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 as Chairman of the Colorado Public Utilities Commission;
JAMES TARPEY, in his official capacity as a Commissioner of the Colorado Public Utilities Commission;
PAMELA PATTON, in her official capacity as a Commissioner of the Colorado Public Utilities Commission;

Defendants,

Defendants,

and

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

Defendant-Intervenors.

DEFENDANTS' EARLY MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LACK OF STANDING

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INTRODUCTION

In their Second Amended Complaint, Plaintiffs American Tradition Institute (ATI) and Rod Lueck challenge three components of the Colorado Renewable Energy Standard (RES) as violating the U.S. Constitution's Dormant Commerce Clause. To support their standing in this case, Plaintiffs rely on Alpha Natural Resources (Alpha), a U.S. mining company with two coal mines in Wyoming, and Lueck, an individual living and working in Colorado. Doc. 156-1 at 35.

In this Motion, Defendants and Defendant-Intervenors Solar Energy Industries Association (collectively, "Defendants") seek summary judgment on all claims because Plaintiffs lack Constitutional and prudential standing. Plaintiffs have not presented evidence sufficient to show that Alpha and Lueck have Constitutional standing. Instead, the undisputed facts show that the RES has not impacted Alpha's sales in Colorado, and Lueck has benefited financially from the RES. Further, prudential standing limitations preclude Plaintiffs' claims because Alpha and Lueck's alleged injuries do not fall within the "zone of interests" that the Dormant Commerce Clause protects, and their alleged harms may only be brought by third parties.[1]

LEGAL BACKGROUND

Article III of the U.S. Constitution establishes jurisdiction for federal courts to hear "cases" and "controversies." U.S. Const. Art. III, § 2. Standing is a component of this "cases and controversies" element, and prevents courts from "usurp[ing] the powers of the political branches." Clapper v. Amnesty Int'l, 133 S.Ct. 1138, 1146 (2013); Summers v. Earth Island Institute, 555 U.S. 488, 492-93 (2009).

The party bringing the lawsuit has the burden to establish the elements of standing. Utah Ass'n of Counties v. Bush, 455 F.3d 1094, 1100 (10th Cir. 2006). "Standing is determined as of the time the action is brought." Id. at 1099. Plaintiffs' burden to prove standing is elevated at the

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[1] Defendant-Intervenor Solar Energy Industries Association also supports the Early Motion for Summary Judgment on Claims 1 and 2 (Doc. 186) filed by Defendants and Defendant-Intervenors Environment Colorado, Conservation Colorado Education Fund, Sierra Club, The Wilderness Society and Interwest Energy Alliance.

summary judgment stage, where a "plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). In this case, Plaintiffs must demonstrate that they have standing as to *each* RES component they challenge under the Dormant Commerce Clause. Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008) ("Standing is not dispensed in gross … a plaintiff must demonstrate standing for each claim"); WildEarth Guardians v. Public Service, 690 F.3d 1174, 1182 (10th Cir. 2012) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); State of Utah v. Babbitt, 137 F.3d 1193, 1204 (10th Cir. 1998) (finding plaintiffs "have not alleged a distinct identifiable injury for each cause of action").

To establish Article III standing, a plaintiff must demonstrate: (1) a "concrete and particularized" injury that is "actual or imminent," (2) "a causal connection between the injury and the conduct complained of," which is "not the result of the independent action of some third party not before the court," and (3) it must be "likely … that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61; Wilderness Soc'y v. Kane Cnty., 632 F.3d 1162, 1168 (10th Cir. 2011).

Beyond these constitutional requirements, courts have adopted prudential standing limitations. Warth v. Sedin, 422 U.S. 490, 499 (1975). "Prudential standing imposes different demands than injury in fact." Wilderness Soc'y, 632 F.3d at 1168. One prudential standing requirement involves the "zone of interest" test, whereby a plaintiff's complaints must fall within the zone of interests protected by the law invoked. Warth, 422 U.S. at 499. In addition, prudential standing principles prohibit a plaintiff from litigating the rights and interests of others. Wilderness Soc'y, 632 F.3d at 1168 (holding plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In 2004, Colorado voters passed the RES by ballot initiative. Doc. 163 at 17. The amended RES, codified at Colorado Revised Statutes (CRS) § 40-2-124, requires that Colorado utilities "generate or cause to be generated" electricity from defined "eligible energy resources," including renewable resources. C.R.S. § 40-2-124 et seq.[2]

2. The RES imposes three relevant requirements on Colorado utilities. First, a percentage of the electricity sold by these utilities must be generated from eligible energy resources by 2020: 30 percent for investor-owned utilities, 20 percent for "Qualifying Wholesale Utilities" and large cooperative utilities, and 10 percent for large municipal and smaller cooperative utilities. C.R.S. § 40-2-124(1)(c)(I), (c)(V)(D) & (c)(V.5). Second, the RES mandates that, for investor-owned utilities, three percent of the above 2020 requirement comes from "distributed-generation" sources; for large cooperative utilities serving more 10,000 meters, one percent of the requirement must come from "distributed-generation" sources; and for smaller cooperative utilities, the distributed generation requirement is three-quarters of one percent. Id. §§ 40-2-124(1)(c)(I)(E); 40-2-124(1)(c)(X) & 40-2-124(1)(c)(X)(A).[3] Third, the RES provides assistance for municipal and cooperative utilities to achieve these requirements: each kilowatt hour of electricity generated from an eligible energy resource that connects to transmission or distribution facilities owned by a municipal or cooperative utility counts as two kilowatt-hours towards satisfying the requirement. Id. § 40-2-124(1)(c)(IX).[4]

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[2] The RES defines eligible energy resources as "recycled energy and renewable energy resources." C.R.S. § 40-2-124(1)(a). Renewable energy is further defined as "solar, wind, geothermal, biomass, new hydroelectricity with a nameplate rating of ten megawatts or less, and hydroelectricity." Id. § 40-2-124(1)(a)(VI).

[3] Distributed generation is defined to include "retail" or "wholesale" distributed generation. Retail distributed generation means "a renewable energy resource that is located on the site of a customer's facilities and is interconnected on the customer's side of the utility meter." C.R.S. § 40-2-124(1)(a)(VIII). Wholesale distributed generation means: "renewable energy resource with a nameplate rating of thirty megawatts or less and that does not qualify as retail distributed generation." Id. § 40-2-124(1)(a)(IX).

