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 SUMMARY JUDGMENT ON STANDING

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INTRODUCTION

Defendants' previously asked the Court to dismiss this case, arguing Plaintiffs American Tradition Institute and Rod Lueck (collectively "ATI") lacked both Constitutional and prudential standing to challenge the Constitutionality of the Colorado Renewable Energy Standard ("RES"). The Court denied that motion, explaining that ATI had properly alleged "ATI's coal-producing member, Alpha Natural Resources, "is shut out of that part of the interstate market for coal that would have existed but for the Colorado RES and thereby suffers injury from losses in sales," and holding that "[t]hese allegations establish all of the required elements for constitutional standing of these members of ATI: injury-in-fact, causation, and redressability." Doc. No. 64 at pp. 13-14. The Court also held that because Alpha could bring the complaint in its own right, ATI had associational standing to litigate on Alpha's behalf. *Id*. at 14. Finally, the Court recognized that the zone of interest of the dormant Commerce Clause is protection of the interstate market, the market specifically harmed by the Colorado Renewable Energy Standard ("RES") at issue in this case and that Alpha's lost opportunity to participate in that market is within the zone of interest. As a result, the Court held that ATI met the test for prudential standing. *Id* at 15. Because Alpha met all standings requirements, the Court declined to evaluate standing based on Mr. Lueck's equally compelling basis for standing. *Id* at 17.

With regard to standing, Defendants are given repeated bites at the apple. What they could not obtain, based on the complaint and Plaintiffs' allegations, they now wish to obtain by a demand of facts. Plaintiffs respectfully supply the factual basis that Alpha suffered injury in fact as alleged, and in every other manner meets both Article III and prudential standing requirements. As well, Plaintiffs offer facts showing Mr. Lueck deserves standing.

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 or denial with an explanation.

1. Defendants make four factual statements. In the Scheduling Order, the parties agreed to the first fact as undisputed (Doc. No. 149 p. 11 of 24). Admit as to the second.

2. Defendants identify eleven elements of the Colorado RES. Admit as to each.

3. Defendants make five statements. Admit as to the first, second and fifth. Deny as to the second and fourth, as ATI promotes economic and environmental efficiency in energy generation and does not dispute the existence of climate change. Exh. 1, ATI Executive Director Declaration.

4. Defendants make eight factual statements. Admit as to the first five and deny as to the last three. Plaintiffs' Early Motion for Summary Judgment argues that Claims 1 and 2 are unconstitutional as extraterritorial regulation and do not argue discriminatory effect. In that Motion, Plaintiffs' argue that Claims 3 through 6 are either discriminatory or extraterritorial regulation. Plaintiffs Motion explains that strict scrutiny applies to their discriminatory and extraterritorial arguments. *Pike* balancing is only used for non-discriminatory regulation and where the regulation admits only of a national regulatory schema. ATI has reserved these latter arguments for post-discovery adjudication.

5. Defendants make five factual statements. None are material facts. Admit as to each.

6. Defendants make four factual statements. Deny as to first and second. Admit as to third and fourth.

7. Defendants make five factual statements. Deny first, admit as to second, third and fourth, deny as to fifth.[1] None of these statements are material.

8. Defendants make seven statements. Admit as to each.

9. Defendants make eight statements. None are material. Admit as to each.

10. Defendants make four statements. None are material. Admit as to first two and fourth. Deny that Bats do not occur in northeastern Colorado.

11. Defendants make six statements. Admit as to first two, deny as to the last four. Lueck, not Techmate, purchased and installed solar panels and was the party to the transfer of funds (the "rebate") from Xcel to the solar panel seller. Exh. 2. Lueck did not quantify but did identify power outages and reductions in power at Techmate offices. Exh. 5, Lueck Transcript at p. 168.

12. Defendants make eight statements. None are material. Admit as to all.

ATI'S STATEMENTS OF MATERIAL FACTS

1. Alpha Natural Resources and its subsidiaries Alpha Coal West and Alpha Coal Sales ("Alpha") are members of the American Tradition Institute. Exh. 1, at Attachment 1.

