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,
JAMES TARPEY, and
PAMELA PATTON,

Defendants,

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

Defendant-Intervenors.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Regulations

INTRODUCTION

Defendants' Response confirms that the RES should be invalidated *in toto* because it either constitutes an unconstitutional in-state quota under *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)—a case Defendants do not address, acknowledge, or even cite—or controls wholly out-of-state transactions and methods of productions entirely unrelated to the physical properties of the good being imported (electricity), thereby violating the dormant Commerce Clause's categorical per se bar against extraterritorial regulation. State statutes that violate the Court's rigid discrimination test are virtually per se invalid, and those that violate the Court's bright-line, exceptionless extraterritoriality test are always automatically invalid.

The RES, on its face, forces Colorado qualifying retail utilities to "***generate, or cause to be generated***," electricity from Colorado-approved renewable sources in "minimum amounts." Defendants admit that wholly out-of-state Colorado-approved renewable energy generation is used to comply with the RES. By "causing" Colorado-approved renewable energy generation to occur *in other states,* the RES regulates extraterritorially. This extraterritorial regulation is unrelated to any physical qualities or properties of the good being imported (electricity). This is unconstitutional. Defendants cannot ignore inconvenient constitutional constraints to impose their vision of enlightened public policy on *other states*. Defendants' justifications for the RES are irrelevant. There is no de minimis defense to Tier One dormant Commerce Clause violations. There are no defenses where, as here, a statute regulates extraterritorially; it is automatically per se invalid. There are no genuine disputes of material fact. Therefore, Plaintiffs are entitled to summary judgment as a matter of law on all merits claims.

ATI's REPLY ON DEFENDANTS STATEMENT OF MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit, but deny the implication that Colorado Rules apply to service outside Colorado.

4. Admit, but deny the implication that Colorado requirements apply to them.

5. Admit, but deny that these statements are material.

ATI'S REPLY ON ATI'S STATEMENT OF MATERIAL FACTS

14. In the context of this litigation, the only material fact regarding RECs is that the sole practical use of RECs is compliance with state renewable energy mandates and those that do not qualify under 4 CCR 723-3 cannot be used to meet the RES quotas.

17. Defendants admit that the RECs ATI described do not meet the definition of "eligible energy resources" in C.R.S. § 40-2-124(1)(a) and thus may not be used to demonstrate RES compliance.[1]

18. Joshua Epel is the Chairman of the Colorado Public Utilities Commission is a named defendant in this action. His statement constitutes an admission by a party opponent under Federal Rule of Evidence 801(d)(2). Defendants admit in their Early Motion for Summary Judgment on Claims 1 and 2, Dkt. No. 186, at 9, ¶ 21 (Sept. 30, 2013), that this is a "statement[] by the Colorado Public Utilities Commission…" and deemed admitted under F.R.C.P. 56(e)(2).

19. Defendants admit the substance of this fact but dislike the word "quota." The RES mandates are, by definition, a quota. *See* Black's Law Dictionary, *1130 (5th Ed. 1979) and may be deemed admitted under F.R.C.P. 56(e)(2).

[1] This fact may be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

21. Coal mine methane, which is produced and available in Utah, is a fuel that can be used for electricity generation and qualifies as a renewable energy resource in Utah after Utah enacted H.B. 192 in 2010; a fact that may be deemed admitted pursuant to F.R.C.P. 56(e)(2).

22. 4 CCR 723-3-3656(e) uses the word "may," which, read in context, refers to the time of the application: "The investor owned QRU may apply to the Commission, at any time…." 4 CCR 723-3-3657(a) states that "[e]ach investor owned QRU *shall* file for Commission approval, by application, a proposed plan detailing how the QRU intends to comply with these rules in accordance." (emphasis added). Likewise, 4 CCR 723-3-3657(b) establishes standards for compliance plans submitted by QRUs for Commission approval: "Each QRU compliance plan shall include …."

