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' RESPONSE TO DEFENDANTS' EARLY MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS 1 AND 2

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INTRODUCTION

Plaintiffs American Tradition Institute and Rod Lueck (collectively, "ATI") seek declaratory and injunctive relief, asking the Court to declare the Colorado renewable energy standard ("RES"), codified at C.R.S. 40-2-124, unconstitutional under Article I, Section 8 of the United States Constitution. Doc. No. 156-1. ATI's third through sixth Claims for Relief target specific elements of the RES, while the first two Claims address the functional structure of the entire statutory authority. The Defendants have filed an Early Motion for Summary Judgment regarding only the first two Claims to which this memorandum is ATI's Response.[1]

Defendants' Motion is the kind of reflexive, overused action that does nothing but unreasonably delay the progress of this litigation.[2] The first two-thirds of their argument address an issue not before the Court. Their second argument is a transparent attempt to circumvent the page limitations of their Response to ATI's Early Motion for Summary Judgment and an attempt to divert the Court's attention away from controlling Tenth Circuit jurisprudence. Their third argument is clearly premature, misstates both facts and law, and fails to meet the standard of review necessary to obtain the Courts grant.

RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

Defendants' Statement of Material Facts contains inaccurate paraphrasing of cited documents, citations that do not support the fact alleged and often include more than one alleged fact per paragraph, requiring ATI to give qualified admission of denial with an explanation.

[1] ATI has also filed an Early Motion for Summary Judgment, but addresses all six Claims. Doc. No. 180. Because ATI filed in conformance with the Scheduling order, while Defendants did not file their early motion until ten days later, Defendants were fully aware of ATI's arguments that moot most of Defendants' early motion arguments.

[2] *See* Martinez, W.J., Judge, "Practice Standards" Sec. II. (E) (1). (Dec. 1, 2012).

1. Defendants make two factual statements. Admit as to each.

2. Defendants make three factual statements. Deny as to the first and Admit as to the second and third, but note that the latter two are not a material facts. Defendants incorrectly paraphrase the requirement which is "the electric resource standards shall require each qualifying retail utility *to generate, or cause to be generated*, electricity from eligible energy resources" C.R.S. § 40-2-124 (1)(c) (emphasis added).

3. Defendants make two factual statements. Admit to each. The first is not a material fact.

4. Deny. To the degree this fact is material, it is clearly in dispute. ATI has filed expert reports showing the "Bluebook" arguments for the RES are not consistent with numerous studies. See, Tanton and Michaels Expert Reports, Doc. No. 177-4 & 177-5 respectively.

5. Admit in part and deny as to "many".

6. Admit, but not a material fact.

7. Admit.

8. Defendants make two factual statements, admit as to both.

9. Defendants make four factual statements, admit as to each.

10. Admit.

11. Defendants make three factual statements, admit as to each.

12. Defendants make three factual statements repetitious of early statements of fact to which ATI has already admitted.

13. Defendants make three factual statements, none material. Admit as to each.

14. Admit as to number but deny to the degree Defendants imply that the standards in each state are the same as that of Colorado.

15. Defendants make two factual statements, neither of which is material. Admit as to the first, but deny as to the second. ATI's comment on putting wind on trial was a statement indicating that this litigation will have the salubrious effect of trying wind power in the court of public opinion and does not alter the Claims ATI has placed before this Court.

16. Defendants make two factual statements. Deny as to the first which materially misrepresents the Complaint. The Complaint speaks for itself. Admit as to the second.

17. Def. makes two statements, neither a material fact. Deny. ATI makes multiple arguments as to the discriminatory effect of the RES, including the two made in paragraph 17.

18. Admit as cited to Colo. Rev. Stat. but deny as cited to Plaintiffs Second Amended Complaint.

19. Admit, but not a material fact.

20. Deny as an incomplete statement taken out of context. ATI argues that "the electric resource standards shall require each qualifying retail utility *to generate, or cause to be generated*, electricity from eligible energy resources" C.R.S. § 40-2-124 (1)(c) (emphasis added), which can be generated in-state or out-of-state. *See* Doc. No. 180 at p.22 (19).[3]

21. Defendants make four statements of fact. Deny as to first as it misrepresents ATI's arguments. Deny second as to ATI's use of the legislative declaration, but admit as to the partial description of the legislative intent. Deny as to the third as it mischaracterizes the statements but admit as to Defendants' admission that the statements were made by the Colorado Public Utilities Commission. Deny as to fourth. ATI has argued that the in-state preferences discussed

[3] In this Brief, ATI makes pinpoint citations to the docket using both the page of the docket entry and the page as numbered within the document cited. Thus "Doc. No. 180 (at p.22 (19)" cites to the 22nd page of the docket entry, which is labeled as page 19 in the bottom margin of the document.

with regard to Counts 3 through 6 are additional evidence of the RES purposes and clearly intend a discriminatory intent behind passage of the RES. Doc. No. 180 at 18(15).