2. Defendants admit Alpha participates in an interstate market for coal because Alpha sells coal to Colorado utilities from its two coal mines in Wyoming, and continues to do so. *See*, Defendants SOF No. 7. During pendency of the RES, to supply electric utilities that generate

[1] Mr. Deal stated

> "To the best of my knowledge, information, and belief~ after reasonable inquiry, Alpha has not performed or received an analysis to determine the impact of the Colorado Renewable Energy Standard ("RES") on the production or sale of coal produced by the Alpha Affiliate Mines. To the best of my knowledge, information, and belief~ after reasonable inquiry, these companies and their personnel, including me, have not made any determination whether or not coal production or sales by Alpha or the Alpha Affiliate Mines have been or will be reduced or otherwise adversely impacted due to the operation and effects of the RES.

Doc. No. 101 at ¶ 3.

electricity to the electric grid servicing Colorado, Alpha has participated in the interstate coal market to Montana, Oklahoma, Wyoming, and Oregon. U.S.DOE, Energy Information Administration, "EIA Detail Data – Form 912" *see* http://www.eia.gov/electricity/data/eia923/.

3. Defendants admit the practical effect of the RES has been to reduce the size of the market for coal for electric generation serving Colorado and that renewable energy generation increased by the same percentage as coal-based generation has decreased. Doc. 187 Response to SOF 33, at p. 7.

4. Black Hills, a Colorado electric generating company, closed the coal-fired Clark unit and shifted the Pueblo 5 and 6 generating units from coal to gas because "retirement of these plants and replacement of some portion of their capacity and energy with modern natural gas units can facilitate the integration of larger amounts of renewable energy on the Company's system." Exh. 3. In like measure, Public Service Company of Colorado ("PSCo") is shifting Arapahoe unit 4 from coal to natural gas to support expanded wind and solar generation. Exh. 4.

6. Coal-based electric generation costs less than renewable energy generation. Doc. No. 177-4 p. 39.

7. The RES has caused Alpha lost opportunity to sell coal. Doc. 177-5 p. 18.

8. The purpose of the RES is to reduce the use of coal for electric generation into Colorado. *See* Doc. No. 180 at p. 27 and note 57.

9. C.R.S. § 40-2-124(1)(a)(VIII) defines retail distributed generation as "a renewable energy resource. The purpose of the Distributed Energy mandate in the RES is to create an incentive to use renewable energy to replace coal and natural gas generation. Colorado Governor's Energy Office, "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).

10. "The primary purpose of [C.R.S. § 40-2-124(1)(c)(IX), the rural economic development program] was to establish a special RES compliance multiplier" and "[t]he intent of the multiplier is to stimulate rural economic development through the construction and operation of renewable energy resources up to 30 megawatts in size." Doug Dean, Director, Colorado Public Utilities Commission, Report in Accordance with C.R.S. § 40-2-124(1)(c)(IX), Established in HB 10-1418, at 1 (Dec. 31, 2011)) *available at* http://tinyurl.com/kko3j7b (*accessed on* 8/15/2013).

11. Rod Lueck is a member of the American Tradition Institute and Defendants have admitted this fact. Def. SOF No. 3.

12. Lueck has suffered aesthetic damage from windmills near his family home. Exh. 5 Lueck Transcript at p. 47-48, 136-137.

13. The RES was and is intended to increase the use of windmills in Colorado, including those near the Lueck family home. *See* Doc. No. 180 at p. 27 and note 57.

14. Mr. Lueck is an environmental advocate seeking to protect the ecologies in Colorado, including those near his family home in North Eastern Colorado and learned of bird and bat kills from nearby farmers and when perusing the internet. Exh. 5, Lueck Transcript at p. 142-45. Mr. Lueck testified that "Unless you park those [windmill] blades, they are going to kill birds." *Id*. at 180.

15. Windmills, including those in Colorado, destroy raptors and bats, both of which control important ecologies in Colorado. The Ponnequin Wind facility is located in North Eastern

Colorado. Several dead bats were found over a 3-year period at the Ponnequin (CO) wind plant and nearly 90 percent of birds killed by Ponnequin wind plants were in the *passerine* family.[2]

16. Colorado lists the Western Yellow-Billed Cuckoo and the Southwestern Willow Flycatcher as Federally and State Endangered or State Special Concern species.[3] Both are members of the *Passerine* family with ranges that include the Ponnequin Wind Facility.[4]

17. Mr. Lueck , and not Techmate, was the named purchaser and had installed solar panels and other forms of backup electricity on the Techmate facility. Exh. 2. Mr. Lueck was unable to install solar panels from a trustworthy vendor without participating in the solar rebate program. Exh. 5 Lueck Transcript p. 167-68. Mr. Lueck paid in excess of $99,000, more than three times the value of the solar subsidy to protect against outages. *Id*. at 81, 168-70.

