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 AND DEFENDANT-INTERVENORS' RESPONSE TO PLAINTIFFS' EARLY MOTION FOR PARTIAL SUMMARY JUDGMENT

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Come now Defendants and Defendant-Intervenors (collectively, "Defendants") and file their Response in opposition to Plaintiffs' Early Motion for Summary Judgment.

INTRODUCTION

Colorado voters approved Amendment 37 in 2004, and thereby established the State's Renewable Energy Standard (hereinafter, the "RES"). The RES, codified at C.R.S. § 40-2-124, et.seq. (2013), requires certain Colorado electric utilities to provide a percentage of their retail electricity sales from certain forms of eligible energy sources, such as wind, solar, methane captured from coal mines, and recycled energy (collectively, "renewable energy").

Plaintiffs' Second Amended Complaint (ECF Doc 180, "Complaint") challenges discrete parts of the RES, including the core requirement for utilities to provide or purchase up to 30% of their electricity sales from eligible resources. Defendants are the three Commissioners of Colorado's Public Utilities Commission ("PUC" or "Commission"). The Commission promulgated implementing rules for the RES at 4 Colo. Code Regs. § 723-1, *et seq*. ("Commission Rules").

Plaintiffs' motion seeks judgment on each of their claims that the RES violates the Dormant Commerce Clause. See ECF 180, p.1, ¶ 1. Plaintiffs allege that the challenged portions of the RES either directly discriminate against interstate commerce or regulate extraterritorially. Id., p.12 (the Motion argues "only first-tier violations").

Plaintiffs' arguments are not supported in law or fact: the challenged provisions do not discriminate on their face or discriminate against interstate commerce, and Plaintiffs' arguments that the challenged provisions regulate wholly extraterritorial conduct fail because they set standards for Colorado electricity utilities, and do not prevent the sale of energy into Colorado.

Thus, Plaintiffs fail to demonstrate that the RES discriminates against interstate commerce or regulates activity wholly outside of Colorado.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

Plaintiffs' Statement of Material Facts contains many misstatements of law or regulation, and a large number of Plaintiffs' footnoted citations do not support the fact(s) alleged, often requiring Defendants to give a qualified admission or denial with an explanation. Moreover, Plaintiffs often include more than one alleged fact per paragraph in their statement of facts.

1. Admit partially. The RES was amended after entry of the Scheduling Order in this case through Senate Bill 13-252 (see Exh. A attached hereto), and a rulemaking for the revised RES is currently underway. See Exh. B, Proceeding 13R-0901E, Notice of Proposed Rulemaking.

2. Admit the quoted statements. Defendants note that Plaintiffs provide an incomplete paraphrase of the declaration. See Complaint, ECF Doc. 163, ¶ 60.

3. Admit.

4. Admit.

5. Plaintiff's citation is unrelated to Fact alleged. Fact admitted.

6. Admit.

7. Admit.

8. The cited material does not support the facts alleged. Admit.

9. Admit.

10. The cite does not support the fact alleged. Admit.

11. The cite does not support the fact alleged. Admit.

12. Admit.

13. Admit that the cited provisions include some of the ways RECs can be transferred.

14. Admit that Public Service Company of Colorado sold RECs to IREA, and that some of the RECs sold were generated outside Colorado. Deny that some RECs cannot be "used" under the RES, as all RECs can be bought, sold, imported, exported, and traded under the RES.

Response to Fact 17, below. Admit that some RECs (whether generated inside or outside of Colorado), such as those from hydropower generating facilities larger than 30 MW, may not be utilized to demonstrate compliance with the RES. See Fact 24.

15. The cited pages do not provide the State of origin of any RECs. Admit that regulated Colorado utilities (not necessarily wholesale electricity suppliers) can and do comply with the RES using RECs from both in-state and out-of-state renewable energy generation. See Fact 17.

16. Admit the fact alleged. Deny that all footnoted references support this fact.

17. Deny. Even if RECs from certain electricity generating facilities that do not meet the definition of "eligible energy resources" in C.R.S. § 40-2-124(1)(a) (both inside and outside Colorado) may not be used to demonstrate RES compliance, all RECs can still be bought, sold, imported, exported and traded in this state. See Fact 12 hereof (admitting Colorado has a system to use RECs by buying, selling and trading); Facts 15 & 16 (noting that in-state and out-of-state RECs traded into and out of Colorado in an interstate market); Fact 24 (out-of-state WAPA hydropower energy and RECs imported into Colorado).

18. Deny that the PUC made this statement, as Joshua Epel is not "the Commission."

19. Admit substance, but deny the cited provisions refer to a "quota."

20. Admit. This statutory provision was added to the RES through recent statutory amendments in SB 13-252. See Exh. A. The PUC is in the process of promulgating rules related to SB 13-252. See Exh. B.

