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,

and

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

Defendant-Intervenors.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR EARLY MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LACK OF STANDING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DEFENDANTS' REPLY CONCERNING UNDISPUTED FACTS

6. ATI claims it may rely on unnamed utilities to support its standing, but stipulated that it would not do so. Doc. 69 at 4 and Doc. 188-2 at 2.

7. ATI denies certain material statements in Alpha's Larry Deal affidavit, but Alpha's testimony speaks for itself and ATI offers no evidence contrary to Mr. Deal's statements.

9. Defendants agree that Lueck's customer relationship with IREA is no longer material solely because ATI decided not to rely on this relationship to support its standing.

10. ATI denies that bats do not occur in northeastern Colorado, but provides no evidence indicating otherwise.

11. ATI claims Lueck, and not Techmate, "purchased" solar panels and backup electricity equipment for Techmate's offices, but has provided no evidence that Lueck personally paid for these items. ATI provides no evidence that the RES caused power outages at Techmate offices.

RESPONSE DISPUTING ATI'S ADDITIONAL STATEMENT OF FACTS

ATI's statement of facts in its Response Brief (Doc. 194) are undisputed, except as noted.

2. Defendants deny "Alpha participates in the interstate market for coal" because that phrase is vague and ambiguous, but admit Alpha sells coal to Colorado utilities from its Wyoming mines.

3. Defendants admit that coal has lost some share of the electricity market in Colorado, but deny "the practical effect of the RES has been to reduce the size of the market for coal."

4. Plaintiffs' Exhibits 3-4 speak for themselves. Black Hills power plants and some Xcel-Public Service of CO plants are closing due to Clean Air Clean Jobs Act. Defs.' Exhs. 7-8.

6. Defendants deny Plaintiffs' depiction of comparative costs, which is not relevant to standing.

7. Deny as ambiguous; no dispute that RES did not cause Xcel to buy less coal from Alpha.

12. Defendants admit that Lueck testified to disliking the sight of wind farms in northeastern Colorado; no evidence that such facilities resulted from the RES or would cease operations if RES were struck down.

13. Defendants deny RES's purpose was to increase windmills near the Lueck's relatives. ATI offers no evidence that RES impacts wind farms near the Lueck home.

14. Deny Lueck has information that northeastern Colorado wind farms have harmed bats.

15. The Ponnequin Wind facility is located approximately 100 miles from Lueck's relatives; the cited study pre-dates the RES.

16. The identified passerine bird species do not occur in northeastern Colorado.

17. ATI provides no evidence that Lueck personally paid for Techmate's backup electricity equipment. Lueck testified "I'm pretty sure it [backup equipment] was paid out of the company because it was for the company property." Doc. 188-3 at 86.

18. ATI provided no evidence that the RES caused any power outages at Techmate.

19. ATI provided no evidence Lueck paid out of his personal account Techmate's Xcel bill.

ARGUMENT

I. ATI MUST ESTABLISH STANDING FOR EACH CLAIM

ATI claims it does not have to demonstrate constitutional standing for *each* RES provision challenged, but instead "only show injury from the RES as a whole." Doc. 194 at 12.

ATI is wrong as a matter of law. "Standing is not dispensed in gross…a plaintiff must demonstrate standing for each claim." Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008).[1] Accordingly, even though ATI "need not show redressability on every section of the RES" (Doc. 194 at 18, n.8), ATI must establish constitutional standing, including redressability, for each RES provision challenged. E.g., Chamber of Commerce of U.S. v. Edmundson, 594 F.3d 742, 756-59 (10th Cir. 2010) (applying claim-specific standing analysis). The cases ATI offers (Doc. 194 at 12) do not support its argument to the contrary.[2]

In any case, the premise of ATI's argument is flawed. ATI has not challenged the RES

---

[1] WildEarth Guardians v. Public Service, 690 F.3d 1174, 1182 (10th Cir. 2012); State of Utah v. Babbitt, 137 F.3d 1193, 1204 (10th Cir. 1998).

