offered no other evidence of a discriminatory intent behind passage of the RES.

22. ATI claims the Renewable Energy Mandate imposes an impermissible burden on interstate commerce because it (1) reduces the market for coal producers;[7] (2) increases electricity prices in Colorado;[8] (3) decreases electricity reliability in Colorado;[9] and (4) causes adverse environmental impacts, including increased air pollution, noise pollution, and bird deaths.[10]

23. None of the burdens alleged by ATI have a greater impact outside of Colorado than in this state, or affect out-of-state companies more heavily than Colorado companies. See Tanton Dep. 85:21–86:10, Aug. 7, 2013 (Ex. 15) (ATI expert Tanton did not evaluate whether impacts of RES were different for coal producers inside or outside Colorado); ATI Resp. to Interrogs. 1–2, Aug. 28, 2013 (Ex. 14) (no answer to interrogatories seeking information on whether fossil fuel-generated power plants and coal producers outside Colorado have been affected by the RES "to a greater degree, or in a different manner than" their in-state

[7] 2d Am. Compl. ¶¶ 65, 138; Robert J. Michaels Expert Report at 25–29 (ECF No. 177-5, ATI 000377–81); Thomas Tanton Expert Report at 11–14 (ECF No. 177-4, ATI 000090–93).

[8] 2d Am. Compl. ¶¶ 84–92, 117–33; Tanton Expert Report at 14–20 (ATI 000093–99).

[9] 2d Am. Compl. ¶¶ 72–83; Tanton Expert Report at 22–28 (ATI 0000101–07).

[10] 2d Am. Compl. ¶¶ 64, 96–107; Greg Walcher Expert Report at 8 (ECF No. 177-2, ATI 000160); Tanton Decl. at 18–22 (ECF No. 12-2). Defendants dispute all of the burdens alleged by ATI.

counterparts); id. at Resp. to Interrog. 3 (asserting that a question about disparate impact to persons inside and outside of Colorado is "irrelevant").

24. Data from the U.S. Energy Information Agency (EIA) shows that since the RES was implemented, the percentage of Colorado electricity generated by coal has declined relative to other sources of energy. EIA, Colorado State Profile & Energy Estimates (Ex. 16). Nevertheless, in 2011, coal-fired power generation still accounted for 66% of the electricity generation in Colorado; which is substantially greater than the 42% average market share for coal nationally. EIA, Colorado State Energy Profile (Ex. 17); EIA, AEO2013 Early Release Overview (Ex. 18).

25. According to EIA data, coal used to generate electricity in Colorado has increasingly come from other states since the RES took effect. Since the RES was enacted, out-of-state coal has supplied an increasing share of the Colorado market, while the percentage of electricity generated by coal mined in this state has declined from 57.5% in 2008 to 44.1% in 2012. Michael A. Hiatt Decl. ¶ 23 (Attach. A); see also Michaels Expert Report at 28–29 (ATI 0000380–81) (stating that Colorado coal production has decreased by 33% since 2002, but the state has "continued importing coal from" Wyoming).

26. ATI expert witness Robert Michaels concludes that Colorado has gone from being a net exporter of electricity to a net importer since the RES took effect. Michaels Expert Report at 28 (ATI 000380). Michaels' report states that in 2007, generators in Colorado produced nearly 3,000 gigawatt-hours more electricity than were sold in this state. Id. at 65 (ATI 000417). Michaels states that by 2010, the balance had reversed, with Colorado electricity sales exceeding in-state production by 2,000 gigawatt-hours. Id.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." When ruling on a summary judgment motion, the Court draws all reasonable inferences in the record in favor of the nonmoving party. Hansen v. PT Bank Negara Indonesia (Persero), 706 F.3d 1244, 1247 (10th Cir. 2013). However, where (as here) the non-moving party bears the ultimate burden of persuasion on the merits, summary judgment is appropriate if the movant shows a lack of evidence to support an essential element of the nonmoving party's claims. Id.; Bausman v. Interstate Brands Corp., 252 F.3d 1111, 1115 (10th Cir. 2001). Furthermore, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

ARGUMENT

The Commerce Clause of the U.S. Constitution grants the federal government authority to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign nations, and among the several States . . . ."). The Supreme Court has long recognized a corollary known as the dormant Commerce Clause, which generally prohibits states from enacting laws "designed to benefit in-state economic interests by burdening out-of-state competitors." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)). As the Court has explained, the dormant Commerce Clause case law "is driven by concern about 'economic

protectionism'" and states "retreating into . . . economic isolation." Id. (quoting Limbach, 486 U.S. at 273–74, and Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996)).