23. Renewable energy credit contracts and bundled energy contracts involving Colorado-approved RECs that are used to comply with the RES necessarily, as a definitional matter, control non-Colorado generation sources. Under the RES, qualifying retail utilities must "generate, or cause to be generated," a specified minimum percentage of electricity from Colorado-approved energy sources. *See* C.R.S. 40-2-124(c)(I),(V). Defendants admit that "regulated Colorado utilities … can and do comply with the RES using RECs from … out-of-state renewable energy generation." Defendants' Response at 4, ¶ 15. The only way that these out-of-state RECs can be used to comply with the RES is if the regulated utilities generate this energy of state or *cause* this energy to be generated out of state, either of which necessarily requires control. Whether a REC is "federally approved" is not a material fact.

24. C.R.S. 40-1-124(1)(a) (VII) defines "renewable energy resources" to only include certain small hydropower: "new hydroelectricity with a nameplate rating of ten megawatts or less, and

hydroelectricity in existence on January 1, 2005, with a nameplate rating of thirty megawatts or less." The materials cited in footnote 18 of Plaintiffs' Motion establish that a Colorado utility, IREA, has purchased RECs linked to "Large Hydro Generators (>30 MW)" located in Montana and Wyoming. Under the Colorado RES, these federal RECs may not be used to comply with RES quotas.

25. ATI uses the word "use" in its fact statements associated with using RECs in Colorado as meaning "available to count against the Colorado RES quotas" and makes explicit and implicit that the sole practical use of RECs is compliance with state renewable energy quotas.

26. The RES "require[s] qualifying retail electric utilities to generate, or cause to be generated, electricity from *recycled energy and/or renewable energy resources* in certain minimum amounts by certain years." *Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1227 (D. Colo. 2012) (citations omitted and emphasis added). Coal, natural gas, and nuclear generation from out-of-state sources does not qualify as recycled energy or renewable energy resources under the RES. *See* C.R.S. 40-1-124(1)(a). Therefore, out-of-state coal, natural gas, and nuclear generation is barred for competing from this portion of the Colorado electricity market. The remainder of Defendants' explanation for their denial is not responsive to the stated material fact. This fact should be deemed admitted pursuant to F.R.C.P. 56(e)(2)

27. The Court has taken judicial notice of the RES's provisions (Doc. No. 64 p. 3, n.2.), thus Defendants' denial has no significance. The RES provisions ***require*** utilities to meet RES quotas only with RECs that meet RES qualifications; and, implementing regulations ***require*** utilities to get PUC approval of those RECs through their RES compliance plans. *See*, ¶¶ 17 & 22 above, *and see*, 4 CCR 723-3-3657(a) & (b). This Court has already held that the RES "require[s]

qualifying retail electric utilities to generate, or cause to be generated, electricity from *recycled energy and/or renewable energy resources* in certain minimum amounts by certain years." *Am. Tradition Inst.*, 876 F. Supp. 2d at 1227 (citations omitted and emphasis added). This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

28. Mr. Ronald Binz was one of the original named defendants in this action. Defendants admit in their Early Motion for Summary Judgment on Claims 1 and 2, Dkt. No. 186, at 9, ¶ 21 (Sept. 30, 2013), that this is a "statement[] by the Colorado Public Utilities Commission…." This statement thus constitutes an admission by a party opponent under Federal Rule of Evidence 801(d)(2). This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

29. Statements Governor Hickenlooper made in Executive Order B 2013-004 are admissible under Federal Rule of Evidence 803(8) as public records and reports. The remainder of Defendants' explanation for their denial is not responsive to the stated material fact. This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

30. Statements Governor Hickenlooper made in Executive Order B 2013-004 are admissible under Federal Rule of Evidence 803(8) as public records and reports. The remainder of Defendants' explanation for their denial is not responsive to the stated material fact. This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

31. Defendants' explanation for their denial is not responsive to the stated material fact. This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

32. Defendants' explanation for their denial is not responsive to the stated material fact. This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

33. Defendants were provided Microsoft Xcel spreadsheets which included specific pages and graphs documenting the ATI's statement, both of which fully support the fact alleged. ATI also offered the Tanton and Michaels Expert Reports support the fact. Doc. Nos. 177-4 p. 14 & 177-5 p. 26 & 29 ("There has been a near-direct replacement of coal-fired power by wind power and a corresponding loss of market for coal and coal-fired generation").