[2] For instance, ATI relies on a *dissenting* opinion from a panel rehearing denial in New England Health Care Employees v. Woodruff, 520 F.3d 1255, 1258 (10th Cir. 2008), which does not apply here, because it concerned whether non-settling parties could challenge a settlement agreement. Moreover, two other cases cited contradict ATI's position: DaimlerChrysler v. Cuno, 547 U.S. 332, 353 (2006), reasserts the principle that "standing is not dispensed in gross;" and San Juan Citizens' Alliance v. Salazar, 2009 WL 824410, *5-9 (D. Colo. March 30, 2009), reviewed plaintiffs' standing for each claim brought.

as a whole, and thus the Court cannot "strike the entire RES as unconstitutional under the dormant Commerce Clause." See Doc. 194 at 12. Rather, ATI's Second Amended Complaint challenges three specific aspects of the RES: the percentage of eligible energy resources required for all utilities (Claims 1 & 2); the distributed generation requirement (Claims 3 & 4); and the multiplier benefits for municipal and cooperative utilities (Claims 5 & 6). In these claims, ATI seeks declaratory and injunctive relief regarding these provisions only. Doc. 163, ¶¶ 137-151.

II. PLAINTIFFS HAVE NOT ESTABLISHED CONSTITUTIONAL STANDING TO CHALLENGE THE SPECIFIC RES PROVISIONS IN CLAIMS 3-6

As made evident in Defendants' Motion (Doc. 188 at 20-22), ATI's members Alpha and Lueck lack standing to bring claims against the distributed generation RES provisions (Claims 3-4) and the provision providing a time-limited multiplier that assists municipal and cooperative utilities (the "Muni-Coop Multiplier") in satisfying the renewable energy standards (Claims 5-6).[3] ATI has offered no evidence that these specific RES provisions have caused Alpha or Lueck harm, or explained how a ruling eliminating these provisions would redress any injury.

A. Distributed Generation Requirements: The RES's distributed generation requirements are subset of the larger renewable energy requirement. Investor-owned utilities, for example, must secure 30% of its retail sales from renewable sources, with 3% of the 30% requirement coming from distributed generation. C.R.S. §§ 40-2-124(1)(c)(I)(E). Alpha and Lueck's alleged injuries stem from the broader renewable energy requirement, not from the portion of this requirement that is reserved for distributed generation. Accordingly, even if the distributed generation requirements are eliminated, both ATI members would suffer the same alleged injuries because the 30% mandate would remain unchanged.

ATI's Response Brief fails to confront this causation and redressability problem. Instead, ATI states simply that there would be an "increase [in] the market for non-renewable generation" absent the distributed generation provisions. Doc. 194 at 18, n. 8. However, ATI's success on

---

[3] For the reasons discussed delow, ATI lacks standing for Claims 1 and 2 as well. However, as detailed here, ATI's standing for Claims 3-6 is uniquely flawed.

Claims 3 and 4 will not affect the "non-renewable" market. That is, the 30% requirement would continue to affect this market in the same manner and to the same extent as ATI alleges it does now. Centralized renewable energy (e.g., wind farms or large-scale solar) would substitute for the 3% of renewable energy from distributed generation (e.g., rooftop solar), resulting in the same total amount of renewable energy acquired. Notably, ATI provides no evidence showing how the "market for non-renewable generation" would increase if utilities were allowed to meet the 30 percent renewable requirement without using distributed generation. ATI also offers no evidence detailing how Alpha and Lueck would be redressed if the remaining RES provisions continue to mandate that utilities are required to generate the same amount of renewable energy (without the distributed generation sub-requirement). See Doc. 194 at 20, n. 12.

In sum, no less renewable energy would be required to be purchased or generated if the distributed generation mandates were stricken, and thus ATI's success on Claims 3-4 will not redress the alleged injuries to Alpha or Lueck. See City of Hugo v. Nichols, 656 F.3d 1251, 1264 (10th Cir. 2011) (holding "[i]nvalidating the challenged laws under the dormant Commerce Clause would not compel the Board to grant Hugo's applications, or even to process them in any particular way"); Ash Creek Mining v. Lujan, 969 F.2d 868, 876 (10th Cir. 1992) (finding court could not redress plaintiffs' injury by providing plaintiffs with mining rights).