21. Deny as unclear; the cite is to a newsletter which notes changes to Utah law.

22. Deny. 4 CCR 723-3-3656(e) states that regulated Colorado entities "may" apply for PUC review of renewable energy credit contracts or renewable energy supply contracts with

renewable distributed generation.[1]

23. Deny. Statement draws an inaccurate legal conclusion. See Response to Fact 17; see legal argument below.

24. Deny that footnote 18 describes a "federally approved" REC.[2] Admit electricity from hydroelectricity generating facilities is sold to Colorado utilities. Deny that footnote 19 supports the fact alleged.

25. Cite does not support fact alleged. Admit that some RECs created by electricity generating facilities that do not meet the definition of "eligible energy resources" in C.R.S. § 40-2-124(1)(a) may not be used by Colorado utilities to demonstrate compliance with the RES. Deny that any REC's "use" is prohibited in Colorado. While some RECs may not be available for RES compliance purposes, they can and are bought, sold, and traded in Colorado and other states. See response to Fact 17, above.

26. Deny. The RES on its face does not prohibit any electricity sales from out-of-state sources. See C.R.S. § 40-2-124(1)(c)(I)(A-D); § 124(1)(d). Deny that in- or out-of-state coal, natural gas, and nuclear energy are treated differently than the same in-state energy sources.

27. Deny. The RES does not differentiate between in-state and out-of-state kilowatt or megawatt hours. Defendants note that the environmental, transmission, economic and other attributes of different generation methods differ. Deny that Colorado must "approve" out-of-state sources, or that it regulates those sources. The RES regulates certain Colorado utilities' use

[1] 4 CCR § 723-3-3657(b)(1)(F) and (G) requests "estimates" of energy to be acquired and possible "plans" for future acquisitions. Approval of a "plan" simply creates a "rebuttable presumption of prudence," not a binding contract.

[2] The document shows that energy was developed from "hydropower resources" (see RL 663, top) and specifically denies that the energy sold meets any particular jurisdiction's REC definition.

of RECs to satisfy the Mandate. See C.R.S. § 40-2-124(1)(c)(I)(A-D); § 124(1)(d); Commission Rule 4 CCR 723-3-3659(a) ("Renewable energy credits and recycled energy will be used to comply with the renewable energy standard").

28. Admit that Ronald Binz made the quoted statements. Deny that Mr. Binz is the Public Utilities Commission.

29. Admit that the Governor made the quoted statement about economic benefits but deny that it reflects any discriminatory intent or that the Governor is the "Commission." Deny that the Governor's statement necessarily represents the intent of the entire Legislature or electorate of the State of Colorado.

30. Admit that the Governor made the quoted statement, but deny that it reflects any discriminatory intent. Deny that the Governor's statement necessarily represents the intent of the entire Legislature or electorate of the State of Colorado.

31. Admit that the sponsor made the quoted statement, but deny that it reflects any discriminatory intent. Deny that this necessarily represents the intent of the entire Legislature or electorate of the State of Colorado.

32. Admit that Sen. Schwartz made the quoted statement, but deny that it reflects any discriminatory intent. Deny that this necessarily represents the intent of the entire Legislature or electorate of the State of Colorado.

33. The cite does not support fact alleged.[3] Defendants admit that coal has lost some market share as an electricity generation source in Colorado, but note that this resulted from many factors, including market conditions (e.g., prices of coal, gas and renewable energy generation),

[3] The cited data is made up of 5 spreadsheets with over 130,000 lines of uncollated data, making it impossible to determine what information Plaintiffs used to arrive at the conclusions stated in this "Fact."

plant closures and maintenance unrelated to the RES, and many federal and state laws (such as the federal Clean Air Act and the Clean Air Clean Jobs ("CACJ"), House Bill 10-1365 (attached hereto as Exh. C) CACJ required consideration of modifying or closing coal fired generation units in Colorado to meet Federal EPA and Clean Air Act requirements. Id. Admit that wind energy increased its market share by some amount over the same period. Defendants' deny the allegations about the exact size of changes in market share, because Plaintiffs' citation is too general to evaluate the accuracy of the allegation and Plaintiffs' use of percentages is unclear.

34. The cite does not support the fact alleged. Although Alpha's coal sale may have declined, Alpha has not attributed that change to the RES. See ECF Doc 101, Alpha Affidavit, ¶ 3.

35. Deny. The RES does not regulate the sale of any type of electricity into Colorado. See Response to Fact 26, above.

36. Admit.

37. Admit that Plaintiffs include part of the definition of retail distributed generation.

38. Admit that Plaintiffs include part of 4 CCR 723-3-3652(aa). This rule is subject to revision following the passage of SB 252. See Exh. B, Notice of Rulemaking Proceedings.