[4] The RES allows utilities to meet the rquired amount of renewable energy either by (1)

3. On April 4, 2011, Plaintiffs ATI and Rod Lueck filed suit to challenge several RES provisions. ECF Docket No. (hereinafter, "Doc.") 1. Based in Washington D.C., Plaintiff ATI is a national non-profit organization founded in 2009. See http://www.atinstitute.org/. ATI and its members promote coal energy and dispute the existence of climate change. Id. Plaintiff Rod Lueck is named as an individual plaintiff, is a member of ATI, and a Colorado resident. Doc. 163 at 3-4.

4. On June 24, 2013, Plaintiffs amended their complaint to significantly reduce the scope of this lawsuit. Doc. 163. In six claims for relief, the new complaint challenges three aspects of the RES described above: the percentage requirements of eligible energy resources imposed on Colorado utilities (Claims 1 and 2), the "distributed generation" requirements (Claims 3 and 4), and the 2:1 multiplier available for municipal and cooperative utilities (Claims 5 and 6). Doc. 163 at ¶¶ 137-141; 142-146; 147-151.[5] In their Complaint and Early Motion for Summary Judgment, Plaintiffs maintain that each provision challenged is discriminatory, unlawfully burdens interstate commerce based on the Pike balancing test, and illegally regulates extraterritorially. Id.; Doc. 180.

5. On July 17, 2012, the Court ruled on two motions to dismiss – filed separately by the State Defendants (Doc. 28) and the Intervening Conservation Groups (Doc. 37), which challenged Plaintiffs' constitutional and prudential standing. In responding to the State's motion, Plaintiffs solely relied on Mr. Lueck for standing, claiming he suffered economic injury caused by the RES. Doc. 39 at 3-4. In responding to the Conservation Groups' motion, Plaintiffs argued that Alpha and two unnamed utilities, as members of ATI, also supported Plaintiffs' standing.[6] In denying both Motions, the Court did not rely on Lueck, but based its ruling on alleged injuries

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generating or buying renewable power directly, or by (2) purchasing Renewable Energy Credits (RECs). Colo. Rev. Stat. § 40-2-124(1)(d). For purposes of this motion, "renewable energy" refers both to the purchase of energy directly from a renewable source and the purchase of RECs

[5] Plaintiffs organized Claims 1-6 based on relief sought. Claim 7 is not a cause of action, but a request for attorney fees and costs. Doc. 163, ¶¶ 152-53.

[6] The Court noted that it "d[id] not approve" of Plaintiffs waiting until their oppostion brief to disclose Alpha and the anonymous utilities. Doc. 64 at 12.

to Alpha and the unnamed utilities. Doc. 64 at 12-15. The Court noted the two unnamed utilities could not remain anonymous and would be subject to discovery by Defendants. Id. at 13, n.7.

6. After the ruling on the Motions to Dismiss, Plaintiffs changed course. Instead of subjecting the unnamed utilities to discovery, Plaintiffs ceased relying on them to demonstrate Plaintiffs' standing. Doc. 69 at 4. Plaintiffs now solely rely on Mr. Lueck and Alpha to support their standing. Exh. 1 (Pls.' Supplement Discovery Responses at 1).

7. In response to a subpoena, on November 1, 2012, Alpha produced the affidavit of Larry Deal, Senior Vice President of Western Sales for Alpha, who is most knowledgeable of Alpha's coal sales into Colorado. Doc. 101. Mr. Deal states that Alpha sells coal to Colorado utilities from its two coal mines in Wyoming, and continues to do so. Id. at 2. Deal states that Alpha has no information indicating the RES caused a loss of Alpha coal sales in Colorado. Id.

8. In Colorado, Alpha sells its coal to two coal-fired power plants -- the Comanche and Pawnee power plants -- that are operated by Public Service Corp. of Colorado (PSCo), a subsidiary of Xcel Energy (Xcel). Doc. 186-1 (Michael Hiatt Decl., ¶¶ 24-32); Doc. 101 at 2. Prior to 2009, 100 percent of the coal Xcel purchased for these two plants came from Alpha. Dec. of Craig Romer, ¶ 7. Since then, Xcel has bought less coal from Alpha. Id. According to Xcel, the RES is not the reason why Xcel has purchased less coal from Alpha at these power plants. Id. ¶ 8. Xcel has bought less coal from Alpha because of a competitive market place wherein other coal companies are supplying coal to Xcel at lower prices than Alpha. Id. Xcel has not been using or buying less coal since the RES was adopted. Id.

9. Rod Lueck is a member of ATI. Doc. 163 at 3-4. Lueck formerly received electrical service at his home from a cooperative utility named the Intermountain Rural Electric Association (IREA). Exh. 2 (Lueck Deposition Transcript at 7-8, 121); Exh. 6 (Pls.' Deposition Written Responses at 5). Lueck is no longer a member-customer of IREA. Id. IREA members may receive "capital credits," or dividends, when IREA sales exceed its costs. Exh. 3 (IREA New Consumer Info at 6, 12). At his deposition, Lueck could only speculate about the impact of the RES on his IREA dividends. Exh. 2 (Lueck Deposition Transcript at 124-127). According to

IREA, a customer's capital credits are never guaranteed, and dividends are distributed only when IREA operates at a profit during a given year. Exh. 3 (IREA New Consumer Info at 6, 12). IREA details that the issuance of member credits is at the complete discretion of its Board of Directors, who consider several factors in determining whether to issue dividends. Id.; Exh. 5 (Tanton Deposition Transcript at 69, 80-82).

10. Lueck does not live near wind turbines or wind farms. Exh. 2 (Lueck Deposititon Transcript at 7). Lueck has seen wind turbines when traveling to visit relatives in northeastern Colorado. Id. at 131-36. Bats do not occur in northeastern Colorado near his relatives. Id. (Lueck Deposition Transcript at 146). Lueck provided no evidence that any bird kills have occurred in northeastern Colorado near his relatives. Id. (Lueck Deposition Transcript at 142-44).

11. Lueck is a part-owner of a computer company serving the financial services industry, Techmate. Doc. 163 at 3-4; Exh. 2 (Lueck Deposititon Transcript at 19). Xcel supplies Techmate with electricity. Id. (Lueck Deposititon Transcript at 8, 101). Techmate has purchased certain forms of backup electricity. Id. (Lueck Deposititon Transcript at 52-57, 86). Lueck cannot detail or document past power outages or reductions in power at Techmate's offices. Exh. 1 (Supp. Discovery Responses at 2-3) (October 8, 2012); Doc. 79 at 3-4 (refusing to supporting documentation); Exh. 2 (Lueck Deposition Transcript at 58, 65). Techmate has installed solar panels at its office. Exh. 2 (Lueck Deposition Transcript at 7, 42, 84, 87, 90). Techmate's solar panels were paid in part with a $30,800 solar rebate, which was made available through the RES's solar rebate program. Id.; see C.R.S. § 40-2-124(1)(e).