B. Muni-Coop Multiplier: Lueck and Alpha also suffer no injury caused by the Muni/Coop Multiplier, which provides a 2:1 credit for certain projects undertaken by municipal and cooperative utilities. C.R.S. § 40-2-124(1)(c)(IX). And, in fact, enjoining the Multiplier would aggravate their alleged harms because *more* renewable energy would be required.[4]

ATI's response, buried in two footnotes, does not address the issue. Although ATI states without evidence that the Multiplier harms Lueck (Doc. 194 at 20, n.12), this contention is baseless. This Multiplier provision allows certain utilities to sell *less* renewable energy than

[4] For example, if a utility used the multiplier to acquire 10 MWh of electricity, it would get credit for 20 MWh, reducing the total requirement for renewable energy purchases by 10 MWh.

would be required otherwise, creating a smaller market for the wind facilities that allegedly injure Lueck.[5] ATI provides no basis to claim this provision provides an "incentive" for certain utilities to construct "rural wind" facilities. See id. For the same reasons, Alpha is not harmed by a provision permitting certain utilities to generate less renewable energy. See Doc. 194 at 18, n.8. By reducing the total amount of renewable energy, the Muni/Coop Multiplier cannot result in a reduced non-renewable market that ATI complains will injure Alpha.

II. ALPHA LACKS CONSTITUTIONAL STANDING FOR ANY OF ATI'S CLAIMS

A. Alpha's Reduced Coal Sales Are Neither Traceable To The RES Nor Redressable

In its Response Brief, ATI maintains that Alpha has suffered an "actual" injury in the form of "a loss of sales" in recent years. Doc. 194 at 13. Defendants are not disputing this loss of sales, as Xcel has provided undisputed evidence that it is buying less coal from Alpha for its Comanche and Pawnee power plants. Doc. 188-1, ¶ 7.[6]

Rather, ATI lacks standing because the RES has not caused this injury and this Court cannot redress Alpha's lost sales. See WildEarth Guardians v. Public Service of Colo., 690 F3d 1174, 1182 (10th Cir. 2012); Jordan v. Sosa, 654 F.3d 1012, 1019 (10th Cir. 2011). Both Xcel and Alpha have testified that the RES has not caused Xcel to buy less coal from Alpha. Doc. 188-1, ¶ 8; Doc. 101. The reason Xcel is buying less coal from Alpha at its Comanche and Pawnee power plants is because "Alpha's competitors have offered our Comanche and Pawnee power plants coal at prices that are lower than Alpha's." Doc. 188-1, ¶ 8. Further, at these two plants, "Xcel has not been using or buying less coal since the RES was adopted." Id.

ATI's Response Brief completely ignores this specific testimony about Alpha's coal sales. Instead, ATI simply notes that "prior to the RES, Alpha supplied all the coal to two plants in Colorado …[and] after the RES came into effect …Alpha los[t] coal sales." Doc. 194 at 16. This is the same deficient correlation that ATI's standing "expert" offered and was thoroughly

---

[5] As detailed below, ATI has provided *no* evidence that any particular wind farm located in northeastern Colorado and allegedly harming Lueck was constructed or operated due to the RES.

[6] ATI does not dispute that Alpha sells coal in Colorado only to these two Xcel power plants.

refuted in Defendants' Motion. Doc. 188 at 12-14.[7] ATI has offered no evidence that shows a causal relationship exists or that disputes Xcel and Alpha's testimony.

Without any basis, ATI claims that striking the RES "will allow Alpha to recoup sales in Colorado." Doc. 194 at 13. Because the RES did not cause Alpha to lose coal sales, there is no evidence to support ATI's redressability argument. Indeed, "the unfettered choices made by independent actors" – here, Xcel – to purchase coal from Alpha's competitors caused Alpha's injury. See Northern Laramie Range Alliance v. FERC, __F.3d __, 2013 WL 5716544, *4 (10th Cir. Oct. 22, 2013). Accordingly, there is no basis to find that Alpha would recoup its lost sales, and no court order can compel Xcel to buy Alpha's coal. See Ash Creek, 969 F.2d 876.

B. ATI's Allegation Of Future Injury To Alpha Based On Lost Economic Opportunities To Sell Coal Is Speculative

ATI also asserts that Alpha's injury is based on a future "loss of economic opportunity" to sell coal because, according to ATI, the RES reduces the Colorado coal market. Doc. 194 at 13-14. However, as described in Defendants' Motion (Doc. 188 at 12), ATI's speculation about Alpha's future economic injury lacks the certainty necessary to support constitutional standing under Clapper v. Amnesty Int'l, 133 S.Ct. 1138, 1147 (2013); see also See Wyoming v. Lujan, 969 F.2d 877, 882 (10th Cir. 1992) (ruling company's hope to acquire leases did not support standing). This is especially true here because the RES has been in effect for several years without causing any traceable harm to Alpha's sales. Doc. 101, ¶ 3. As detailed above, competition with other coal companies caused Alpha's lost coal sales, not the RES. Doc. 188-1, ¶ 8. Because Alpha already cannot compete in Colorado due to competitors' pricing, a repeal of the RES would not affect that dynamic. Absent evidence that the RES has caused Alpha past harm, ATI can only offer barren speculation about a potential injury, which is insufficient to demonstrate an imminent future injury. Cf. Sac and Fox Nation v. Pierce, 213 F.3d 566, 573 (10th Cir. 2000) (finding tribe demonstrated "particularized imminent economic injury if the

[7] As demonstrated (Doc. 188 at 9-11), Tanton's testimony fails to meet the requirements for admissible expert testimony, and, based on its Response Brief, ATI appears to abandon Tanton.

