No. _________

In the

Supreme Court of the United States

ENERGY & ENVIRONMENT LEGAL INSTITUTE, *et al*,

Petitioners,

v.

JOSHUA EPEL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

Colorado's Renewable Energy Standard (RES): (i) bars electricity generators from accessing an ever-increasing portion of the western interstate market for electricity by necessarily requiring out-of-state commerce to be conducted according to in-state terms; (ii) requires out-of-state electricity generators to use a production method that complies with Colorado law; (iii) applies Colorado law to electricity generated in other States but which never enters Colorado and in some cases cannot; (iv) refuses to credit out-of-state generation as "renewable" despite being defined as renewable in the states within which it is generated; (v) denies access to the Colorado set-aside by "non-renewable" generation, even though other states allow such generation access to the entire interstate electricity market. The Tenth Circuit decision below begins with the recognition that the Colorado RES is an extraterritorial regulation, but applied a novel, narrow application of this Court's precedent, refusing to strike the RES as unconstitutional because "it isn't a price control statute." Other Circuits refuse to limit the prohibition of extraterritorial regulation only to price affirmation and control statutes. The circuits are hopelessly divided over this recurring issue.

Petitioners present the following questions:

1. Did the Tenth Circuit err in concluding that the federal Constitution's bar against extraterritorial State legislative or regulatory acts involving interstate commerce is limited to price-affirmation and price-control statutes?

2. May Colorado prohibit the introduction within her territory of electricity of wholesome quality acquired in other states, regardless of price or means of manufacture?

LIST OF PARTIES

Petitioners, the Energy & Environmental Legal Institute and Rod Lueck, were the appellants in the court below. Respondents, Joshua Epel, James Tarpey and Pamela Patton, in their official capacity as Commissioners of the Colorado Public Utilities Commission, were appellees in the court below. Intervenors Environment Colorado, Conservation Colorado Education Fund, Sierra Club, the Wilderness Society, the Solar Energy Industries Association, and the Interwest Energy Alliance, were intervenor-appellees in the court below.

CORPORATE DISCLOSURE STATEMENT

The Energy & Environment Legal Institute is a 501(c)(3) non-profit public charity. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in the Institute. Mr. Lueck is a citizen of the State of Colorado. He is the owner and President of Techmate (dba C5 Solutions for Broker Dealers). The company is not a party to this matter.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Energy & Environment Legal Institute v. Joshua Epel, et al.*, 793 F.3d 1169 (10th Cir. 2015) and reproduced in the appendix hereto ("App.") at 1a. The Tenth Circuit affirmed the May 9, 2014 decision of the United States District Court for the District of Colorado, reported at 43 F. Supp. 3d 1171 (D. Co. 2014), and reproduced at App. 26a. *See* Appendices A & B.

STATEMENT OF JURISDICTION

The Tenth Circuit's rendered its opinion on July 13, 2015. This Court's jurisdiction is invoked under 29 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Article 1, Section 8, Clause 3 of the Constitution provides in relevant part that Congress shall have power "to regulate Commerce . . . among the several states."

Article 4, Section 1, Clause 1 of the Constitution provides in relevant part that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the Constitution, Section 1, Clause 3, provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Amendment 37 (2004) to the Colorado Revised Statutes, codified at C.R.S.§40-2-124(1)(c)(I), (V)&(V.5), requires "each qualifying retail utility to generate, or cause to be generated, electricity from eligible energy resources in [designated] minimum amounts." The definitions of "eligible energy resources that can be used to meet the standards" are codified at C.R.S.§40-2-124(1)(a). The provisions of C.R.S.§40-2-124 are lengthy and, therefore, set out in Appendix E (App. 79a), pursuant to Supreme Court Rule 14.1(f).

INTRODUCTION

This dispute involves a Colorado statute that imposes Renewable Energy Standards ("RES"). Colorado's RES sets aside a portion of the interstate market for electricity and limits who may participate in that submarket to those who generate electricity using means that qualify as renewable energy under the Colorado statute. The District Court found that the practical effect of the RES is to restrict the means companies may use to access this set-aside, regardless of where the company operates or whether the electricity actually generated even enters Colorado. The District Court also found that when the RES forces Colorado-qualified renewable generation to occur in other states, this forces non-Colorado-qualified generation off of the grid, even though the "actual electricity … may never enter Colorado." Colorado did not dispute either of these findings.

In the decision below, the 10th Circuit also recognized that the RES has extraterritorial effect. *See*, App. A at 11-12a. Appellants argued that this extraterritorial regulation is barred by the Constitution and also under long-standing "dormant Commerce Clause" precedent. The 10th Circuit disagreed.

Of the three ways a state statute can "violate" the "dormant Commerce Clause," only one rests firmly on textual prohibitions found in the Constitution itself – the bar on extraterritorial regulation.

This Court has a long-established prohibition of extraterritorial regulation for cases sounding in interstate commerce. In *Baldwin*, this Court ruled that one state has no power to project its legislation into another state. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1939). In *Healy*, it held that the Constitution "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." *Healy v. Beer Inst.*, 491 U.S.

324, 336 (1989), quoting and citing to *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982). *Edgar* further explains (and prohibits):

> a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state . . . ." The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."

Id., *citing to Shaffer v. Heitner*, 433 U.S. 186, 197 (1977); *and*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945). In *Brown-Forman* this Court held that a state may not force a merchant to seek regulatory approval in one State before undertaking a transaction in another; may not project its legislation into other states; and may not control conduct beyond the boundaries of the State. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986).

This Court and many Circuits' Court of Appeals have applied the *Baldwin – Edgar – Brown-Forman – Healy* jurisprudence to a broad array of events, including state statutes that: controlled prices; required price affirmations; regulated train lengths; required disclosure of repainted cars, required specific types of mudguards on trucks, regulated postings on the Internet; regulating stock offers; required trash recycling; limited the interstate shipment of wine; regulated beverage labels; limited sales of fine art in foreign states; enforced collegiate sports rules; and regulated car dealerships.

Although the 10th Circuit recognized that the Colorado RES is extraterritorial regulation, it restricted the *Baldwin – Edgar – Brown-Forman – Healy* precedent exclusively to price control and price affirmation cases. As discussed *infra*, several other Circuits refuse to limit the bar on extraterritorial regulation only to price affirmation and control statutes. Because the circuits are hopelessly divided over this recurring issue; and because recent decisions of this Court regarding application of *Baldwin* have created some ambiguity as to the reach of the prohibition on extraterritorial regulation, this Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. The Colorado Renewable Energy Statute

In 2004, Colorado voters passed Amendment 37. The Legislative Declaration of Intent of the Amendment states that "Colorado's renewable energy resources are currently underutilized" and that, to "attract new businesses and jobs, promote development of rural economies, … [and] diversify Colorado's energy resources," Colorado should "develop and utilize renewable energy resources to the maximum practicable extent." (10th Cir. Aplt.App.-183 *and see id.* at 177.) Amendment 37 was codified in 2005 at C.R.S. §40-2-124. Since its adoption, the Colorado Legislature has amended the statute three times to increase the Renewables Quota and to add different kinds of electricity generation within its definition of renewable energy.

"The centerpiece of the statute is its Renewable Energy Mandate…." (10th Cir. Aplt.App.-173, ¶8.) The statute expressly requires Colorado "qualified retail utilities" to "*generate, or to cause to be generated*," electricity from Colorado-approved renewable sources in specified minimum amounts. C.R.S. §40-2-124(1)(c)(I),(V)&(V.5); C.R.S. §40-2-124(3)&(4). The statute thereby facially establishes a Renewables Quota and forces Colorado utilities to *cause* electricity generation to occur using Colorado-approved production methods, regardless of where it is generated. By 2020, the statute sets aside 30% of electricity supplied by investor-owned utilities to be obtained from Colorado-qualified (and approved) renewable sources. C.R.S. §40-2-124(1)(c)(I)(E). Other kinds of retail utilities must meet slightly smaller quotas.

The District Court held and the 10th Circuit acknowledged that the Renewables Quota is a "set aside for renewable energy." App. A at 2a, *and* App. B at 58a. It does not "treat energy generated outside the state of Colorado different than energy produced within the state of Colorado." (ECF-219 at 20.) Instead, "[t]he distinction drawn…is between renewable and non-renewable energy…." App. B at 73a.

The statute specifies the methods of Colorado-qualified renewable-energy generation that utilities must use to comply with the Renewables Quota. C.R.S.§40-2-104(1)(a). These include certain types of recycled energy and energy generated from "renewable energy sources," a defined term. *See id.* Utilities must comply with the Renewables Quota by either generating or buying renewable power directly, or by purchasing Renewable Energy Credits ("RECs"). C.R.S. §40-2-124(1)(d). The Quota and the definitions of renewable energy jointly constitute the Colorado Renewable Energy Standards ("RES").

The statute and its associated regulations implement the RES through a system of tradable Colorado Renewable Energy Credits ("C-RECs"), and a related accounting system that records the generation and ownership of the C-RECs as they are used to comply with the RES. C.R.S. §40-2-124(1)(d); 4C.C.R.§723-3.3659(a).

C-RECs are not energy or electricity. Solely the creature of Colorado law, C-RECs are "created" when a certain amount of electricity is generated using a Colorado-qualified method of generation. 4 C.C.R.

§723-3- 3652(y) (defining them as a "contractual right to…non-energy attributes…directly attributable to a specific amount of electric energy generated from a renewable energy resource" and stating that "[o]ne [C-REC] results from one megawatt-hour of electric energy generated from a renewable energy resource" as defined by the Colorado RES).

C-RECs are Colorado's way of regulating the means and methods of electricity production, regardless of where it occurs and irrespective of where the electricity is used. But because Colorado-qualified C-RECs can only be created by Colorado-qualified renewable-energy generation, these certificates have the practical effects of causing Colorado-qualified renewable-energy generation to occur, displacing non-Colorado-qualified electricity generation, both renewable and non-renewable in kind.

B. Colorado's Extraterritorial Reach

The reach of the Colorado RES is nationwide and international. The RES regulates electricity injected into and delivered through an interstate electricity grid.

All Colorado retail electrical service is integrated and pooled through the Western Interconnection, an interstate grid. (10th Cir. Aplt.App.-73 ¶¶50-52; & *id.* p.112, ¶¶50-52.)

The Western Interconnection pools electricity and serves 11 western States and two foreign Nations.