18. Mr. Lueck testified that there were power outages at his offices and that his investments in backup power allowed his company to continue operating despite outages, including those caused by variable wind power mandated under the RES. Exh. 5, Lueck Transcript p. 118-19 & 168.

19. Mr. Lueck was personally responsible for paying electric bills at the Techmate facility; those bills included a price increase solely associated with the RES, and Mr. Lueck received no

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[2] Erickson, W. et al. "Synthesis and Comparison of Baseline Avian and Bat Use, Raptor Nesting and Mortality information from Proposed and Existing Wind developments" p. 32, (Dec. 2002). *See*, http://www.bpa.gov/Power/pgc/wind/Avian_and_Bat_Study_12-2002.pdf (accesed 10/13/2013) *and* http://www.nationalwind.org/assets/archive/Avian_Collisions_with_Wind_Turbines_-_A_Summary_of_Existing_Studies_and_Comparisons_to_Other_Sources_of_Avian_Collision_Mortality_in_the_United_States__2001_.pdf (Accessed 10/13/2013).

[3] *See*, http://wildlife.state.co.us/WildlifeSpecies/SpeciesOfConcern/Birds/Pages/BirdsOfConcern.aspx (accessed 10/13/2013).

[4] http://birds.audubon.org/birds/yellow-billed-cuckoo (accessed 10/13/2013) *and* http://www.birds.cornell.edu/bfl/speciesaccts/sw_wilfly.html (accessed 10/13/2013).

additional or better quality electricity for the added cost. Exh. 5, Lueck Transcript at 178-79.

STANDARD OF REVIEW

This Court has routinely applied the appropriate standard of review (*see*, *Landegger v. Cohen*, 2013 U.S. Dist. LEXIS 140634, 2-4 (D. Colo. Sept. 30, 2013)) and ATI need not repeat it here. ATI does, however, draw attention to the nature of a sufficient showing, citing to this Court's previous holding in this case. Summary judgment is appropriate when no "rational trier of fact" could find for the nonmovant based on the showing made in the motion and response. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If there is a genuine dispute as to a material fact relevant to whether even one of the plaintiffs has standing, Defendants motion should be denied. *See Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1236 (D. Colo. 2012). And, ATI emphasizes the well established standard that the factual record must be viewed in the light most favorable to the nonmovant. *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994).

ARGUMENT

I. Alpha Meets all Standings Requirements.

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).[5] As

[5] *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902-903 (10th Cir. 2012) (The standing requirements are "meant to foster the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (citations omitted)); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) ("In general, this inquiry seeks to determine "whether [the plaintiff has] 'such a

the docket of this case demonstrates, ATI has fully demonstrated the Plaintiffs have such a personal stake and have the concrete adverseness that has already sharpened the presentation of the constitutional questions before this Court.

The breadth of ATI's complaint has a bearing on standing. ATI seeks to strike the entire RES as unconstitutional under the dormant Commerce Clause. *New Eng. Health Care Emples. Pension Fund v. Woodruff*, 520 F.3d 1255, 1258 (10th Cir. 2008) (the ultimate issue is the entire agreement thus standing on each provision is unnecessary). Because it has done so, ATI is also free to identify all grounds on which the statute violates the Commerce Clause. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (once a litigant has standing to request invalidation of an action, it may do so by identifying all grounds on which the action may have 'failed to comply). Had ATI complained of violations of more than a single constitutional or legislative right, they would have to document standing for each claim. *See*, *e.g.*, *San Juan Citizens' Alliance v. Salazar*, 2009 U.S. Dist. LEXIS 29804 (D. Colo. Mar. 30, 2009). But, ATI did not and thus to obtain standing, need only show injury from the RES as a whole.

Article III standing requires:

> (1) that the plaintiff have suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997) (citation omitted). The requirements for Article III

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personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'").

standing are minimal. *See, e.g., Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-66 (1993) (prospective bidders had standing to challenge statutory preference that only applied to small percentage of business, even absent a showing that they would have received contract absent the challenged ordinance; "injury in fact" was competitive harm); *see Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (loss of competitive advantages in "bargaining process" sufficient for standing, "irrespective of the end result"). Plaintiffs offer factual evidence of each element of Article III standing for ATI.