22. Deny, as it is an incomplete list, admit these are some of the burdens on interstate commerce and others are adverse effects resulting from burdens on interstate commerce.

23. Deny, as the predicate that these are all the burdens is in error and the fact is not material to the extraterritorial regulation imposed by the RES.

24. Defendants make two statements of fact. Admit as to the first. The second in not material, but admit.

25. Defendants make three statements of fact. Admit as to all. The second statement regarding the percentage of coal mined within Colorado is not material.

26. Defendants make three statements of fact. Admit as to all.

ATI'S STATEMENT OF MATERIAL FACTS

1. The Bluebook admits the RES is intended to force reduction in non-renewable generation Doc. No. 186-1 p. 24.

2. The Defendants (PUC) "will monitor and enforce the compliance of those utilities required to meet the new renewable energy requirements." Doc. No. 186-1 p. 25(15)

3. The intent of the RES is in-state economic gain realized by "Renewable energy facilities, typically located in rural areas, [which will] boost rural economies. The construction and maintenance of renewable energy facilities will create jobs in rural Colorado." Doc. No. 186-1 p. 25(15).

4. The intent of the RES is in-state economic gain realized by "provid[ing] tax revenues that can be used by local governments" Doc. No. 186-1 p. 26(16).

5. Defendants admit a burden on interstate commerce as evidenced by the fact that renewables are more expensive and will be required to generate electricity regardless of cost. Doc. No. 186-1 p. 26(16).

6. Defendants admit a burden on interstate commerce as evidenced by the fact that the cost of the RES will be passed onto the consumer and will include the cost of transmission lines (to facilitate out of state generation). Doc. No. 186-1 p. 26(16).

7. Defendants admit a burden on interstate commerce as evidenced by the fact that the statute offers no cost cap for non-residential customers. Doc. No. 186-1 p. 26(16).

8. Defendants admit a burden on interstate commerce as evidenced by their admission that wind generation must be backed up by reliable generation (Doc. No. 186-1 p. 26(16)), which increases costs further and causes increased pollution. *See* Tanton expert report Doc. 177-4.

9. Defendants admit a burden on interstate commerce as evidenced by the fact that wind is intermittent and "could cause problems during peak energy demand periods or in emergencies." Doc. No. 186-1 p. 26(16).

10. Defendants admit there is a less burdensome alternative to the RES, admitting a voluntary program could be used in place of the RES mandate. Doc. No. 186-1 p. 26(16).

11. Defendants admit the Legislative intent of the RES is address "Colorado's [economic] welfare and development and to "save [Colorado] consumers and businesses money, attract new businesses and jobs [to Colorado], promote development of [Colorado] rural economies" Doc. No. 186-1 p. 29(39).

12. The Defendant endorses and thus admits the fact that the Colorado PUC controls Distributed Generation eligibility. Doc. No. 186-1 p. 37.

13. Defendants admit the RES displaces fossil fuel-fired generation and replaces it with renewables. Doc. No. 186 p 20 (14).

14, The Court has taken judicial notice of the RES, and the RES does not permit Colorado utilities to meet RES quotas by use of out-of-state generated Renewable Energy Credits ("RECs") that fail to qualify under the RES's definition of RECs.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, 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 Lobby, Inc*., 477 U.S. 242, 248 (1986).

Defendants' selective reliance on *Bausman v. Interstate Brands Corp.*[4] is misplaced, as it only requires that "[t]o avoid summary judgment, the nonmovant must establish, at a minimum, *an inference of the presence of each element essential to the case*," citing to *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994); *see Martin v. Canon Bus. Solutions, Inc.*, 2013 U.S. Dist. LEXIS 129008, at *3 (D. Colo. Sept. 10, 2013) (stating standard).

ARGUMENT

Under Claims 1 and 2, ATI argues that the Colorado RES violates the dormant Commerce Clause. There are four ways a state law can cause this kind of violation. For Claims 1 & 2, ATI only argues only one form of violation – an extraterritorial violation.[5]

[4] 252 F.3d 1111, 1115 (10th Cir. 2001).