These include Colorado, Wyoming, Montana, Idaho, Washington, Oregon, California, Nevada, Utah, New Mexico, Arizona; British Columbia and Alberta (Canada); and, Baja California (Mexico). (10th Cir. Aplt.App.-45; *id.* p.141.) The District Court ruled that "[E]lectrical grids are inherently interstate commerce…." *See* App. C at 87a. The parties agree that all retail electricity serving Colorado is in interstate commerce.[1] (10th Cir. Aplt.App.-163 ¶7; *id.* p.203 ¶7.)

Colorado is a net importer of electricity, and energy that is generated in other states is used in Colorado and that there are not enough C-RECs generated in Colorado to satisfy the Quota. (10th Cir. Aplt.App.-160; *id.* p.164, ¶8; *id.* p.203 ¶8.)

The parties agree that physical electricity generated by renewable sources and supplied to the grid is indistinguishable from the physical electricity generated by nonrenewable sources and supplied to

[1] *See New York v. FERC*, 535 U.S. 1, 7 (2002) ("[A]ny electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce."); *FERC v. Mississippi*, 456 U.S. 742, 757 (1982) ("It is difficult to conceive of a more basic element of interstate commerce than electric energy…. No State relies solely on its own resources in this respect.").

the grid.[2] (10th Cir. Aplt.App.-164, ¶9; *id.* p.203, ¶9; *see id.* p.44, ¶12.)

C. Colorado Controls Foreign Electricity Generation

The Appellees in this case, the members of the Colorado Public Utility Commission ("PUC"), wield exclusive regulatory powers over all public utilities within Colorado. C.R.S. §40-2-101; *and see*, *Denver S. Pac. Ry. v. City of Englewood*, 62 Colo. 229, 161 P. 151, (1916), appeal dismissed, 248 U.S. 294, 39 S. Ct. 100 (1919); *Highland Utils. Co. v. Pub. Utils. Comm'n*, 97 Colo. 1, 46 P.2d 80 (1935). They determine whether or not a public utility may service the public. The power to ascertain and determine whether or not a public utility should or should not continue service to the public is possessed solely by the PUC, subject to review by the courts of the action of the commission. *Id.* Their authority ends at the border of the State.

[2] "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). "No one disputes that electricity is fungible; a user cannot distinguish between electricity generated by a nuclear power plant and that generated by a facility which burns a fossil fuel." *In re Consumers Power Company*, 6 N.R.C. 892, *138 (N.R.C. 1977). This is also true for electricity generated by other sources.

Every state has a similar authority with similar geo-jurisdictional limitations.

The Colorado PUC decides what forms of electric generation may be supplied to the interstate electric grid within Colorado, and which of it is considered renewable. It has no authority to control what may be supplied to the grid in other states nor what they must consider renewable. That authority belongs to the other states.

Electricity cannot be effectively traced from the point of generation and supplied to the point of consumption. (10th Cir. Aplt.App.-46, ¶¶23.) Like the Internet, the transmission of electricity over the Western Interconnection grid does not recognize state (or national) boundaries. The purchase of wholesale electricity is nothing more than a transfer of money and does not, and cannot, mean that the power purchased by the retail utility was produced by the source receiving the retail utility's money. 10th Cir. Aplt.App.46-47, ¶23. The Western Interconnection does not match buyers to sellers, it only ensures that the supply on the grid exactly matches the demand. Once electricity enters the grid, it is indistinguishable from the rest of the electricity in the grid. *Id.*

Colorado's C-REC definitions serve as the vehicle through which Colorado projects its favored methods of renewable-energy generation into other states. The C-REC definitions require out-of-state renewable-energy generators to seek Colorado's approval as a condition of accessing Colorado's RES-created renewable-energy submarket. (10th Cir. Aplt.App.-165,167, ¶¶17,25; *id.* p.204-05, ¶¶17,25.) This has the practical effect of regulating out-of-state electricity-generation practices unrelated to any physical attributes of the tangible good being imported into Colorado.

Thirty states and the District of Columbia have mandatory renewable energy standards, each with different renewables requirements. (10th Cir. Aplt.App-274.) The Colorado C-REC definitions are inconsistent with those of other States (10th Cir. Aplt.App.-149), thereby, as a practical matter, operating to deny out-of-state renewable-energy generators access to the Colorado Renewables Quota market unless and until they do business according to Colorado's terms. (10th Cir. Aplt.App-167, ¶25; *Id.*p.205, ¶25.)

The following examples demonstrate the RES's extraterritorial effect on other States' RECs and renewable-energy markets.

Coal mine methane created through a coal degassing operation as a fuel for electricity generation is available and used as a renewable-energy resource in Utah.[3] But this type of coal mine methane cannot be used to comply with Colorado's RES, as only "naturally escaping" methane can be used for this purpose. *See* C.R.S. §40-2-124(1)(a)(II).

RECs approved by other states, such as ocean thermal and ocean wave generation and hydropower with a nameplate capacity greater than 30 megawatts, as approved in California, cannot be used to comply with Colorado's Renewables Quota. (Aplt.App-167, ¶25; *id.*p.205, ¶25.)

Federally approved RECs from hydroelectricity generation units with nameplate capacity greater than 30 megawatts, such as WAPA large dams, are sold to Colorado utilities (Aplt.App-166, ¶24; *id.*p.205. ¶24) but do not qualify for C-RECs and may not be used to meet the Colorado RES Quotas. *See* C.R.S. §40-2-124(1)(d).

There is no difference between electricity generated using methods that create Colorado-approved C-RECs and those that do not. (Aplt.App-140; *id.*p.164, ¶9; *id.*p.203, ¶9.) Colorado's RES regime simply regulates out-of-state conduct.

Another aspect of C-RECs' extraterritorial effect is its creation of a low-level trade war among the states. Because Utah methane mine gas RECs do not quality

[3] Utah Code § 54-17-601(10)(a)(vi).

as C-RECs, Colorado beats back the competition and favors Colorado mine operators over those operating in Utah.

Colorado eliminates competition with California renewable energy companies in the same way. Colorado has no opportunity to use ocean thermal and ocean wave generation within its borders. By eliminating competition from those sources, Colorado favors other forms of Colorado-qualified renewable energy, some of which is generated within the state. The hydro-generation definitions demonstrate an even stronger example of the low-level trade war. California defined as renewable those new dams with a maximum capacity of 35 megawatts. In response, Colorado defined as renewable only those dams with a capacity of less than 30 megawatts. Because only the latter qualifies for C-RECs, Colorado favors in-state generation over virtually identical foreign generation, again stealing the march on out-of-state competition through its extraterritorial regulatory effect.

Because foreign companies cannot access the Colorado set-aside until Colorado determines that their electricity qualifies for C-RECs and because Colorado will not accept other State's RECs, Colorado extends its policies and law beyond its own borders. The 10th Circuit acknowledges this extraterritorial effect, using it as the starting point for their analysis of the law.

D. Procedural Posture of the Case

On April 4, 2011, E&ELegal brought this action in the U.S. District Court for the District of Colorado seeking a declaration that Colorado's Renewable Energy Standard ("RES") statute, Colo.Rev.Stat.§40-2-124, constitutes prohibited extraterritorial regulation and otherwise violates the dormant Commerce Clause of the federal Constitution; and sought appropriate injunctive relief under 28U.S.C.§2202. (ECF-1)[4].

Two years after the case was filed, and recognizing that its statute included facial violations of the dormant Commerce Clause due to in-state preferences, the Colorado Legislature passed significant revisions to the RES that mooted some claims. In response, E&ELegal was forced to file a Second Amended Complaint. ECF-156-1. It is this second amended complaint that is before the Court.

In light of the Amended Complaint, the litigation process began anew. The Chief Magistrate Judge of the District issued a scheduling order on June 17, 2013. Under the District Court Judge's "Practice Standards", the parties were required to file any

[4] ECF refers to the Electronic Court Filing system in the U.S. District Court for the District of Colorado, filed under civil case 1:11-cv-0859. ECF-1 refers to Docket Entry 1 on the District Court Docket Sheet.

"Early Motion for Partial Summary Judgment" (hereinafter "Early Motion") "30 days after entry of the initial scheduling order." The scheduling order thus allowed for these "early motions" as well as a second round of dispositive motions for summary judgment after completion of discovery.

Each side filed early motions for summary judgment. As described by the Chief Magistrate Judge, these consisted of:

> "(1) Plaintiffs' Early Motion for Partial Summary Judgment [Doc. # 180, filed 8/30/2013] which argued that the Colorado Renewable Energy Standard, section 40-2-124, C.R.S. (the "Colorado RES"), is unconstitutional because it violates the dormant Commerce Clause; (2) Defendants and Defendant-Intervenors' Early Motion for Summary Judgment on Claims 1 and 2 [Doc. # 186, filed 9/30/2013] which is the mirror image of the Plaintiffs' Early Motion and argues that the defendants/intervenors are entitled to summary judgment dismissing the plaintiffs' first and second claims because the Colorado RES does not violate the Commerce Clause and is not unconstitutional; and (3) Defendants' Early Motion for Summary Judgment on Plaintiffs' Lack of Standing [Doc. # 188, filed 9/30/2013] arguing that the plaintiffs lack standing to assert their claims and that there is no justiciable case or

> controversy as required by Article III of the Constitution.

The Chief Magistrate Judge continued,

> The parties insist that resolution of the Early Motions will materially impact how the litigation proceeds and the focus of the parties going forward. They urge the entry of an order postponing the dispositive motion deadline and the final pretrial conference until the Early Motions are decided.

See ECF-213. The Magistrate Judge vacated the dispositive motion deadline. Notably, as a result, almost none of the 19 expert and expert rebuttal reports totaling 665 pages of dense information, and thousands of discovery documents also likely to be entered into evidence, ever came before the District Court. Further, neither party had the opportunity, and did not ask the court, to conduct a *Pike* balancing.

Facing inclusion on the District Court's semi-annual Civil Justice Reform Act report, and without benefit of a hearing, the District Court issued its decisions on the Early Motions, denying E&ELegal's extraterritoriality motion and granting Defendants' mirror image motion; while denying in relevant part Defendants' jurisdictional motion and thus granting E&ELegal standing (for the second time).

The District Court went further, however. Despite having no motion seeking a *Pike* balancing and without any relevant evidence before it, the District

Court conducted an ersatz balancing and held that this favored Colorado. In so doing, the court terminated the entire case. Refusing to entertain Appellants' complaint that the District Court did not have the *Pike* question before it, the 10th Circuit also ignored the Magistrate Judge's efforts to streamline the case and allow for a second round of motions in which the parties would be able to make their *Pike* arguments and offer relevant evidence. The result was a narrowing of the case exclusively to the question of extraterritorial regulation.

The only question remaining in this case is as to whether Colorado's RES is constitutionally infirm extraterritorial regulation.