12. Plaintiffs rely on the expert opinion of ATI's former executive director Thomas Tanton to support their standing. Tanton opines that the RES caused Alpha's reduced coal sale in Colorado. Exh. 4 (Tanton Expert Report at 9). Tanton did not contact Alpha or Xcel upon issuing his opinion. Exh. 5 (Tanton Deposition Transcript at 62-63). Tanton does not know Alpha's process for selling coal in Colorado, and is not aware of any specific coal contracts Alpha may have lost. Id. at 48. Tanton did not consider whether Xcel might have been buying

coal from Alpha's competitors at lower prices. Id. at 49-50. Tanton agreed that the amount of coal burned to generate electricity at Comanche and Pawnee has increased since the RES was adopted. Exh. 5 (Tanton Deposition Transcript at 53-54, 62). Tanton states that IREA customer-members have had their "distributions" reduced due to the RES. Exh. 4 (Tanton Expert Report at 11). Tanton did not opine whether the RES reduced Lueck's dividends.

STANDARD OF REVIEW

Under Fed.R.Civ.P. 56(a), summary judgment should be entered by the district court if "there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, 477 U.S. 242, 248–50 (1986). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit." E.E.O.C. v. Horizon/ CMS Healthcare, 220 F.3d 1184, 1190 (10th Cir. 2000). An issue is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. Allen v. Muskogee, 119 F.3d 837, 839 (10th Cir. 1997).

ARGUMENT

Plaintiff ATI relies on members Alpha and Lueck to satisfy the first requirement of organizational standing.[7] As detailed below, Plaintiffs have failed to present evidence demonstrating that either Alpha or Lueck has standing to challenge the RES provisions included in the Second Amended Complaint.

I. PLAINTIFFS LACK CONSTITUTIONAL STANDING TO CHALLENGE THE RENEWABLE ENERGY STANDARD

A. THE RES DID NOT CAUSE A REDUCTION IN ALPHA'S COAL SALES

Plaintiffs allege that Alpha has suffered an actual injury-in-fact in the form of lost coal sales. Doc. 64 at 13-14 ("suffers injury from losses in sales"). Plaintiffs also contends that the

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[7] For an organization to establish standing, it must demonstrate that "its members would otherwise have standing to sue in their own right, (2) the interest it seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief required requires the participation of individual members in the lawsuit." Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 447 n.3 (10th Cir. 1996). Plaintiffs do not dispute the second and third elements of organizational standing.

RES has caused Xcel to buy less coal from Alpha's Wyoming mines in recent years. Exh. 4 (Tanton Expert Report at 9); Doc. 53-1 at 4 (Tanton Second Decl.). Alpha sells coal to two Colorado coal-fired power plants (Comanche and Pawnee) operated by Xcel. Doc. 101 at 2 (Alpha "currently sells coal to electricity generating facilities in Colorado and intends to market to those facilities in the future"); Doc. 186-1 (Michael Hiatt Decl. ¶ 24) ("Alpha has not sold coal to any other Colorado power plants during this time period").

Plaintiffs cannot demonstrate that the RES as a whole, much less the specific RES provisions Plaintiffs challenge, caused this alleged injury-in-fact to Alpha. Plaintffs are also unable to show that a favorable ruling is likely to redress Alpha's lost sales. See State of Utah v. Babbitt, 137 F.3d 1193, 1202 (10th Cir. 1998); City of Hugo v. Nichols (Two Cases), 656 F.3d 1251, 1264 (10th Cir. 2011); e.g. Mt. Evans, 14 F.3d at 1451 (holding company's injuries not redressible because no guarantee company would be awarded new contract); State of Utah, 137 F.3d at 1213 (holding plaintiff must do more than show relief requested "might" redress plaintiff's injuries).

1. Alpha And Xcel Disavow Any Connection Between The RES And Reduced Sales

The facts completely refute Plaintiffs' allegations regarding causation and redressability. First, Alpha denies that any aspect of the RES, including those provisions challenged, was the reason for its lost sales in Colorado. On November 1, 2012, the company produced an affidavit in response to a subpoena, which states: (1) Alpha "has not performed or received an analysis to determine the impact of the Colorado Renewable Energy Standard on the production or sale of coal produced by Alpha," and (2) Alpha has "not made any determination whether or not coal production or sales by Alpha or the Alpha Affiliated Mines have been or will be reduced or otherwise adversely impacted due to the operation and effects of the RES." Doc. 101 at 2.

Elaborating further, Xcel has confirmed that the RES is *not* the reason it is buying less coal from Alpha. Decl. of Craig Romer, ¶ 7 ("The Colorado Renewable Energy Standard ("RES") and its mandates have not caused or contributed to Xcel buying less coal from Alpha

than in years past"). Instead, Xcel has been buying coal from other companies at lower prices than Alpha's marketed prices. Id. at ¶ 8 ("Since 2009, Alpha's competitors have offered our Comanche and Pawnee power plants coal at prices that are lower than Alpha's"). As Alpha's only Colorado customer demonstrates dispositively, the RES is not causing Alpha's injury-in-fact, and eliminating the RES provisions that Plaintiffs in this case challenge will not redress Alpha's lost coal sales. See State of Utah, 137 F.3d at 1202; City of Hugo, 656 F.3d at 1264.

Accordingly, the two parties most knowledgeable about Alpha's coal sales in Colorado undermine Plaintiffs' allegations. Based on Alpha and Xcel testimony, therefore, there is no genuine issue of material fact as to whether the RES has caused Alpha's lost sales – it did not.

2. Tanton's Opinion Does Not Create A Genuine Issue Of Material Fact

Notwithstanding the undisputed testimony of Alpha and Xcel, Plaintiffs rely on Thomas Tanton, who Plaintiffs offer as an expert, to allege otherwise. The Court should disregard Mr. Tanton's opinion regarding the cause of Alpha's reduced coal sales because it is unreliable and failed to consider several critical facts.