39. Deny. The cited report from 2010 offers a passing generalization but could not have described where future generation would actually occur (and does not purport to do so).

40. Admit.

41. Admit.

42. Admit that the Governor's Energy Office recognized the potential economic development benefits of the distributed generation requirement. Deny that the cited report offers any evidence of an intent to discriminate against interstate commerce.

43. Plaintiffs inaccurately paraphrase Commission Rules. See 4 CCR 723-3-3650. If Plaintiffs allege that only Colorado utilities are subject to PUC Rules, Defendants admit.

44. Admit this paraphrases the statute. Defendants note that "rural economic development" is not limited to Colorado in the language of the statute.

45. Admit that the Governor's Energy Office recognized the economic development benefits of renewable energy. Deny that the cited report offers any evidence of an intent to discriminate against interstate commerce. Note that statutory language creating "in state compliance-value multipliers" was eliminated by SB 13-252 (See Exh. A).

46. Admit that Doug Dean made the quoted statement. Deny that Doug Dean is the PUC.

47. Deny. The statute does not say the project must be located in Colorado or owned by a Colorado cooperative.

DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. Utilities meet RES percentage requirements either by generating or buying renewable power directly or by purchasing Renewable Energy Credits ("RECs"). C.R.S. § 40-2-124(1)(d).

2. "'Renewable energy credit' or 'REC' means a contractual right to the full set of non-energy attributes, including any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, directly attributable to a specific amount of electric energy generated from a renewable energy resource. One REC results from one megawatt-hour of electric energy generated from an eligible energy resource." Colorado PUC Rule 3652(t).

3. Some cooperative electric associations have service territories that include both Colorado and other states, including areas of Nebraska, Wyoming and Utah.[4]

[4] See, e.g., Exhibit D, (High West Energy service area map); Exhibit E (Highline Electric Association service area map), available at: http://www.hea.coop/About/service_area.cfm;

4. Municipal electric utilities operate in states other than Colorado. See, e.g., http://www.nepower.org/who-we-are/public-power/ (discussing public utilities in Nebraska); http://www.wmpa.org/publicpower/ (Wyoming).

5. Experts have stated that retail DG offers several benefits to utilities and their customers, including: locating generation on-site possibly avoids the potential loss of electricity that occurs during transmission from a power plant (and which increases with distances); DG could positively affect reliability by providing a back-up energy source during a system outage; Utilities potentially benefit when customers who generate electricity on-site reduce demand on the grid during periods of high electricity use.[5]

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When ruling on a summary judgment motion, the Court draws all reasonable inferences in the record in favor of the nonmoving party. Hansen v. PT Bank Negara Indonesia (Persero), 706 F.3d 1244, 1247 (10th Cir. 2013). "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty

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Exhibit F (Moon Lake Electric Association), available at: http://www.moonlakeelectric.com/dgt_area.html; Exhibit G (Empire Electric Association), available at: http://www.eea.coop/district-map.html .

[5] Governor's Energy Office, Colorado's 30% Renewable Energy Standard: Policy Design and New Markets (Aug. 2010) at 4-5, available at: http://cnee.colostate.edu/graphics/uploads/HB10-1001-Colorados-30-percent-Renewable-Energy-Standard.pdf ; U.S. Dep't of Energy, The Potential Benefits of Distributed Generation and Rate-Related Issues That May Impede Their Expansion (Feb. 2007) at i-iv; Interstate Renewable Energy Council, 12,000 MW of Renewable Distributed Generation by 2020: Benefits, Costs and Implications (July 2012) at 2-4.

Lobby, Inc., 477 U.S. 242, 248 (1986). In addition, because part of ATI's motion alleges a facial challenge to the RES, ATI "must establish that no set of circumstances exists under which the [law] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).

ARGUMENT

The 10th Circuit has identified three primary ways a state statute can violate the dormant Commerce Clause. Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1307 (10th Cir. 2008). First, if part of a statute clearly discriminates against *interstate* commerce in favor of *intrastate* commerce, it must be justified by a valid factor unrelated to economic protectionism or it will be invalidated. KT & G Corp. v. Attorney General of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008). Second, if the challenged portion of the statute does not discriminate against interstate commerce, the law may still be invalidated if a factual balancing test demonstrates that the law imposes a burden on interstate commerce that is clearly excessive in relation to its local benefits. Id. (citing Pike v. Bruce Church, 397 U.S. 137, 142 (1970)). Third, a law may violate the dormant Commerce Clause if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state. Id.