34. Defendants' do not dispute the reduction in Alpha's coal sales into Colorado. The reason for the decline in Alpha's coal sales is addressed at length in ATI's Response to Defendants' Motion for Summary Judgment on Standing. Doc. No. 194 p. 15. ATI cites to Professor Michaels' Expert Report to show the RES caused Alpha's injuries. *See*, 177-5, p. 18.

35. See *supra* paragraphs 26 & 27. The RES regulates the sale of wholesale electricity (by both in-state and wholly out-of-state suppliers) to qualifying retail utilities located in Colorado. The RES "require[s] qualifying retail electric utilities to generate, *or cause to be generated*, electricity from *recycled energy and/or renewable energy resources* in certain minimum amounts by certain years." *Am. Tradition Inst.*, 876 F. Supp. 2d at 1227 (citations omitted and emphasis added). This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

39. Defendants offer no evidence to refute Plaintiffs' evidence that all retail distributed generation that is used to comply with the RES is generated only within Colorado. Because the RES requires distributed generation to be on the customer side of the meter, and because the only utilities the PUC may regulate are within Colorado, the distributed energy mandate can apply only to in-state utilities, unless Defendants wish to admit the mandate has extraterritorial effect. This fact cannot be genuinely disputed and should be deemed admitted pursuant to F.R.C.P.

56(e)(2).

42. Defendants do not deny that distributed generation is a type of renewable-energy generation that necessarily occurs in Colorado. Defendants offer no evidence to refute Plaintiffs' assertion that all distributed generation necessarily occurs in Colorado. This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

46. Mr. Doug Dean made the quoted statement in his official capacity as the Director of the Colorado Public Utilities Commission. Defendants admit in their Early Motion for Summary Judgment on Claims 1 and 2, Dkt. No. 186, at 9, ¶ 21 (Sept. 30, 2013), that this is a "statement[] by the Colorado Public Utilities Commission…." This statement thus constitutes an admission by a party opponent under Federal Rule of Evidence 801(d)(2). This fact should be deemed admitted pursuant to Federal Rule of Civil Procedure 56(e)(2).

STANDARD OF REVIEW

Defendants wrongly claim that *United States v. Salerno*, 481 U.S. 739, 745 (1987), establishes the standard for facial challenges. This is not, and never has been, the law. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1125-28 (10th Cir. 2012).

ARGUMENT

I. THE RES CONTROLS WHOLLY OUT-OF-STATE COMMERCE.

The RES explicitly requires Colorado "qualified retail utilities" to "***generate, or to cause to be generated***," electricity from Colorado-approved renewable sources to comply, Defs' Resp. at 3, ¶ 19; *see* C.R.S. § 40-2-124(1)(c)(I),(V) & (V.5); C.R.S. § 40-2-124(3)&(4), i.e., establishes a quota and forces Colorado utilities to cause electricity generation to occur using Colorado-approved production methods. RECs meeting Colorado-specific REC definitions, which conflict

with those of neighboring states, linked to electricity generated wholly out of state using Colorado-approved methods of production are being used to comply with the RES; out-of-state RECs not complying with Colorado definitions may not be used to meet quotas. Defs' Resp. at 3-4, ¶¶ 14-17, 25. Defendants admit that Colorado is a net importer of electricity, Defs' Resp. at 3, ¶ 8; the physical properties of electricity generated by nonrenewable sources, such as coal, are identical to those of electricity generated by Colorado-approved "eligible" renewable-energy resources, such as wind. Defs' Resp. at 3, ¶ 9; and electricity is delivered through an interstate grid that serves 11 western states and two foreign nations. Defs' Resp. at 2, ¶¶ 3-6. Defendants do not dispute that the RES's practical extraterritorial effects project into other states and regulate and limit the sale of coal into Colorado *and other states.*