State imposes its motor fuel tax on fuel distributed to the Tribes' retail stations"); see also WildEarth Guardians v. Salazar, 834 F.Supp.2d 1220, 1226-28 (D. Colo. 2011) (explaining how injury may be demonstrated).[8] ATI offers no meaningful response on this issue.

Further, ATI's alleged economic opportunity injury is not particular to Alpha. See Ash Creek, 969 F.3d at 875 (requiring "distinct and palpable injury" to plaintiff). Rather, ATI raises a generalized concern that the RES affects the competitive coal market as a whole. However, any injury must be "concrete and particularized" to Alpha, which it is not. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). ATI engages in pure speculation in claiming that impacts to the coal market will injure Alpha specifically. See Northern Laramie, 2013 WL 5716544, *6. Indeed, ATI has failed to refute the fact that Alpha has only historically sold coal to two Colorado power plants, which have been unaffected by the RES. ATI does not identify any other coal contracts that Alpha lost because of the RES.[9] Accordingly, ATI has failed to establish that Alpha "will almost surely" lose business. See DEK Energy v. FERC, 248 F.3d 1192, 1195 (D.C. Cir. 2001).

Moreover, the foundation for ATI's "competitive injury" argument is a line of equal protection cases that do not apply here. See Doc. 194 at 13-14. These cases are based uniquely on the "equal footing doctrine" developed in Northeastern Fla. Chapter of Associated General Contractors v. Jacksonville, 508 U.S. 656, 666 (1993), wherein a plaintiff's injury is based on the inability to compete equally for a particular benefit, such as a government-subsidized contract or a set-aside program. See Midwest Fence v. U.S. Dept. of Transp., 2011 WL 2551179, *5 (N.D.

---

[8] ATI cites Hobby Lobby Stores v. Sebelius, 723 F.3d 1114, 1116 (10th Cir. 2013) for the undisputed proposition that economic injury is a type of injury-in-fact. Doc. 194 at 13. This case, however, highlights Alpha's lack of imminent future injury. Whereas, in Hobby Lobby, the challenged law was about to go into effect and require plaintiffs to pay for certain health benefits, here, the RES has been in effect since 2006 with no effect on Alpha's coal sales, and there is no evidence that future injury to Alpha is imminent.

[9] ATI's reference (Doc. 194 at 17) to coal plants operated by "Black Hills and PSCo" does not advance ATI's position because Alpha supplied coal to neither plant. ATI offers no evidence that Alpha would have sold coal to these two plants absent the RES, or that either plant "abandoned coal" due to the RES. See Exhs. 7 & 8.

Ill. June 27, 2011). Nothing about the RES burdens Alpha's ability to compete. See Schultz v. Thorne, 415 F.3d 1128, 1134 (10th Cir. 2005) (ruling out-of-state hunter had injury to challenge Wyoming law limiting number of hunting licenses available for non-Wyoming residents); Cache Valley Elec. v. Utah Dep't of Transportation, 149 F.3d 1119, 1122 (10th Cir. 1998) (ruling electric company demonstrated that it had previously lost government-subsidized contract due to challenge law). ATI has offered no evidence – nor is there any -- that Alpha has been unable to bid on coal contracts at Colorado power plants because of the RES. Indeed, Alpha has coal contracts with Xcel's power plants and is continuing to seek contracts to supply coal to Colorado power plants. Doc. 101, ¶ 5; Doc. 188-1, ¶ 7. Alpha has not been deprived of an opportunity to compete for supplying coal in Colorado. See Wyoming Sawmills v. U.S. Forest Serv., 383 F.3d 1241, 1248-50 (10th Cir. 2004) (rejecting argument that "lost opportunity to bid" on timber sale was redressable injury).