Rule 702 of the Federal Rules of Evidence requires that expert testimony is, among other things, "based on sufficient facts or data." Fed. R. Evidence 702(b). In its "gatekeeper" role, courts must ensure that proffered expert testimony "rests on a reliable foundation." Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 597 (1993); Kumho Tire v. Carmichael, 526 U.S. 137, 150 (1999) (reliability "tied to the facts of a particular case"). "An opinion is *reliable* if the witness is qualified to give it, and it is based upon reliable scientific principles and sufficient facts." Christou v. Beatport, 2013 WL 248058, *2 (D. Colo. Jan. 23, 2013) (emphasis in original); accord United States v. Crabbe, 556 F.Supp.2d 1217, 1220 (D. Colo. 2008); Goebel v. Denver & Rio Grande Western R. Co., 346 F.3d 987, 991 (10th Cir. 2003). To assess reliability, courts consider "whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion (or, whether the gap between the analytical data and the opinion proffered is too large)" and "whether the expert adequately accounted for obvious alternative explanations." Phoenix v. Trinity Universal, 2013 WL 4594529, *7 (D. Colo. Aug. 29, 2013)

(citations omitted). "Courts have routinely excluded expert testimony that was based on nothing more than speculation." Id. (citations omitted).

Mr. Tanton's testimony should be excluded. His opinion does not consider sufficient facts, particularly those revealed by Alpha and Xcel, to determine the cause of Alpha's reduced sales. When questioned at his deposition, Tanton admitted that he did not discuss his opinion with Alpha or Xcel. Exh. 5 (Tanton Deposition Transcript at 62-63). Tanton further admitted to not knowing Alpha's process for selling coal in Colorado, or any specific coal contracts Alpha may have lost. Id. at 48 ("I don't know if their sales process includes contracts or just invoices and delivery. So I don't know if they had contracts that were cancelled or not renewed. I don't know their process for selling coal"). He also did not consider any alternative reasons for Alpha's reduced coal sales, including that Xcel was buying coal from Alpha's competition at lower prices. Id. at 49-50.

The limited facts Tanton did consider reveal that his opinion is only a simplistic correlation. That is, according to Tanton, the RES caused Alpha to lose coal sales in Colorado because (1) RES became effective in 2006, and (2) Alpha has sold less coal in Colorado between 2007 and 2012. Exh. 4 (Tanton Expert Report at 6-8); Exh. 5 (Tanton Deposition Transcript at 28, 31) (identifying Energy Information Administration's online database as showing that Alpha's coal sales have been reduced). Assuming both facts are true, they are not sufficient facts under Rule 702 to form a reliable opinion. Fundamentally, Tanton did not consider or refute the facts presented by Alpha and Xcel -- the entities most knowledgeable about the cause of any loss in Alpha's coal sales -- showing that the RES did not cause Alpha's reduced sales. Consequently, Mr. Tanton did not gather "sufficient facts and data" to formulate a reliable opinion. See U.S. v. Lauder, 409 F.3d 1254, 1264 n. 5 (10th Cir. 2005); Crabbe, 556 F.Supp.2d at 1223 (question pertains to quantity of data, not quality).

For the same reasons, his opinion is insufficient to create a genuine issue of material fact. See Fed. R. Civ. P. 56(e) (evidence must be admissible to defeat summary judgment); E.E.O.C. v. C.R. England, 644 F.3d 1028, 1037 (10th Cir. 2011) ("unsupported conclusory allegations do

not create a genuine issue of fact"). The Court should not permit Mr. Tanton's opinion to "manufacture" a genuine issue of material fact. See Law Co. v. Mohawk Const. & Supply, 577 F.3d 1164, 1169 (10th Cir. 2009) (finding evidence "should be disregarded if the Court concludes that it is attempting to create a sham fact issue"); Baca v. Sklar, 398 F.3d 1210, 1216 (10th Cir. 2005) ("Mere allegations unsupported by further evidence ... are insufficient to survive a motion for summary judgment.").[8] Accordingly, Defendants are entitled to summary judgment on Alpha's Constitutional standing because the issue "is so one-sided that' Defendants "must prevail as a matter of law." Reyes v. Snowcap Creamery, 2013 WL 4229835, at *1 (D. Colo. Aug. 14, 2013).

3. Plaintiffs Do Not Trace Alpha' Lost Sales To The Provisions Challenged

Alpha lacks standing for another reason. Plaintiffs must demonstrate Article III causation and redressability for *each* RES provision they challenge in Claims 1-6. See Davis, 554 U.S. at 724; WildEarth Guardians, 690 F.3d at 1182. Tanton's opinion – the only evidence offered by Plaintiffs -- is based vaguely on the RES, and not on the specific provisions Plaintiffs contend violate the Dormant Commerce Clause. Tanton does not connect Alpha's reduced sales to (1) the eligible energy resources requirement for investor-owner, cooperative, and municipal utilities (Claims 1-2), (2) the RES's distributed generation requirements (Claims 3-4), and (3) the benefits provided municipal and cooperative utilities (Claims 5-6). Plaintiffs thus lack standing to challenge these RES component because they do show that Alpha's alleged "injury was caused by the challenged sections" of the RES. See Chamber of Commerce of U.S. v. Edmundson, 594 F.3d 742, 756 (10th Cir. 2010).

B. ALPHA'S ALLEGATION OF POSSIBLE FUTURE INJURY IS SPECULATIVE

Not only are Plaintiffs unable to demonstrate standing based on Alpha's existing, "actual," injury-in-fact, but Plaintiffs' alternative assertion that Alpha will suffer future

[8] Plaintiffs' produced Tanton's Expert Report three weeks after Alpha produced its affidavit (Doc. 101), and long before Plaintiffs declared their experts in July 2013.

economic injury also fails because it is wholly speculative. Plaintiffs maintain that Alpha will suffer a future "loss of economic opportunity" because the coal market will be reduced due to the RES. Exh. 1 (Pls.' Supplemental Responses at 4).

This speculative future economic injury does not satisfy the Supreme Court's "certainly impending" standard articulated in Clapper. In Clapper, the court ruled that plaintiffs' "allegations of *possible* future injury are not sufficient." Clapper, 133 S.Ct. at 1147 (emphasis in original) (alleging injury from possible government surveillance of communications with foreign contacts under authority of Foreign Intelligence Surveillance Act). According to the court, plaintiffs' future injury stemmed from "their highly speculative fear" that was based on a "speculative chain of possibilities." Id. at 1147-48.

