IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

AMERICAN TRADITION INSTITUTE and
ROD LUECK,

Plaintiffs,

v.

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

Defendants,

and

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

Defendant-Intervenors.

DEFENDANTS AND DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF EARLY MOTION FOR SUMMARY JUDGMENT ON CLAIMS 1 AND 2

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INTRODUCTION

The Colorado Renewable Energy Standard (RES) requires Colorado electric utilities to provide a percentage of their retail electricity sales from renewable energy (the Renewable Energy Mandate). As described in Defendants' Motion for Summary Judgment on Claims 1 and 2, the Mandate is constitutional because it (1) does not discriminate against interstate commerce, (2) does not control commerce occurring wholly outside Colorado, and (3) none of the general economic and environmental impacts allegedly resulting from the Mandate represent "burdens to interstate commerce" under Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). ECF No. 186.

In response, Plaintiffs American Tradition Institute and Rod Lueck (collectively, ATI) offer no support for their claim that the Renewable Energy Mandate discriminates against interstate commerce. ATI focuses instead on its "extraterritorial regulation" theory that the RES improperly regulates energy generation in other states, but that theory fails as matter of law. The only entities regulated by the RES are Colorado utilities, and the statute does not require energy companies outside Colorado to do (or forego) anything. Finally, ATI offers no evidence showing that the Mandate burdens interstate commerce within the meaning of the Pike test. Accordingly, summary judgment is warranted on Claims 1 and 2 because the undisputed facts show that the Mandate does not violate the dormant Commerce Clause.

REPLY CONCERNING UNDISPUTED FACTS

2. Defendants did not incorrectly paraphrase Amendment 37. The 2004 Bluebook stated that the RES would "require[] certain Colorado utilities to generate or purchase a portion of their electric power from renewable energy resources." ECF No. 186-1 at 23 (Ex. 2 at 13).

16. Defendants accurately paraphrased the cited provisions of ATI's Second Amended Complaint.

18. It is unclear what ATI means by "deny as cited to Plaintiffs['] Second Amended Complaint." ATI admits that the provisions at Colo. Rev. Stat. § 40-2-124(1)(c)(I), (1)(c)(V), (1)(c)(V.5), (3), (4), do not facially distinguish between in-state and out-of-state energy sources. These provisions are the only sections challenged in Claims 1 and 2 of the Second Amended Complaint. 2d Am. Compl. ¶¶ 137–41 (ECF No. 163).

20. Defendants accurately quoted ATI's summary judgment motion.

21. Sentences 1–3 of paragraph 21 in Defendants' Statement of Material Facts accurately described the cited paragraphs from ATI's filings. 2d Am. Compl. ¶¶ 60–64; ECF No. 180 at 6–7. Regarding sentence 4, ATI fails to identify any evidence of a discriminatory intent relevant to this summary judgment motion. While ATI points to the provisions challenged in Claims 3–6, those provisions are not at issue in Defendants' summary judgment motion regarding Claims 1 and 2.

22. Defendants accurately summarized the four types of "burdens" alleged in ATI's Second Amended Complaint and its expert reports. While ATI asserts that this is an incomplete list, it does not identify any additional burdens on interstate commerce caused by the RES.

23. ATI offers no evidence showing that the "burdens" identified in Paragraphs 22–23 of Defendants' Statement of Material Facts have a greater impact outside of Colorado than in this state, or that those impacts affect out-of-state companies more heavily than Colorado companies. While ATI asserts that Defendants' list is incomplete, ATI does not identify any additional burdens on interstate commerce caused by the RES.

RESPONSE CONCERNING ADDITIONAL DISPUTED FACTS

1. Deny. The 2004 Bluebook explains that the RES requires Colorado utilities to provide a percentage of their retail electricity sales from certain forms of eligible energy sources, such as wind, solar, and geothermal energy. ECF No. 186-1 at 23–24, 29–30 (Ex. 2 at 13–14, 39–40). The Bluebook does not state that the RES is intended to force a reduction in electricity generation from non-renewable sources. Id.