[5] In Claims 3 – 6, ATI argues those sections of the statute are either extraterritorial violations or constitute discrimination, both subject to strict scrutiny. The other two kinds of violations,

State statutes that have the ***practical effect*** of controlling out-of-state commerce are extraterritorial violations and necessarily violate the dormant Commerce Clause. *Healy v. Beer Inst*., 491 U.S. 324, 336 (1989). State statutes that exceed a state's "regulatory jurisdiction," even if nondiscriminatory, are subject to strict scrutiny and struck without further inquiry. *See id.* There is no defense to extraterritorial regulation. *See American Beverage Assoc. v. Rick Snyder*, 700 F.3d 796, 812 (6th Cir. 2013) (Sutton, J., concurring). The offending statute is simply struck. To the extent that the RES regulates extraterritorially, it is "invalid per se." *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. 2008); *accord KT & G Corp. v. AG of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008). Because it is not fact-intensive, this kind of violation is well suited to a motion for summary judgment.

I. Discrimination under Claims 1 & 2 is not before the Court

Defendants spend two-thirds of their argument under this motion attempting to suggest that ATI has not offered evidence showing the RES discriminates against interstate commerce. Doc. No. 186 pp. 19(13) – 25(19). There is no good reason for Defendants' argument. ATI did not argue that the RES's quota causes discrimination and creates preferences.[6] Thus, that issue is not before the Court. Should this case reach a point when it is appropriate for ATI to make

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neither of which ATI argues at this time, are subject to the *Pike* balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Courts find a third form of violation when, despite regulating evenhandedly "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id* at 142. The fourth form of violation arises because the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation". *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88-89 (1987).

[6] *See* ATI's Early Motion for Summary Judgment, Doc. No. 180 p. 22(19). ATI instead argues that *if* the RES's quota did not violate the dormant Commerce Clause's categorical bar on extraterritorial regulation, because only in-state renewable energy could be used to comply—which is not the case — the RES's quota would *then* constitute an instate preference and thus would violate the dormant Commerce Clause under *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

Pike arguments, it will do so. But because the Second Tier bases are not now before the Court and discovery relevant to such arguments remains underway, Defendants' arguments are premature and should be rejected. *See* Exhibit 1 (Counsel's affidavit); *see also Anderson*, 477 U.S. at 250 ("Rule 56[d] [requires] that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.").

ATI does, however, have a duty of candor to the Court, and as such needs to discuss portions of Defendants' arguments, as these arguments' penumbra may bleed into other arguments that have or will come before the Court and ATI does not wish the Court to be misdirected by Defendants' effort to create ambiguities in this case.

Defendants argue that the RES does not discriminate in practical effect against interstate commerce in coal used to fuel electric generators ("thermal coal"), citing to cases involving in-state preferences. While ATI has not argued an instate preference for coal, the RES mandate to replace hydrocarbon fuels (thermal coal and natural gas) with renewables reduces the market for those fuels, and that forced reduction in the interstate market indeed creates a burden on interstate commerce. *See, e.g., United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 254-56 (2nd Cir. 2001).

Defendants reprise this discussion in part B of their opening section (Doc. No. 186 p. 22(16)) and again in the final section of their argument (discussed below) apparently attempting to muddy the waters on dormant Commerce Clause law not before the Court on Claims 1 & 2, but before the Court on Claims 3 – 6. Defendants admit that the purpose of the RES is to replace thermal coal and natural gas generation with renewable sources, but they claim this is not an impermissible form of discrimination against interstate commerce. We have yet to make that

argument. We have reserved the right to argue it is an impermissible burden on interstate commerce, but that argument is inappropriate for an early motion for summary judgment and may be inappropriate for any motion for summary judgment because it is heavily fact dependent and requires balancing under the *Pike* test. ATI may eventually have to make a *Pike* argument, but it will not fail on the ground that there is no burden on the interstate market for thermal coal.

Defendants also use their stillborn preference argument to suggest that the RES's well-documented facial purposes to stimulate economic growth within Colorado have no discriminatory design. Doc. No. 186 p. 21-22(15-16). Whether those economic purposes have a discriminatory design is not at issue for Claims 1 & 2. Under Claims 3-6, however, the economic purposes of the RES are clearly designed to aid Colorado economic interests over out-of-state interests, as ATI discusses throughout its Early Motion for Summary Judgment. Doc. No. 180.

Defendants also attempt to validate a recent Ninth Circuit decision on facial discrimination for no cognizable purpose other than to improperly supplement their arguments in their Response to ATI's Early Motion for Summary Judgment, a painfully obvious attempt to do an end-run on the page limitations allowed in a responsive brief.[7]

The Ninth Circuit *Rocky Mountain Farmers* case (a split panel decision) is marked by two important characteristics. In dissent, Judge Murguia explains both:

The majority puts the cart before the horse and considers California's reasons for

[7] Likewise, Defendants inaccurately cite inapposite dicta from *another* Ninth Circuit case, *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 967 v. F.3d 521 (9th Cir. 2009), for the proposition that "states 'may prevent businesses with certain structures or methods of operation from participating in a retail market without violating the dormant Commerce Clause." Doc. No. 186 p. 23(17) (quoting *id.* at 527). In that case, the Ninth Circuit was referring to a distinction between different entities that provide different services—opticians are different from optometrists and ophthalmologists. *See id.* Conversely, nonrenewable energy generators produce the exact same good as Colorado-approved renewable energy generators: electricity.