Yet, Defendants argue that the RES "does not attempt to regulate or directly control commerce occurring outside Colorado." Defs' Resp. at 12. They are wrong. As explained below, the RES has the ***practical effect*** of regulating extraterritorially. State statutes that have the ***practical effect*** of controlling out-of-state commerce necessarily violate the dormant Commerce Clause, regardless of whether this extraterritorial reach was intended. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* There is no de minimis exception and there are no defenses to this type of constitutional violation.[2] *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. 2008). State laws that attempt to regulate beyond that state's jurisdiction are automatically constitutionally invalid per se. *Healy*, 491 U.S. at 336-37.

[2] *Accord Am. Bev. Ass'n v. Snyder*, 700 F.3d 796, 812 (6th Cir. 2013) (Sutton, J., concurring) (Extraterritorial "regulation is automatically invalid, no matter how great the regulation's local benefit, no matter how small its out-of-state burden." (quoting *Healy*, 491 U.S. at 336)).

A. The Dormant Commerce Clause Prohibits States' from Regulating Wholly Out-of-State Production Practices.

Defendants are wrong when they claim that the rationale of *Healy*, *Baldwin*, and other extraterritoriality cases are limited to price control/affirmation statutes.[3] Supreme Court precedent confirms that they are wrong,[4] as does this Circuits' and other Circuits' precedent.[5]

Healy makes clear that the bar on extraterritorial regulation is not so circumscribed, using specific examples (*one of which* was price affirmation statutes) to illustrate broad principles:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation *stand at a minimum for the following propositions*: First, the "Commerce Clause … precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *and, specifically,* a State may not adopt legislation that has the practical effect of establishing "a scale of prices for use in

[3] Defendants cite dicta from an inapposite case involving a statute establishing a rebate program, which did not regulate out-of-state production practices. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 653-55,669 (2003). Defendants claim that "if some aspect of a commercial transaction occurs in-state," it cannot be extraterritorial, Defs' Resp. at 11, is addressed in Plaintiffs' Response to Defendants' motion for summary judgment on counts 1 and 2.

[4] *See, e.g., S. Pac. Co. v. Arizona*, 325 U.S. 761, 779-784 (1945) (state statute regulating train lengths constitutes unconstitutional extraterritorial regulation where "practical effect of such regulation is to control train operations beyond the boundaries of the state"); *BMW of N. Am. v. Core*, 517 U.S. 599 (1996) (invalidating state statute prohibiting selling repainted cars without disclosing that car had been repainted because repainted could have occurred in a different state); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (invalidating state statute requiring certain type of mudguard on semis because other states allowed different mudguards and one state actually required a different type of mudguard); *Edgar v. Mite Corp.*, 457 U.S. 624, 641-43 (1982); *see Healy*, 491 U.S. at 333-337 & ns. 9 & 14.

[5] *See ACLU v. Johnson*, 194 F.3d 1149, 1160-1161 (10th Cir. 1999) (statute regulating Internet regulates extraterritorially); *accord Am. Bev. Ass'n v. Snyder*, 700 F.3d 796, 810 (6th Cir. 2013) (applying *Healy* and *Brown-Forman* to "novel issue of an 'unusual extraterritoriality question'"); *National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) ("Although cases like *Healy* and *Brown-Forman Distillers Corp*. involved price affirmation statutes, the principles set forth in these decisions are not limited to that context ."). Dicta from the Ninth Circuit's decision in *Ass'n des Eleveurs de Candards et d'Oeis du Quebec v. Harris*, No. 12-56822, 2013 U.S. App. LEXIS 18154 (9th Cir. Aug. 30, 2013), is simply mistaken and directly contradicted by this Circuit's, other Circuits, and Supreme Court precedent.

> other states," Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority *and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature*. … Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.