E. The Constitutional Basis for Prohibition of Extraterritorial State Regulation

Appellants argue that the Colorado RES is unconstitutional because it has prohibited extraterritorial reach. Where state laws control extraterritorial conduct, this Court has deemed them *per se* invalid.[5] Where this extraterritorial reach directly harms interstate commerce, some courts have improperly pigeon-holed these cases as exclusively within the realm of the "dormant" Commerce Clause.

[5] *Bonaparte v. Tax Court*, 104 U.S. 592 (1881); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) *and Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935).

The 10th Circuit decision below falls into this conceptual trap and because of that fatal error, improperly restricts application of this Court's extraterritorial jurisprudence, a jurisprudence that stems not from the Commerce Clause but from the structure of our system as a whole.

As Professor Regan explains, "the extra-territoriality principle should not be regarded as grounded in any particular clause of the Constitution, it should be regarded as an inference from the structure of our system as a whole."[6] This Court's decisions reflect the independent, free-standing nature of the extraterritorial principle: "*Gore* and *Campbell* suggest that a more general extraterritoriality prohibition lurks somewhere in the Constitution, having nothing to do with the dormant Commerce Clause."[7] In *Gore*, this Court specifically distinguished "the maintenance of a national

[6] See, Regan, Donald H. "Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation." 85 Mich. L. Rev., 1865-913, 1887 (1987).

[7] Katherine Florey, "State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation." 84 Notre Dame L. Rev. 1057, 1062 (2009), (citing to, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)).

economic union unfettered by state-imposed limitations on interstate commerce" from "the autonomy of the individual States within their respective spheres."[8] Rather than rely on the "dormant" Commerce Clause, *Gore* relied on the free-standing prohibition of extraterritorial regulation, disallowing a state statute from "infringing on the policy choices of other States."[9] More recently, this Court reiterated the free-standing principle prohibiting extraterritorial regulation in *Campbell*: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."[10] Even courts that consider extraterritorial regulation as it applies to the dormant Commerce Clause to have narrow applicability, these courts acknowledge that free-standing extraterritorial principles must be applied within the dormant Commerce Clause arena, not because of it.[11]

[8] *BMW of North America, Inc. v. Gore*, 517 U.S. at 571-72.

[9] *Id.*

[10] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 422.

[11] *IMS Health Inc. v. Mills*, 616 F.3d 7, 30 (1st Cir. Me. 2010) (The Supreme Court invalidates "statutes that 'force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.' *Healy,* 491 U.S. at 337; *see*

The Colorado RES violates not only the dormant Commerce Clause, but is a classic example of an extraterritorial regulation that independently violates the system as a whole, including the Full Faith and Credit clause and the Due Process Clause.

1. Structure of the Constitution

The Framers of our union fully recognized the potential for extraterritorial regulation and eschewed it as improvident. Federalist 7, Federalist 22 *and* Federalist 42 ("the law of one State [would] be preposterously rendered paramount to the law of another, within the jurisdiction of the other [absent a superintending authority].") Moreover, the Framers recognized that the federal courts would "ultimately" have to adjudicate and limit extraterritorial regulation. Federalist 39, Federalist 42 (describing "[t]he necessity of a superintending authority over the reciprocal trade of confederated States."), *and see* Federalist 45 and 51.

For more than a century and a third, this Court has acknowledged prohibition of extraterritorial regulation. *See*, *Pennoyer v. Neff,* 95 U. S. 714 (1878) ("no State can exercise direct jurisdiction and authority over persons or property without its

also Edgar v. MITE Corp., 457 U.S. at 627, 642-43 (plurality opinion).").

territory"); *and see*, *Bonaparte v. Tax Court* 104 U.S. at 594, ("No state can legislate except with reference to its own jurisdiction"); *and more recently, San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546, (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be *equally* free to engage in any activity that their citizens choose for the common weal") (*emphasis added*).

Although a freestanding Constitutional principle, the prohibition of extraterritorial regulation is implicit rather than explicit and rises out of the Constitution in several clauses. It is enforceable through each of those clauses singly or in combination. It is not bound exclusively to the Commerce Clause and cases involving interstate commerce are not absolved of honoring other Constitutional rights. *See*, *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 37-38 (1910):

> "It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination

> to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

And see, *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("[the ordinance] would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States.") In the instant matter, Colorado sought to export its policies, requiring foreign parties to obtain Colorado's approval of their electricity generation methods before being allowed to sell C-RECs into the Colorado marketplace. This violates three independent Constitutional rights.

2. Full Faith and Credit Clause

Bonaparte identifies the point at which Colorado must submit to the wishes of a foreign state, prohibiting the reach of the Colorado's statutory definitions of what constitutes renewable energy. *Bonaparte v. Tax Court*, 104 U.S. at 595. ("the states are left free to extend the comity which is sought, or not, as they please."); *and see*, Federalist 42.

This Court peremptorily strikes "statutes that 'force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.'"[12]

It is not that Colorado must give full faith and credit to, for example, California's definition of renewable energy. It is that Colorado tramples Californians opportunity to compete in the interstate market for electricity under. This removes some power from California's Public Utility Commission and as such fails to give full faith and credit to California's laws. Citing to Justice Brandeis, Regan explains, "the full faith and credit clause presupposes the extraterritoriality principle."[13] Thus, if the Court wishes to place the extra-territoriality jurisprudence at the feet of a specific clause within the Constitution, it may credit the full faith and credit clause, but in so doing it is also crediting the federalism structure of our system as a whole and as reflected in the various Constitutional clauses.[14]

3. Due Process Clause

[12] *IMS Health Inc. v. Mills*, 616 F.3d 7, 30, (1st Cir. Me. 2010), *citing to*, *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989); see also *Edgar v. MITE Corp.*, 457 U.S.624, 627, 642-43 (plurality opinion).

[13] Regan, *supra* note 6, at 1894, citing to *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 156 (1932) ("Later cases have seriously undermined the precise holding *of Bradford,* which upheld the full faith and credit claim, but nothing in later cases casts doubt on the proposition quoted in the text.")

[14] *Id.* at 1987.

Am. Bev. Ass'n v. Snyder,[15] although sounding under the "dormant" Commerce Clause, specifically notes the outcome would be the same by simply applying a due process analysis to the facts.[16]

> "Eliminating extraterritoriality as a freestanding Commerce Clause prohibition also would not eliminate the role of territory in constitutional law. Territorial limits on lawmaking underlie, indeed animate, many other constitutional imperatives. The most powerful of these, due process, limits a State's power to extend its law outside its borders."

Id.

Due process requires fairness. Reese proposed a two-part test under the Due Process Clause to assess the permissibility of legislative jurisdiction in a particular situation: whether the act in question "would be fair to the parties and also consistent with

[15] 735 F.3d 362, 380 (6th Cir. Mich. 2013) (concurring opinion).

[16] Nor is this application of the extraterritoriality principle through both the Commerce Clause and the Due Process clause in a matter involving interstate commerce unusual. *See*, *Quill Corp. v. N.D.*, 504 U.S. 298, 305 (1992). ("'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems . . . . To some extent they overlap.") (*internal citations omitted.*); *and see*, *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1791 (2015).

the needs of the federal ... system."[17] This is consistent with the Framers' intentions. *See* Federalist 42 (extraterritorial effects are harmful not because they are "impolitic" so much as that they are "unfair" within the intended federal union.) This applies specifically to the Colorado statute and has been recognized in "dormant" Commerce Clause cases as well. California entities have no opportunity to participate in the policy or elective processes in Colorado and thus a Colorado statute that limits the opportunities of California entities is unfair because Californians don't have the substantial contacts necessary to create fairness. *See*, *e.g.*, *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013), *quoting Helvering v. Gerhardt*, 304 U.S. 405, 415 (1938) ("the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, [they are] without representation.").

The unfairness to foreign entities is especially acute where the regulations imposed on foreign entities are written by a Public Utility Commission engaged in a low-level trade war with competitor states and who are thus averse to seriously considering the petitions of the forum state's own competitors. *See*, *e.g.*, *Morley-Murphy Co. v. Zenith*

[17] Willis L.M. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1592 (1978).

Elecs. Corp., 142 F.3d 373, 379 (7th Cir. Wis. 1998) ("any state that has chosen a policy more *laissez faire* than Wisconsin's would have its choices stymied, because the state that has chosen more regulation could always trump its deregulated neighbor.") And, indeed, Utah, California and 26 other states have had their definitions of renewable energy trumped by Colorado.

4. The Commerce Clause

This Court's long-established extraterritorial dormant Commerce Clause jurisprudence controls this case, but has been put at issue by the 10th Circuit decision below. The rules the 10th Circuit rejects are straight forward.

The rule that one state has no power to project its legislation into another state (*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 521) embodies the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres. *Healy v. Beer Inst.*, 491 U.S. at 335-36 (*citing* to the plurality in *Edgar* that relies on *Shaffer v. Heitner*, 433 U.S. 186 (U.S. 1977) ("any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power"; *in turn quoting Pennoyer v. Neff, 95 U. S.* at 722 "that no State can exercise direct jurisdiction and authority over persons or property without its territory.")[18]

To protect our system of federalism, 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." *Healy v. Beer Inst.*, 491 U.S. at 336. Therefore, a state may not directly regulate interstate commerce. "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." *Brown-Forman Distillers*, 476 U.S. at 582; *and see*, *Healy v. Beer*, 491 U.S. at 337. A state also "may not project its legislation into other states," and it may not control conduct beyond the boundaries of the State. *Brown-Forman Distillers*, 476 U.S. at 582.

[18] Some courts attempt to erase the *Edgar–Healy* extraterritoriality jurisprudence, arguing that these reflected pluralities rather than majority decisions. In *Edgar* (1981), Justices Burger, White, O'Connor and Stevens concurred with the extraterritoriality section of the decision while Justices Marshall and Brennan did not reach the issue. In *Healy* (1989), however, Justices Brennan and Marshall endorsed the extraterritoriality principle explained in *Edgar*, relying on the *Pennoyer–Shaffer–Brown-Forman* formulation of the extra-territorial rules on which *Edgar* is grounded, thus providing a clear majority of the *Edgar* court for the foundational dormant Commerce Clause prohibition of extraterritorial regulation.

Further, denial of access to a local market violates the Commerce Clause. *C&A Carbone v. Town of Clarkstown*, 511 U.S. at 393. Such extraterritorial regulation categorically violates the dormant Commerce Clause. *See Healy*, 491 U.S. at 336 (invalid *per se* if practical effect is extraterritorial).