> distinguishing between in-state and out-of-state ethanol before examining the text of the statute to determine if it facially discriminates. This approach is inconsistent with Supreme Court precedent, which instructs that we must determine whether the regulation is discriminatory before we address the purported reasons for the discrimination.[8]

Indeed, the majority opinion offers not a single case to support its bizarre public policy-based argument. Judge Murguia exposes this absurdity, writing:

> Determining whether a regulation facially discriminates against interstate commerce begins and ends with the regulation's plain language. Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." "[T]he purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." Only after we find discrimination do we address, in our application of strict scrutiny, whether the reason for the discrimination is sufficiently compelling to justify the regulation.

Id. as *72 (quoting *Or. Waste Sys., Inc.*, 511 U.S. at 99-100). *Rocky Mountain Farmers* also collides with Tenth Circuit law. *See Energysolutions, LLC v. Utah*, 2010 U.S. App. LEXIS 23245, 18-19 (10th Cir. 2010) ("The dormant Commerce Clause forbids states from discriminating against articles of commerce based on the article's state of origin."); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009) ("The first-tier inquiry turns on whether the challenged law affirmatively or clearly discriminates against interstate commerce on its face or in practical effect." (internal quotation marks omitted)). Because ATI has not yet argued that Claims 1 & 2 create an in-state preference or weigh in favor of in-state economic interests over out-of-state purposes, and because ATI will only mount its Second Tier arguments after close of discovery, Defendants' argument is premature and ATI respectfully suggests that this section of their argument is not sufficient or appropriate to support denying ATI's first two claims.

[8] *Rocky Mountain Farmers v. Corey*, *slip opinion* at *72 (No. 12-14121, 9th Cir. Sept. 18, 2013) (Murguia, J., dissenting). *Cf. Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-76 (1997).

II. Colorado may not regulate extraterritorially.

In a second attempt to end-run the page limitations allowed in its Response brief to ATI's Early Motion for Summary Judgment, Defendants also attempt to shoehorn an extraterritoriality argument into their discrimination section of the brief (Doc. No. 186 p. 23(17)).Defendants go so far as to boldly claim that the interstate nature of the retail electricity market "does not call into question Colorado's authority to regulate how power sold in this state is generated" wholly out of state. Doc. No. 186 p. 23 (17). They are wrong. The dormant Commerce Clause categorically bars Colorado from forcing its preferred production practices onto other states. Colorado has the authority to limit what kinds of power generation it allows to be built within the state but not what power generation may be used outside the state. *BMW v. Gore*, 517 U.S. 559, 571 (1996) (state cannot "impose its own policy choice on neighboring States"). Nor may Colorado burden the interstate market for thermal coal by shrinking the size of the thermal coal market, absent proper cause. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1042-1043 (10th Cir. 2009) (allowing a shift from one interstate supplier to another, but not a reduction in the size of the market).

Here, the RES does not prohibit goods (i.e., electricity) that are themselves inherently different or dangerous so as to pose a threat to Colorado's citizens or environment from accessing a portion of Colorado's retail electricity market. *Cf. Maine v. Taylor*, 477 U.S. 131, 141-43, 151-52 (1986). Rather, it necessarily places a restriction on how the goods are manufactured, not the quality or character of the goods themselves.[9] Contrary to Defendants'

[9] "Once electricity is generated and injected into the power grid, it is a fungible commodity and there are 'no qualitative differences based on the source from, or method by, which the electricity has been generated.'" *North Dakota v. Swanson*, 2012 U.S. Dist. LEXIS 141070, *15 (D. Minn. Sept. 30, 2012). The Nuclear Regulatory Commission has explained: "No one disputes that electricity is fungible; a user cannot distinguish between electricity generated by a nuclear

claim (*see* Defs' Resp. at 12), the RES requires out-of-state electricity generation to be conducted according to Colorado's terms for that electricity to have access to the portion of the Colorado electricity market reserved exclusively for Colorado-approved renewable generation.[10] But Colorado does not have authority to restrict transactions involving goods that are generated out-of-state solely because it does not approve of the method by which those goods are manufactured, while permitting transactions involving identical goods that were manufactured in a way that Colorado does not find offensive. *See C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) ("States and localities may not attach restrictions to exports or imports to control commerce in other States."). Indeed, Colorado's RES operates to project Colorado's energy policy onto other states, such as Wyoming, that have expressly rejected any legislation that would limit nonrenewable energy generation. *See* Wyo. Stat. § 35-11-213.