Healy, 491 U.S. at 336 (citations omitted and emphasis added).[6]

Baldwin illustrates that the dormant Commerce Clause forbids states from enacting legislation that, as a practical matter, controls production practices in other states. A state can "regulate the importation of unhealthy swine or cattle or decayed or noxious foods" and enact "inspection laws, game laws, [and] laws intended to curb fraud or exterminate disease." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 525 (1935). But "[o]ne state may not put [indirect] pressure … upon others to reform their … standards," for "[t]he next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business." *Id.* at 524. *Baldwin* provided as an example a state law that conditioned importation on proof of a state-approved minimum wage to illustrate a broader rule.[7] *Baldwin* stands for the proposition that while a state can regulate "the quality of the product" being imported, *see Baldwin*, 294 U.S. at 523-24, and even protect public health by requiring "appropriate certificates" concerning the physical properties of the product (for example, whether milk was produced in a sanitary way) as a condition of importation, *see id.* at 524, a State cannot regulate out-of-state production practices unrelated to the physical commodity being

[6] Commerce is broadly defined under the dormant Commerce Clause. *See Furst & Thomas v. Brewster*, 282 U.S. 493, 497-98 (1931) (includes "all component parts of commercial intercourse"); *Ky. Power Co. v. Huelsmann*, 352 F.Supp. 2d 777, 785 (E.D. Ky. 2005).
[7] *See National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995).

imported,[8] *see id.*

B. The RES Directly Regulates Wholly Out-of-State Energy Generation.

As Defendants repeatedly concede, electricity generated by nonrenewable sources (e.g., coal, natural gas, nuclear) is identical in every way to that generated by Colorado-favored renewable sources (e.g., wind) and is, by necessary implication, at least as safe, healthy, and reliable. There is no disputant that once generated, electricity is electricity and there is no difference in the electrons based on how the electricity came into existence.[9] The RES thus regulates out-of-state production practices in a manner unrelated to the state's legitimate interest in regulating the quality of imports to ensure that they are safe, sanitary, and do not endanger public health. As a federal district court interpreting a state statute "requiring companies to purchase allowances if it 'import[s] or commit[s] to import [power] from outside the state' that increases statewide power sector carbon dioxide emissions,' " recently explained: "To the extent carbon dioxide emissions occur, they occur when energy is generated. Because the carbon dioxide emissions occur in the state where energy is generated, the … [Minnesota statute] does seek to regulate carbon emissions occurring outside of Minnesota."[10]

Defendants are wrong when they claim that the "RES does not regulate the generation of energy or RECs outside of Colorado at all…." Defs' Resp. at 11. The RES does this by not only

[8] This is because "whatever relation there may be between" wholly out-of-state production practices unrelated to the physical properties of the product (e.g., what the minimum wage is in another state) and a state's legitimate interest in protecting its citizens from purchasing dangerous products "is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." *Id.*

[9] *See* Defs' Ans. ¶ 46 ("[P]hysical electricity generated by renewable sources and supplied to the grid is indistinguishable from electricity generated by non-renewable....").

[10] *North Dakota v. Swanson*, 2012 U.S. Dist. LEXIS 141070, *44-45 n. 10 (D. Minn. Sept. 30, 2012); *cf. Mont. Envtl. Info. Ctr. v. BLM*, 2013 U.S. Dist. LEXIS 86560, 17-20 (D. Mont. 2013).

preventing nonrenewable generators from accessing a portion of the Colorado electricity market but also affirmatively forcing Colorado-approved production practices onto other states by forcing Colorado utilities to "*generate, or cause to be generated*," specified minimum amounts of electricity using Colorado-approved methods of production in other states.[11] The RES requires out-of-state electricity generation to be conducted according to Colorado's terms for that electricity to have access to a portion of the Colorado electricity market. On its face, the RES, also necessarily ***causes*** Colorado-approved renewable energy generation to occur in other states (e.g., Wyoming, which does not have a RES), i.e., *controls* wholly out-of-state production practices. This is because regulated Colorado utilities can only comply with the RES by either generating ***or causing to be generated*** electricity using Colorado-approved methods of production. Therefore, the RES regulates extraterritorially in violation of *Baldwin*.[12]