Here, it is even more speculative that Alpha's future coal sales will suffer due to the RES. Whereas the statute in Clapper was newly enacted when challenged, the RES has been in place for almost a decade without causing any harm to Alpha's sales. Absent evidence that the RES previously caused Alpha to lose coal sales in Colorado, there is no basis to claim future sales will be harmed. In similar circumstances, the Tenth Circuit held that possible future injury, alone, is not sufficient for standing. Keyes v. School Dist. No. 1, 119 F.3d 1437 (10th Cir. 1997). There, the court ruled:

> Appellants have failed to demonstrate that the School District or any school has withdrawn policies, instituted policies, or refrained from withdrawing or instituting policies as a result of the Busing Clause. Consequently, any injury flowing from the application of the Busing Clause constitutes possible future injury, not past or present injury. Appellants thus lack standing

Id. at 1445-46; see also WildEarth Guardians v. Salazar, 834 F.Supp.2d 1220 (D. Colo. 2011) (explaining evidence required to prove future injury from harm to area is greater where plaintiff has no history of using area in past). Accordingly, because Alpha has not suffered lost sales due to the RES in the past, the standard for Alpha's future harm is elevated, and Plaintiffs cannot satisfy their heightened burden to show future harm. See Clapper, 133 S.Ct. at 1147.[9]

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[9] Plaintiffs' reliance on an alleged future decline in the statewide coal market fails because

C. LUECK CANNOT SUPPORT HIS CONSTITUTIONAL STANDING

Plaintiffs allege that Mr. Lueck has suffered economic and environmental injury. They allege specifically: (1) Lueck has received smaller dividends from the electrical service provider at his former home – IREA; (2) Techmate, a computer business in which Lueck is a part-owner, has purchased backup generators to ensure a reliable supply of electricity; (3) Techmate's electricity bills include a fee authorized by the RES; and (4) wind turbines are ugly to Lueckand harm birds and bats, and renewable energy increases air pollutio. As detailed below, each alleged injury-in-fact is unsupported or otherwise deficient, and, like Alpha, Plaintiffs have offered no evidence that the specific RES provisions challenged in Claims 1-6 have caused any of Lueck's alleged injuries, or that success in this case will redress them. See See Davis, 554 U.S. at 724; Chamber of Commerce of U.S., 594 F.3d at 756.

1. IREA Dividends Are Not Available To Lueck

Plaintiffs allege that Lueck is a member and customer of IREA, an electric cooperative and that his member dividends have been adversely impacted by the RES. Exh. 4 (Tanton Expert Report at 11); Exh. 2 (Lueck Deposition Transcript at 124-25); Exh. 3 (IREA New Consumer Info at 6, 12) (explaining IREA members may receive "capital credits" when sales exceed costs).

Plaintiffs' reliance on Lueck's IREA dividends for economic injury is fatally flawed. Lueck conceded at his deposition that IREA no longer provides him with electrical service. Exh. 2 (Lueck Deposition Transcript at 7-8, 121). Plaintiffs admitted that Lueck "is no longer a consumer-member of IREA." Exh. 6 (Pls.' Deposition Written Responses at 5). Lueck is thus no longer able to receive IREA dividends that could support an injury-in-fact. See Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1485 (10th Cir. 1995) (plaintiffs required to maintain injury throughout litigation). He also cannot show that the RES is causing injury to his

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Alpha's Colorado market for the past decade has been limited to two power plants – Xcel's Comanche and Pawnee plants. Doc. 186-1 (Michael Hiatt Decl., ¶ 24). At these two plants, Xcel continues to purchase the same amount of coal for these plants from Alpha's competitors at lower prices.. Decl. of Romer ¶¶ 7-8. Accordingly, alleged changes in the statewide market does not support a "particularized" injury to Alpha. See Lujan, 504 U.S. at 560-61.

dividends, or that a favorable court judgment is likely to relieve Lueck's injury. Exh. 6 (Pls.' Deposition Written Responses at 5) (admitting "striking the unconstitutional statute cannot repair that injury nor prevent future injury associated with his membership in IREA"); see WildEarth Guardians, 690 F.3d at 1182.

Even had Lueck remained a member-customer of IREA, Plaintiffs have not provided evidence showing that the RES has caused a reduction in Lueck's dividends. See Lujan, 504 U.S. at 561; Bush, 455 F.3d at 1100. When questioned at his deposition, Lueck could only speculate whether his IREA dividends had been reduced, and provided no evidence that his dividends were reduced *because of* the RES provisions that Plaintiffs challenge. Exh. 2 (Lueck Deposition Transcript at 124-127). Based on IREA's own documents, Lueck could not make the required showing because a customer's capital credits are never guaranteed, and dividends are distributed only when IREA operates at a profit during a given year. Exh. 3 (IREA New Consumer Info at 6, 12). Even then, providing members with dividends is at the complete discretion of IREA's Board based on numerous factors, including the need for working capital, capital investments, storm damage reserves, and other contingencies Id.; see also Exh. 5 (Tanton Deposition Transcript at 69); id. at 80-82 (admitting IREA's costs in 2010 and beyond included financing new coal plant). In short, it is entirely speculative whether the RES, or some other factor, impacted Lueck's dividends.

2. Techmate's Backup Power Supply Does Not Establish Lueck's Injury

Lueck alleges he was injured because Techmate purchased backup electricity to guard against power outages. Lueck Decl. (March 19, 2011) ¶¶ 6-11; Exh. 1 (Supp. Disco Response at 4); see also Doc. 53-1 (Tanton Declaration). Lueck's spending choices have nothing to do with the RES or its effects: Lueck admitted at his deposition that he had no evidence that the RES, or any of the provisions challenged, made power outages more likely, or that they might be prevented if the challenged RES provisions were eliminated. Moreover, Lueck was unable to detail or document any power outages or reduced power quality at Techmate's office. Exh. 1 (Supp. Discovery Responses at 2-3); Doc. 79 at 3-4 (refusing to supply supporting

documentation); Exh. 2 (Lueck Deposition Transcript at 58, 65).

Instead, Lueck alleged that Techmate incurred these expenses based on a generalized fear about future outages. See Exh. 2 (Lueck Deposition Transcript at 67, 68). This self-inflicted cost based on pure speculation fails to satisfy the injury-in-fact requirement. Clapper, 133 S.Ct. at 1147; Keyes, 119 F.3d at 1445-46. As the Supreme Court held, a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." Clapper, 133 S.Ct. at 1151. Lueck's fear, which is unsupported by any evidence of past interruptions in electrical service, does not establish standing for Plaintiffs in this case. See American Tradition Institute v. U.S. E.P.A., 2013 WL 428452, *4 (E.D. Va. Jan. 31, 2013) (finding injuries cannot be "solely based on self-imposed subjective apprehension" or "based on unsubstantiated conjecture").