In support of this bold claim of authority to regulate wholly out-of-state electricity generation, Defendants misrepresent *Arkansas Electric Coop. Corp. v. Ark. Public Serv. Comm'n*, 461 U.S. 375 (1983), suggesting that because regulation of local retail electric service is a traditional state authority, Colorado can regulate how that electricity is generated *outside the state*. They cannot, and *Arkansas Electric* makes that clear: "the ***production*** and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently

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power plant and that generated by a facility which burns a fossil fuel." 6 N.R.C. 892, *138 (N.R.C. 1977). This proposition holds true with respect to electricity generated by other sources. "'[E]nergy flowing onto a power network or grid energizes the entire grid, and consumers then draw undifferentiated energy from that grid.' As a result … , 'any activity on the interstate grid affects the rest of the grid.'" *New York v. FERC*, 535 U.S. 1, 8 (2002) (citation omitted).

[10] The Second Circuit's decision in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004), is inapposite because, *inter alia*, in that case "[t]he extraterritorial effect … [at most] amount[ed] to no more than the upstream pricing impact of a state regulation," *id.* at 220,

interfere with broader national interests." *Id.* at 377 (*emphasis added*); *see also GMC v. Tracy*, 519 U.S. 278, 291 n. 8 (1997) (*Arkansas Electric*'s reasoning "implies that state regulation of retail sales is not, as a constitutional matter, immune from our ordinary Commerce Clause jurisprudence"). In fact, *Arkansas Electric* was not an extraterritoriality case at all: at issue was whether a state public utilities commission had regulatory jurisdiction over wholesale rates charged by an ***in-state*** electric cooperative "to its member retail distributors, ***all of whom are located within the State.***"[11] *Arkansas Electric*, 461 U.S. at 377; *see id.* at 390 n. 16.

Supreme Court precedent recognizes that a state can, of course, regulate electricity generation occurring within the borders *of that state*.[12] But the method by which electricity is generated *in other states* is not a matter of local concern. Moreover, under the Federal Power Act ("FPA"), the only area left for state regulation is "sale at local retail rates to ultimate consumers" and any other exceptions to the FPA that Congress explicitly made subject to regulation by the states. *See Fed. Power Comm. v. So. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). While leaving for the states, like Colorado, the authority over facilities used to generate electricity ***within their borders*** and for furnishing retail service, Congress clearly and

[11] The Supreme Court explained in *New Eng. Power Co. v. N.H.*, 455 U.S. 331 (1982), states lack the authority to regulate the interstate transmission of electricity. *See* 340-344 & n. 10. In *New England Power Co.*, the Court held that a state cannot constitutionally prohibit the exportation of electricity generated within its borders, because "restrict[ing] the flow of privately owned and produced electricity in interstate commerce" in this manner violates the dormant Commerce Clause. *See id.* at 433, 344. The inverse also holds true. Further, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants…." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011).

[12] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-208 (1983); *see PPL Energyplus, LLC v. Nazarian*, 2013 U.S. Dist. LEXIS 140210, *92-93 & n. 45, *99-101 (D. Md. Sept. 30, 2013) (states "retain *traditional state authority to regulate the development, location, and type of power plants within its borders.*…); *North Dakota v. Swanson*, 2012 U.S. Dist. LEXIS 141070, *23-25 (D. Minn. 2012).

conclusively evidenced its intent to occupy the field of interstate electricity power transmission and sale at wholesale. *See* 16 U.S.C. §§ 824(a), (b)(1).

In two similar misrepresentations of law, Defendants again suggest that Colorado can regulate how electricity is generated ***outside*** the state. But their citations are purely limited to generation within the state.[13] Moreover, FERC orders cannot, and do not purport to, displace well-established Supreme Court precedent interpreting the dormant Commerce Clause to place limitations on states' regulatory authority.

Finally, in footnote 13, Defendants suggest that discriminatory quotas do not violate the dormant Commerce Clause. (Doc. No. 186 p. 23 (17, n. 13)). They are wrong. In *Wyoming v. Oklahoma,* the Court squarely rejected this exact argument. *See* 502 U.S. at 455-57.