The RES's Mandate also necessarily "forc[es] a merchant to seek regulatory approval in one State before undertaking a transaction in another," thereby "directly regulat[ing] interstate commerce." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986). RECs linked to electricity wholly generated in other states can only be used to comply with the RES if they meet Colorado's definition of "eligible energy resources." Defs' Resp. at 3-4, ¶¶ 17, 25. The RES thereby reserves a portion of the Colorado market for electricity linked to Colorado-approved RECs.[13] Thus, Colorado utilities must seek regulatory approval in Colorado before engaging in transactions in other states, and out-of-state generators are directly controlled

[11] *See* C.R.S. 40-2-124(1)(a); C.R.S. 40-2-124(c)(I),(V).
[12] If it did not have this prohibited effect, it would still be unconstitutional as an in-state preference under *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), a case that Defendants do not even attempt to address.
[13] C.R.S. 40-2-124(1)(a); C.R.S. 40-2-124(c)(I),(V).

by that approval.

In practice, the RES's quota operates to require out-of-state firms to produce Colorado-approved to gain access to the portion of the Colorado electricity market reserved for Colorado-approved renewable energy. Defendants admit that the RES's "Mandate" erects barriers to accessing the Colorado electricity market unless out-of-state generation methods "meet[] the same standards to which Colorado sources are subject."[14] There is *no constitutionally significant difference* between blocking access to the entire in-state market and only blocking access to a portion of the in-state market, no matter how small.[15] "[T]he 'clearest example of [an abuse] is a law that overtly blocks the flow of interstate commerce at a State's borders.'"[16] This is exactly what the RES overtly accomplishes.

II. THE RENEWABLE ENERGY MANDATE DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Defendants argue that "[d]ifferent 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." Defs' Resp. at 15. They are wrong. The case they cite to, *United Haulers*[17], is inapposite because the RES does not discriminate in favor of the government but rather solely regulates private businesses and inures to the benefit of Colorado-approved privately owned renewable energy generators.[18] Whether a statute, like the RES, likewise burdens a subset of in-state businesses is immaterial to the question whether the

[14] Defendants Early Motion for Summary Judgment on Claims 1 and 2, Dkt. No. 186, at 13-14.
[15] *Wyoming v. Oklahoma*, 502 U.S. 437, 455-457 (1992).
[16] *EnergySolutions, LLC v. Utah*, 625 F.3d 1261, 1266 (10th Cir. 2010) (citation omitted).
[17] *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007)
[18] *Id.* at 334 (finding "difference constitutionally significant"); *id.* at 356-60.

statute unconstitutionally discriminates against out-of-state businesses.[19]

Like the ordinance at issue in *Carbone*, the RES disadvantages a subset of in-state businesses (e.g., in-state coal producers) and numerous out-of-state businesses (e.g., out-of-state coal producers) for the *admitted* purpose of "creating demand for renewable energy," Defs' Resp. at 12, the overwhelming majority of which is generated by favored in-state businesses.[20] For this reason, it is no less unconstitutional, as it "deprives out-of-state businesses of access to a local market."[21] *Carbone*, 511 U.S. at 389.

III. THE RES'S DISTRIBUTED GENERATION MANDATE IS AN UNCONSTITUTIONAL IN-STATE QUOTA.

Defendants argue that the RES's "DG provision [does not] discriminate[] against out-of-state energy providers." Defs' Resp. at 16. They are wrong. It discriminates against out-of-state energy suppliers because it prevents them from competing for the portion of the Colorado electricity market reserved for in-state DG.[22] Wholly out-of-state nonrenewable energy (and DG) suppliers are similarly situated to in-state DG producers for purposes of the Commerce Clause, as they compete in the same Colorado retail electricity market. *GMC v. Tracy*, 519 U.S. 278, 298-300 (1997). The way in which electricity is produced is constitutionally irrelevant. *Bacchus Imps. v. Dias*, 468 U.S. 263, 268-269 (1984).