Moreover, Plaintiffs have not substantiated that Lueck personally paid the expenses for Techmate's backup electricity systems. Exh. 6 (Plaintiffs' Deposition Responses at 4) (objecting and refusing to detail accounts from which expenses paid). To the contrary, at his deposition, Lueck stated that Techmate's backup generator was paid for by Techmate. Exh. 2 (Lueck Deposition Transcript at 86) ("I'm pretty sure it was paid out of the company because it was for the company property."). Absent supporting evidence, Plaintiffs' standing cannot be based on Lueck's alleged injury from acquiring backup electricity for Techmate. See Lujan, 504 U.S. at 561; Bush, 455 F.3d at 1100.

3. Xcel's Monthly Fee Does Not Establish Lueck's Standing

Plaintiffs allege that Techmate's monthly bill from Xcel includes a small fee attributable to the RES. Exh. 2 (Lueck Deposition Transcript at 171). The Renewable Energy Standard Adjustment (RESA) provision of the RES authorizes utilities to charge customers up to 2 percent of their monthly electricity bill to pay for renewable energy projects. C.R.S. § 40-2-124(1)(g). Although Plaintiffs claim this RESA fee injured Lueck, when pressed, Lueck was unable to demonstrate that he, as opposed to Techmate, had incurred this expense. Despite requests, Plaintiffs have refused to provide documentation showing that Lueck has personally paid

Techmate's monthly electricity bill. Exh. 6 (Plaintiffs Deposition Responses at 4).

Moreover, Lueck has benefitted financially from the RES in a manner that far exceeds this small monthly fee. Exh. 2 (Lueck Deposition Transcript at 171). Techmate installed solar panels and took advantage of the RES's rebate program, receiving $30,800 to defray the costs. Exh. 2 (Lueck Deposition Transcript at 7, 42, 84, 87, 90). Thus, Lueck's alleged financial loss from the RESA fee has been more than offset by the $30,800 received for the solar panels.

4. Lueck Cannot Support Aesthetic Injuries Related To Wind Energy

Plaintiffs also allege that Lueck suffered aesthetic injuries from looking at wind farms and turbines. Exh. 1 (Supp. Discovery Responses at 4); Doc. 163 at 35. Lueck asserts that he does not like appearance of wind farms located several miles from his relatives' homes in northeastern Colorado along the Interstate-76 corridor. Exh. 2 (Lueck Deposition Transcript at 131-41).[10] He also alleges that wind turbines kill bats and birds. He further maintains that wind energy increases air pollution. Doc. 12-1, ¶ 11 (Lueck Decl.).

None of these claims withstand scrutiny. First, at his deposition, Lueck conceded that he is unaware of any bats or bat habitat near the wind farms in northeastern Colorado. Exh. 2 (Lueck Deposition Transcript at 146). Second, Lueck admits that he has not seen birds being killed or injured by turbines at the wind farms near his relatives' homes, nor has he has provided evidence that any bird kills have occurred there. Id. (Lueck Deposition Transcript at 142-44).

With respect to Lueck's alleged aesthetic harm due to "ugly" wind turbines (id. at 136), Plaintiffs have disavowed any reliance on Lueck's relatives homes for ATI or Lueck's standing. Exh. 6 (Plaintiffs' Deposition Responses at 3) (stating Lueck does not "intend to base [his] standing on alleged injuries associated with Mr. Lueck[]" mother's home in Iliff, Colorado). Further, Lueck was unable to establish that the RES caused the construction of the wind farms in

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[10] Plaintiffs' written discovery responses stated falsely Lueck "suffered aesthetic loss at his home from the destruction of the vista previously enjoyed and now destroyed by wind turbines." Exh. 1 (Pls.' Supplemental Discovery Responses at 4). Lueck's concerns over the presence of wind turbines is based on wind farms located in northeastern Colorado, not at his current Lakewood home or former Morrison home. Exh. 2 (Lueck Deposititon Transcript at 131-32).

northeastern Colorado, or that they were built since the time the RES was enacted. Exh. 2 (Lueck Deposition Transcript at 132-35, 139-40, 142-44). He also offered no reason to believe that wind farms would be dismantled if this lawsuit succeeds in striking down the RES.[11]

Lueck's alleged injuries from air pollution are similarly deficient. Indeed, when questioned at his deposition, Lueck abandoned this assertion, claiming he did not recall the basis for the relevant statements in his declaration he filed with the Complaint in this case. Exh. 2 (Lueck Deposition Transcript at 158-60). He could not identify what this injury was or how it was causally related to the RES.

D. PLAINTIFFS ALSO LACK CONSTITUTIONAL STANDING TO BRING CLAIMS 3-6 AS A LEGAL MATTER

1. The Distributed Generation Mandate Cannot Cause Injury

Plaintiffs cannot demonstrate causation or redressability to challenge the distributed generation provisions in Claims 3 & 4 because these provisions do not establish a requirement that is independent of the total renewable energy requirement. The distributed generation mandate is small portion of the larger total renewable mandate. C.R.S. §§ 40-2-124(1)(c)(I)(E), 40-2-124(1)(c)(X), 40-2-124(1)(c)(X)(A). For example, for an investor-owned utility, "[t]hirty percent of its retail electricity sales in Colorado for the years 2020 and thereafter, *with distributed generation equaling at least 3 percent of its retail electricity sales*." C.R.S. § 40-2-124(1)(c)(I)(E) (emphasis added). Use of "with" in the phrase "with distributed generation equaling" means that distributed generation is inclusive of, or a component of, the 30% requirement. Thus, the total renewable resource standard is 30%, of which distributed generation is a component. A plain reading of the relevant RES provisions, therefore, does not support Plaintiffs' allegations that the distributed generation *is in addition to* the minimum required percentages of renewable energy.

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[11] Further, Plaintiffs do not seek relief against owners of any wind turbines. Plaintffs have offered no basis to assert that owners would remove the wind turbines or utilities would stop operating these turbines if the RES was struck down. None of Lueck's alleged injuries associated with wind farms are redressable by a ruling in Plaintiffs' favor.

Accordingly, the distributed generation provisions challenged in Claims 3 and 4 do not contribute to Plaintiffs injuries. This requirement does not affect Alpha, for example, because no *additional* renewable energy beyond 30% is required by C.R.S. § 40-2-124(1)(c)(I)(E). Alpha would be injured to the same extent whether renewable energy was from distributed generation (home solar), or from non-distributed generation (a wind farm).

For the same reason, Plaintiffs cannot demonstrate redressability. If Plaintiffs are successful and the offending distributed generation mandate is removed, the same total renewable requirement of 30% will remain. Alpha thus would be unaffected by the removal of the distributed generation mandate , and Lueck still would consume the same amount of electricity generated through renewable resources, and thus incur the same purported injuries.