III. The RES directly controls Commerce Occurring Wholly Outside Colorado.

In the second section of their memo, Defendants continue their efforts to end-run the page limitations of their Response to ATI's Early Motion for Summary Judgment, continuing their response to ATI's extraterritoriality argument. They begin with a footnote suggesting that ATI cannot raise this argument. This is nonsense. ATI stated clearly that the RES is "unconstitutional, invalid and unenforceable under the dormant Commerce Clause." Second Claim for Relief Doc. No. 163 ¶ 141. Evidence of the adequacy of ATI's specification of claims

[13] *See* 70 F.E.R.C. P61,215, 61 (F.E.R.C. 1995) ("we acknowledge California's ability under its authorities over the electric utilities <u>*subject to its jurisdiction*</u> to favor particular generation technologies over others.") (*emphasis added*); *New York v. FERC*, 535 U.S. 1, 24 (2002) ("FERC has recognized that the States retain significant control <u>*over local matters*</u> . . . . *See, e.g.*, Order No. 888, at 31,782, n. 543 ("Congress left to the States authority to regulate generation and transmission <u>*siting*</u>") (*emphasis added*). Defendants' also fundamentally misunderstand FERC Order No. 1000, 136 FERC ¶ 61,051 (2011), which does not purport to "acknowledge[] the legitimacy of state law like the RES…." Doc. No. 186 p. 24 (18). Rather, Order 1000 is policy-neutral and simply acknowledges the practical burdens statutes like the RES will have on interstate commerce, *see id.* at ¶¶ 29, 39, 45, 82, 497, which supports ATI's *Pike* argument.

is shown in the Defendants' statements of their "Merits Defenses," where they recognize that "[u]nder the Dormant Commerce Clause, state laws cannot . . . regulate extraterritorially." Doc. 149 p. 8. Defendants were on adequate notice of the claim, and ATI has met all requirements of Fed. R. Civ. Proc. 8. With regard to the RES's extraterritorial regulation, ATI has made its arguments in its Early Motion and Reply briefs and need not repeat them here except to respond to Defendants separate claims. *See*, ATI's Early MSJ Doc. No. 180 at pp. 23(20) – 26(23).

Defendants argue that "the RES does not directly control commerce occurring outside of Colorado because out-of-state entities are free to generate electricity in whatever manner they wish and can sell electricity into Colorado regardless of how the energy is generated." (Doc. No. 186 p. 25-26 (19-20).) They are wrong, as they admit in the next sentence: "*Out-of-state* entities may choose to take advantage of *the Renewable Energy Mandate* by generating renewable energy for sale into Colorado…." Doc. No. 186 p. 26 (20) (emphasis added)).. A "Mandate" is *not* a mere incentive. Rather, it is "[a] command" or an "order." BLACK'S LAW DICTIONARY, 867 (5th Ed. 1979) (defining "Mandate"). Elsewhere, Defendants admit that the RES regulates extraterritorially: "[T]he RES's Renewable Energy Mandate erects no barriers to … [utilities generating or purchasing out-of-state energy] *so long as the energy meets the same standards to which Colorado sources are subject*." Doc. No. 186 p. 20 (14) (emphasis added). The Mandate directly regulates wholly out-of-state conduct by requiring Colorado utilities "to *generate, or cause to be generated*," electricity using Colorado-approved methods of renewable-energy generation.[14] C.R.S. § 40-2-124(1)(c)(I),(V) & (V.5); C.R.S. § 40-2-124(3)&(4). This means that

[14] If Colorado utilities solely complied with the RES's Renewable Energy Mandate it would violate the dormant Commerce Clause as a discriminatory in-state quota, or set aside, under *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

when Colorado utilities use out-of-state renewable-energy to comply, the RES projects out of Colorado and forces Colorado's preferred methods of production onto other states. *See Swanson*, 2012 U.S. Dist. LEXIS 141070 at *44-45 n. 10. The RES, on its face, does not only "influence out-of-state conduct" (Doc. No. 186 p. 26 (20)) but ***causes***, i.e., controls, out-of-state conduct.[15]

Further, the definition of a Colorado-eligible renewable energy source bars out-of-state nonrenewable energy generators from accessing a portion of the Colorado electricity market because Colorado does not agree with their wholly out-of-state production practices: it does not simply condition the voluntary participation in the Colorado market but goes so far as to require Colorado's permission to enter the market and completely stops non-conforming energy generators from entering the interstate market in Colorado-eligible RECs. Nor can Defendants credibly claim that a non-conforming energy source is party to a commercial transaction in Colorado, and thus the RES does not regulate extraterritorially, because the non-conforming energy source never gets the opportunity to enter a commercial transaction that will result in helping a retail utility meet its RES quota. *Cf. Trade Council v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999) (striking down statute that penalized contract bidders based on out-of-state conduct).