ATI's summary judgment motion asserts that the RES fails the first and third dormant Commerce Clause tests.[6] According to ATI, the RES provisions challenged in its Second Amended Complaint (a) discriminate against interstate commerce and (b) improperly control commerce occurring entirely outside of Colorado. ATI asserts a false dichotomy that the RES has to fall into one of these categories and its theories fail. Facts alleged by ATI do not show that the RES attempts to exercise extraterritorial control of commerce. Nor do the undisputed

[6] The Complaint alleges that the RES fails the second prong, the Pike test, but ATI does not seek judgment on its Pike theory. ECF No. 180, p.12 (the Motion argues "only first-tier violations").

facts show that the challenged RES provisions discriminate against interstate commerce.

I. THE RES DOES NOT CONTROL COMMERCE OCCURRING WHOLLY OUTSIDE COLORADO (All Claims).

ATI alleges that the RES violates the Commerce Clause by defining what types of energy (and RECs) may be used to comply with the statute. According to ATI, this amounts to impermissible "extraterritorial" regulation of out-of-state energy producers. See ECF No. 180 at 16-17 (distributed generation provisions), 18 (cooperative and municipal multiplier sections), 19-24 (renewable energy mandate). [7] ATI's argument fails, because the RES does not require any action or compliance from an out-of-state energy producer. The RES instead creates standards for how Colorado utilities must meet the requirements for purchase of defined percentages of renewable energy. Nothing in the RES prevents out-of-state companies from developing any type of energy or from selling that electricity (and associated RECs) in Colorado or any other state. Further, nothing in the RES purports to or has the effect of regulating the sale of non-Colorado power to non-Colorado entities.

A state law exerts extraterritorial control over out-of-state commerce if it "directly controls" commerce "that takes place wholly outside of the State's borders." Healy v. Beer Inst., 491 U.S. 324, 336 (1989); see also Quik Payday, 549 F.3d at 1307 (state laws cannot control "commerce occurring entirely outside the boundaries of the state"). A state law has an "extraterritorial reach if it 'necessarily requires out-of-state commerce to be conducted according to in-state terms.'" Pharm. Research & Mfrs. of Am. v. Concannon ("PhRMA"), 249 F.3d 66,

[7] Neither ATI's Second Amended Complaint, nor its "Statement of Claims" in the Scheduling Order, allege that the RES impermissibly regulates extraterritorial commerce. See Complaint, ECF No. 163 at 3–6. Because the argument falls outside the claims raised by ATI's Complaint, it cannot serve as the basis for awarding judgment in ATI's favor. In the event the Court considers the arguments, Defendants address herein how it fails.

(1st Cir. 2001) (quoting Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995)), aff'd 538 U.S. 644 (2003). For example, the Supreme Court invalidated a law that required out-of-state distributors to sell beer in Connecticut at a price no higher than it was being sold in neighboring states. Healy, 491 U.S. at 337-339. The Court ruled that the law violated the Commerce Clause by effectively "locking in" the prices that could be charged for beer sales occurring entirely outside Connecticut. Id. A Wisconsin statute was also invalidated for regulating commerce occurring entirely outside that state where it banned disposal of any solid waste in Wisconsin unless the community in which the waste originated enacted a recycling ordinance meeting Wisconsin's specifications. Nat'l Solid Wastes Mgt. Ass'n v. Meyer, 165 F.3d 1151, 1153–54 (7th Cir. 1998). But "[i]n the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine." Rocky Mountain Farmers Union v. Corey, Nos. 12-15131, 12-15135, 2013 WL 5227091, at *23 (9th Cir. Sept. 18, 2013).

The extraterritorial regulation line of cases has no applicability to the RES, which does not attempt to regulate or directly control commerce occurring outside Colorado. First, the RES provisions challenged by ATI have no impact on commerce occurring wholly outside Colorado. In the 10th Circuit, if some aspect of a commercial transaction occurs in-state, "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." Quik Payday, 549 F.3d at 1308; accord, Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1224 (9th Cir. 2003); see also Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 15 (1st Cir. 2007) (plaintiffs must show "how the commercial activity identified is 'wholly outside' the State's boundaries"). Colorado's RES does not regulate the generation of energy or RECs outside of Colorado at all; it only determines what type of RECs can be retired by a Colorado utility to satisfy applicable RES requirements. Accordingly, if an

out-of-state company wishes to sell any type of energy (or RECs) to a non-Colorado buyer, the RES has no impact on that transaction. The RES therefore has no effect on commerce occurring wholly outside Colorado. [8]

Second, the RES does not require out-of-state electricity generation to be conducted according to Colorado's terms for that electricity to be sold in Colorado. Out-of-state companies are free to generate electricity in whatever manner they wish and to sell that energy to Colorado utilities regardless of how it is generated. If out-of-state entities wish to generate electricity that does not count toward a Colorado utility's RES compliance, they may do so and sell that power in Colorado. The entities "remain free to conduct commerce on their own terms, without either scrutiny or control by [Colorado]." Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 221 (2d Cir. 2004); see also PhRMA, 249 F.3d at 82. ATI itself acknowledges that out-of-state companies sell electricity (and RECs) to Colorado utilities from sources that do not qualify for compliance with the RES. See ECF No. 180 at 5, ¶ 24 (some hydropower electricity bundled with RECs sold to Colorado utilities does not satisfy the RES requirements).