III. ALPHA LACKS PRUDENTIAL STANDING

Alpha also cannot satisfy the zone of interest test required for ATI's Dormant Commerce Clause challenge to the RES. See e.g., Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320–321, n.3 (1977). The Dormant Commerce Clause restricts laws that interfere with interstate commerce by benefitting in-state interests to the disadvantage of their out-of-state competitors. Dept of Revenue of Ky. V. Davis, 553 U.S. 328, 337-338 (2008); Tarrant Regional Water Dist. v. Hermann, 656 F.3d 1222, 1233-34 (10th Cir. 2011). Alpha's alleged economic interests relating to maintaining coal sales in Colorado are not within the zone of interests that the Dormant Commerce Clause protects – that is, interstate commerce free of discrimination. See Doc. 188 at 24. The Dormant Commerce Clause does not prohibit state laws that distinguish between types of energy. While the RES requires that a percent of energy sold in Colorado is generated from renewable energy sources, it treats and affects all coal producers equally, within or outside of Colorado. The harms incurred by coal producers, like Alpha, are not tied to the Dormant Commerce Clause.

In response, ATI relies on Wyoming v. Oklahoma, 502 U.S. 437, 468-73 (1992), to argue

that "[o]ut-of-state (and in-state) producers, like Alpha, are in the heartland of the zone of interests protected by the dormant Commerce Clause." Doc. 194 at 19. Here, ATI lumps together *in and out-of-state* coal producers, claiming the RES burdens coal producers generally. This argument reveals ATI's misunderstanding of the zone of interest test. As the Wyoming v. Oklahoma court confirmed, "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." 502 U.S. at 454. The Oklahoma law violated the Dormant Commerce Clause because it "expressly reserves a segment of the Oklahoma coal market *for Oklahoma-mined coal, to the exclusion of coal mined in other States*." Id. at 455.[10] The RES makes no such geographic distinctions, which is why Alpha's interest in coal sales is not within the Dormant Commerce Clause's zone of interest.

ATI wrongly suggests that Defendants admitted Alpha satisfies prudential standing requirements and the zone of interest test. Doc. 194 at 19. For this proposition, ATI cites footnote 9 of the Court's July 12, 2012, Order on the Motions to Dismiss, which reads:

> Defendants' Motion to Dismiss argues that Plaintiff Lueck cannot raise the legal rights of those entities actually impacted by the RES, *specifically identifying producers of non-renewable energy and electric utilities* as those entities directly impacted by the RES.

ATI v. Colorado, 876 F.Supp.2d 1222, 1235, n.9 (D. Colo. 2012) (emphasis in original). Footnote 9 is not related to Alpha's ability to satisfy prudential the zone of interest test, or whether its interests coincide with the interests that the Dormant Commerce Clause protects.[11]

IV. LUECK LACKS CONSTITUTIONAL STANDING TO SUPPORT ATI'S CLAIMS

Until its Response Brief, ATI identified several potential injuries to Lueck to support standing. Based on the undisputed facts, Defendants' Motion demonstrated that Lueck lacked

---

[10] ATI accuses Defendants of "assiduously avoid[ing]" addressing the *dissent* in Wyoming v. Oklahoma. Doc. 194 at 19. But the dissent is not only dicta, it offers speculation about the standing of hypothetical Wyoming coal companies. The sole plaintiff in Wyoming was the State of Wyoming – not coal companies like Alpha. Moreover, unlike the RES, the law challenged in Wyoming explicitly benefitted Oklahoma coal producers while burdening Wyoming producers.

[11] Moreover, following the Court's 2012 Order, ATI abandoned its reliance on the unnamed "electric utilities" as a basis for standing.

any of the injuries. Doc. 188 at 16-20. In response, ATI has narrowed the list of Lueck's alleged injuries to three. Doc. 194 at 20-22.

First, ATI asserts that Lueck "was responsible for" Techmate's monthly Xcel electricity bill, which includes a fee -- known as the Renewable Energy Standard Adjustment (RESA), C.R.S. § 40-2-124(1)(g). Doc. 194 at 20. ATI also claims that Techmate's office now also serves as Lueck's home and he "personally paid for the home costs." Id.; see Doc. 188-3 at 7, 8 (Lueck stated at his deposition that he moved into Techmate's offices in June 2013).