2. Admit that the 2004 Bluebook includes the passage quoted by ATI, but deny that Defendants Joshua Epel, James Tarpey, or Pamela Patton individually represent the Public Utilities Commission or the "PUC."

3. Admit that the 2004 Bluebook includes the passage quoted by ATI in the "arguments for" the RES, but deny that this passage demonstrates any intent to achieve "in-state economic gain" by discriminating against interstate commerce.

4. Admit that the 2004 Bluebook includes the passage quoted by ATI in the "arguments for" the RES, but deny that this passage demonstrates any intent to achieve "in-state economic gain" by discriminating against interstate commerce.

5. Deny. The document cited by ATI is the 2004 Bluebook summary of "arguments against" the RES—not an admission or statement by Defendants. Moreover, an allegation that "renewables are more expensive" does not represent a burden on interstate commerce for purposes of the dormant Commerce Clause.

6. Deny. The document cited by ATI is the 2004 Bluebook summary of "arguments against" the RES—not an admission or statement by Defendants. Moreover, an allegation of

increased costs to consumers does not represent a burden on interstate commerce for purposes of the dormant Commerce Clause.

7. Deny. The document cited by ATI is the 2004 Bluebook summary of "arguments against" the RES—not an admission or statement by Defendants. Moreover, the alleged lack of a "cost cap" for non-residential customers does not represent a burden on interstate commerce for purposes of the dormant Commerce Clause.

8. Deny. The document cited by ATI is the 2004 Bluebook summary of "arguments against" the RES—not an admission or statement by Defendants. Moreover, the alleged cost increases, pollution, and need for back-up generation do not represent burdens on interstate commerce for purposes of the dormant Commerce Clause.

9. Deny. The document cited by ATI is the 2004 Bluebook summary of "arguments against" the RES—not an admission or statement by Defendants. Moreover, the alleged reliability "problems" do not represent a burden on interstate commerce for purposes of the dormant Commerce Clause.

10. Deny. The 2004 Bluebook passage cited by ATI does not state that there is a less burdensome alternative to the RES or that a voluntary program could be used in its place. There is no evidence that a voluntary program could be an adequate alternative to the RES.

11. Deny. ATI mischaracterizes the RES's "Legislative declaration of intent" by repeatedly inserting the word "Colorado" to claim the declaration states the RES will "save [Colorado] consumers and businesses money, attract new businesses and jobs [to Colorado], [and] promote development of [Colorado] rural economies." See ECF No. 186-1 at 29 (Ex. 2 at 39).

12. Deny. ATI mischaracterizes the cited document, which merely summarizes the requirements of the RES. It does not state that the Colorado PUC "controls Distributed Generation eligibility." The statute defines the forms of eligible distributed generation.

13. Defendants admit that the RES is one of several reasons why fossil fuel-fired electricity generation is being displaced by renewable energy sources.

14. Admit. Whether they are located in Colorado or other states, renewable sources (and associated Renewable Energy Credits (RECs)) only count toward compliance with the RES if they meet the statute's eligibility requirements. 4 Colo. Code Regs. § 723-3-3652(v).

ARGUMENT

I. The Undisputed Facts Show That The Renewable Energy Mandate Does Not Discriminate Against Commerce Between Colorado And Other States.

The RES's Renewable Energy Mandate does not discriminate against interstate commerce. A state law discriminates against interstate commerce if it causes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007). The Mandate requires Colorado utilities to generate or purchase minimum amounts of renewable energy, but it makes no distinction whether that energy is generated in Colorado or out-of-state. The Mandate does not discriminate against commerce from outside Colorado facially, in practical effect, or in purpose. ECF No. 186 at 13–19.