A. Alpha suffers remediable injury-in-fact caused by the RES.

1. Alpha has suffered monetary and competitive injury-in-fact.

Alpha has suffered both a loss of sales (Def. SOF 8) and a loss of opportunity to compete for coal sales in Colorado and other states that service the interstate electric grid supplying Colorado because the RES quotas reduce the size of the interstate market for hydrocarbon-based electricity and requires Colorado utilities to utility *to generate, or cause to be generated*, electricity from eligible energy resources" CRS § 40-2-124 (1)(c) (emphasis added). ATI's SOF 2. Either is sufficient to constitute a judicially cognizable injury-in-fact. "[E]conomic injury is a paradigmatic form of injury in fact." *Gonzalez v. PepsiCo, Inc*., 489 F. Supp. 2d 1233, 1240-1241 (D. Kan. 2007) (listing cases). A monetary injury can be exceedingly small—even economic harm measured in terms of a few cents (as opposed to dollars) per year is sufficient. *See, e.g., Flast* v. *Cohen*, 392 U.S. 83, 106 (1968). Imminent or actual loss of money is sufficient. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013). Competitive injury—such as preventing a business from competing on equal terms—can independently constitute a

judicially cognizable injury-in-fact.[6] *See Gen. Cont. of America*, 508 U.S. at 663-66*; Clinton*, 524 U.S. at 433; *see also Petrella v. Brownback*, 697 F.3d 1285, 1294 (10th Cir. 2012) ("unequal treatment … constitutes the injury); *Schutz v. Wyoming*, 2003 U.S. Dist. LEXIS 26518, 11-13 (D. Wyo. 2003), *aff'd* 415 F.3d 1128 (10th Cir. 2005). A plaintiff "who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies [the injury-in-fact] part of the standing test.'" *Clinton*, 524 U.S. at 433. ATI meets both tests.

ATI has documented a watt per watt shift from the coal-generated share of the market to the renewables-generated market. ATI SOF 3. "Defendants admit that coal has lost some market share as an electricity generation source in Colorado" and that "Alpha's coal sale may have declined" in Colorado after the RES was enacted. Doc. 189 at 9-10 (5-6 ¶¶ 33-34). In addition, generating companies have closed coal-fired generating utilities for the express purpose of allowing more renewable energy generation, another demonstration of loss of coal sales opportunity associated with the renewables quotas. ATI SOF 4. These loss of sales and opportunity each constitute an injury in fact. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160-62 (1981); *see Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 881 (10th Cir. 1992) ("loss of an opportunity for benefit constituted injury in fact"); *Grand River Enter. Six Nations, Ltd. v.*

[6] *See, e.g., Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 152, 154 (1970) (injury-in-fact element met by allegations that competition from national banks "might entail some future loss of profits" and that respondent bank was preparing to perform data processing services for two of plaintiffs' customers); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 45-46 (1970) (holding that travel agents had "competitor standing" to test ruling allowing national banks to provide travel services); *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 620-21(1971)(finding "competitor standing," on the part of investment companies, to test a regulatory ruling authorizing national banks to operate collective investment funds).Even subsidies to competitors, as opposed to quotas like the RES's Mandate, are injuries in fact sufficient to confer standing. *U.S. Telecom. Ass'n v.* FCC, 295 F.3d 1326, 1331(D.C. Cir. 2002) (subsidy that foreclosed *would-be* competitor from entering market "on an equal basis" sufficient for injury); *Sea-Land Service, Inc. v. Dole*, 723 F.2d 975, 977-978 (D.C. Cir. 1983).

Pryor, 481 F.3d 60, 67 (2d Cir. 2007) (loss of current or future market share may).

Finally, Defendants cite language from a factually inapposite Supreme Court case and then claim that, all of the above notwithstanding, Alpha's "future" economic injuries "do[] not satisfy the Supreme Court's 'certainly impending' standard articulated in *Clapper*." Doc. No. 188 at 15 (12) (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)). They are wrong. First, as explained above, Alpha *already has* suffered well documented economic injuries. Here, Colorado enacted the RES, which restricts the percentage of electricity that can be generated using coal, and Alpha's coal sales dropped. Second, even if Alpha had not yet suffered any economic injuries, it would still have standing.[7] *Clapper* involved "self-inflicted injuries" designed to manufacture standing, *see* 133 S.Ct. at 1152, and a *five-level* chain of bald speculation, *see id.* at 1148. Under those facts, the Court concluded that that theory of standing "relie[d] on a highly attenuated chain of possibilities … [that] d[id] not satisfy the requirement that threatened injury must be certainly impending." *Id.* As the RES's Mandate grows in size, Alpha's coal sales and sales opportunity will continue to drop.