ATI has the burden to demonstrate its standing. See Utah Ass'n of Counties v. Bush, 455 F.3d 1094, 1100 (10th Cir. 2006). However, ATI has failed to demonstrate that Lueck, as opposed to Techmate, is personally paying the Xcel bill that includes the RESA fee. During his deposition, Lueck was unable to confirm that his personal funds were used to pay Techmate's Xcel bill. Defendants thus followed-up with requests that ATI provide proof of payment. Doc. 188-7 at 4. ATI refused. Id. Absent such evidence, Lueck cannot establish that this economic injury is "particularized" to him. See Lujan, 504 U.S. at 560; Ash Creek, 969 F.3d at 875.[12] Accordingly, ATI has failed to meet its burden that RESA is a source of harm for Lueck.

Even if Lueck could demonstrate this was a personalized cost, and not paid for by Techmate, ATI's success would not redress this economic injury. In its Second Amended Complaint (Doc. 163), ATI does *not* challenge the RESA provision, which authorizes utilities to recover the costs associated with complying with the renewable energy standard and limits the maximum retail rate impact associated with the RES to 2% annually. C.R.S. § 40-2-124(1)(g). Thus, even if the renewable energy requirement is invalidated, Xcel will continue to have the ability under the RESA provision to charge customers this additional 2% to pay for renewable energy projects. C.R.S. § 40-2-124(1)(g)(1)(B) (authorizing utilities to recoup costs advanced

[12] ATI has offered no evidence that Lueck, as of June 2013, is personally paying any portion of the electric bill. Even if Lueck had recently begun paying a portion of this bill, this would not support ATI standing because standing must exist at the time the lawsuit is filed. See Utah Ass'n, 455 F.3d at 1099 ("Standing is determined as of the time the action is brought.").

through "future retail rate collections").

The second economic injury ATI relies upon for Lueck's standing involves the expenses Techmate incurred to protect against possible power outages. Doc. 194 at 21. As with Techmate's Xcel bill, however, ATI provides no evidence that Lueck, as opposed to Techmate, actually incurred any of these expenses. When Defendants requested evidence to support ATI's claim that Lueck personally paid for this business expense, ATI did not provide any. Doc. 188-7 at 4. And when Lueck was asked directly at his deposition if he or Techmate paid for the equipment, he testified: "I'm pretty sure it was paid out of the company because it was for the company property." Doc. 188-3 at 86.

In its Response Brief, ATI offers nothing to show Lueck was wrong about Techmate paying for this backup equipment. ATI references Lueck's "own signature" on the paperwork for installing solar panels at Techmate's office. Doc. 194 at 21. However, this does not show that Lueck, who is Techmate's chief executive (Doc. 188-3 at 34), personally paid for the solar panels or any other equipment.[13]

Further, ATI's reliance on these Techmate expenses fails regardless of who paid for the equipment. As Defendants' Motion detailed (Doc. 188 at 17-18), Lueck cannot "manufacture" an injury based on the fact that he is admittedly "paranoid" (Doc. 188-3 at 68) about power outages. See Clapper, 133 S.Ct. at 1147, 1151. Lueck does not establish ATI's standing by inflicting economic harm on Techmate based on "hypothetical future harm." See id. at 1151. Moreover, Lueck was unable to document that any power outages at Techmate's offices were attributable to the RES (Doc. 188-2 at 4), or the backup generation systems have been activated due to the RES, as opposed to some other reason like bad weather. Doc. 188-3 at 168.

Third, ATI claims Lueck has suffered aesthetic injury because wind generation facilities

---

[13] The solar panels are not part of Techmate's backup generation system. Doc. 188-3 at 53 (identifying backup power supply as natural gas generator and large batteries known as "UPS" or uninterruptible power supply); id. at 60 (recognizing power outages prevent solar panels from working).

in northeastern Colorado are adversely affecting birds, bats and vistas. Doc. 194 at 21-22. ATI has not shown this alleged injury is "concrete and particularized" to Lueck, and has not substantiated the allegations with specific and relevant evidence. See Lujan, 504 U.S. at 560-61. During his deposition, Lueck conceded that he was unaware of bats in northeastern Colorado, or that wind turbines have injured bats. Doc. 188-3 at 146. Further, as ATI now admits, "Lueck provided no evidence that any bird kills have occurred in northeastern Colorado near his relatives." Doc. 188 at 9; Doc. 194 at 7; see Doc. 188-3 at 142 ("I haven't seen it myself."). Indeed, when discussing birds at his deposition, Lueck referenced a conversation with an unnamed farmer, but was never told that wind farms in northeastern Colorado actually have harmed birds. Doc. 188-3 at 142-143 (Lueck explaining "[j]ust that you find dead carcasses laying around every now and then. You find that near radio towers too. And you find it near roads…I fly airplanes and I've dodged more than a few").