Strict scrutiny applies to any State attempt to "control conduct beyond the boundary of the state," *id.* at 336-37. *Healy* follows by eight years this Court's decision in *Edgar* which held that "The Commerce Clause also 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," *Edgar v. MITE Corp.*, 457 U.S. at 642. State laws that attempt to "control conduct beyond the boundary of the state" are invalid, regardless of whether this extraterritorial reach was intended. *Healy*, 491 U.S. at 336-337. There is no *de minimis* exception and there are no defenses to an extraterritorial dormant Commerce Clause violation.[19] The offending statute is simply struck.

[19] *See Am. Beverage Assoc. v. Snyder*, 700 F.3d 796, 810 (6th Cir. 2013) (no defenses to extraterritoriality violation). Unlike other forms of dormant Commerce Clause violations, *see generally Quik Payday, Inc. v. Stork*, 549 F.3d at 1307, such as where a State law "discriminates" against out-of-state businesses, there are no defenses to this form of dormant Commerce Clause violation. *Healy*, 491 U.S. at 336-37. State statutes that exceed a state's

See, *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("[the ordinance] would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States."). This Court cited to *Carbone* for this proposition as recently as 2005. *Granholm v. Heald*, 544 U.S. 460, 472-73 (2005).

Because the RES regulates extraterritorially through its REC definitions and Renewables Quota, it is "invalid *per se*." *KT & G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008).

F. The Tenth Circuit Proceeding

The court below began with a recognition that the Colorado RES constitutes extraterritorial regulation. *See* App. A at 39a. The gravamen of its decision is rejection of the *Healy* extraterritorial rule that automatically finds unconstitutional statutes with the practical effect of "control[ling] conduct beyond the boundaries of the State." App. A at 42a. The 10th

"regulatory jurisdiction," even if nondiscriminatory, are *per se* unconstitutional. *See id.* at 336. For example, in *Heydinger*, 2014 U.S. Dist. LEXIS 53888, the court invalidated a Minnesota statute that had the practical effect of regulating out-of-state electricity generation because it "violates the extraterritoriality doctrine and is *per se* invalid" and therefore did "not address whether the statute is discriminatory or fails a *Pike* analysis," *id.* at *48.

Circuit argues it may reject the *Healy* formulation as mere dicta that does no more than reflect a plurality of this Court. The decision makes no reference to *Edgar*, *Pennoyer*, or *Shaffer*, upon which *Healy* is grounded and discounts *Brown-Forman* as applying only in the context of price control and price affirmation statutes, despite *Healy* relying on *Brown-Forman*, which specifically cites to *Baldwin* for its bar on not only price controls but non-price regulatory reach[20]. Professor Coleman predicts this 10th Circuit outcome and explains its inherent errors, stating: "regulations are extraterritorial and thus invalid [] when, as in *Baldwin*, the regulation is *targeted* at out-of-state decisions." James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357 (2014)1384-85 n. 169.

Nor does the court below acknowledge the *Healy* dissent that, like the plurality, endorses *Baldwin* as applying to non-price control circumstances. *Healy v. Beer*, 491 U.S. dissent at 346 ("The Court rightly held that this sort of a regulation violated the *Commerce Clause* because it 'set a barrier to traffic between one state and another as effective as if customs duties . . .

[20] *Brown-Forman Distillers*, 476 U.S. at 580 ("Our inquiry, then, must center on whether New York's affirmation law regulates commerce in other States.")

had been laid upon the thing transported.'", *citing to Baldwin*)

As explained above (*supra*, note 18), Justices Burger, White, Stevens, Marshall, O'Connor and Brennan, a majority of the *Healy* court, have endorsed the *Edgar* formulation against extraterritoriality, either in *Edgar* or *Healy*. In addition, Justices Kennedy, Scalia, Souter, Ginsburg, and Breyer endorsed the *Edgar* formulation when citing to *Carbone* in *Granholm.* Further, the court below failed to recognize this Court's endorsement of the *Healy* rule in *Walsh.*[21] And, careful examination of *Healy* reveals that the dissent endorses the extraterritorial rule where the evidence shows mandatory regulatory compliance in a foreign state[22], as is before this Court in the instant case. The *Healy* dissent was grounded on a lack of evidence of extraterritorial reach, not a repudiation of the *Baldwin–Edgar* prohibition against extraterritorial reach.

[21] *Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 669, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003) (in which this Court pointedly referred to the prohibition on extraterritorial regulation as "[t]he rule that was applied in *Baldwin* and *Healy*").

[22] *Healy v. Beer*, 491 U.S. dissent at 347-48 (allowing extraterritorial reach as long as it places the foreign competitor "under no legal obligation" to comply).

The court below also discounted this Court's extraterritoriality jurisprudence sounding in interstate commerce, claiming in error that this Court struck extraterritorial state laws only three times. In fact, this Court has produced a lengthy line of cases that prohibited extraterritorial regulation and that did not involve any form of price control or price affirmation.[23] Nor did the court below recognize that twenty-two (22) appellate court decisions have prohibited extraterritorial regulations that do not involve price controls or affirmations, all of them relying on *Baldwin*, *Brown-Forman* and *Healy*.

Instead, the court below restricted the *Healy* formulation to only the "dormant" Commerce Clause and only to price control and price affirmation cases.

REASONS FOR ALLOWANCE OF THE WRIT

Unlike other petitions for certiorari asking this Court to clarify the extraterritoriality jurisprudence, the 10th Circuit has carefully, narrowly and specifically set this case up for Supreme Court review,

[23] *See*, *Shafer v. Farmers Grain Co., 268 U.S. 189, 199* (1925); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 779-84 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Shaffer v. Heitner, 433 U.S. 186, 197 (1977)*; *Edgar v. Mite Corp.*, 457 U.S. 624, 641-43 (1982); *BMW of N. Am. v. Gore*, 517 U.S. 599 (1996); *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

stating “only the final, *Baldwin*, test is at issue.” App. A. at 6a. This issue has come to this Court repeatedly in cert petitions and will continue to unless the Court grants cert here and resolves these issues. Appellants offer three reasons for allowance of the writ reflecting Rule 10 (a) and (c).

A. An Unsettled question of federal law

This Court has established a line of jurisprudence it describes as “price-affirmation” cases. *See Healy v. Beer* 491 U.S. at 342-43. In Section V of *Healy*, a plurality concluded that price affirmation statutes are no different than any other kind of binding affirmation statute. Further, the plurality concluded that where the affirmation is binding, “as noted . . . in *Brown-Forman*, this extraterritorial effect violates the *Commerce Clause*, a plurality opinion articulated in *Edgar* which stands behind both *Brown-Forman* and *Healy*.

Because six justices that participated in both *Edgar* and *Healy* concluded that the Constitution prohibits extraterritorial regulation that has the practical effect of controlling conduct beyond the boundaries of the State, arguably this effectively establishes as controlling law the extraterritoriality principle for any form of “dormant” Commerce Clause violation. The *Brown-Forman*, *Edgar* and *Healy* plurality opinions are not, however, stand-alone majority “opinions of the Court,” and did not need to reach the extraterritoriality issue. As a result, some courts of appeal, including the court below, refuse to apply the extraterritorial principle that was laid out in *Baldwin*, *Edgar, Brown-Forman* and *Healy* to anything other than a price control or affirmation case.

Notably, in 1994, this Court cited to *Baldwin* in *C&A Carbone v. Town of Clarkstown*[24], striking an extraterritorial regulation having nothing to do with any form of affirmation, holding the ordinance "would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States."

In 2003, however, this Court inadvertently muddied the waters, stating:

> unlike price control or price affirmation statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices. The rule that was applied in *Baldwin*

[24] 511 U.S. 383 (1994).

> and *Healy* accordingly is not applicable to this case.

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. at 669 (*internal citations omitted*). The Court was explaining that because there was no form of price affirmation in the Maine law at issue and no other form of extraterritorial reach at issue, either, the *Baldwin* line of cases does not apply. That notwithstanding, some appellate courts have seized on this Court's apparent linkage of *Baldwin* and *Healy* to price affirmation cases as an excuse to limit *Baldwin* and *Healy* only to price affirmation cases.

The waters remain muddied despite the 2005 decision in *Granholm v. Heald* that cited to *Baldwin* in a case involving the interstate market in wine and did not involve price control or affirmation. Thus, the questions remain: is the prohibition of extraterritorial regulations that limit interstate commerce restricted exclusively to price affirmation cases; and, is a state without power to prohibit the introduction within her territory of goods of wholesome quality acquired in other states, regardless of price or means of manufacture?

This case cleanly and narrowly presents this issue, one in which The Court of Appeals for the 10th Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court

B. A Split in the Circuits

The court below concluded that the prohibition of extraterritorial regulation of interstate commerce applies exclusively to price control or affirmation statutes: "only price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters are considered by the Court so obviously inimical to interstate commerce that we will forgo that more searching inquiry in favor of *Baldwin's* shortcut." App. A at 50a-51a.

The 10th Circuit's limitation of extraterritoriality jurisprudence is in direct conflict with four other circuits and is not in conflict, at least in part, with two others.

1. Circuits in Conflict

The 7th Circuit has applied the extraterritoriality principle broadly, specifically rejecting a limitation of the principle only to price control or price affirmation statutes. *See*, *National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) ("Although cases like *Healy* and *Brown-Forman* involved price affirmation statutes, the principles set forth in these decisions are not limited to that context."). Notably, however well cited *Meyer* is, the 7th Circuit eschewed application of *Edgar* in 2003. *Alliant Energy Corp. v.*

Bie, 330 F.3d 904 (7th Cir. Wis. 2003) ("the language, appearing in part V-A of Justice White's opinion, did not draw support from a majority of the Court and is therefore not the opinion of the Court."). An examination of post-2003 district court cases in the 7th circuit indicates, however, only the *Meyer* precedent is in effect. *See, e.g., Midwest Title Loans, Inc. v. Ripley*, 2009 U.S. Dist. LEXIS 30261 (S.D. Ind. Apr. 3, 2009).

In 2010 and again in 2013, the 6th Circuit agreed with the 7th Circuit, adopting the extraterritoriality principle in *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010). ("a state regulation that controls extraterritorial conduct is per se invalid.") 622 F.3d at 645. The key inquiry is whether the regulation would control conduct occurring wholly outside the state's boundaries. *Id.* at 645-46. *And see*, *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 379-380, (6th Cir. Mich. 2013) ("Michigan is forcing states to comply with its legislation in order to conduct business within its state, which creates an impermissible extraterritorial effect and is in violation of the Supreme Court's precedent stated in *Brown-Forman* and *Healy*."). The 2nd and 4th Circuits join the 6th and 7th Circuits. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. Vt. 2003); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 239, (4th Cir. Va. 2004).