2. Alpha's Lost Sales and Market Share and Competitive Injuries are Causally Connected to the RES's Renewable Energy Mandate.

Defendants argue that Alpha's loss of actual coal sales within Colorado is not related to the RES, but reflects simple market competition. Doc. No. 188 at 12. Defendants are wrong. The RES coercively bars utilities from using coal-generated electricity to comply with the renewable-

[7] *See Adams v. Watson*, 10 F.3d 915, 921-22 & n. 13 (1st Cir. 1993) (listing cases); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008) (future loss of market share sufficient to satisfy injury-in-fact requirement for standing); *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1258 (D.C. Cir. 1990) ("Those who must compete with allegedly illegal commercial transactions have Article III standing to challenge a regulatory order authorizing the transactions.").

energy quota. This is not simple market competition. "[D]efendants' misconduct need not be the proximate cause of a plaintiff's harm" and Article III only "require[s] proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Bronson v. Swensen*, 500 F.3d 1099, 1109-10 (10th Cir. 2007) (citation omitted). "[I]njury produced by determinative or coercive effect upon the action of someone else" is sufficient. *Id.* at 1111 n.10.

Moreover, Defendants actually provide the quantitative evidence of the adverse effect of the RES on the coal market, mistaking the practical effect of a smaller market for the windfall price competition redounding to PSCo's benefit. ATI's experts Tanton and Michaels explain the economic implications of the RES (Doc. No. 177-4, Tanton Report at 11-12; Doc. No. 177-5, Michaels Report at 18, 22-28, while Defendants only examine the narrow issue of market price. If the coal market extends beyond the state enacting the restriction the price and quantity of coal traded in it will fall. (Doc. No. 177-5, Michaels Report at 18). As the RES causes coal-fired plants to close or shift fuels to support mandatory renewable energy (ATI SOF 4) and the overall market shrinks due to the RES, the competition for the remaining market produces hyper-competition and lower prices for coal. As Professor Michaels explains, this is the practical effect of the market restriction imposed by the RES. Alpha's loss of sales is directly caused by the RES and the best evidence of that is that prior to the RES, Alpha supplied all the coal to two plants in Colorado, but only after the RES came into effect and its practical effect on the marketplace became apparent did Alpha lose coal sales. This evidence, in the light most favorable to ATI, demonstrates that Alpha suffered injury-in-fact attributable to the RES through loss of sales.

Evidence also shows the RES has directly reduced the Alpha's market opportunities. Alpha has declared that it continues to market to facilities in Colorado (Doc. No. 101 ¶ 5) and

federal documents show Alpha sells to facilities in other states that power the grid that services Colorado. ATI SOF 2. Because the RES requires Colorado utilities to "generate, or cause to be generated" renewable energy, the practical effect of the RES is to cause Colorado utilities to shift away from coal-generated electricity (ATI's SOF 3) and in addition to import Renewable Energy Credits ("RECs") from outside the state (Doc. No. 180 SOF 36) thus reducing the coal-generation market share both inside and outside Colorado. Nor can Alpha market its coal to generating facilities such as the Black Hills and PSCo units that have abandoned coal to facilitate compliance with the RES.

3. Invalidating the RES's Renewable Energy Mandate is likely to redress Alpha's competitive and monetary injuries.

Because the cost of coal-generated electricity is significantly less than the cost of renewable generation (Doc. No. 177-4 p. 4 ¶ 6, *et seq*.) striking the renewables quotas will shift the percentage of electricity generated from renewables back to coal. In addition, the quantitative easing of the market will allow Alpha to recoup sales in Colorado. Doc. No. 177-5, at 18. As Defendants have explained, costs drive the market for electricity generation (Doc. No. 188 at 11-12), and the PUC states it has a duty to "maintain utility rates as low as possible for residential and business consumers that are consistent with minimum standards for service, safety, economic viability, and the environment." *See*, http://cdn.colorado.gov/cs/Satellite/DORA-PUC/CBON/DORA/1251626358437 (*accessed* 10/15/2013). As discussed above, ATI's experts explain that some, although not all, renewable energy will be removed from the grid or otherwise used less often, when the RES is struck because the costs of renewables are greater than the cost of non-renewables, resulting in greater reliance on coal. Further, the PUC would not be able to approve new, cost-inefficient renewable

generation that would be required under the ever increasing quotas, allowing utilities to opt for more lesser-cost coal-generated electricity.