State laws may run afoul of the dormant Commerce Clause in three ways. Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1307 (10th Cir. 2008). First, laws that discriminate against commerce from other states are "virtually per se invalid" and are upheld only if they "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Davis, 553 U.S. at 338 (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99, 101 (1994)). Second—under what is commonly referred to as the "Pike balancing test"—state laws that do not discriminate, but instead regulate evenhandedly, "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Id. at 338–39 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Third, a state law may violate the dormant Commerce Clause if it has the "practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." Quik Payday, 549 F.3d at 1307 (quoting KT & G Corp. v. Att'y Gen. of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008)).

ATI has made no allegations, and offered no evidence, showing that the RES's Renewable Energy Mandate (1) discriminates against commerce between Colorado and other states, or (2) burdens such commerce within the meaning of the dormant Commerce Clause's Pike balancing test. Instead, ATI addresses the costs and benefits of renewable energy compared to fossil fuels both inside and outside of Colorado. These arguments may bear on the wisdom of Colorado's renewable energy policy, but they do not support a cause of action under the dormant Commerce Clause. Likewise, ATI has failed to properly allege, and offered no evidence, that the

RES directly controls commerce occurring wholly outside Colorado. As a result, Defendants are entitled to judgment as a matter of law on Claims 1 and 2 of the Second Amended Complaint.

I. The RES's Renewable Energy Mandate Does Not Discriminate Against Commerce Between Colorado And Other States.

A. The Mandate does not discriminate against interstate commerce because it treats in-state and out-of-state economic interests evenhandedly.

"Discrimination" in the dormant Commerce Clause context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (quoting Or. Waste Sys., 511 U.S. at 99, and Limbach, 486 U.S. at 273). Discrimination may be (1) clear from the statute's face, or the state law may discriminate (2) in effect, or (3) in purpose. Id.; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981). The RES's Renewable Energy Mandate provisions do not discriminate against interstate commerce on their face, or in their purpose or effect.

1. Facial discrimination

The Renewable Energy Mandate provisions at issue in Claims 1 and 2 of ATI's complaint do not facially discriminate because those provisions make no distinction between in-state and out-of-state energy generators. See Colo. Rev. Stat. § 40-2-124(1)(c)(I), (1)(c)(V), (1)(c)(V.5), (3), (4); Statement of Material Facts ("SOF"), supra, ¶ 18. The Mandate requires Colorado utilities to generate or purchase (directly or through RECs) minimum amounts of renewable energy. On their face, none of the Mandate provisions provide differential treatment based on whether that renewable energy is generated in-state or out-of-state. Utilities are free to generate or purchase renewable energy out-of-state if they choose, and the RES's Renewable

Energy Mandate erects no barriers to doing so as long as the energy meets the same standards to which Colorado sources are subject.

Moreover, the RES does not treat out-of-state fossil fuel producers differently from Colorado fossil fuel producers. While the Renewable Energy Mandate may displace some fossil fuel-fired generation and replace it with renewables, the law treats coal and natural gas interests the same whether they are inside or outside of Colorado. SOF ¶ 18. Unlike state laws that courts have struck down because they facially discriminate, the RES on its face does not treat in-state and out-of-state economic interests differently. Cf. Granholm v. Heald, 544 U.S. 460, 473–76 (2005); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 100 (1994).[11]

2. Discriminatory effect

The Renewable Energy Mandate also does not discriminate in practical effect against commerce from states outside Colorado. Fossil fuel generating plants outside Colorado are not burdened relative to their Colorado counterparts. SOF ¶¶ 19–20. Nor do the RES provisions challenged in Claims 1 and 2 treat renewable energy producers outside Colorado differently from those in this state. ATI does not claim otherwise. In its early motion for summary judgment, ATI even admits that the "RES'[s] practical effect has been to allow utilities to use out-of-state renewable generation to meet the Colorado renewable quotas." SOF ¶ 20. Moreover, ATI's own

[11] ATI's complaint quotes Illinois Commerce Commission v. FERC, 721 F.3d 764, 776 (7th Cir. 2013) in support of Claim 1. See, e.g., 2d Am. Compl. ¶ 138. Illinois Commerce Commission is inapposite because that case did not involve a dormant Commerce Clause challenge to Michigan's renewable energy standard. The language quoted by ATI is just a passing statement in dicta that a state law "forbid[ding] Michigan utilities to count renewable energy generated outside the state toward satisfying the requirement[s]" of the state's renewable energy standard would have dormant Commerce Clause problems. 721 F.3d at 775–76. Moreover, the Michigan case is also inapposite because the Colorado RES contains no prohibition on using out-of-state renewables to comply with the statute.

expert, Robert Michaels, concludes that out-of-state electricity producers have improved their competitive position in Colorado since the RES's enactment. Michaels asserts that out-of-state energy providers have supplied an increasing share of Colorado's electricity since the RES was enacted. SOF ¶ 26.