2. Circuits not in conflict

The 1st Circuit agrees, at least in part, with the 10th Circuit decision below. It concedes that the 7th Circuit's holding is correct and the doctrine "remains viable." *IMS Health Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010). It splits, however with regard as to where the extraterritoriality principle applies, applying the *Baldwin, Edgar, Brown-Forman, Healy* rule only to two kinds of cases, (i) "price-affirmation statutes that force regulated entities to certify that the in-state price they charge for a good is no higher than the price they charge out of state"; and, (ii) statutes that force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 30. The decision offers no principled basis for this anomalous approach.

3. Circuits in Conflict with themselves

It should be noted, as the court below did not, the 10th Circuit has previously held that the extraterritoriality principle applies to more than price control and affirmation statutes. *See*, *ACLU v. Johnson*, 194 F.3d 1149, 1160-1161 (10th Cir. 1999) ("Statute regulating Internet regulates extra-territorially 'an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause.'"); *and see*, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. Kan. 2008) ("[T]hird, a statute will be invalid per se if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.”). The 10th Circuit failed to address its earlier, conflicting decisions, choosing not to make reference to *Johnson, ACLU* or other decisions that the decision in the instant case apparently overturns.

This kind of internal inconsistency is even more rampant in the 9th Circuit and reflects a very sharp division within the 9th Circuit judiciary. *See*, *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. Cal. 2013) (“States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants.” *Citing to Walsh*). Compare this with the seven judge dissent in Rocky Mt. Farmers Union v. Corey, 740 F.3d 507 (9th Cir. 2014):

> [W]hether California's scheme is characterized as providing incentives" or establishing mandates," it has the practical effect of regulating interstate commerce. And, under the dormant Commerce Clause, [t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."
>
> * * *
>
> “The very purpose of the dormant Commerce Clause is to ensure that [r]ivalries among the States are . . . kept to a minimum, and a

> proliferation of trade zones is prevented." Until the majority's ruling, the dormant Commerce Clause guarded against such economic fragmentation. *See Baldwin*, 294 U.S. at 524 (explaining that a state may not condition importation upon proof of a satisfactory wage scale in factory or shop"). Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent

Id. at 518-19 (*internal citations omitted.*) The *Rocky Mt. Farmers Union* decision was buttressed by *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (2013) ("the Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product.")

With these fresh 2013 decisions before the Circuit, a 2014 9th Circuit panel changed course again. *See*, *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 432-433 (9th Cir. Cal. 2014) ("The dormant Commerce Clause forbids a state from regulating commerce 'that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (*citing* to *Healy*)).

And, in 2015, the 9th Circuit seemingly walked away from *Rocky Mt. Farmers Union*, applying *Baldwin* to a matter involving art and having nothing to do with price controls or affirmations:

> [O]ur cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following proposition[]: . . . 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.

Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1322-24 (9th Cir. Cal. 2015).

The circuit courts are in great need of "an exercise of this Court's supervisory power." Rule 10(a).

C. The Need for an Exercise in Supervisory Power

A split in the circuits surely requires an exercise in the supervisory powers of the Supreme Court, but there is more. California has exported its regulatory agenda nationwide. As the instant case demonstrates, so too does Colorado. Whether the issue is fuel standards, renewable energy generation, *pate foi gras*, or the size of cages used to confine egg-laying chickens[25], there is an escalating "low-level trade war" that is taking advantage of the confusion with regard to applicability of the extraterritorial principle as applied to interstate commerce. In

[25] *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014).

Missouri v Harris, the state of Missouri offered the following analogy:

> [I]magine that the State of Missouri decides to enact legislation that requires all grapes to be harvested by people with Bachelor's degrees or greater in horticulture or viticulture and, in addition to that, passes a law that says you can't sell the product of a grape unless it was harvested by someone with a Bachelor's degree or a Master's degree in Missouri.
>
> So if you had a California farmer or a California wine producer who sells a third of its wine into Missouri . . . what does that person do? Do they -- they have several options. They can reduce their production . . . [t]hey can lower all of their prices . . . [o]r they can acquiesce to Missouri's regulations.
>
> The problem there is because they cannot -- they have no way -- that vintner has no way of challenging Missouri law in a political process, the only thing they can do is urge their own legislature to retaliate

Id. at 1069. Under the decision of the court below, Missouri would be allowed to legislate in that manner.

We offer another analogy, one that is being contemplated in several state legislatures – one that is decidedly more visceral. Imagine Kentucky enacts a statute defining a "person" as including any "viable fetus," which is a fetus capable of being viable outside the womb;

and in addition to that, passes a law that prohibits the sale of "day after" abortifacients within the state unless they are produced by employees covered with a health care program that specifically incorporates and protects the right to life of a Kentucky-defined "viable fetus". Under the 10th Circuit decision below, Kentucky could export its "viable fetus" protections across the nation.

Until this Court sorts out the reach of the extraterritorial principle as it applies under the "dormant" Commerce Clause, the Full Faith and Credit Clause and the Due Process Clause, the states will be emboldened to accelerate export of their policies onto their sister states and escalate their low-level trade wars.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 14-1216

ENERGY AND ENVIRONMENT LEGAL INSTITUTE; ROD LUECK,

Plaintiffs-Appellants

v.

JOSHUA EPEL; JAMES TARPEY; PAMELA PATTON, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE COLORADO PUBLIC UTILITIES COMMISSION,

Defendants-Appellees,

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

Defendants Intervenors – Appellees

Argued and Submitted January 21, 2015

Filed July 13, 2015

Before TIMOTHY M. TYMKOVICH, DAV*ID* M. EBEL, and NEIL M. GORSUCH, Circuit Judges

OPINION

GORSUCH, Circuit Judge.

Can Colorado's renewable energy mandate survive an encounter with the most dormant doctrine in dormant commerce clause jurisprudence? State law requires electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources. Under the law, too, this number will rise over time. It may be that Colorado's scheme will require Coloradans to pay more for electricity, but that's a cost they are apparently happy to bear for the ballot initiative proposing the renewable energy mandate passed with overwhelming support. So what does this policy choice by Coloradans affecting Colorado energy consumption preferences and Colorado consumer prices have to do with the United States Constitution and its provisions regarding interstate commerce? The Energy and Environment Legal Institute points out that Colorado consumers receive their electricity from an interconnected grid serving eleven states and portions of Canada and Mexico. Because electricity can go anywhere on the grid and come from anywhere on the grid, and because Colorado is a net importer of electricity, Colorado's renewable energy mandate effectively means some out-of-state coal producers, like an EELI member, will lose business with out-of-state utilities who feed their power onto the grid. And this harm to out-of-state coal producers, EELI says, amounts to a violation of one of the three branches of dormant commerce clause jurisprudence.

In the end, the district court disagreed with EELI's assessment and so must we.

The Constitution extends to Congress the power to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. Most everyone accepts that this language grants Congress authority to pass laws concerning interstate commerce and to direct courts to disregard state laws that impede its own. U.S. Const. art. VI, cl. 2; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). Yet some see even more than that here. For many years — perhaps since Gibbons and at least since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851) — the Supreme Court has read the clause as embodying a sort of judicial free trade policy. Employing what's sometimes called "dormant" or "negative" commerce clause jurisprudence, judges have claimed the authority to strike down state laws that, in their judgment, unduly interfere with interstate commerce. Detractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure. See, e.g., *Comptroller of Treasury of Md. v.*

Wynne, 135 S. Ct. 1787, 1808, 191 L. Ed. 2d 813 (2015) (Scalia, J., dissenting); *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 68, 123 S. Ct. 2142, 156 L. Ed. 2d 54 (2003) (Thomas, J., concurring in part and dissenting in part). But as an inferior court we take Supreme Court precedent as we find it and dormant commerce clause jurisprudence remains very much alive today, as but a glance at this term's slip opinions will confirm. See, e.g., *Wynne*, 135 S. Ct. at 1792 (majority opinion).

On the usual telling, dormant commerce clause cases are said to come in three varieties. The farthest reaching of these may be associated with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). There the Court read the Commerce Clause as allowing judges to strike down state laws burdening interstate commerce when they find insufficient offsetting local benefits. By any reckoning, that's a pretty grand, even "ineffable," all-things-considered sort of test, one requiring judges (to attempt) to compare wholly incommensurable goods for wholly different populations (measuring the burdens on out-of-staters against the benefits to in-staters). *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring). Whether because of the difficulties associated with applying such an unwieldy test or for some other reason, the Court has devised two firmer rules applicable to discrete subsets of cases. The first might be associated with cases like *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978), and applies to state laws that "clearly discriminate" against out-of-staters. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). Legislation of this stripe is condemned as "virtually invalid per se and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *KT & G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008) (quoting *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 168 (2d Cir. 2005)). The second finds its roots in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), and is said to apply to certain price control and price affirmation laws that control "extraterritorial" conduct — that is, conduct outside the state's borders. Here too laws of that sort are deemed almost per se invalid. *KT & G. Corp.*, 535 F.3d at 1143.

It might be fair to describe the law as it's developed in this area a bit like the law as it's developed in antitrust, another pocket of federal jurisprudence characterized by a long and evolving history of almost common-law-like judicial decisionmaking. As there we find here a kind of "rule of reason" balancing test providing the background rule of decision with more demanding "per se" rules applied to discrete subsets of cases where, over time, the Court has developed confidence that the challenged conduct is almost always likely to prove problematic and a more laborious inquiry isn't worth the cost. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys.*, Inc., 441 U.S. 1, 8-9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) ("[I]t is only after considerable experience with certain business relationships that courts classify them as per se violations" rather than apply the "rule of reason" to them (internal quotation marks omitted)).

Before us in this case only the final, *Baldwin*, test is at issue. Yes, EELI asked the district court to invalidate Colorado's law under all three tests, *Pike, Philadelphia*, and *Baldwin*. Yes, the district court rejected all three arguments. But for reasons known only to it, EELI has appealed just the district court's disposition under *Baldwin*. So whether Colorado's law survives the *Pike* or *Philadelphia* tests may be interesting questions, but they are ones that will have to await resolution in some other case some other day.

Baldwin's extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause jurisprudence. See Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause* Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1884 (1987). It is certainly the most dormant for, though the Supreme Court has cited *Baldwin* in passing a number of times, a majority has used its extraterritoriality principle to strike down state laws only three times. *IMS Health, Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010), *vacated on other grounds sub nom. IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091, 180 L. Ed. 2d 911 (2011).