ATI need only demonstrate that the injury to Alpha would "likely" be redressed. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902-903 (10th Cir. 2012). Thus, ATI need only show that injuries likely "would be reduced to some extent," not that the injury be completely cured. *Id.*; *see, e.g., Utah v. Evans*, 536 U.S. 452, 464 (2002) (sufficient to show "change in legal status" and "practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.").[8] ATI easily meets this test.

B. ATI meets the Prudential Standings Requirements.

Incredibly, Defendants claim that Alpha "lack[s] prudential standing because Alpha fails the zone of interest test." Doc. No. 188 at 22 (19). They are wrong. In its denial of Defendants' Motion to Dismiss, the Court held that American Tradition Institute met prudential standing requirements based on the alleged injuries suffered by the coal-producing member: "[A] coal-producing company who lost business due to the RES's requirements on electric utilities … [is] arguably within the 'zone of interests' intended to be protected by the dormant Commerce

[8] Defendants also argue that Alpha's injury cannot be reduced by striking the preferences for instate distributed generation ("DG") and instate coop and municipal small rural generation. As discussed above, because ATI seeks to strike the entire RES, based on extraterritorial effect, it need not show redressability on every section of the RES, including the distributed energy and rural generation multipliers. Nevertheless, Defendants' argument is easily dismissed. Defendants argue that these sections are not in-state preferences. Doc. No. 187 at p. 16. If that were so, utilities could purchase DG RECs from out-of-state sources not within the western grid serving Colorado. This would increase the market for non-renewable generation as the western grid would still need the same amount of electricity. More obviously, the rural generation multiplier allows utilities to buy fewer RECs from distant suppliers. This would multiply the amount of coal allowed to be burned within the western grid. In each case, the coal market would expand under Defendants' theory of the case.

Clause." *Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1235 (D. Colo. 2012). This Court explained that Defendants admitted that coal producers, like Alpha, have prudential standing to challenge the RES.[9] Because ATI has now perfected its demonstration of injury with undisputed facts, the Court's previous analysis stands.

In all its memoranda, whether associated with ATI's early motion or Defendants two early motions, Defendants have assiduously avoided reference to *Wyoming v. Oklahoma*, 502 U.S. 437, 468-473 (1992). In *Wyoming*, the Court held that Oklahoma's imposition of an instate coal quota violated the dormant Commerce Clause because it created an in-state preference for local coal which reduced the opportunity of out-of-state coal companies to participate in an interstate market. In that case, even the dissent admitted that "[t]he coal companies, of course, would pass the zone-of-interests test." *Id* at 469. Out-of-state (and in-state) producers, like Alpha, are in the heartland of the zone of interests protected by the dormant Commerce Clause.[10]

The zone of interests "test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit[,] *[t]he test is not meant to be especially demanding*." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (*emphasis added*). The Supreme Court has explained that the Commerce Clause was intended to benefit those individuals who are engaged in interstate commerce.[11] Alpha's interests in protection from Colorado's burdens on commerce are clearly within the zone of interest of the dormant

[9] *See Am. Tradition Inst.* 876 F. Supp. 2d at 1235 n. 9.
[10] *See Dennis v. Higgins*, 498 U.S. 439, 449 (1991); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).
[11] *See Wyoming v. Oklahoma*, 502 U.S. at 469 – 70 ("[T]he negative Commerce Clause "confer[s] a 'right' to engage in interstate trade free from restrictive state regulation," for it "was intended to benefit those who . . . are engaged in interstate commerce.'" (citations omitted)).

Commerce Clause. *Cf. GMC v. Tracy*, 519 U.S. 278, 286 (1997).

II. Plaintiff Lueck meets all Standings Requirements.

As discussed above, Rod Lueck, challenges the entire RES and thus need constitutional and prudential standing only under the RES, not each section of the RES. Lueck easily meets both sets of requirements.