[15] The Ninth Circuit's sui generis decision in *Rocky Mountain Farmers Union* is addressed and also distinguishable: Unlike the RES, under the California statute, "no [out-of-state] firm must meet a particular … [California production] standard" to gain access to a portion of the in-state market, 2013 U.S. App. LEXIS 19258 at *23, and the majority concluded that it did not regulate extraterritorially because it only involved "incentives," *id.* at *23-28, and "reporting requirements, *id.* at *87, as opposed to the RES Mandate. The Second Circuit's decision in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), is inapposite because, *inter alia*, in that case "[t]he extraterritorial effect … [at most] amount[ed] to no more than the upstream pricing impact of a state regulation," *id.* at 220. The First Circuit's decision in *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd* 538 U.S. 644 (2003), illustrates why the RES violates the bar on extraterritorial regulation. In that case, the First Circuit reasoned that "[b]ecause the regulation only applies to in-state activities, there is no extraterritorial reach and the Act is not per se invalid…." *Id.* at 82. The RES, on its face, not only applies to but *causes* wholly out-of-state activities (to wit, out-of-state Colorado-approved energy generation).

In any event, Defendants' inaccurate claim that "[i]f a party to a commercial transaction is in-state, 'the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause'" (Doc. No. 186 p. 26 (20) (quoting *Quik Payday*, 549 F.3d at 1308)) fundamentally misinterprets fact-specific dicta from *Quik Payday.* First, this is not the law. The mere fact that "a party to a commercial transaction is in-state" does not preclude a finding that a state statute impermissibly controls wholly out-of-state commercial activity. For example, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1939), involved "a milk dealer in the city of New York," which purchased milk from Vermont, *see id.* at 518; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("mere fact" that effects of state law "are triggered only by" in-state sales "does not validate the law if it regulates the out-of-state transactions" of companies that sell in-state). Like the statute at issue in *Baldwin*, the RES unconstitutionally "uses an in-state hook to affect out-of-state conduct." *See Pharm. Research & Mfrs. of Am. v. District of Columbia*, 406 F. Supp. 2d 56, 69 (D.D.C. 2005). The dormant Commerce Clause prohibits "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…." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citation and internal quotation marks omitted). That the RES is addressed to retail sales in Colorado "is irrelevant if the practical effect of the law is to control" wholly out-of-state commerce. *Brown-Forman*, 476 U.S. at 583.

Second, unlike this case, the Kansas statute at issue in *Quik Payday* regulated the "payday" loan transactions in Kansas, *see Quik Payday*, 549 F.3d at 1308, *not* wholly out-of-state commercial activity such as electricity generation.[16] The RES regulates out-of-state energy

[16] Commerce is broadly defined under the dormant Commerce Clause. *See Furst & Thomas v.*

generation and thus regulates wholly out-of-state commerce. *See Swanson*, 2012 U.S. Dist. LEXIS 141070 at *45 n.10. Reference to *Rocky Mountain Farmers* does not avail the Defendants either. In *Rocky Mountain Farmers*, California conditioned the "carbon intensity" low carbon fuel on the distance it had to travel to get to California. It did not bar entry of that fuel and did not reduce the size of the market for that fuel. In this case, the Colorado RES does both—while also directly forcing Colorado-approved energy generation onto *other states*.

Because the Colorado RES does directly control commerce occurring wholly outside of Colorado, as discussed here and in ATI's Early Motion for Summary Judgment, Defendants have not met the standard necessary to prevail on their motion and ATI respectfully suggests the Court is without the basis necessary to deny ATI's Claims 1 & 2 under this motion.

IV. The RES Burdens Interstate Commerce.

In their third section, Defendants again place before the Court an issue not yet ripe. Defendants attempt to suggest that the Colorado RES imposes no burden on interstate commerce whatever and thus must always succeed against a *Pike* test. To get to a *Pike* test, ATI need only establish *an inference of the presence of each element essential to the case*." *Bausman*, 252 F.3d at 1115 (*emphasis added*). ATI has not yet raised a *Pike* argument, which is too fact intensive for an early motion for summary judgment, and thus has not addressed the economic burden imposed by the RES. Should ATI ever have to offer a *Pike*-based Second Tier argument on Claims 1 & 2, however, it has plenty of grist upon which to rely as Defendants *own exhibits* make clear. [17] Moreover, and citing to the identical paragraph used by Defendants,[18] the

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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).