By creating demand for renewable energy, the RES is not regulating extraterritorially. Instead, it merely provides an incentive for out-of-state entities to voluntarily generate electricity (or RECs) that can be counted toward RES compliance. But courts have repeatedly recognized that a state law does not control out-of-state conduct simply because it creates incentives influencing that conduct. See, e.g., Rocky Mountain Farmers Union, 2013 WL 5227091, at *25 (States "are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants."); Freedom Holdings, 357 F.3d at

[8] Plaintiffs' argument reinforces their lack of standing. Despite assertions about the effects on out-state electricity generators, Plaintiffs do not include a single entity involved in the sale of electricity outside of Colorado.

211–14 (New York regulations created a strong incentive for cigarette manufacturers to join a master settlement agreement); PhRMA, 249 F.3d at 71–72 (Maine statute "create[d] an incentive for [out-of-state] manufacturers to enter rebate agreements").

The Ninth Circuit's recent decision in Rocky Mountain Farmers Union sheds clear light on why ATI's extraterritorial claims fail. In that case, the court upheld a California renewable fuels law against various dormant Commerce Clause claims where the law sought to lower the carbon content of motor vehicle fuels consumed in-state. 2013 WL 5227091, at *10–28. The law created an incentive for out-of-state producers to produce low carbon fuels. Id. at *23–28. The court rejected Plaintiffs' extraterritoriality challenge:

> The Fuel Standard regulates only the California market. Firms in any location may elect to respond to the incentives provided by the Fuel Standard if they wish to gain market share in California, but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California.

Id. at *23. Similarly, the Colorado RES regulates only the Colorado market. Out-of-state firms may choose to respond to the RES's incentive to produce renewable energy, but no out-of-state firm must produce qualifying renewable energy or adopt any regulatory standards to gain access to the Colorado electricity market. Just as in Rocky Mountain Farmers Union, the RES does not regulate extraterritorially. Id.

ATI's summary judgment motion also relies heavily on Healy, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), and other Supreme Court cases striking down price control and price affirmation statutes. ECF No. 180 at 14, 19–20, 22. The Supreme Court is clear, however that the rationale of Baldwin and its other price control and price affirmation cases are inapplicable when a state law does not regulate the price of out-of-state commercial transactions. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003); see also Ass'n des Eleveurs de

Canards et d'Oies du Quebec v. Harris, No. 12-56822, 2013 WL 4615131, at *10 (9th Cir. Aug. 30, 2013) ("Healy and Baldwin are . . . inapplicable" when a state law is not a price fixing statute). The RES does not dictate or regulate the price of out-of-state energy transactions.

Finally, ATI is wrong when it argues that the Colorado Public Utilities Commission (PUC) regulates out-of-state renewable energy production because, as the agency charged with implementing the RES, it determines which renewable energy sources qualify for compliance with the statute. See ECF No. 180 at 16–18, 20–21. The PUC's regulations make clear that it is Colorado utilities—not out-of-state entities—that may seek PUC approval of renewable energy (or RECs) used for RES compliance. 4 Colo. Code Regs. § 723-3-3656(e). The PUC only regulates Colorado utilities, and it in no manner regulates, or attempts to regulate, energy production outside Colorado's borders.

Neither the undisputed facts nor applicable case law support that the RES attempts to regulate extraterritorially and summary judgment must be denied. Anderson, 477 U.S. at 248.

II. THE RES' MANDATE DOES NOT DISCRIMINATE AGAINST COMMERCE BETWEEN COLORADO AND OTHER STATES (Claims 1-2).

ATI makes a half-hearted argument that the RES's core requirement for Colorado utilities to provide a percentage of retail electricity sales from renewable energy (the "Renewable Energy Mandate") discriminates against interstate commerce. ECF No. 180 at 18–19. This theory fails both factually and legally.

"Discrimination" in the dormant Commerce Clause context "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (quoting Or. Waste Sys., 511 U.S. at 99, and Limbach, 486 U.S. at 273). A state law may

discriminate against interstate commerce by treating in-state and out-of-state interests differently (1) on its face, (2) in practical effect, or (3) in purpose. Id.; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981). As discussed in detail in the parties' early motion for summary judgment on Claims 1 and 2, the RES does not discriminate against interstate commerce, because it treats in-state and out-of-state interests identically. See Defendants and Def.-Intervenors' Early Mot. for Summ. J., ECF No. 186, Argument § I. Different treatment of types of electricity generation (e.g., wind versus coal) does not constitute discrimination for interstate commerce purposes if in-state and out-of-state generators face the same requirements. *Id.* at Section 1(B), p.16.