The same is true of coal imported to Colorado from other states for power generation. EIA data shows that since the RES was implemented, out-of-state coal has supplied an increasing share of the Colorado market compared to Colorado coal suppliers. SOF ¶ 25. The RES thus does not discriminate against interstate commerce in practical effect. Cf. C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390–94 (1994) (striking down state law because its "practical effect and design" prevented out-of-state firms from entering the local market); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350–52 (1977) (striking down state law with the "practical effect" of discriminating against out-of-state products).

3. Discriminatory purpose

The RES also has no discriminatory purpose in regards to commerce from states outside Colorado. ATI alleges that the "legislative declaration of intent" for Amendment 37 and various statements by Colorado's elected officials show that the RES aims to attract new businesses and jobs, promote rural development, and diversify Colorado's energy resources. SOF ¶ 21. These statements, however, make no suggestion that the state would achieve these goals by disparately burdening out-of-state economic interests. Accordingly, these references fall far short of showing any discriminatory purpose behind the RES. As the Supreme Court has explained, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," and such laws are valid so long as they do not

discriminate against interstate commerce. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984); see also Clover Leaf Creamery, 449 U.S. at 463 n.7, 471 n.15 (courts should not impute a discriminatory purpose to a state law simply because the legislative history shows that "some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry"); Rocky Mountain Farmers Union v. Corey, No. 12-15131, 2013 WL 5227091, at *22 n.13 (9th Cir. Sept. 18, 2013) (selective quotes regarding a law's economic benefits do not show discriminatory purpose if they "do not plausibly relate to a discriminatory design").[12]

B. The RES's differential treatment of renewable energy and fossil fuels is not discrimination against interstate commerce.

ATI's claim that the Renewable Energy Mandate impermissibly discriminates against interstate commerce is premised on a fundamental misunderstanding of dormant Commerce Clause jurisprudence. ATI's central theory appears to be that the RES discriminates against interstate commerce by favoring renewable energy over coal and natural gas-generated electricity. See SOF ¶¶ 16–17. According to ATI, coal and natural gas—and the electricity generated from them—are articles sold in interstate commerce and the RES decreases the market for these goods; therefore the RES impermissibly discriminates against interstate commerce. Id. That is not the law.

The Colorado RES does not violate the dormant Commerce Clause because it "discriminates" against fossil fuel-generated electricity in favor of renewable energy. The relevant discrimination for dormant Commerce Clause purposes is "differential treatment of in-

[12] Bacchus found a dormant Commerce Clause violation because the Court found strong evidence of both discriminatory purpose going well beyond a "legislative declaration of intent" regarding economic development, and a discriminatory effect. 468 U.S. at 270–71.

state and out-of-state economic interests," not differential treatment of certain goods or services. United Haulers, 550 U.S. at 338. ATI's theory that any reduction in the market for a good or service sold in different states is discrimination against interstate commerce is contrary to Supreme Court precedent. In Clover Leaf Creamery, the Court held that a state law that completely banned one type of product (milk sold in nonreturnable plastic containers) in favor of another product (milk sold in paperboard cartons) did not discriminate against interstate commerce because the product ban applied equally to in-state and out-of-state interests. 449 U.S. at 471–72. The Renewable Energy Mandate similarly treats in-state and out-of-state interests evenhandedly. Just as the product ban in Clover Leaf Creamery did not result in discrimination against interstate commerce, the RES does not discriminate against interstate commerce simply because it prefers renewable energy over coal, natural gas, and other fossil fuels.[13] See also Rocky Mountain Farmers Union, 2013 WL 5227091, at *11–22 (upholding California law preferring low carbon fuels, such as ethanol, over high carbon fuels, such as crude oil); Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown, 567 F.3d 521, 527 (9th Cir. 2009) (states "may prevent businesses with certain structures or methods of operation from participating in a retail market without violating the dormant Commerce Clause").