Defendants are also wrong when they claim that the DG mandate is nondiscriminatory

---

[19] *See Carbone. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.").
[20] *See, e.g.*, Exhibit 1, PSCo REC transfer records at RL000624 - RL000625.
[21] This is true *a fortiori* where, as here, "a state law purporting to promote environmental purposes is in reality simple economic protectionism" subject to the per se invalidity rule. *Rocky Mountain Farmers Union*, 2013 U.S. App. LEXIS 19258 at *69 (citation omitted).
[22] *Wyoming v. Oklahoma*, 502 U.S. at 455-457 (disallowing such in-state preferences).

because it does not explicitly state that all retail DG must be installed in Colorado. *See* Defs' Resp. at 17. Even facially neutral statutes are subject to the rule of per se invalidity if they discriminate against out-of-state businesses *in practical effect*.[23], [24] Defendants admit that "retail DG by definition involves energy generated and used at the same location" and concede that only in-state energy can qualify. *See* Defs' Resp. at 18-19. For these reasons, the DG mandate constitutes an unconstitutional in-state quota, *Wyoming v. Oklahoma*, 502 U.S. at 456-57, as does the "wholesale" DG mandate,[25] *see* 4 CCR 723-3(ff).[26]

Next, Defendants argue that "there are a number of legitimate policy objectives"

---

[23] *See, e.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-353 (1977) (facially neutral statute nonetheless discriminatory in practical effect); *and see Wyoming v. Oklahoma*, 502 U.S. at 456-57.

[24] Defendants' argument that Plaintiffs have "not shown that retail DG has a discriminatory purpose," Defs' Resp. at 17, should also be rejected. Defendants admit that "Colorado leaders clearly believed that a DG mandate would encourage growth of the solar energy industry." Defs' Resp. at 17. They note "the *market created by* the retail DG requirement." Defs' Resp. at 19 n. 10. The admitted purpose of the DG requirement was to encourage ***in-state*** solar energy generation through an in-state solar quota. Governor's Energy Office, Colorado's 30% Renewable Energy Standard: Policy Design and New Markets (Aug. 2010) at p.5, *at* http://cnee.colostate.edu/graphics/uploads/HB10-1001-Colorados-30-percent-Renewable-Energy-Standard.pdf (*accessed on* 8/15/2013); "Strategic Transmission and Renewables: A Vision of Colorado's Electric Power Sector to the Year 2050," at 3, 14, 61 (December 2010) *available at* http://tinyurl.com/lpsska4 (*accessed on* 8/15/2013).

[25] And, if wholly out-of-state DG producers were allowed to produce RECs for use within Colorado, this would, again, violate the categorical bar on extraterritorial regulation.

[26] To the extent that coops and service companies have service territories and customers in other states, they are subject to those states' laws, not Colorado's. For example, the portion of Highline Electric's service territory in Nebraska (*see* Doc. 187-5) is regulated by the Nebraska Power Review Board, *see* Map of Public Power District and Cooperative Service Areas, http://www.nprb.state.ne.us/service_area_maps.html , as is that of Bridger Valley EA (*see* Doc. 187-6); the portion of High West's territory located in Wyoming (*see* Doc. 187-4) is regulated by the Wyoming Public Service Commission, *see* WPSC, Electric Utility Map, http://psc.state.wy.us/htdocs/Dwnload/CertMaps/electric.pdf ; *see also* WPSC, Electric Industry, http://psc.state.wy.us/pscdocs/electric.html ("[T]he Commission … has regulatory authority over … electric cooperatives that provide electric service within the state.")

justifying the DG mandate that somehow render it nondiscriminatory. Defs' Resp. at 17. They are wrong. Defendants have "put the cart before the horse." "[T]he first step" is analyzing whether the law discriminates against out-of-state businesses.[27] *See Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Then, the burden shifts to the *Defendants* to produce "concrete record evidence" showing that "nondiscriminatory alternatives will prove unworkable."[28] *Granholm v. Heald*, 544 U.S. 460, 493 (2005). Defendants have offered no evidence justifying the discriminatory DG mandate and have failed to meet their heavy burden.