What do these three cases have in common? In *Baldwin*, New York prohibited out-state companies from selling milk in the State unless they purchased their milk from dairy farmers at the same price paid to New York dairy farmers — all to insulate the in-state dairy industry from price competition by out-of-state producers. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), New York law required liquor merchants to list their prices once a month and affirm that the prices they charged in New York were no higher than those they charged in other states. Because a seller couldn't lower price elsewhere without first doing so in New York on its monthly timetable, the scheme had the effect of preventing price competition out-of-state. In *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989), the Court struck down another price affirmation scheme that, due to its interaction with similar regulations elsewhere, again had the effect of inhibiting out-of-state price competition. In all three cases, then, the Court thus faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses. See *Id.* at 339 ("States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." (quoting *Brown-Forman*, 476 U.S. at 580 (citing *Baldwin*, 294 U.S. at 528))).

In this light, you might ask whether the *Baldwin* line of cases is really a distinct line of dormant commerce clause jurisprudence at all. The usual telling of the law in this area suggests it is one of three separate strands of authority. But a careful look at the holdings in the three leading cases suggests a concern with preventing discrimination against out-of-state rivals or consumers. And given this, one might see *Baldwin* and its progeny as no more than instantiations of the *Philadelphia* anti-discrimination rule. In this vein it's worth noting that *Baldwin* was decided before the anti-discrimination rule solidified and might be said simply to have anticipated it. Indeed, one of the Court's earliest anti-discrimination cases, *Dean Milk Co. v. City of Madison*, conceived of *Baldwin* in just this way. 340 U.S. 349, 353-54, 71 S. Ct. 295, 95 L. Ed. 329 (1951). *Healy* applied *Baldwin*'s rule only as an alternative holding to an application of anti-discrimination doctrine, 491 U.S. at 335-41 — and only over the objection that the *Baldwin* analysis was therefore unnecessary, *Id.* at 344-45 (Scalia, J., concurring in part and concurring in the judgment).

And you might even read *Brown-Forman* — where *Baldwin*'s rule seemed to do the most independent work — as treating *Baldwin* simply as an application of the anti-discrimination rule. See 476 U.S. at 580 (discussing *Baldwin* together with anti-discrimination cases).

But whatever doctrinal pigeonhole you choose to place them in, we don't see how *Baldwin*, *Healy*, and *Brown-Forman* require us to strike down Colorado's mandate. For that mandate just doesn't share any of the three essential characteristics that mark those cases: it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters. EELI doesn't even seriously attempt to suggest otherwise. While Colorado's mandate surely regulates the quality of a good sold to in-state residents, it doesn't directly regulate price in-state or anywhere for that matter. And state laws setting non-price standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety) may be amenable to scrutiny under the generally applicable *Pike* balancing test, or scrutinized for traces of discrimination under Philadelphia, but the Court has never suggested they trigger near-automatic condemnation under *Baldwin*.

In saying this much, we hardly mean to suggest non-price regulations don't impact price in or out of state. In today's interconnected national marketplace such a suggestion would be beyond naive. We readily recognize that state regulations nominally concerning things other than price will often have ripple effects, including price effects, both in-state and elsewhere. So, for example, when one or more states impose quality mandates manufacturers may find the cheapest way to comply isn't to produce a special product for them but to redesign their product as it's sold nationwide, with an increased cost felt by consumers everywhere. Still, without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers, *Baldwin*'s near per se rule doesn't apply. See generally *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008); *Snyder*, 735 F.3d at 379 (Sutton, J., concurring).

The reason, again, takes us to the question of certainty. In antitrust many agreements among market participants will affect price and all may be scrutinized under the rule of reason test. It's only when the parties' agreement involves "naked price fixing" or something else experience teaches to be clearly invidious that we will forgo that searching inquiry in favor of a shortcut and declare the agreement per se anticompetitive. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 100-01, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). Similarly here, state regulations and standards across a wide spectrum may invite *Pike* balancing. But only price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters are considered by the Court so obviously inimical to interstate commerce that we will forgo that more searching inquiry in favor of *Baldwin*'s shortcut.

Our case illustrates the point. How can we have the sort of steadfast conviction the *Baldwin* Court did that interstate commerce will be harmed when, if anything, Colorado's mandate seems most obviously calculated to raise price for in-state consumers? EELI offers no story suggesting how Colorado's mandate disproportionately harms out-of-state businesses. To be sure, fossil fuel producers like EELI's member will be hurt. But as far as we know, all fossil fuel producers in the area served by the grid will be hurt equally and all renewable energy producers in the area will be helped equally. If there's any disproportionate adverse effect felt by out-of-state producers or any disproportionate advantage enjoyed by in-state producers, it hasn't been explained to this court. And it's far from clear how the mandate might hurt out-of-state consumers either. The mandate does have the effect of increasing demand for electricity generated using renewable sources and (under the law of demand) you might expect that to lead to higher prices for electricity of that sort for everyone in the market (here, presumably, everyone connected to the grid). But the mandate also reduces demand for and might be expected to reduce the price everyone in the market has to pay for electricity generated using fossil fuels. So the net price impact on out-of-state consumers is far from obviously negative and, for all we know, may tip in favor of those willing to shift usage toward fossil fuel generated electricity. To reach hastily for *Baldwin*'s per se rule, then, might lead to the decidedly awkward result of striking down as an improper burden on interstate commerce a law that may not disadvantage out-of-state businesses and that may actually reduce price for out-of-state consumers.

We acknowledge that EELI reads *Baldwin*, *Brown-Forman*, and *Healy* as standing for a (far) grander proposition than we do. Exploiting dicta in *Healy*, EELI contends that these cases require us to declare "automatically" unconstitutional any state regulation with the practical effect of "control[ling] conduct beyond the boundaries of the State." See Br. for Appellants at 30 (quoting *Healy*, 491 U.S. at 336) (emphasis omitted). But, as we've explained, the Court's holdings have not gone nearly so far and have turned instead on the presence of three factors not present here. In fact, the Supreme Court has emphasized as we do that the *Baldwin* line of cases concerns only "price control or price affirmation statutes" that involve "tying the [*13] price of . . . in-state products to out-of-state prices." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003). The Ninth

Circuit has made the same point, too, explaining that "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.'" *Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (quoting *Walsh*, 538 U.S. at 669).

EELI's contrary position would also risk serious problems of overinclusion. After all, if any state regulation that "control[s] . . . conduct" out of state is per se unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels? See supra at 9. Certainly EELI offers no limiting principle that might prevent that possibility or others like it. Instead, it seems to embrace such results and, in this way, it seems to call on us not merely to respect the actual holdings of the most dormant authorities in all of dormant commerce clause jurisprudence but to revive and rebuild them on the basis of dicta into a weapon far more powerful than *Pike* or *Philadelphia*. That's an audacious invitation we think the Court unlikely to take up, especially given its remarks about the limits of *Baldwin* doctrine in *Walsh*, and it's a novel lawmaking project we decline to take up on our own. See Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause*: A Doctrinal Post-Mortem, 73 La. L. Rev. 979, 998-99 (2013) (noting the "lack of a limiting principle" in the "sweeping" dicta in *Healy* on which EELI relies); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 806 & n.90 (2001) (characterizing that dicta as "overbroad").[1]

If it cannot prevail on substance, EELI pins its hopes on a separate procedural complaint. The dormant commerce clause question comes to us by way of the district court's ruling on Colorado's motion for summary judgment. As part of its opposition to Colorado's summary judgment motion in district court, EELI said the motion was premature, more discovery was necessary, and it filed an affidavit pursuant to Fed. R. Civ. P. 56(d) asking the court to defer its ruling until that additional discovery could

[1] Colorado briefly questions whether EELI has suffered an "injury-in-fact" sufficient to afford it Article III standing to pursue its dormant commerce clause challenge. But Colorado defers this potentially dispositive jurisdictional argument, usually something parties present right up front, to the end of its brief. And it does so for a reason. EELI member Alpha sells coal to Colorado electricity generators and by all accounts Colorado's law reduces the demand for coal and limits the portion of the Colorado electricity-generation market Alpha may serve. Many cases confirm this is more than enough to satisfy Article III's "injury-in-fact" requirement. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 432-33, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); N.E. Fla. *Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993).

take place. The district court rejected EELI's suggestion. This, EELI says, was improper, leaving it without sufficient time to prepare and the case should be remanded for further discovery.

In one respect EELI has a point. The district court stated that its written "practice standards" require parties who want the court to do anything to file a separate piece of paper denominated a "motion." Because EELI didn't file such a paper requesting a deferral of decision on the summary judgment motion — a motion to defer a motion, if you will — the district court ruled that the group's request was procedurally deficient and could be rejected on this basis alone.

This much was in error. The Federal Rules of Civil Procedure allow a good deal of leeway for local rules and individual judicial practice standards. But the rules also show a degree of mercy for the practicing lawyer who, like the medieval glossator, must account not just for the text but all the marginalia surrounding it — in this case not only all the federal rules, but all the advisory notes that underlie them, all the local rules on top of them, all the individual judicial practice standards that accompany them — not to mention all the (often most important and individualized) unwritten rules that apply in every courtroom. See generally William H. Erickson, *Colorado's Answer to the Local Rules Problem*, 16 U. Mich. J.L. Reform 493 (1983) (discussing the challenges lawyers face by the proliferation of rules).

The federal rules specify that district courts may create additional procedural rules only if and to the extent they are "consistent with" the federal rules themselves. Fed. R. Civ. P. 83(a)(1). And that mandate poses a problem here. For the federal summary judgment rule expressly specifies that, when you think summary judgment is premature and should wait for additional discovery, you may present an "affidavit or declaration" to register the point. Fed. R. Civ. P. 56(d). The district court may be able to specify a different form of submission when the federal rules do not speak to the question. The district court may even allow the parties to present a request for additional discovery by way of a formally denominated "motion" as well as by "affidavit or declaration." All these results might be "consistent with" the federal rules. But we don't see how the district court could hold an affidavit or declaration insufficient to request the deferral of a summary judgment motion when the federal rules expressly indicate that those modes of communication are sufficient to the task. By any fair account, that's just not "consistent with" what the federal rules say and we remind the district courts within our jurisdiction that their considerable leeway for personal practice and local rules remains subject to Rule 83. Cf. Reed v. Bennett, 312 F.3d 1190, 1194-95 (10th Cir. 2002) (Rule 83 prohibits a district court from granting a summary judgment motion based only on a local rule deeming failure to respond to a motion consent to the relief it seeks).