A. Lueck meets all Constitutional Standings Requirements.

Mr. Lueck's standing arises from three distinct injuries. He has and continues to suffer economic injury from increased fees; the need to purchase protection from the likelihood of accelerating service interruptions caused by variable wind power; and, aesthetic injury due to bird and bat kills and overall loss of spectacular vistas near his family home. In each case, he was injured, that injury was caused by the RES and would be cured in part, by striking the law.[12]

Lueck was responsible for PSCo RESA costs manifest on his electric bills (Exh. 2) at both his business and his home and personally paid for the home costs. Exh. 5 Lueck Transcript at 8, 101. The RESA costs are specifically required due to the RES and do not increase either the quantity or quality of electricity provided to Mr. Lueck. Mr. Lueck is not able to purchase electricity from out of state retail suppliers that are not regulated or otherwise controlled by the

[12] Defendants also argue that Mr. Lueck's injuries cannot be reduced by striking the preferences for instate distributed generation ("DG") and instate coop and municipal small rural generation. As discussed above, because ATI seeks to strike the entire RES, based on extraterritorial effect, it need not show redressability on every section of the RES, including the distributed energy and rural generation multipliers. Nevertheless, Defendants' argument is easily dismissed. Additional rural renewables generation takes the form of wind power and Mr. Lueck's environmental and aesthetic injuries result from such rural wind generation. Striking the incentive for more rural wind would directly benefit Mr. Lueck. Distributed energy, whether from wind or solar sources, is inherently variable. That variability increases the likelihood of less reliable electrical service, the reason that Mr. Lueck was forced to install expensive electrical backup equipment. The need to use that backup equipment is reduced with reductions in causes of service unreliability, a benefit that would arise by striking the distributed energy preference.

Colorado statute. This increased cost for no benefit is an injury-in-fact, caused by the RES and would be fully removed if the RES were struck. This is sufficient to confer standing. *See GMC v. Tracy*, 519 U.S. 278, 286 (1997) (customers who pay more for a product because of a regulation "forbidden under the Commerce Clause" have standing).

The RES mandate requires use of renewable energy that is highly variable and which can increase the likelihood of brownouts and blackouts. Doc. No. 177-4, Tanton Report at 24. Mr. Lueck was aware of this likelihood, (Exh. 5, Transc. 118) and was further informed by an expert. Exh. 5, Lueck Transcript at 71, 73, 74. Indeed, he suffered electric service losses. ATI SOF 18. Mr. Lueck needs perfect non-stop electrical service. *Id*. at 77. In light of this need, and when he was able to afford it, Mr. Lueck, under his own signature, purchased in excess of $99,000 in equipment to protect from the decrease in electric service quality, well in excess of the subsidy provided by Xcel to the solar equipment distributor. These costs necessary to protect against harm from brownouts and blackouts caused by the RES quotas for renewable energy are an injury-in-fact, caused by the RES and remediable with a lower reliance on renewables, as would occur when the RES is struck.

No one disputes that the RES has spurred the construction and use of wind generation facilities in Colorado. These facilities, including those near Mr. Lueck's family homestead, kill birds and bats of the kind protected under federal and state laws. ATI SOF 14-16. Mr. Lueck is an environmental advocate concerned about the harm to ecology caused by increased wind mill use. This is the exact kind of concern that routinely supports standing for environmental advocates.[13] Striking the RES would result in two forms of reduced environmental injury. The

[13] *See*, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686

increasing quotas would disappear, making further new high-cost wind generation unnecessary and, under PUC rules, not cost competitive with hydrocarbon-based electricity. In addition, some wind facilities would be used less often, especially those near protected bird and bat flyways, where balancing of energy needs with environmental protection would allow the environmental needs to outweigh the need for renewable energy. He also suffers aesthetic injury from the construction of wind facilities near his family homestead and when he flies his airplane over a still broader geographic area where he grew up. Exh. 5, Lueck Transcript at 47-48 ("You see an infestation of turbines."). Because the RES quotas continue to increase, the need for new wind facilities also increases. Indeed, PSCo currently intends to expand its wind generation in Colorado.[14] These aesthetic injuries in fact are caused by the RES and would be abated, at least in part, by striking the RES and especially the ever-increasing quotas.

B. Mr. Lueck meets all Prudential Standing Requirements.

Federal courts should not dismiss for lack of prudential standing a legal challenge to a constitutionally protected right on the theory that the underlying interest is not legally protected. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006). The scope of the Commerce Clause is broad and thus too is its zone of interest. "[E]very consumer may look to the free competition from every producing area of the Nation to protect him from exploitation." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). The Supreme Court has

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(1973) (recognizing injury to aesthetic and environmental well-being is sufficient to establish Article III standing); *see*, *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996) (injury in fact due to an increased risk of actual, threatened, or imminent environmental harm with a geographical nexus to, or actual use of the land used by plaintiff).