In response, ATI contends that "[d]iscrimination under Claims 1 & 2 is not before the Court," apparently because ATI has not moved for summary judgment on this theory. ECF No. 193 at 7–8. This is plainly wrong: the scope of issues before the Court is not controlled by ATI's summary judgment motion, but instead by Defendants' motion and the scope of issues in the

Complaint. Moreover, ATI has alleged in its summary judgment briefs, and throughout this case, that the requirement for utilities to generate or purchase renewable energy discriminates against interstate commerce. See ECF No. 192 at 13 (ATI summary judgment argument that "the renewable energy mandate discriminates against interstate commerce"); ECF No. 149 at 3–5 (scheduling order); 2d Am. Compl. ¶¶ 2, 6–8, 61–63. To avoid summary judgment, ATI must show—now—that disputed issues of material fact exist on this claim.[1]

ATI has not done so. Plaintiffs opposing summary judgment "must present significant probative evidence to support [their] position," and if they "fail[] to make a sufficient showing on an essential element with respect to which [they] ha[ve] the burden of proof, judgment as a matter of law is appropriate." Hansen v. PT Bank Negara Indonesia (Persero), 706 F.3d 1244, 1247 (10th Cir. 2013).

ATI's response presents no evidence or argument that the Renewable Energy Mandate discriminates facially, by intent, or in effect, against energy sources outside of Colorado. ECF No. 193 at 7–14. In fact, ATI admits numerous material facts on this issue. Id. at 3 ¶¶ 18–20 (admitting the Mandate does not distinguish between in-state and out-of-state energy sources on its face or in practical effect); id. at 4 ¶¶ 24–26 (admitting that out-of-state energy has supplied an increasing amount of the Colorado market since the RES took effect). The undisputed facts show that Defendants are entitled to summary judgment. See Hansen, 706 F.3d at 1247.

Moreover, ATI's reliance on Wyoming v. Oklahoma, 502 U.S. 437 (1992), and C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994), is misplaced. See ECF No. 193 at 7 n.6, 12, 14, 15 n.14; see also ECF No. 192 passim. In Wyoming, the Court struck down

[1] ATI makes the same misguided argument that its Pike test theory is not yet before the Court, and it fails for the same reason. ECF No. 193 at 18.

a discriminatory Oklahoma law that required power plants "to burn a mixture of coal containing at least 10% Oklahoma-mined coal." 502 U.S. at 440, 454–55. In contrast, the RES contains no in-state "quota," and Colorado utilities can comply with the Mandate by generating energy (or purchasing RECs) from in-state or out-of-state renewable sources. ECF No. 186 at 13–19.

Carbone is also readily distinguishable. In Carbone, the Court struck down as discriminatory an ordinance requiring all waste to be processed at a single in-state facility because it burdened out-of-state competitors by "hoard[ing] a local resource . . . for the benefit of local businesses." 511 U.S. at 392. The RES, in contrast, does not require any electricity to be generated in-state and it does not treat out-of-state interests differently from Colorado interests. ECF No. 186 at 13–19. The undisputed facts show that Defendants are entitled to judgment on Claims 1 and 2 to the extent they allege that the Renewable Energy Mandate is discriminatory.

II. The RES Does Not Regulate Extraterritorially.

ATI focuses its argument on the Mandate's alleged extraterritorial effect. ECF No. 193 at 7–18; see also ECF No. 180 at 18–24 (ATI SJ Mot.). The Mandate, however, does not regulate commerce occurring entirely outside Colorado. The RES regulates sales by Colorado utilities, and only impacts out-of-state companies when they sell electricity to those Colorado utilities. Nothing in the RES restricts a Wyoming generator's ability to sell power in Wyoming or any other non-Colorado state. Moreover, the RES simply defines the types of energy that Colorado utilities can count toward compliance with the statute. Out-of-state entities remain free to generate and sell non-renewable energy in Colorado or elsewhere to whomever they choose. ECF No. 186 at 19–20; see also ECF No. 189 at 10–14 (Defs.' Resp. to ATI's SJ Mot.).