The district court, however, did offer an alternative ground for denying the Rule 56(d) request. And here it had the better of it. EELI filed its Rule 56(d) affidavit seeking more time for discovery in October 2013. Yet discovery didn't close until January 2014 and the district court didn't get around to ruling on the motion until May 2014. So while EELI may have fairly conveyed its need for more discovery as of October 2013, it wound up getting exactly what it asked for: months more of discovery. And not once at any point did EELI seek to supplement its summary judgment opposition papers with new evidence acquired from the additional discovery it received — even as it repeatedly called the district court's attention to additional and new legal authorities. Neither did EELI seek to explain to the district court after January 2014 what discovery (if any) it still needed by that point. Given these facts, the district court said it saw "no reason to defer ruling" on the motion past May 2014. This conclusion we find hard to fault, especially given that even now EELI is unable to cite to this court any discovery that it needed but lacked time to pursue after the close of discovery in January 2014. Indeed, in similar cases we have held that the district court did not abuse its discretion in proceeding to rule and we cannot find a sound reason to distinguish them here. See, e.g., *Alpine Bank v.*

Hubbell, 555 F.3d 1097, 1114 (10th Cir. 2009); *Wilson v. Vill. of Los Lunas*, 572 F. App'x 635, 637-40 (10th Cir. 2014). So it is that, by the end of it all, we fail to see here any procedural or substantive error that might warrant reversal.

The judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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

43 F. Supp. 3d 1171

ENERGY AND ENVIRONMENT LEGAL INSTITUTE; ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL; JAMES TARPEY; PAMELA PATTON, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE COLORADO PUBLIC UTILITIES COMMISSION,

Defendants,

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

Defendants Intervenors

Decided May 9, 2014

Filed May 9, 2014

Before WILLIAM J. MARTÍNEZ, District Judge

OPINION

ORDER DENYING PLAINTIFFS' EARLY MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS & INTERVENOR-DEFENDANTS' EARLY MOTION FOR SUMMARY JUDGMENT

This action challenges the constitutionality of Colorado's Renewable Energy Standard statute, Colo. Rev. Stat. § 40-2-124. In this case's current posture, Plaintiffs seek a declaration that the provision requiring that Colorado utility companies obtain an increasing proportion of their electricity from renewable sources violates the Commerce Clause of the United States Constitution. (Sec. Am. Compl. (ECF No. 163) pp. 40-45.)

Before the Court are the following motions: (1) Plaintiffs' Early Motion for Partial Summary Judgment ("Plaintiffs' Motion") (ECF No. 180); and (2) Defendants and Intervenor-Defendants' Early Motion for Summary Judgment on Claims 1 and 2 ("Defendants' Motion") (ECF No. 186). For the reasons set forth below, Plaintiffs' Motion is denied and Defendants' Motion is granted.

I. LEGAL STANDARD

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987).

A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248. The Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Energy and Environment Legal Institute[2] ("EELI") is a non-profit organization which describes itself as being dedicated to the advancement of rational, free-market solutions to land, energy, and environmental challenges in the United States. (Am. Compl. ¶ 3.) EELI also promotes coal energy, and believes that the impact human activities have had on the rise in global temperatures is an open question. (ECF No. 188 ¶ 3; ECF No. 194-1.) Plaintiff Rod Lueck is a member of EELI who resides in Colorado. (*Id.* ¶ 4.) Defendants Joshua Epel, James Tarpey, and Pamela Patton are members of the Colorado Public Utilities Commission. (*Id.* ¶¶ 6-8.) The Intervenor-Defendants are various non-profit organizations devoted to preserving the environment or promoting renewable energy resources and industries. (See, ECF Nos. 21 & 73-75.) For purposes of this Order, the Court's reference to "Defendants" includes the named Defendants and the Intervenor-Defendants.

In 2004, Colorado voters passed Amendment 37, which was intended to promote the development and utilization of renewable energy resources. (*Id.* ¶ 60.) Amendment 37 was codified in 2005 as the Renewable

[2] The Energy and Environment Legal Institute was formerly known as the American Tradition Institute. (ECF No. 200.) Plaintiffs represent that this was only a name change and does not impact the purpose or activities of the institute.

Energy Standard statute (the "RES") at Colo. Rev. Stat. § 40-2-124. Although Plaintiffs originally challenged other aspects of the RES, at this point in the case, the only remaining claims assert that Colo. Rev. Stat. §§ 40-2-124(1)(c)(I),(V),(V.5) and 40-2-124(3),(4), and their implementing regulations codified at 4 Colo. Code Regs. §§ 723-3 et seq. (together, the "Renewables Quota"), violate the Commerce Clause of the United States Constitution. (*Id.* ¶¶ 137-51.)

The Renewables Quota requires each retail utility to generate, or cause to be generated, renewable energy resources in specified minimum amounts. (*Id.* ¶¶ 137-141.) As originally formulated, the Renewables Quota required certain Colorado electric utilities to provide 10% of their retail electricity sales from renewable sources by 2015. (ECF No. 186-1 at 23.) Since the RES was adopted, the Colorado Legislature has amended the statute three times to increase the Renewables Quota and to add different kinds of electricity generation entities.

As it currently stands, the Renewables Quota includes three distinct requirements depending on the type and size of electric utility. By 2020, investor-owned utilities such as Xcel must obtain 30% of their retail electricity sales from renewable sources. Colo. Rev. Stat. § 40-2-124(1)(c)(I)(E). Cooperative electric associations serving 100,000 or more utility meters must obtain sufficient renewable energy to supply

20% of their electricity by 2020. *Id.* § 40-2-124(1)(c)(V.5). Cooperative associations serving fewer than 100,000 utility meters, as well as large municipal utilities, must obtain 10% of their retail sales from renewable sources by 2020. *Id.* § 40-2-124(1)(c)(V)(D).

The RES allows utilities to meet their Renewables Quota by either generating or buying renewable power directly, or by purchasing renewable energy credits. Colo. Rev. Stat. § 40-2-124(1)(d). The RES defines the types of energy that can be credited towards a utility's Renewables Quota, and includes certain types of both recycled energy and energy generated from renewable sources. *Id.* § 40-2-124(1)(a). Recycled energy is energy captured from the heat from exhaust stacks or pipes that would otherwise be lost, and which does not combust additional fossil fuel. *Id.* § 40-2-124(1)(a)(VI). The RES's definition of renewable energy resources includes solar, wind, geothermal, biomass, and hydroelectricity with certain restrictions. *Id.* § 40-2-124(1)(a)(VII).

The RES and its implementing regulations also create a system of tradable renewable energy credits that may be used by a utility to fulfill its Renewables Quota. Colo. Rev. Stat. § 40-2-124(1)(d). For a Colorado utility to use renewable energy (or renewable energy credits) towards its Renewables

Quota, it must seek approval from Colorado's Public Utility Commission. 4 Colo. Code Regs. § 723-3-3656. Certain utilities must also submit to the Public Utilities Commission a plan detailing how they intend to comply with the Renewables Quota, including estimates of the amount of renewable energy that will be generated by various sources. *Id.* § 723-3-3657. An approved plan carries a rebuttable presumption that the utility is acting with prudence. *Id.* § 723-3-3657(c).

In April 2011, Plaintiffs filed this lawsuit challenging six aspects of the then-existing statutory scheme. (ECF No. 1.) The case was stayed pending resolution of jurisdictional and immunity issues. (ECF No. 46.) Defendants moved to dismiss this action, arguing that Plaintiffs lacked standing to pursue their claims. (ECF Nos. 28 & 37.) The Court granted in part and denied in part those motions, dismissing all claims brought against the State of Colorado, Defendants John Hickenlooper and Barbara Kelley, and all monetary claims against the Defendants in their official capacities. (ECF No. 64.) The Court found that Plaintiffs had sufficiently alleged facts to show that they had standing to survive the Motion to Dismiss as to the claims for injunctive and declaratory relief brought against the members of the Public Utilities Commission in their official capacities, as well as Plaintiffs' claim under 42 U.S.C. § 1983 for monetary damages brought against these Defendants in their individual capacities. (*Id.*) Plaintiffs then voluntarily dismissed their claim for damages under § 1983. (ECF No. 70.)

After these rulings the stay was lifted and the case proceeded to discovery. (ECF Nos. 65 & 149.) In 2013, the Colorado Legislature passed significant revisions to the RES that impacted Plaintiffs' claims. See A Bill for An Act Concerning Measures to Increase Colorado's Renewable Energy Standard so as to Encourage the Deployment of Methane Capture Technologies, S.B. 13-252 (69th Gen. Assembly 2013). In response to these changes, Plaintiffs filed a Second Amended Complaint which brings six claims challenging three aspects of the RES. (ECF No. 163.) The Second Amended Complaint is the operative pleading for this case.

Near the close of discovery, Plaintiffs filed their Early Motion for Summary Judgment seeking judgment in their favor on all claims. (ECF No. 180.) Shortly thereafter, Defendants filed their Early Motion for Partial Summary Judgment, which seeks judgment in their favor on claims 1 and 2, which relate to the Renewables Quota. (ECF No. 186). These motions are fully briefed and are presently before the Court.

At the same time, Defendants also filed a Motion for Summary Judgment renewing their argument that Plaintiffs lacked standing to pursue their claims. (ECF No. 188.) The Court found that Plaintiffs lacked standing to pursue claims 3-6, but that they had established standing to pursue claims 1 and 2. (ECF No. 219.) The dismissal of claims 3-6 moots significant portions of the Plaintiffs' Motion for Summary Judgment, but the Court will address all arguments relevant to claims 1 and 2.

III. ANALYSIS

The Commerce Clause providids that 'Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States."' *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 337, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007) (quoting U.S. Const. art. I, § 8, cl. 3). In addition to that express authority, courts have also interpreted the Commerce Clause to restrain state authority implicitly, which is referred to as the dormant Commerce Clause. See *Id.* The "central rationale" of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).

In this circuit, a state statute may violate the dormant Commerce Clause in three ways. First, a statute that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid per se and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *KT&G Corp. v. Attorney Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008). Second, a statute will be invalid per se if it has the practical effect of controlling commerce occurring entirely outside the boundaries of the state in question. *Id.* Finally, if the statute does not discriminate against interstate commerce, it will nevertheless be invalidated if it imposes a burden on interstate commerce which is not commensurate with the local benefits secured. See *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

A. Scope of the Motions

In Defendants' Motion, they argue that Plaintiffs cannot show that the Renewables Quota violates the dormant Commerce Clause under any of the above theories. (ECF No. 186 at 18-19.) Despite the fact that Defendants' Motion plainly moves for summary judgment as to each theory of a dormant Commerce Clause violation, in response to Defendants' Motion, Plaintiffs argue that the only issue properly before the Court is whether the Renewables Quota improperly regulates wholly extraterritorial commerce. (ECF No. 193 at 11.) Plaintiffs appear to have formed this belief based on the limited scope of their own early Motion for Summary Judgment, which argues only that Plaintiffs are entitled to an affirmative grant of summary judgment on claims 1 and 2 under the second theory of extra-territorial control. (See *Id.* at 12-13 (stating that whether the Renewables Quota is discriminatory is not before the Court because Plaintiffs did not raise the issue in their Motion).) Plaintiffs' Motion does not address the argument that the Renewables Quota is discriminatory or that it fails the *Pike* test. (*Id.*)

Despite Plaintiffs' contention to the contrary, the scope of the issues before the Court is not limited by the arguments raised by Plaintiffs in their affirmative summary judgment motion. While the Court must address any arguments raised therein, it must also address all arguments raised by Defendants in their separate summary judgment motion. See Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."). Plaintiffs' failure to apprehend the correct scope of the issues presented by Defendants' Motion is legally of no moment; as it must under Rule 56, the Court will consider in turn each of the contentions Defendants advance for entry of judgment in their favor as a matter of law.