The fact that electricity happens to be sold in interstate commerce does not call into question Colorado's authority to regulate how power sold in this state is generated. The Supreme Court has explained that regulation of electric utilities is one of the most important traditional state functions, and a state's power to regulate is at its greatest when it involves such

[13] Moreover, the RES's impact on fossil fuels comes nowhere close to the outright product ban upheld in Clover Leaf Creamery, as Colorado utilities will remain free to generate between 70% and 90% of their electricity from fossil fuels after 2020.

traditional state matters. Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Co., 461 U.S. 375, 377–78 (1983) ("[R]egulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 670 (1981) ("It may be said with confidence . . . that a State's power to regulate commerce is never greater than in matters of traditionally local concern."). As the Supreme Court has held, "[s]tates retain 'broad power' to legislate protection for their citizens in matters of local concern," and "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976).

The states' traditional authority over utility regulation extends to favoring one form of electricity generation over another. The Federal Energy Regulatory Commission ("FERC") has made clear that states have the authority "to favor particular generation technologies over others." S. Cal. Edison Co., 70 FERC ¶ 61,215, at 61,676 (1995); see also Cal. Pub. Utilities Com'n, 134 FERC ¶ 61,044, at 61,160 (2011) ("[S]tates have the authority to dictate the generation resources from which utilities may procure electric energy."). FERC has further stated that the federal government "respect[s] the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways." S. Cal. Edison Co., 70 FERC at ¶ 61,676; see also New York v. FERC, 535 U.S. 1, 24 (2002) (noting that states retain "significant control" over retail utility regulation, including "authority over utility generation and resource portfolios"). And recently, FERC acknowledged the legitimacy of state laws like the RES by ordering interstate electric transmission providers to plan for how transmission systems

can convey power among the states to comply with such renewable energy mandates. FERC Order No. 1000, 136 FERC ¶ 61,051, at ¶¶ 1–2, 82, 203 (2011).

While ATI disagrees with Colorado's policy decision to require the use of renewable energy, that policy falls well within the state's traditional authority to regulate electric utilities. The undisputed facts show that the Renewable Energy Mandate does not discriminate against out-of-state renewable energy sources compared to Colorado renewable energy generators. As a result, the Mandate does not violate the dormant Commerce Clause.

II. The RES Does Not Directly Control Commerce Occurring Wholly Outside Colorado.

The Renewable Energy Mandate also does not impermissibly regulate extraterritorial commerce. A state law exerts extraterritorial control over out-of-state commerce if it "directly controls commerce occurring wholly outside the boundaries of [the] State." Healy v. Beer Inst., 491 U.S. 324, 336 (1989); see also Quik Payday, 549 F.3d at 1307. As the Defendants explain in detail in the response to ATI's early motion for summary judgment, the RES does not violate the extraterritorial doctrine because it does not exert any direct control over commerce occurring wholly outside Colorado's borders. See Defs.' Resp. to Pls.' Early Mot. for Partial Summ. J. (filed Sept. 30, 2013).[14]

First, the RES does not directly control commerce occurring outside Colorado because out-of-state entities are free to generate electricity in whatever manner they wish and can sell

[14] Neither ATI's Second Amended Complaint, nor its "Statement of Claims" in the Scheduling Order, allege that the RES impermissibly regulates extraterritorial commerce. See 2d Am. Compl.; ECF No. 149 at 3–6. Because the argument falls outside the claims raised by ATI's Complaint, it cannot serve as the basis for awarding judgment in ATI's favor. Nonetheless, we address the argument to show why it is meritless.

electricity into Colorado regardless of how the energy is generated. Out-of-state entities may choose to take advantage of the Renewable Energy Mandate by generating renewable energy for sale into Colorado, but that incentive does not violate the dormant Commerce Clause. Courts have repeatedly recognized that a law does not exert improper extraterritorial control simply because it may influence out-of-state conduct. See, e.g., Rocky Mountain Farmers Union, 2013 WL 5227091, at *23–28; Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 219–21 (2d Cir. 2004); Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 80–83 (1st Cir. 2001), aff'd 538 U.S. 644 (2003). Second, the RES does not control commerce occurring wholly outside Colorado because it only affects out-of-state entities that choose to sell renewable energy (or RECs) to Colorado utilities. If a party to a commercial transaction is in-state, "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." Quik Payday, 549 F.3d at 1308; see also Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1224 (9th Cir. 2003) (same). Accordingly, the RES does not regulate extraterritorially.

III. The Economic And Environmental Impacts Alleged By ATI Do Not Represent Burdens On Interstate Commerce Within The Meaning Of Pike.