[14] Law 360, "Xcel Plans Colo. Renewable Projects, Coal Plant Closure", *see*, http://www.law360.com/articles/471473/xcel-plans-colo-renewable-projects-coal-plant-closure (*accessed* 10/16/2013).

repeatedly recognized that consumers' interests are within the zone of interests protected by the dormant Commerce Clause.[15] This exploitation can take the form of an increase in electricity prices and the Tenth Circuit has recognized that parties suffering that cost meet prudential standing requirements.[16] Mr. Lueck is a captive of the RES-regulated Colorado electricity market and is unable to purchase electricity from out of state retail suppliers. He is "inextricably bound up with the activity [he] wishes to pursue", to wit a dormant Commerce Clause challenge, and thus meets the prudential standing requirements.[17]

As this Court has previously noted, "the 'zone of interests' prudential standing test 'is not meant to be especially demanding' and that 'we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of the doubt goes to the plaintiff.'" *Am. Tradition Inst.*, 876 F. Supp. 2d at 1235 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).) This extends to the

[15] *See, e.g., GMC v. Tracy*, 519 U.S. 278, 286 (1997) ("Cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured, as in this case where the customer is liable for payment of … [a] tax …."); *Bacchus Imps. v. Dias*, 468 U.S. 263, 267 (1984) (in-state purchasers who "are liable for the tax" that allegedly violated dormant Commerce Clause "plainly have standing to challenge the tax*"); Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (in-state stockholder challenged tax regime imposing higher taxes on stock from issuers with out-of-state operations than on stock from purely in-state issuers); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (in-state milk dealers challenged tax and subsidy scheme discriminating against out-of-state milk producers); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (in-state camp subject to state real and property tax had standing to raise dormant Commerce Clause claim); *accord Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 89 (2d Cir. 2009) (consumers who suffer injury in the form of prices higher than other consumers from state action that implicates the dormant Commerce Clause satisfy the standing requirements of Article III).

[16] *Sac & Fox Nation v. Pierce*, 213 F.3d 566, 574 (10th Cir. 2000) (Plaintiff asserts his right to be free from the cost imposed by the statute).

[17] *See Singleton v. Wulff*, 428 U.S. 106, 113-116 (1976).

environmental and aesthetic harms he suffers as the direct effect of the commercial exploitation caused by the RES is environmental and aesthetic harm.

Prudential standing stems from the requirement to "insure that concrete adverseness which sharpens presentation of issues on which the courts depend for illumination of difficult constitutional questions."[18] Thus, in its constitutional prudential standing inquiry, a Court focuses on the constitutional rights in question and adverseness of the plaintiff's claims to these same constitutional rights. In the instant case, the Plaintiffs are best situated to prosecute a dormant Commerce Clause challenge for the reasons discussed by Justice Breyer in his seminal treatise, "*Breaking the Vicious Circle – Toward Effective Risk Regulation.*"[19] As he explains therein, public alarm spurs legislative action that produces regulatory actions which then reinforces and expands public alarm. This, Justice Breyer argues, creates a "vicious circle, diminishing public trust in regulatory institutions and thereby inhibiting more rational regulation." *Id*. Because, under the Colorado statutes and rules, retail electrical utilities are certain to obtain fair profits, they have little incentive to prosecute a dormant Commerce Clause claim. Only the ratepayers and others such as Alpha Natural Resources have this incentive. These ratepayers, like Mr. Lueck, are best suited to prosecute the claims made in this case and thus meet any reasonable requirement for prudential standing.

CONCLUSION

For the foregoing reasons, ATI respectfully requests that the Court deny Defendants' Motion, and for such other relief as the Court deems appropriate.

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[18] *Chicano Police Officer's Asso. v. Stover*, 526 F.2d 431, 436-37 (10th Cir. 1975), rev'd on other grounds.

[19] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE – TOWARD EFFECTIVE RISK REGULATION, 33, (Harvard University Press, (1993).

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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 SUMMARY JUDGMENT ON STANDING** to the Clerk's Office using the CM/ECF System for filing, which will generate a Notice of Filing and Service on all parties' counsel who are all registered CM/ECF users, including Defendants and Defendant-Intervenors' counsel listed below:

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