ATI, in fact, appears to concede that the statutes treats in-state and out-of-state interests identically: "the RES'[s] practical effect has been to allow utilities to use out-of-state renewable generation to meet the Colorado renewable quotas," and then focuses its argument instead on the meritless extraterritoriality theory. See ECF No. 180 at 19. Given ATI's concession, and its failure to offer any other evidence that the challenged provisions discriminate against interstate commerce, the Court should deny ATI's motion for summary judgment on Claims 1-2.

III. THE REQUIREMENT FOR DISTRIBUTED GENERATION DOES NOT CREATE AN UNCONSTITUTIONAL IN-STATE PREFERENCE (Claims 3-4).

A. The Retail Distributed Generation Requirements Do Not Discriminate Against Interstate Commerce.

ATI offers a similarly cursory argument that the RES requirement for retail distributed generation ("retail DG") violates the dormant Commerce Clause because "by definition retail DG sources must be located in Colorado." ECF No. 180 at 15; see also Complaint, ECF No.

163, ¶¶ 142-46. This claim fails because ATI cannot show that the statute's retail DG provision discriminates against out-of-state energy providers.

The RES requires that a small part of utilities' retail electricity sales be generated from smaller-scale, non-centralized renewable energy sources known as "distributed generation" ("DG"). Colo. Rev. Stat. § 40-2-124(1)(c)(I)(C).[9] At least half of this distributed generation must be derived from "retail" DG, which is defined as a renewable energy resource "located on the site of a customer's facilities" and "provid[ing] electric energy primarily to serve the customer's load." Id. § 40-2-124(1)(a)(VIII).

Retail DG often consists of solar panels installed on site at residences and businesses. See, e.g., Colo. Governor's Energy Office, A Vision of Colorado's Electric Power Sector to the Year 2050 at 61 (2010) ("2010 Energy Office Report"), available at http://tinyurl.com/lpsska4 (the RES estimated to result in up to 100,000 "solar rooftops" over the next decade). Experts have stated that retail DG offers several benefits to utilities and their customers. For example, locating generation on-site possibly avoids the potential loss of electricity that occurs during transmission from a power plant (and which increases with distances). DG could positively affect reliability by providing a back-up energy source during a system outage. Utilities potentially benefit when customers who generate electricity on-site reduce demand on the grid during periods of high electricity use. Defendants' Fact 5.

Moreover, establishing such a program aimed at increasing a particular method of generation does not discriminate against interstate commerce. First, nothing on the face of the DG multiplier statute requires that retail DG be installed only in Colorado. ATI cites to the

[9] Currently, investor-owned utilities must provide 1.25% of their sales from DG and Cooperative utilities also must generate a small amount of DG. C.R.S. § 40-2-124(1)(c)(I)(C) and (X).

statutory definition of "retail DG" and makes the bald assertion that "by definition, retail DG sources must be located in Colorado." ECF No. 180 at 15 (citing Colo. Rev. Stat. § 40-2-124(1)(a)(VIII)). However, that definition does not mention Colorado. Additionally, it is clear that some utilities have customers outside of Colorado, and nothing in the RES prevents those customers from installing retail DG. See Defendants' Facts 3-4 (noting that service areas of some cooperative utilities extend beyond Colorado).

ATI also neglects to show why a retail DG mandate, even if tied to customer locations in Colorado, would necessarily be infirm. "[A] regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally." Rocky Mountain Farmers Union, slip op. at 34-35. If there are physical attributes of the good produced that are tied to the statute's legitimate local benefits, it is not a violation of the Dormant Commerce Clause for the statute's effect to be different for in- and out-of-state producers. Id. at 37-42. Here, there are a number of legitimate policy objectives identified above (e.g., reducing peak loads, enhancing local reliability, reducing transmission losses and reducing peak grid load stresses) that leverage the highly-specialized nature of retail DG installed at Colorado customers' homes. Thus, although the statutory language describing "retail DG" does not require retail DG to be in state, Plaintiffs have failed to create an undisputed question of fact regarding discrimination even if Colorado had done so. Id. at 37-42.

ATI also has not shown that retail DG has a discriminatory purpose. Colorado leaders clearly believed that a DG mandate would encourage growth of the solar energy industry. See 2010 Energy Office Report (cited at ATI SOF ¶ 42); ATI SOF ¶¶ 2, 28-32. That statement does not establish a discriminatory intent. As the Supreme Court has explained, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of

encouraging domestic industry," and such laws are valid so long as they do not discriminate against interstate commerce. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 471 n.15 (1981); Rocky Mountain Farmers Union, 2013 WL 5227091, at *22 n.13.