Finally, Defendants appear to argue that inapposite FERC orders concerning wholesale rate setting and authorize Colorado to use otherwise unconstitutional discriminatory quotas. That, too, is wrong. *Wyoming v. Oklahoma*, 502 U.S. at 456-57, controls.

IV. THE RES'S IN-STATE REGULATORY COMPLIANCE MULTIPLIER VIOLATES THE DORMANT COMMERCE CLAUSE.

Defendants concede that in-state regulatory compliance value multipliers are discriminatory, instead arguing that the muni/coop multiplier is not limited to in-state generators. Defs' Resp. at 21-22. But Defendants have admitted that this provision was enacted for the purpose of providing special benefits to in-state generators.[29] Doc. 189 at 11 (7 ¶ 46)).[30]

---

[27] There is no de minimis exception to the dormant Commerce Clause's bar on discrimination. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 581 n. 10 (1997); *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100-01 & n. 4 (1994).

[28] "This is an extremely difficult burden…." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 582 (1997); *accord Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009).

[29] It was added via H.B. 10-1418, appropriately entitled "An Act Concerning Requirements Applicable to Community Based Projects that Qualify for Special Treatment Under the Renewable Energy Portfolio Standard." It is official Colorado policy "to encourage local ownership of renewable energy generation facilities to improve the financial stability of rural communities." 4 CCR 723-3.3651.

[30] To the degree Defendants claim the statute applies to out-of-state projects is the degree to

V. THE RES AS A WHOLE IS CONSTITUTIONALLY INVALID.

Because the Court "cannot ignore the text and purpose of … [the RES] in order to save it," the canon of constitutional avoidance cannot rescue it. *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). The RES's unconstitutional renewable-energy mandate is not severable from the remainder of the RES, which cannot operate as intended without it.[31] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2668-69 (2012). The RES must be struck down in its entirety.

CONCLUSION

For the foregoing reasons, the Court should GRANT Plaintiffs' Motion.

Respectfully submitted,

/s/ David W. Schnare
David W. Schnare
Free Market Environmental Law Clinic
9033 Brook Ford Rd.
Burke, VA 22015
schnare@fmelawclinic.org
571-243-7975

Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Michael.Pepson@CauseOfAction.org
202-499-2024
Admitted to practice only in Maryland.
Practice limited to cases in federal court.

Attorney for Plaintiffs
AMERICAN TRADITION INSTITUTE and
ROD LUECK

---

which they admit extraterritorial regulation.

[31] Note, Defendants' admit that the quotas are "the centerpiece of the RES," and when that fails Constitutional muster, the entire statute collapses. *See*, Doc. No. 189, p. 10 ¶ 8.

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I electronically transmitted **PLAINTIFFS' REPLY TO DEFENDANTS AND DEFENDANT-INTERVENORS' RESPONSE TO PLAINTIFFS' EARLY MOTION FOR PARTIAL SUMMARY JUDGMENT** 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, including Defendants and Defendant-Intervenors' counsel listed below:

Will V. Allen
Kathleen L. Spalding
Colorado Attorney General's Office
1525 Sherman Street
Denver, CO 80203
will.allen@state.co.us
erin.overturf@state.co.us
kit.spalding@state.co.us

Neil Levine
Neil Levine Law Offices
4438 Tennyson Street
Denver, CO 80212
303-455-0604
Fax: 303-484-8470
Email: nlevine@grandcanyontrust.org

Michael Stephen Freeman
Earthjustice Legal Defense Fund−Denver
1400 Glenarm Place
#300
Denver, CO 80202
303−623−9466
Fax: 303−623−8083
Email: mfreeman@earthjustice.org

John Edward Putnam
Kaplan Kirsch & Rockwell, LLP-Denver
1675 Broadway
#2300
Denver, CO 80202
303-825-7000
Fax: 303-825-7005
Email: jputnam@kaplankirsch.com

/s/ David W. Schnare
David W. Schnare
Free Market Environmental Law Clinic
9033 Brook Ford Rd.
Burke, VA 22015
schnare@fmelawclinic.org
571-243-7975