ATI argues that the RES "controls" out-of-state conduct by preventing non-renewable energy generators in other states from "accessing a portion of the Colorado electricity market." ECF No. 193 at 16. This argument confuses extraterritorial "control" with legislation that happens to create incentives. The RES does not ban the sale of non-renewable energy into Colorado, or force out-of-state companies to do anything. At most, the RES provides an incentive for out-of-state companies to generate renewable energy (or RECs) that Colorado utilities can purchase for RES compliance. Such incentives do not involve the "direct control" over out-of-state entities forbidden by the dormant Commerce Clause. ECF No. 186 at 19–20. Courts have repeatedly upheld similar laws that regulate in-state entities in a manner that happens to influence out-of-state entities' conduct. Id. at 20. Tellingly, ATI fails to cite a single case that invalidated a state law for creating such incentives.[2]

ATI also claims that the Renewable Energy Mandate is "not a mere incentive. Rather, it is a command or an order." ECF No. 193 at 15 (internal quotation marks omitted). But ATI fails to mention that the "command or order" applies solely to Colorado utilities—not to out-of-state energy producers. ECF No. 186 at 2–6. The Renewable Energy Mandate requires Colorado utilities to purchase or generate clean energy. It does not require any out-of-state companies to produce or sell that electricity. Moreover, ATI's assertion that the RES requires out-of-state renewable energy generators to secure Colorado's "permission to enter the market" is incorrect.

[2] National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) and North Dakota v. Swanson, No. 11-3232 (SRN/SER), 2012 WL 4479246 (D. Minn. Sept. 30, 2012), cited by ATI, are both inapposite. ECF No. 193 at 16. Natsios ruled that a Massachusetts statute penalizing companies doing business with the country of Burma violated the Foreign Commerce Clause because the penalties applied even if a company's transactions in Burma were unrelated to its activities in Massachusetts. 181 F.3d at 61–71. The Massachusetts law bears no resemblance to Colorado's RES. The Swanson opinion contains no dormant Commerce Clause analysis at all.

ECF No. 193 at 16. The applicable regulations make clear that while Colorado utilities *may* (not must) seek the Public Utilities Commission's approval of renewable energy credits used for RES compliance, no such requirement applies to out-of-state entities seeking to sell energy or RECs in Colorado. 4 Colo. Code Regs. § 723-3-3656(e). Further, the regulations do not distinguish between in-state or out-of-state energy and RECs a utility seeks to purchase. Id.

Next, ATI fails in its attempt to distinguish the Tenth Circuit's holding in Quik Payday, Inc. v. Stork, 549 F.3d 1302 (10th Cir. 2008). ECF No. 193 at 17. Quik Payday rejected an extraterritoriality challenge to a Kansas statute regulating online payday loans, because the law applied only to transactions involving consumers in Kansas. 549 F.3d at 1308–09. The court ruled that a state law does not regulate extraterritorially when it only governs transactions to which an in-state entity is a party. Id.; see also Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1103 (9th Cir. 2013) (distinguishing laws "that regulate out-of-state parties directly from those that regulate[] contractual relationships in which at least one party is located" in-state (internal quotation marks omitted)). ATI asserts that this case is different from Quik Payday because Colorado's RES supposedly "regulates out-of-state energy generation." ECF No. 193 at 17–18. But, like the law in Quik Payday, the RES only affects transactions when out-of-state companies sell energy to a Colorado utility. ECF No. 186 at 20. In contrast, when a Wyoming wind farm sells electricity to a buyer outside Colorado, the RES does not affect that transaction. Quik Payday is controlling here.[3]

[3] ATI also contends that the electrons generated from coal are the same as those from wind or solar power. ECF No. 193 at 9 n.7, 11 n.9. The environmental, economic, and other impacts from generating that electricity, however, differ greatly depending on its source. ECF No. 186 at 3. Nothing in the dormant Commerce Clause requires states to consider the end product