ATI's challenge to the Renewable Energy Mandate also fails under the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Under Pike, the Court considers whether a law's burdens to interstate commerce are clearly excessive in relation to the local benefits. Id.; Kleinsmith v. Shurtleff, 571 F.3d 1033, 1040 (10th Cir. 2009). "State laws frequently survive this Pike scrutiny . . . ." Davis, 553 U.S. at 339. Summary judgment on ATI's Pike claims is appropriate because none of the impacts alleged are burdens to interstate

commerce within the meaning of the Pike test. Instead, ATI attempts to misuse the Pike test as a vehicle for raising its policy objections to the wisdom of the Renewable Energy Mandate.

Not all costs resulting from a state law implicate the dormant Commerce Clause. If a state regulation causes consumer prices to increase or otherwise burdens consumers, that "relates to the wisdom of the statute, not to its burden on commerce." Exxon Corp. v. Governor of Md., 437 U.S. 117, 128 (1978). Instead, a state law may fail the Pike test only if it imposes a burden that falls disproportionately on commerce from other states relative to in-state commerce. In V-1 Oil Company v. Utah State Department of Public Safety, the Tenth Circuit explained:

> The incidental burdens of the Pike inquiry are the burdens on interstate commerce that exceed the burdens on intrastate commerce. Such incidental burdens might also include the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant [S]tate, and impacts that fall more heavily on out-of-state interests.

131 F.3d 1415, 1425 (10th Cir. 1997) (emphases added and internal quotation marks and citations omitted); see also Freedom Holdings, 357 F.3d at 217 (under Pike, "[t]he statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." (emphasis added)).

The Supreme Court has similarly concluded that a state law fails the Pike test only if the law (1) imposes disparate burdens on out-of-state economic interests, or (2) "undermine[s] a compelling need for national uniformity in regulation." Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997) (surveying Pike case law); see also Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, No. 12-56822, 2013 WL 4615131, at *11 (9th Cir. Aug. 30, 2013) (same); Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1132 (7th Cir. 1995) (When a law "affects interstate shipments, but it does not discriminate against interstate

commerce in either terms or effect," there is "[n]o disparate treatment, no disparate impact, no problem under the dormant Commerce Clause.").

The costs that ATI claims are caused by the Renewable Energy Mandate do not represent burdens on interstate commerce under Pike and V-1 Oil. ATI alleges that the Mandate: (1) increases electricity costs in Colorado; (2) decreases electricity reliability in Colorado; and (3) causes adverse environmental impacts, including increased air pollution, noise pollution, and bird deaths. See SOF ¶ 22. These alleged costs are not burdens on interstate commerce within the meaning of Pike because they affect the economy generally, rather than commerce between Colorado and other states. ATI does not allege that increased electricity costs, decreased electricity reliability, and the environmental impacts alleged to result from the RES impose a burden on commerce between states that exceeds the impacts to commerce within Colorado. Nor does ATI allege that these costs place a disproportionate burden on out-of-state economic interests or commerce from other states. SOF ¶ 23; 2d Am. Compl. ¶¶ 135–36. Therefore, they are not cognizable burdens to interstate commerce under Pike and summary judgment is warranted. See Freedom Holdings, 357 F.3d at 217–18 (when plaintiffs do not raise a "valid claim" under Pike, "a reviewing court need not proceed further"); V-1 Oil, 131 F.3d at 1425.[15]

ATI also appears to claim that the Renewable Energy Mandate imposes an impermissible burden on interstate commerce by reducing the market for coal producers. SOF ¶ 22. The RES's impact on the coal industry is not a cognizable burden on interstate commerce under Pike

[15] The impacts alleged by ATI also do not undermine any compelling need for national uniformity. In deferring to the states' authority to regulate generation and prefer certain resources over others, the federal government has elevated deference to state authority over national uniformity as a policy objective in the field of electricity generation. See supra at 18–19.

because any alleged burden does not fall more heavily on out-of-state coal producers than Colorado producers. If anything, ATI's own expert report suggests the opposite is true: out-of-state coal producers have increased their Colorado market share since the RES took effect. SOF ¶ 25. Moreover, Colorado continues to provide a significant market for both in-state and out-of-state coal producers, as coal accounts for a much larger percentage of Colorado's energy portfolio than any other source, and a larger share than in most other states. SOF ¶ 24.