2. The Cooperative And Municipal Utility Multiplier Could Not Harm Plaintiffs

In Claims 5 and 6, Plaintiffs challenge the RES provision establishing a multiplier for cooperative or municipally-owned utilities, which allows these utilities to satisfy the RES's renewable energy requirement with less renewable energy. See C.R.S. § 40-2-124(1)(c)(IX). Neither Alpha nor Lueck could suffer an injury caused by the multiplier provision. The multiplier does not decrease the available market for nonrenewable resources, but instead provides the possibility of an increase in market percentage for which nonrenewable resources may compete. In this respect, the multiplier benefits Plaintiffs' interests, causing them no injury.

The same flaw dooms Plaintiffs' ability to demonstrate redressability as to the multiplier provision. C.R.S. § 40-2-124(1)(c)(IX) grants a cooperative or municipal utility the option of satisfying the standard by using renewable resources that do not qualify for the multiplier, or by using some combination of qualifying and non-qualifying resources. If the multiplier is removed, as Plaintiffs have requested, the overall renewable standard for cooperative and municipal utilities in sections 40-2-124(1)(c)(X) and 40-2-124(1)(c)(X)(A) would remain the

same. Plaintiffs' alleged injuries thus would be unaffected.[12]

II. PLAINTIFFS CANNOT SATISFY PRUDENTIAL STANDING REQUIREMENTS

A. ALPHA AND LUECK'S INTERESTS DO NOT FALL WITHIN THE DORMANT COMMERCE CLAUSE'S ZONE OF INTEREST

Even if Plaintiffs could establish Alpha's constitutional standing, they lack prudential standing because Alpha fails the zone of interest test. See Wilderness Society, 632 F.3d at 1171.[13] To satisfy prudential standing requirements, a plaintiff's interests must fall within the zone of interests protected by the law being invoked. Warth, 422 U.S. at 499; Mt. Evans v. Madigan, 14 F.3d 1444, 1452 (10th Cir. 1994). The zone of interest test turns on the *interest* that the relevant law seeks to protect, not on the *harm* that a particular plaintiff may suffer. Ass'n of Data Processing Serv. v. Camp, 397 U.S. 150, 153 (1970); e.g., Hackford v. Babbitt, 14 F.3d 1457, 1466 (10th Cir. 1994) (ruling, despite evidence of crop damage from diverted irrigation canals, plaintiff lacked "prudential standing because he had no right to manage the irrigation project"). A plaintiff is denied review if its interests are "marginally related to or inconsistent with the purposes implicit" in the relied-upon law. Valley Forge Christian College v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982).

Here, the relevant law is the Dormant Commerce Clause. The Commerce Clause of the U.S. Constitution provides Congress with the power to "regulate commerce … among the

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[12] As a practical matter, this provision applicable to municipal and cooperative utilities could not harm Alpha because Alpha only sells its coal to Xcel, an investor-owned utility. Moreover, Plaintiffs are only seeking relief against the Colorado Public Utility Commissioners and the RES (Doc. 163), and not against any utility or private renewable power producer that actually buys and sells power.

[13] In ruling on Defendants' Motions to Dismiss, the Court ruled "at this early stage of the proceedings" that Plaintiffs, though two unnamed utilities and a coal company (Alpha) had made allegations sufficient to satisfy the prudential standing zone of interest test. Doc. 64 at 15-16. Defendants now file a Motion and fully develop their argument against Alpha's prudential standing based on evidence developed during discovery. Plaintiffs also have abandoned their reliance on the unnamed utilities, who provided a significant basis for the Court's ruling.

several states." U.S. Const. art. I, § 8, cl. 3. In addition to this explicit grant of authority to Congress, the "Dormant" Commerce Clause is "recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." S.-Cent. Timber Dev., v. Wunnicke, 467 U.S. 82, 87 (1984); Tarrant Regional Water Dist. v. Herrmann, 656 F.3d 1222, 1233-34 (10th Cir. 2011) (confirming Commerce Clause includes "an implicit restriction on state interference with interstate commerce"). This limitation "is driven by concern about economic protectionism - that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. The point is to effectuate the Framers' purpose to prevent a State from retreating into economic ... isolation." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008).[14]

Courts employ a three-pronged review of a state's regulation under the Dormant Commerce Clause.[15] First, the court evaluates whether the state law discriminates against interstate commerce "on its face," purposefully, or "in practical effect." C & A Carbone v. Town of Clarkstown, N. Y., 511 U.S. 383, 402 (1994). Discriminatory laws are those that mandate differential treatment of in-state versus out-of-state economic interests, in a manner that benefits the former and burdens the latter. United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007); Kleinsmith v. Shertleff, 571 F.3d 1033, 1041 (10th Cir. 2009). Second, when the law applies evenhandedly, courts conducts a balancing test developed in Pike v. Bruce Church, where a state law is upheld unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970). Third, courts ask whether the law "directly controls commerce occurring wholly outside the boundaries of a State." Healy v. Beer Inst., 491 U.S 324, 336 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); see also KT & G v. Attorney

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[14] The Dormant Commerce Clause's three-part test is detailed in recently-filed motions and briefs, and thus is not repeated here. Doc. 186 at 17-18.

[15] "The burden to show discrimination rests on the party challenging the validity of the statute." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); e.g., (ruling evidence of discriminatory effect must be "significantly probative, not merely colorable").

General of State of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008); Quik Payday v. Stork, 549 F.3d 1302, 1308-09 (10th Cir. 2008) (rejecting Dormant Commerce Clause argument when "possible extraterritorial effect" was speculative, and lacked evidentiary support). Accordingly, Alpha's lost coal sales "must somehow be tied to a barrier imposed on interstate commerce." See Los Angeles v. County of Kern, 581 F.3d 841, 848 (9th Cir. 2009).

They are not. Alpha's alleged economic losses would occur even if the RES required that all renewable energy be generated outside of Colorado, such that there could be no argument that the RES burdens out-of-state entities. The Dormant Commerce Clause does not forbid laws that treat Alpha differently than a renewable energy company. Rather, it prohibits laws that treat coal companies in Wyoming differently than coal companies in Colorado. The RES impacts coal companies located in Colorado to the same extent and in the same manner as coal companies located in Wyoming, like Alpha.