ATI also errs in claiming that Supreme Court cases striking down price control statutes support its extraterritoriality argument. ECF No. 193 at 17. None of those cases involved a law similar to the RES. For example, the law in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), barred the sale of milk in New York unless it had been purchased at a certain price—even if the sale occurred in other states. Id. at 521–24; see also Healy v. Beer Inst., 491 U.S. 324, 337–38 (1989) (Connecticut law controlled transactions between out-of-state brewers and Massachusetts wholesalers); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986) (striking down New York law that limited a company's ability to "free[ly] change its prices elsewhere in the United States"). The critical point of these cases was that the challenged laws affected the prices of transactions that did not touch the regulating state. In contrast, Colorado's RES affects only transactions where a Colorado utility is involved and does not bar the sale of non-renewable energy in Colorado or other states.

Finally, ATI contends that Defendants claim the "authority to regulate wholly out-of-state electricity generation" based on Colorado's authority over in-state generation. ECF No. 193 at 12. Defendants have made no such argument, and the passages discussed by ATI do not even mention extraterritorial regulation. ECF No. 186 at 16–19. Instead, that section of Defendants' motion explains why Colorado's decision to favor renewable energy over fossil fuels does not amount to discrimination against interstate commerce. Id. By mischaracterizing Defendants' argument as an extraterritoriality question, ATI ignores the issue raised by Defendants and attacks a straw man of its own making.

(electricity) in isolation, while ignoring how that product is produced. See Gen. Motors Corp. v. Tracy, 519 U.S. 278, 297 (1997); Rocky Mountain Farmers Union, 730 F.3d at 1092–93.

III. ATI's Pike Theory Fails Because Its Allegations Of General Economic And Environmental Costs Are Not "Burdens To Interstate Commerce."

Summary judgment is also appropriate because none of the economic and environmental costs alleged by ATI represent burdens to interstate commerce within the meaning of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). ECF No. 186 at 20–25. The relevant burdens under Pike are "burdens on interstate commerce that exceed the burdens on intrastate commerce." V-1 Oil Co. v. Utah State Dep't of Pub. Safety, 131 F.3d 1415, 1425 (10th Cir. 1997); ECF No. 186 at 21. To raise a valid Pike claim, a party must show that a law "impose[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 217 (2d Cir. 2004).

Throughout this litigation, ATI has claimed the RES: (1) increases electricity costs in Colorado, (2) decreases electricity reliability in Colorado, and (3) causes adverse environmental impacts. ECF No. 186 at 9, 22. None of these impacts qualify as "burdens on interstate commerce" under Pike because they do not fall more heavily on out-of-state companies or cause an impact on commerce between Colorado and other states that exceeds the impact on commerce within Colorado. Id. at 22–25.

In its response, ATI continues to argue that the Pike test allows the court to weigh costs and benefits regardless of whether they impact commerce differently in Colorado and other states. ECF No. 193 at 19 n.20 (claiming "prices increases alone" represent a burden under Pike when they are "caused by economic inefficiencies"); id. at 19 (asserting that "RES-forced reduction in the market for hydrocarbon generation" is a Pike burden); id. at 5 ¶¶ 5–9 and 18–19

n.17 (listing similar alleged burdens).[4] But ATI fails to cite a single case supporting its view that Pike allows courts to second-guess a legislature's policy decisions in balancing societal costs and benefits. The cases on which ATI relies simply state the uncontroversial principle that a law that does not discriminate or regulate extraterritorially may still violate the dormant Commerce Clause if it fails the Pike balancing test. Id. at 19–20 & n.22. ATI asserts that "[f]our other circuits" have applied the Pike test to weigh the types of general economic costs alleged by ATI. Id. at 20 & n.23. Not one of the cases cited by ATI supports its contention.[5] The case law is clear: costs that do not involve a disparate impact on out-of-state entities or transactions are not burdens to interstate commerce under Pike. V-1 Oil, 131 F.3d at 1425. Because none of the economic and environmental costs alleged by ATI are burdens to interstate commerce under Pike, summary judgment is warranted. See Freedom Holdings, 357 F.3d at 218–19.