The fact that coal producers and electric utilities are engaged in interstate commerce does not make any and all laws affecting those companies a dormant Commerce Clause issue. In Exxon, the Supreme Court explained that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." 437 U.S. at 127. Exxon explained that the dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Id. at 127–28; see also Rocky Mountain Farmers Union, 2013 WL 5227091, at *15 ("[T]he dormant Commerce Clause does not guarantee that . . . producers may compete on the terms they find most convenient."); Quik Payday, 549 F.3d at 1309 ("[T]he benefit-to-burden calculation is based on the overall benefits and burdens that the statutory provision may create, not on the benefits and burdens with respect to a particular company or transaction."). While the Renewable Energy Mandate may cause electricity generation to shift from coal companies to wind farms, that impact does not pose a burden on interstate commerce within the meaning of the Pike test. Wind and other renewable power involve interstate commerce, just as coal-fired power does.

At bottom, ATI disagrees with the policy choices made by Colorado voters and the General Assembly when they adopted and repeatedly strengthened the RES. SOF ¶¶ 1–14. By seeking to "put wind [power] on trial," SOF ¶ 15, ATI asks this Court to undertake a broad cost-benefit analysis of the RES's Renewable Energy Mandate that goes far beyond evaluating its impacts to commerce between Colorado and other states. The far-reaching inquiry sought by ATI is not the Court's role under the dormant Commerce Clause. In no case has the Supreme Court or the Tenth Circuit ever applied the Pike test to engage in the type of generalized, economy-wide cost-benefit analysis advocated by ATI, as opposed to weighing specific burdens on out-of-state interests.[16]

Courts, in fact, have long cautioned against using the Pike balancing test as license for a roving judicial inquiry into the wisdom of state laws. Today, "[i]nterstate communication and transportation is pervasive," and most companies—in almost any industry—do business across state lines. Nat'l Paint & Coatings, 45 F.3d at 1130. As a result, "almost every state and local law" affects goods and services that may be in interstate commerce to some extent. Id. at 1130–31. The dormant Commerce Clause, however, should not be used "to rigorously scrutinize

[16] See, e.g., United Haulers, 550 U.S. at 346 (noting the absence of any "disparate impact on out-of-state as opposed to in-state businesses" and summarily ruling that any other burdens would not outweigh the benefits); Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 526 (1989) (Pike burden analyzed by Court was a decrease in out-of-state gas production relative to in-state gas production); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (Pike burden analyzed by Court was the ability of one state to block securities transactions in other states); Clover Leaf Creamery, 449 U.S. at 472–73 (Pike burdens analyzed by Court were the burden on the free flow of commerce between states and the burden on interstate firms operating in-state); Kassel, 450 U.S. at 671, 674–75 (Pike burdens analyzed by Court were need for national uniformity in trucking regulation and a shift in safety burdens to other states); Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000) (Pike burdens analyzed by the court were fees and registration requirements on out-of-state business); V-1 Oil, 131 F.3d at 1425–27 (Pike burdens analyzed by the court were fees on out-of-state businesses).

economic legislation passed under the auspices of the police power." United Haulers, 550 U.S. at 347. As the Supreme Court recently noted, "[t]here was a time when this Court presumed to make such binding judgments for society, under . . . Lochner v. New York," 198 U.S. 45 (1905), and "[w]e should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause." United Haulers, 550 U.S. at 347.

ATI asks this Court to do just that. ATI's claims of increased electric costs, reduced reliability, and environmental impacts present policy objections that have already been rejected by Colorado voters and the legislature (as well as numerous agencies and researchers). SOF ¶¶ 3–14. If the costs alleged by ATI gave rise to cognizable Pike claims, "then judicial review of statutory wisdom after the fashion of Lochner would be the norm." Nat'l Paint & Coatings, 45 F.3d at 1131. This Court should reject ATI's invitation to become the policy maker of last resort. Unless the dormant Commerce Clause inquiry is tethered to burdens on commerce between Colorado and other states, virtually all state regulation could be subject to the type of Lochner-esque cost-benefit analysis properly rejected by the courts. The costs ATI alleges are not burdens to interstate commerce within the meaning of Pike, and summary judgment is warranted.

CONCLUSION

For the reasons stated above, the Court should grant summary judgment dismissing ATI's first and second claims for relief with prejudice.

Respectfully submitted September 30, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I filed the foregoing **EARLY MOTION FOR SUMMARY JUDGMENT ON CLAIMS 1 AND 2** with the Court's electronic filing system, thereby generating service upon the following parties of record:

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General Information

Court	United States District Court for the District of Colorado
Nature of Suit	Constitutionality of State Statutes
Docket Number	1:11-cv-00859