ATI's summary judgment motion offers no argument that the retail DG requirement has a discriminatory effect. Regardless, the retail DG challenge fails because ATI ignores a threshold issue: it has offered no evidence that customers generating retail DG in Colorado actually compete with comparable out-of-state energy generators. The requirement that comparable products compete with each other in the same market is a "threshold" requirement under the dormant Commerce Clause. The Supreme Court has explained:

> [A]ny notion of discrimination assumes a comparison of substantially similar entities . . . . [W]hen the allegedly competing entities provide different products . . . there is a **threshold question** whether the companies are indeed similarly situated [and serve the same market] . . . . **In the absence of actual or prospective competition . . . in a single market there can be no local preference**.

General Motors v. Tracy, 519 U.S. 278, 298-300 (1997) (emphasis added).

A customer generating solar energy on site for her own use is a different type of entity, producing a different product, than a company operating a commercial wind or solar farm (or large gas and coal plants). Because retail DG is generated primarily for use on-site, it serves a far narrower and much more specialized market (the individual customer) than energy generated by companies planning to sell wholesale energy to utilities for thousands of homes and businesses. ATI has offered no evidence that a Colorado homeowner installing solar panels to supply her own electricity demand in any way competes with out-of-state energy generators. In fact, at no point in its retail DG argument does ATI mention or discuss the RES' possible effects on out-of-state renewable energy producers or related energy-sector participants.

For instance, because retail DG by definition involves energy generated and used at the same location, that Colorado homeowner does not compete with persons installing retail DG energy-producing equipment in other states.[10] C.R.S. § 40-2-124(1)(a)(VIII) (definition of retail DG ties eligibility of a DG source to no more than 120 percent of on-site customer demand). At most, the customer might be viewed as competing with the retail utility serving her property because the customer is buying less electricity from that local utility. That shift, however, involves competition between two entities in the same state – not interstate competition protected by the dormant Commerce Clause.

ATI also argues that requiring DG is discriminatory because non-DG sources cannot compete for that portion of the Colorado market. ECF No. 180 at 17. This argument fails for the same reason as its challenge in Claims 1-2 to the Renewable Energy Mandate. Favoring one generation technology over another is not discrimination against interstate commerce. See Def.-Intervenors' Mot. for Summ. J., ECF No. 186, Argument I(B). Moreover, requiring utilities to employ a small percentage DG falls well within Colorado's authority to favor certain generation technologies. The Federal Energy Regulatory Commission (FERC) has made clear that states have the authority "to favor particular generation technologies over others." S. Cal. Edison Co., 70 FERC ¶ 61,215, at 61,676 (1995); see also Cal. Pub. Utilities Com'n, 134 FERC ¶ 61044, at 61160 (2011) ("[S]tates have the authority to dictate the generation resources from which utilities may procure electric energy."). Neither the facts nor the law support Plaintiffs' claims of discrimination, and summary judgment must be denied.

[10] Nor are out-of-state solar companies adversely affected by the retail DG requirement. ATI offers no evidence that solar panel suppliers or installers from other states face any hurdles to engaging in commerce in Colorado caused by retail DG. If anything, both Colorado and out-of-state solar companies benefit from the market created by the retail DG requirement. See Exh. I.

B. The Wholesale Distributed Generation Requirements Do Not Discriminate Against Interstate Commerce.

In addition to retail DG, the statute allows Colorado utilities to comply with the distributed generation mandate by generating or purchasing electricity from wholesale DG sources. C.R.S. § 40-2-124(1)(a)(IX), (1)(c)(II)(A). The RES's wholesale DG provisions also do not discriminate against interstate commerce.

On its face, the statutory definition of wholesale DG in the RES is facially neutral and, since its amendment in 2013 by Senate Bill 13-252, makes no distinction between in-state and out-of-state wholesale DG. Id. § 40-2-124(1)(a)(IX) (2013) (defining wholesale DG as a "renewable energy resource with a nameplate rating of thirty megawatts or less and that does not qualify as retail distributed generation"). Beyond the law itself, ATI identifies no evidence showing that the statute's wholesale DG provisions discriminate against out-of-state entities in practical effect or in purpose. See ECF No. 180 at 16–17. Consequently, because there is no "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," the RES's wholesale DG provisions do not discriminate against interstate commerce. United Haulers Ass'n, 550 U.S. at 338.

Finally, ATI is mistaken that the RES regulations represent an in-state preference, because they apply only to electric utilities in the State of Colorado. See ECF No. 180 at 16. While only Colorado utilities must comply with the Colorado RES, both in-state and out-of-state wholesale DG are treated evenhandedly under the current version of the statute. Accordingly, the wholesale DG provisions do not discriminate against interstate commerce, and summary judgment must be denied.