Moreover, ATI has offered no evidence that the RES caused the construction of wind farms in this area. See Northern Laramie, 2013 WL 5716544, *6. While claiming "no one disputes that the RES has spurred the construction and use of wind generation facilities in Colorado" (Doc. 194 at 21), ATI has not demonstrated, as it must (Lujan, 504 U.S. at 561), that the RES caused the construction of the wind facilities that Lueck complains about. Cf. SUWA v. OSM, 620 F.3d 1227, 1234 (10th Cir. 2010) (finding traceability between plaintiffs' aesthetic injury and leasing decision). When questioned, Lueck failed to detail when the wind farms were built, and whether they were present before the RES. Doc. 188-3 at 132-35, 139-140, 142-44. Recognizing this deficiency in Lueck's testimony, ATI's Response Brief offers a 2002 study that describes bird kills near a Colorado wind farm called Ponnequin. Doc. 194 at 9-10, n.2. Ponnequin, however, is over 100 miles from the northeastern Colorado home of Lueck's relatives.[14] Moreover, this study was published four years before the RES became effective and

[14] www.xcelenergy.com/About_Us/Our_Company/Power_Generation/Ponnequin_Wind_Farm (last visited Oct. 24, 2013)

thus does not support the causation and redressability requirements for Lueck's standing.[15]

Similarly, ATI has not established that a favorable ruling is likely to redress Lueck's injuries from the presence of windmills in northeastern Colorado. This lawsuit does not seek relief that could remove the windmills that are allegedly injuring birds, bats, or vistas. See Wyo. Sawmills, 383 F.3d at 1246–47 ("the courts do not have the power to grant the only relief that would rectify the alleged injury").[16] Although ATI's Response Brief speculates that production from existing wind farms would decrease (Doc. 194 at 21-22), it offers no evidence to support these predictions. Because ATI has not shown which, if any, of the wind facilities were constructed due to the RES, there is no basis to suggest they would be removed, or "used less often" (Doc. 194 at 22), if the RES is invalidated. And ATI offers no evidence that utilities will purchase less energy from existing wind farms with which they have contracts to purchase power, or that these contracts will be voided should the RES be invalidated. See id. This kind of speculation fails to support Lueck's standing. See N. Laramie, 2013 WL 5716544 at 6.

In sum, ATI has not met its burden regarding Lueck's standing. Lujan, 504 U.S. at 561 ("plaintiff can no longer rest on such mere allegation"); N. Laramie, 2013 WL 5716544 at 3.

V. LUECK DOES NOT SATISFY PRUDENTIAL STANDING REQUIRMENTS

Under prudential standing principles, Lueck's interests must fall "within the zone of interests to be protected by the statute or constitutional guarantee." Association of Data Processing Serv. v. Camp, 397 U.S. 150, 153 (1970). But Lueck's alleged injuries are not related to interests that the Dormant Commerce Clause protects. Lueck's financial harms -- based on a fee in Techmate's electric bill and Techmate's purchase of backup generation -- are not "marginally related" to the purpose of the Dormant Commerce Clause's protections against state barriers to interstate commerce. See Davis, 553 U.S. at 337-38; Tarrant Regional Water

---

[15] ATI's cite to a 2001 study also cannot support Lueck's standing. Doc. 194 at 10, n.2.
[16] Nor can it: the three PUC Commissioners are not alleged to own any of the State's wind facilities. The Complaint seeks no relief from any of the State's utilities or energy developers that own these facilities or are parties to contracts for their energy.

Dist., 656 F.3d at 1233-34. As an illustration, Lueck's economic injuries would exist even if the RES mandated that all renewable energy had to be generated outside of Colorado such that there would be no colorable argument under the Dormant Commerce Clause. Lueck's desire to protect vistas free of wind farms and hypothetical birds and bats is also not marginally related to the interstate commerce interests that the Dormant Commerce Clause protects.

ATI's Response Brief (Doc. 194 at 22-24) is filled with general pronouncements about the Dormant Commerce Clause and the zone of interest limitation, but conspicuously fails to address the defects in Lueck's prudential standing. ATI must still satisfy the zone of interest test, even if it is not "meant to be especially demanding." Doc. 194 at 23. ATI also fails to address the fact that Lueck is asserting third-party rights of Techmate, rather than his own.