[4] ATI incorrectly cites West Lynn Creamery v. Healy, 512 U.S. 186 (1994) and Baldwin as support for its argument that "price increases alone" are sufficient to support a Pike claim. ECF No. 193 at 19 n.20. These two cases say nothing of the sort. They merely explain that protective tariffs and similar measures that increase the price of out-of-state products relative to in-state products discriminate against interstate commerce. W. Lynn Creamery, 512 U.S. at 193–94; Baldwin, 294 U.S. at 521–22, 527; see also Fla. Transp. Servs., Inc. v. Miami-Dade Cnty., 703 F.3d 1230, 1258 (11th Cir. 2012) ("Of course, increased costs are insufficient alone to constitute an unreasonable burden on interstate commerce . . . .").

[5] In Yamaha Motor Corp. v. Jim's Motorcycle, 401 F.3d 560, 573 (4th Cir. 2005), the court stated that its Pike analysis was premised on the fact that the law imposed "heavy burdens predominantly on out-of-state interests." Government Suppliers Consolidating Services v. Bayh, 975 F.2d 1267, 1286 (7th Cir. 1992) noted that the burdens to interstate commerce were heavy because the law "would effectively bar the importation of out-of-state waste." In Florida Transportation, the court's Pike analysis "assum[ed]" that the law had a "disparate impact on out-of-state interests." 703 F.3d at 1259. Finally, the court in Yakima Valley Memorial Hospital v. Washington State Department of Health, 731 F.3d 843 (9th Cir. 2013) never suggested that a reduction in the "total number of operations . . . would have caused a burden on inter[]state commerce," as ATI claims. ECF No. 193 at 20 n.23. Instead, the court stated the exact opposite and noted that "a reduction in the total number of [operations] does not place a significant burden on interstate commerce." Yakima Valley, 731 F.3d at 848.

IV. The Court Should Not Defer Summary Judgment Under Rule 56(d).

ATI also submits a Rule 56(d) affidavit requesting that the Court delay a summary judgment ruling until additional discovery is completed. ECF No. 193, Ex. 1. This affidavit does not justify a delay. "Rule 56[(d)] does not operate automatically," and "[i]ts protections must be invoked and can be applied only if a party satisfies certain requirements" showing that essential facts are unavailable. Price ex rel. Price v. W. Res., Inc., 232 F.3d 779, 783 (10th Cir. 2000).[6] ATI must identify with specificity (1) the probable facts not available, (2) why it cannot present those facts currently, (3) what steps it has taken to obtain the facts, and (4) how additional time will enable it to obtain the facts and oppose the summary judgment motion. Valley Forge Ins. Co. v. Health Care Mgmt. Partners, 616 F.3d 1086, 1096 (10th Cir. 2010); Garcia v. U.S. Air Force, 533 F.3d 1170, 1179 (10th Cir. 2008). ATI fails to make this showing.

First, much of the additional evidence sought by ATI involves the same type of general, economy-wide costs that it has already alleged and which do not support a Pike claim. See ECF No. 193, Ex. 1 ¶ 9 (seeking evidence on the RES's impact on the market for coal and other non-renewable sources of electricity); id. ¶ 11 (seeking evidence to establish "a burden (of any kind)"). Even if ATI develops additional evidence of such costs, that evidence will not rebut Defendants' summary judgment motion. See Allen v. CSX Transp., Inc., 325 F.3d 768, 776 (6th Cir. 2003) (a court may deny a Rule 56(d) request if "none of th[e] [additional] information has any bearing on the determinative legal question").

[6] The 2010 Civil Rule amendments moved former Rule 56(f) to Rule 56(d). No substantive changes were made, and earlier cases on Rule 56(f) remain applicable to amended Rule 56(d). Jones v. Secord, 684 F.3d 1, 5 n.2 (1st Cir. 2012).