IV. THE COOPERATIVE AND MUNICIPAL PROJECT MULTIPLIER DOES NOT CREATE AN UNCONSTITUTIONAL IN-STATE PREFERENCE (Claims 5-6).

Finally, ATI argues that RES compliance multipliers in C.R.S. § 40-2-124(1)(c)(IX) discriminate against out-of-state energy generators. ECF No. 180 at 17-18. The statutory provision gives extra compliance credit for renewable energy generated by projects of a certain size that interconnect to transmission or distribution facilities owned by a cooperative electric association or municipally-owned utility. Colo. Rev. Stat § 40-2-124(1)(c)(IX) (the "muni/coop multiplier"). The statute includes a sunset provision: it provides that the muni/coop multiplier will not apply to any new projects after December 31, 2014. Id.

While ATI claims that, "[b]ased on the face of the statute," the muni/coop multiplier creates an "in-state preference," ECF No. 180 at 18, nothing in the language of the statute limits the muni/coop multiplier to renewable projects in Colorado. Id.[11] On its face, the muni/coop multiplier does not discriminate against interstate commerce.

ATI appears to rely on the requirement that eligible projects connect to distribution and transmission facilities owned by a cooperative association or municipal utility. It alleges that "[o]nly those renewable-energy projects located in Colorado can meet" the requirements for the multiplier. ATI SOF ¶ 47. ATI offers no evidence to support this assumption. However, cooperative utilities are not limited to operating only in Colorado. See C.R.S. §§ 40-9.5-101, 102 (defining "cooperative electric association" without reference to Colorado). The service areas of several Colorado cooperative associations cover both Colorado and surrounding states. Defendants' Fact 3. Similarly, nothing in the statute requires municipally-owned transmission

[11] For certain types of utilities, the multiplier applies "only to the aggregate first one hundred megawatts of nameplate capacity statewide" that take advantage of this provision. Id. This limit, however, does not prevent utilities from taking advantage of the multiplier for projects outside the state.

and distribution facility to be located in Colorado. C.R.S. § 40-2-124(1)(c)(IX). Numerous municipal utilities operate in Nebraska, Wyoming, and other states outside Colorado. Defendants' Fact 4. C.R.S. § 40-2-124(1)(c)(IX) does not discriminate on its face.

ATI makes no allegation and provides no evidence that the coop/muni multiplier has had a discriminatory effect. ATI suggests, however, that the muni/coop multiplier has a discriminatory purpose because its intent "is to stimulate rural economic development." ATI SOF ¶ 46; ECF No. 180 at 17. This reference falls far short of showing a discriminatory purpose behind the muni/coop multiplier, as the dormant Commerce Clause does not prevent a State from passing laws with the goal of encouraging domestic industry, as long as they do not discriminate against interstate commerce. Bacchus Imports, 468 U.S. at 271; see also Clover Leaf Creamery, 449 U.S. at 463 n.7, 471 n.15; Rocky Mountain Farmers Union, 2013 WL 5227091, at *22 n.13.

ATI's undisputed facts do not show that the muni/coop multiplier discriminates against interstate commerce. Its motion for summary judgment on Claims 5-6 should be denied.

V. IN THE ALTERNATIVE, IF THE COURT FINDS THAT ANY RES PROVISIONS VIOLATE THE DORMANT COMMERCE CLAUSE IT SHOULD CONDUCT A SEPARATE REMEDY PHASE.

ATI's summary judgment motion must be denied for the reasons described above. If the Court concludes that any provisions of the RES are constitutionally infirm, however, it should give the parties an opportunity to submit supplemental briefs addressing what the appropriate remedy should be. For example, a provision of the RES found to violate the Dormant Commerce Clause may be severed from the remainder of the statute. Colorado law creates a presumption of severability "[i]f any provision of a statute is found by a court of competent jurisdiction to be unconstitutional… ." C.R.S. § 2-4-204; see also, Schroyer v. Sokol, 550 P.2d 309 (Colo. 1976);

Immigration & Naturalization Serv. v. Chadha, 462 U.S. 932, 934 (1983). The Court should permit the parties to address severability in detail before awarding a remedy.

Moreover, a remedy phase would be appropriate if the Court finds that any of the regulations implementing the RES are improper. The PUC is already in the process of amending its regulations to conform to the statutory changes made in 2013 by Senate Bill 2013-252. See Exh. B, Colo. PUC Proceeding No. 13R-0901E. If the Court finds any infirmities with the RES rules, they may be addressed administratively by the PUC. This court should allow the parties to address that issue before awarding ATI any relief.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Early Motion for Summary Judgment in its entirety, and for such other relief as the Court deems appropriate.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **Response to Plaintiffs' Early Motion for Summary Judgment** upon all parties herein by service through the ECF Electronic Case Filing System (ECF) this 30th day of September, 2013.

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