VI. ALPHA AND LEUCK CANNOT ASSERT THE RIGHTS OF OTHERS

ATI's Response Brief provides no direct response to the fact that Alpha and Lueck are asserting third party rights of the utilities regulated by the RES in an attempt to obtain standing for themselves. This is not permissible under the prudential "third-party standing" rule. See Wilderness Society v. Kane County, 632 F.3d 1162, 1168 (10th Cir. 2011). The facts underlying the third-party standing rule here are not in dispute, and this Court may rule as a matter of law.

The RES imposes obligations upon utilities only, affecting the market for the production of electricity. This law does not impose requirements upon coal producers (Alpha) or consumers of electricity (Lueck). ATI admits that the market at issue is the production of electricity. Doc. 194 at 13, 16, 17, 18 n.8, 23. In contrast, Alpha is neither a utility or a generator of electricity, and Alpha's coal is but one component to the production of electricity, which also requires plant, equipment, transmission and distribution facilities, labor, transportation services, and a multitude of other products and services. If the RES restricts production of electricity from non-renewable sources, and the producer incurs an injury due to loss of electricity sales or higher costs of fuel, vendors of products and services contributing to produce electricity also may sustain economic losses; however, these injuries are merely derivative of injuries sustained by Colorado utilities.

The GMC v. Tracy line of cases cited by ATI (Doc 194 at 23, n. 15) stands only for the

unremarkable proposition that, if a statute requires a purchaser to pay a tax, the taxpayer may have standing to challenge the tax under the Commerce Clause. However, as the Eighth Circuit has held, "[t]hese cases [] do not stand for the proposition that consumers paying the end-line cost of an economic regulation have standing to challenge the regulation under the *Commerce Clause*." Ben Oehrleins and Sons and Daughter v. Hennepin County, 115 F.3d 1372, 1381 (8th Cir. 1997) (emphasis added). Tracy exemplifies the difference between standing for customers where a law requires them to pay a tax or toll, as compared to a lack of standing where a statute targets a service or industry with restrictions that may raise production costs and the customer alleges an indirect injury based on costs passed down by the service or industry. Id. at 1380.[17]

ATI contends that utilities are certain to obtain fair profits through Colorado's regulatory scheme, and thus do not have the incentive to bring a Commerce Clause claim. Doc 194 at 24. The Supreme Court has granted narrow exceptions to the third-party-standing rule, but a lack of incentive is not one of them. See Warth v. Seldin, 422 U.S. 490, 509-10 (1975). ATI's contentions also lack foundation: pursuant to CRS § 40-9.5-103, non-profit cooperatives in Colorado (such as Lueck's former utility) have elected to be exempt from rate regulation; and even private investor, public utilities subject to rate regulation are provided only an opportunity to profit, they are not ensured a profit. See Market Street Ry. v. California Railroad Commission, 324 U.S. 548, 566 (1945). Similarly, the private in- or out-of-state wholesale power producers who sell to utilities are not guaranteed rates of return. Accordingly, although utilities and wholesale producers would have an economic incentive to challenge the RES if ATI's claims were true, none have joined this suit.

CONCLUSION

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

---

[17] "We are aware of no Commerce Clause case in which the court has granted standing to a plaintiff who was a consumer whose alleged harm was the passed-on cost incurred by the directly regulated party." Ben Oehrleins, 115 F.3d at 1380.

Respectfully submitted,

November 18, 2013

/s/ Neil Levine
Neil Levine (CO Bar # 29083)
Law Office
4438 Tennyson Street
Denver, Colorado 80212
Phone: 303-455-0604
nldenverlaw@gmail.com

Attorneys for Intervenor-Defendant
Solar Energy Industries Association

JOHN W. SUTHERS
Attorney General

s/ *Will Allen*
WILL V. ALLEN
TODD LUNDY
KATHLEEN L. SPALDING
Assistant Attorneys General
Colorado Department of Law
Civil Litigation & Employment Law Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
(720) 508-6634 (Spalding)
(720) 508- 6632(Allen)
(720) 508-6032 (FAX)
will.allen@state.co.us
todd.lundy@state.co.us
kit.spalding@state.co.us

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically transmitted Defendants' Reply Brief in Support of Early Motion for Summary Judgment on Standing to the Clerk's Office using the CM/ECF System for filing, which will generate a Notice of Filing and Service on all parties' counsel who are all registered CM/ECF users.

/s/ Neil Levine
Neil Levine