ATI also alleges that it needs to develop evidence that the RES burdens interstate commerce "due to a lack of uniformity in state laws." ECF No. 193 at 19, Ex. 1 ¶¶ 10–11. This request—which raises an issue never mentioned in ATI's Complaint—fails to meet the requirements of Rule 56(d). First, ATI does not identify "the probable facts not available," or why it cannot now present evidence in support of its uniformity theory. See Valley Forge, 616 F.3d at 1096. This is not a case where the material facts are known exclusively to the Defendants. Cf. Price, 232 F.3d at 784. Numerous websites and other public sources provide information about the RES laws in different states. ATI could have submitted expert affidavits or other evidence showing that renewable energy standards need to be uniform. It did not. Instead, ATI alleges vaguely that it hopes to develop evidence about "confusion and uncertainty" resulting from different state standards. ECF No. 193, Ex. 1 ¶ 10. Rule 56(d) requires more. See Garcia, 533 F.3d at 1179–80 (no Rule 56(f) relief where affidavit listed general topics but "failed to identify any specific facts which would create a genuine issue of material fact").

Second, ATI fails to identify "what steps have been taken to obtain" the facts it wants. Valley Forge, 616 F.3d at 1096. ATI has had ample opportunity to develop evidence on this uniformity theory. It produced extensive expert reports about the RES, but did not submit evidence from any expert on this topic. ECF No. 177. Moreover, when ATI served discovery on opposing parties and third parties, it never asked about any need for national uniformity. ECF Nos. 129-3, 155, 158, 160, 161. Even now, with the January 17, 2014 discovery cutoff approaching, ATI has served no discovery addressing this topic. In fact, when Defendants sought discovery from ATI about the RES's impacts on out-of-state entities, ATI claimed this information was irrelevant. ECF No. 186 at 9–10, ¶ 23. ATI's effort to fend off summary

judgment with a new theory does not justify a delay. See Rivera-Torres v. Rey-Hernandez, 502 F.3d 7, 11 (1st Cir. 2007) (to obtain relief a party "must demonstrate due diligence . . . in conducting discovery"); Garcia, 533 F.3d at 1180 (no right to Rule 56(f) relief where a party "has been dilatory in conducting discovery").

Finally, ATI has not shown "how additional time will enable [it] to obtain" evidence of a need for national uniformity that could rebut summary judgment. Valley Forge Ins., 616 F.3d at 1096. Having missed the deadline to submit expert testimony on this topic, ECF No. 149 at 20, ATI asserts that it will instead obtain evidence by taking discovery from Defendants and their experts. ECF No. 193, Ex. 1 ¶¶ 9–10. This is pure speculation. ATI does not explain what it hopes to learn from Defendants' experts that would support its uniformity theory, or why ATI could not have developed such evidence itself. The speculative nature of ATI's request is highlighted by the fact that its October 9 Rule 56(d) declaration was signed nearly a month before it even knew who Defendants' experts would be or what they would say. See ECF No. 183 (Defendants' expert disclosures due November 7). None of Defendants' expert reports support the view that a lack of uniformity burdens commerce.

ATI is just asking the Court to let it pursue a fishing expedition in hopes of turning up something that might support its new theory, when it cannot provide a shred of evidence now. Rule 56(d) does not authorize such delay. See Garcia, 533 F.3d at 1179–80; see also Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, L.L.P., 687 F.3d 1045, 1050 (8th Cir. 2012) (no Rule 56(f) relief where affidavit listed additional depositions to be taken but failed to identify "what specific facts or information further discovery might reveal").

CONCLUSION

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

Respectfully submitted November 18, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I filed the foregoing **REPLY IN SUPPORT OF EARLY MOTION FOR SUMMARY JUDGMENT ON CLAIMS 1 AND 2** with the Court's electronic filing system, thereby generating service upon the following parties of record:

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