Two Ninth Circuit cases illustrate further Alpha's inability to satisfy the zone of interest test. In Individuals for Responsible Gov't v. Washoe County, 110 F.3d 699 (9th Cir. 1997), a Nevada county enacted a law requiring its residents to pay for trash collection services run by the County. Previously, the plaintiffs had taken their trash across state lines to a California disposal site, which they could no longer do. Id. at 702, 703. Plaintiffs' injury – paying for unwanted services – was sufficient to establish constitutional standing. Id. However, plaintiffs' injury was not within the Dormant Commerce Clause's zone of interest, because paying for the required service would have existed even if all trash collected was disposed of in California, such that the law *promoted* interstate commerce. Id. at 703-04. Similarly, in Los Angeles v. County of Kern, the court considered a law adopted by California's Kern County that prohibited the land disposal of sewage within the county. 581 F.3d at 843. Plaintiffs alleged an economic injury because the county law meant some wastes would have to be shipped to Arizona at a higher cost. Id. at 848. However, the court ruled plaintiffs' financial losses were not "tied to a barrier imposed on interstate commerce" because plaintiffs' injury would occur regardless of whether the challenged law discriminated against out-of-state entities. Id.

Lueck's alleged injuries also fail to satisfy the zone of interest requirement.[16] His alleged financial harms, even had they been substantiated, have no relation to the interests covered by the Dormant Commerce Clause -- avoiding "economic protectionism" by states and barriers to interstate commerce. Davis, 553 U.S. at 337-38; Tarrant Regional Water Dist., 656 F.3d at 1233-34. As with Alpha's alleged lost sales, Lueck's alleged financial losses would occur even if the RES mandated that all renewable energy is provided from sources outside of Colorado. See County of Kern, 581 F.3d 848 ("Financial injury, standing alone, does not implicate the zone of interests protected by the dormant Commerce Clause."). Moreover, neither Lueck nor Techmate is a "local economic actor" favored by the RES, nor an "out-of-state actor" burdened by the RES. See United Haulers, 550 U.S. at 338; Kleinsmith, 571 F.3d at 1041.

Lueck's aesthetic and environmental concerns similarly do not fall within the purview of the Dormant Commerce Clause. The Dormant Commerce Clause is not concerned about vistas, bats, birds, or air pollution, but instead targets states with economic protectionism statutes that impact interstate commerce. See Davis, 553 U.S. at 337-38; Tarrant Regional Water Dist., 656 F.3d at 1233-34.

In sum, neither Alpha nor Lueck's injuries are even "marginally related" to the prohibitions established under the Dormant Commerce Clause. Plaintiffs thus lack prudential standing to pursue Dormant Commerce Clause against the RES.

B. THE COURT SHOUD NOT ADJUDICATE THIRD PARTY RIGHTS

Prudential standing limitations also prevent a plaintiff from asserting rights of third parties. See Wilderness Soc'y, 632 F.3d at 1171, 1172. A plaintiff generally "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 1168. Similarly, "[a] shareholder may not bring claims for injuries that are "derivative" of, or indistinct from, the corporation's injury." See Hobby Lobby Stores v.

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[16] Defendants previously briefed this issue in connection with their Motions to Dismiss. Doc. 28, 37. They offer the following points to supplement and update those argument.

Sebelius, 723 F.3d 1114, 62 (10th Cir. June 27, 2013) (J. Matheson concurring in part, dissenting in part) (citing Bixler v. Foster, 596 F.3d 751, 756, 758 (10th Cir. 2010)).

Here, Lueck is asserting the rights of two companies based on his member-customer status with IREA and his part-owner status with Techmate. Lueck's interest is derivative of the rights of IREA or Techmate. See Combs v. Price Waterhouse Coopers. 382 F.3d 1196, 1200 (10th Cir. 2004) ("stockholder cannot maintain a personal action against director or other third party whose actions causes harm to the corporation") (citing, Nicholson v. Ash, 800 P.2d 1352, 1357 (Colo. Ct. App.1990)); Johnstown Feed & Seed v. Cont'l West Ins., 641 F.Supp.2d 1167, 1174 (D. Colo. 2009) ("Shareholders in a corporation lack standing to sue in their own names to vindicate wrongs done to the corporate entity"). Lueck is no different than any other member or owner of IREA or Techmate. As the Tenth Circuit ruled, "conduct which harms a corporation confers standing on the corporation, not its shareholders." Bixler, 596 F.3d at 756-57

Moreover, even if Alpha and Lueck could raise issues of material fact as to their alleged injuries, they do not have prudential standing because they are asserting the legal rights of the utilities generating electricity through nonrenewable resources. Lueck occupies the same consumer role in the chain of electricity sales as the consumers of waste hauling services, and alleged higher electricity rates are derivative of the higher costs incurred by generators of electricity. See Ben Oehrleins and Sons and Daughter v. Hennepin Cnty, 115 F.3d 1372, 1379, 1381 (8th Cir. 1997).

Alpha, and its alleged injuries from reduced coal sales, plays a similar a derivative role in the production of electricity. Alpha's coal is just one of many components to electrical generation that include furnaces, boilers, turbines, transportation services, and other equipment and services. And coal-fired plants are not the only electricity generators that the RES may impact; nuclear, gas-fired, and high-capacity hydroelectric plants may also be affected and occupy the same position as coal in the production of electricity. This shows that Alpha and similarly-situated entities associated with the products and services of electricity generation are not the direct objects of the RES, which instead is directed at utilities that generate electricity

through non-renewable resources. Any purported decrease in the sale, maintenance, or transportation of these varied fuel sources, equipment, and facilities simply is derivative of any decrease in a utilities' generation of electricity through non-renewable sources.

That Alpha and Lueck's asserted harms are derivative of third parties is supported by the Supreme Court's decision in Warth v. Sedin. In Warth, plaintiffs claimed that a zoning ordinance discriminated based upon race and ethnicity, and prevented them from purchasing or leasing lower-priced housing. The court held these plaintiffs lacked prudential standing because their interests were derivative of the home-builders directly impacted by the zoning ordinance. Warth, 422 U.S., at 504-05. In comparison, Alpha and Lueck's interests are even further removed from the RES than the Warth plaintiffs were from the discriminatory ordinance. By attempting to assert the rights of the entities that are the true objects of the RES -- the utilities -- Plaintiffs lack prudential standing to bring any of its claims.

In sum, prudential standing inquiry examines whether the judiciary is performing its proper function in our constitutional system. Warth, 422 U.S. at 498. The Court should not accept Plaintiffs' invitation to address all of the component interests impacted by the RES, because doing so is characteristic of a legislative function, not a judicial one.

CONCLUSION

For the foregoing reasons, Defendants are entitled to summary judgment because Plaintiffs lack constitutional and prudential standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to:

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