[17] For example, Defendants' Exhibit 3 explains that "[t]he variability and uncertainty of wind

Colorado RES imposes burdens such as disruption of markets "due to a lack of uniformity in state laws" (e.g., different REC definitions within the same electrical grid; *see* ATI SOF 25 – 26 in Doc. No. 180)[19] and "impacts on commerce beyond the borders of the defendant state" (e.g., RES-forced reduction in thermal coal market, ATI SOF 27, 33, 34 in Doc. No. 180; RES-forced reduction in the market for hydrocarbon generation, ATI SOF 33 in Doc. No. 180).[20]

Defendants improperly rely on an argument that there can only be a burden on interstate commerce if that burden is discriminatory. Doc. No. 186. P. 28(22). Defendants once again misrepresent the law. *GMC v. Tracy*[21] states: "[E]ven nondiscriminatory state legislation may be

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and solar can have profound impacts on grid operations" and acknowledges that adding wind and solar induces "cycling of fossil-fuel generators, … [which] leads to wear-and-tear costs and changes in emissions." Doc. 186-2 at 9-10 (1-2). Defendants' Exhibit 7 states that "[t]he technical analysis performed in … [a NREL Western Wind and Solar Integration] study shows that it is *operationally feasible* for WestConnect to accommodate 30% wind and 5% solar energy penetration, *assuming the following changes to current practice could be made over time*" and then proceeds to list *ten* bullet points of major required changes. Doc. 186-3 at 103 (3). That study did not address transmission planning, cost-benefit analysis, reliability, and dynamic stability issues. Doc. 186-3 at 106 (6). It concluded: "This study has established both the potential and the challenges of large scale integration of wind and solar generation in WestConnect and, more broadly, in WECC. However, changes of this magnitude warrant further investigation." Doc. 186-3 at 132 (32). Defendants' Exhibit 6 acknowledges that "transition to a less carbon-intensive electricity sector could result in either an increase or decrease in water use…." Doc. 186-3 at 77 (iv). Defendants' Exhibit 8 acknowledges that wind energy is more expensive than conventional energy. Doc. 186-4 at 22 (18). *See supra* note 14 (FERC Order 1000 recognizes burden). At trial, ATI would demonstrate that these sources vastly understate the RES's burden.

[18] *V-1 Oil Company v. Utah State Department of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997) (internal quotation marks and citations omitted).

[19] Defendants admit that "thirty states and the District of Columbia have mandatory renewable energy standards with various renewables requirements." Doc. No. 186. P. 13(7 ¶ 14).

[20] Defendants also falsely claim that price increases, alone, are not sufficient to constitute a burden. Where such increases are caused by economic inefficiencies, flow restrictions, or other similar barriers to interstate commerce, prices are evidence of a burden, and the price increases in electricity in Colorado meet that test. *See Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *W. Lynn Creamery v. Healy*, 512 U.S. 186, 193-194 (1994).

[21] *See GMC v. Tracy*, 519 U.S. 278, 300 n.12 (1997).

invalid under the dormant Commerce Clause, when … [under the] *Pike* undue burden test, 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits….'" (*emphasis added*)). Nor does Defendants' formulation pass muster with the Tenth Circuit.[22] *Kleinsmith* specifically cites to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), explaining that a reduction in the size of a market would be a burden on commerce. *Id* at 127. Four other circuits have all held that any statute that reduces the flow of goods across a state's boundary is a burden on interstate commerce.[23]

Defendants also raise the absurd outcome in *Rocky Mountain Farmers* to argue that Colorado is free to impose its policy choices on other states. It is not. In fact, the *Rocky Mountain Farmers* majority remanded that case "to the district court to apply the *Pike* balancing test" having recognized a burden on interstate commerce. 2013 U.S. App. LEXIS 19258 at *95.

CONCLUSION

For the reasons given above, the Court should DENY Defendants' Motion.

Respectfully submitted,

/s/ David W. Schnare

[22] *See Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1233 (10th Cir. 2011) ("nondiscriminatory state laws" can violate dormant Commerce Clause under *Pike*); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040, 1042 (10th Cir. Utah 2009) (the *Pike* test is used when there is no discrimination, and loss of market share to both in-state and out-of-state businesses is a burden on interstate commerce).

[23] *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 571 (4th Cir. 2005) (Pike burden met when statute "creates a barrier to market entry"); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (a statute that reduces the flow of goods across a state's boundary is a burden on interstate commerce); *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 2013 U.S. App. LEXIS 19458, 11-13 (9th Cir. Wash. Sept. 23, 2013) (had the total number of operations been reduced, based on non-speculative evidence, the statute would have caused a burden on inter-state commerce); *Fla. Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230, 1258-1259 (11th Cir. 2012) (**"**The permitting practices here did not simply impose a burden on entry into the Port's stevedore market. It made entry impossible.").

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I electronically transmitted **PLAINTIFFS' RESPONSE TO DEFENDANTS' EARLY MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS 1 AND 2** 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:

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