Defendants' opening brief plainly moves for summary judgment as to each of the theories for a dormant Commerce Clause violation. (ECF No. 186 at 19-31.) It sets forth the test governing each theory, and explicitly analyzes how the Renewables Quota does not violate any of these tests. (*Id.*) The burden then shifts to Plaintiffs to show a genuine dispute of fact as to whether Defendants were entitled to summary judgment under each theory. See *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). To discharge this burden, Plaintiffs are required "go beyond the pleadings and by their own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotations omitted). The Court will analyze each of the arguments raised by the parties with this standard in mind.

However, before reaching the merits of the parties' arguments, the Court must address Plaintiffs' contention that the Court's consideration of the *Pike* balancing test—the third way to show a dormant Commerce Clause violation—is premature. (ECF No. 193 at 12.) Plaintiffs contend that disposition of the *Pike* balancing test is premature, both because Plaintiffs did not move for summary judgment under this theory, and because discovery is ongoing. (*Id.*) As noted above, the scope of Plaintiffs' Motion does not operate to limit in number or substance the issues that could be raised by Defendants in their separate Motion.

Moreover, the fact that discovery was ongoing at the time Plaintiffs' opposition to Defendants' Motion was filed also does not make disposition of the *Pike* balancing test at this juncture of the proceedings premature. Though Plaintiffs cite Federal Rule of Civil Procedure 56(d) in their Response, they did not file a motion under this rule. Both this Court's local rules and the undersigned's Revised Practice Standards require that all requests for the Court to take any action or grant any relief be contained in a separate, written motion. See D.C.COLO.LCivR 7.1 ; WJM Revised Practice Standards III.B (effective Dec. 1, 2013). Plaintiffs' citation to Rule 56(d) in their opposition brief is insufficient to function as a request that the Court defer ruling on any aspect of Defendants' Motion. See WJM Revised Practice Standards III.B ("A request of this nature contained within a brief, notice, status report or other written filing does not fulfill this Practice Standard.").

Additionally, more than six months have passed since Plaintiffs' brief was filed. In that time, discovery has closed. (See ECF No. 208 (setting a January 24, 2014 discovery deadline).) However, despite the fact that Plaintiffs have repeatedly called additional legal authority to the Court's attention (see ECF Nos. 203 & 217), they have not sought leave to supplement their response to Defendants' Motion with any additional evidence obtained in discovery. As such, the Court sees no reason to defer ruling on any aspect of Defendants' Motion.

B. Discrimination Against Out-of-State Interests

State laws discriminating against interstate commerce on their face are 'virtually per se invalid.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996) (quoting *Or. Waste Sys., Inc. v. Dep't of Env. Quality of Or.*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)). "In this context, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers*, 550 U.S. at 338 (quotation omitted).

Defendants move for summary judgment under this theory, arguing that the Renewables Quota does not discriminate against interstate commerce on its face, or in its purpose or effect. (ECF No. 186 at 19.) In response to this argument, Plaintiffs have made no attempt to identify specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. In fact, Plaintiffs have candidly admitted that "[d]iscrimination under Claims 1 & 2 is not before the Court" and "[w]hether those economic purposes have a discriminatory design is not at issue for Claims 1 & 2." (ECF No. 193 at 11, 13.)

Thus, the Court finds that Plaintiffs have not met their burden of showing that any dispute of material fact exists as to whether the Renewables Quota discriminates against out-of-state interests. It therefore necessarily follows that the Court must grant Defendants' Motion for Summary Judgment as to this theory of establishing a dormant Commerce Clause violation.

C. Practical Effect of Extraterritorial Control

Both parties move for summary judgment under the theory that the RES violates the Commerce Clause by attempting to control wholly extraterritorial commerce. To determine whether a regulatory scheme violates the Commerce Clause under this theory, the [**17] Court must look beyond the plain language of the statute and evaluate its practical effect to discern whether it controls extraterritorial commerce. *KT&G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008). The legislative intent behind a statutory scheme is irrelevant. Healy v. Beer Inst., Inc., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989).

Courts have found that statutes which tie pricing decisions in one state to the prices charged for the same good in another state are invalid. See, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575-76, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986) (finding statute that required distillers to post prices at the beginning of each month and did not permit sale for lower prices in other states controlled extraterritorial commerce because it "forc[ed] a merchant to seek regulatory approval in one State before undertaking a transaction in another"); Healy, 491 U.S. at 328 (statute that required beer distributors to affirm that the prices they charged in Connecticut were as low as any charged in neighboring states violated the Commerce Clause because it "create[d] just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant [**18] to preclude.").

Statutes that attempt to impose one state's policy decisions on other states are also invalid. For example, in *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652, 653-54 (7th Cir. 1995), the court struck down a Wisconsin statute that conditioned imports of waste on the exporting jurisdiction's adoption of Wisconsin's recycling standards. Finally, statutes that regulate commercial transactions between two out-of-state entities also violate the Commerce Clause. See *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982) (striking down an Illinois statute that required companies with certain minimal ties to Illinois to submit all tender offers for approval by Illinois officials, even when the offers were made by a foreign company to shareholders entirely out-of-state); *Pharm. Res. & Mfrs. of Am. v. Dist. of Columbia*, 406 F. Supp. 2d 56 (D.D.C. 2005) (D.C. statute that made it unlawful for any drug manufacturer or licensee to "sell or supply for sale a patented prescription drug that results in the prescription drug being sold in the District for an excessive price" was unlawful because it could hold a company liable in D.C. for a transaction that occurred entirely [**19] out-of-state). Despite the various ways this doctrine has manifested itself, "[i]n the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013).

Plaintiffs argue that the Renewables Quota places a restriction on how out-of-state goods are manufactured in that it requires out-of-state electricity to be generated according to Colorado's terms. (ECF No. 193 at 16.) Plaintiffs contend that the Renewables Quota is a "mandate" which requires energy produced wholly out-of-state to comply with Colorado-approved methods for renewable energy. (*Id.*) Plaintiffs argue that this mandate operates to project policy decisions made by voters in Colorado onto other states, such as Wyoming. (*Id.*)

The Court disagrees. First, the Renewables Quota does not impact transactions between out-of-state business entities. If a Wyoming coal company generates electricity and sells it to a South Dakota business, the Colorado Renewables Quota does not impact that transaction in any way. The Renewables Quota only regulates Colorado energy generators and the companies that do business with Colorado energy generators. As Plaintiffs acknowledge, a state can regulate electricity generation occurring within its borders. (ECF No. 193 at 17.) Because the Renewables Quota does not affect commerce unless and until an out-of-state electricity generator freely chooses to do business with a Colorado utility, it does not impermissibly control wholly out-of-state commerce. See *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308-09 (10th Cir. 2008) (statute that regulated payday loans did not affect wholly extraterritorial commerce because it only applied when some aspect of the transaction, such as where the funds were deposited, occurred in Kansas); *Rocky Mountain Farmers*, 730 F.3d at 1103 (holding that, under the dormant Commerce Clause, there is a distinction between statutes "that regulate out-of-state parties directly" and those that "regulate contractual relationships in which at least one party is located in the regulating state").

Moreover, the Renewables Quota does not mandate that an out-of-state energy generator do business in any particular manner. Colorado energy companies are free to buy and sell electricity from any in-state or out-of-state generator. The RES does not limit these transactions, set minimum standards for out-of-state generators that wish to do business in Colorado, or attempt to control pricing of the electricity. Rather, the RES comes into play only with regard to whether energy purchased by a Colorado utility from an out-of-state electricity generator will count towards the Colorado utility's Renewables

Quota. As such, the RES does not impose conditions on the importation of electricity into Colorado. See *Rocky Mountain Farmers*, 730 F.3d at 1102-03 (California fuel standards did not impose conditions on the importation of ethanol where they did not attempt to control the ethanol produced, sold, or used outside of California, did not require other jurisdictions to adopt certain standards, and did not attempt to affect pricing of ethanol).

The Court agrees with Plaintiffs that the RES may influence the way out-of-state electricity generators do business because the Renewables Quota provides Colorado utilities an incentive to purchase electricity that can be credited towards their Renewables Quota. However, the fact that this incentive structure may negatively impact the profits of out-of-state generators whose electricity cannot be used to fulfil the Quota does not make the Renewables Quota invalid. The dormant Commerce Clause neither protects the profits of any particular business, nor the right to do business in any particular manner. See *Pharm. Res. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 82 (1st Cir. 2001) ("Simply because the manufacturers' profits might be negatively affected . . . , does not mean that the Maine Act is regulating those profits."); *Exxon Corp. v. Maryland*, 437 U.S. 117, 127, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) ("We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market."). Thus, the fact that the RES may economically harm companies—both in-state and out-of-state—that produce non-renewable energy does not mean that it violates the dormant Commerce Clause.

Moreover, the fact that the RES may provide an incentive for out-of-state companies to conduct their business in a manner that complies with Colorado's renewable energy standards also does not make the statute improper. See *Rocky Mountain Farmers*, 730 F.3d at 1103 ("States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants."); see also *Pharm. Res. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 679, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003) (holding that Maine was free to create an incentive for drug companies to negotiate favorable rates with its Medicaid program so long as it did not regulate the price of any out-of-state transaction or tie the price of a product purchased in-state to out-of-state products). The dormant Commerce Clause does not prevent states from creating incentive structures to attract certain kinds of business. See Directv, Inc. v. Treesh, 487 F.3d 471, 481 (6th Cir. 2007) (holding that Kentucky's taxing scheme designed to attract certain kinds of business did not violate the dormant Commerce Clause); Rocky Mountain Farmers, 730

F.3d 1070, 1101 (9th Cir. 2013) ("Firms in any location may elect to respond to the incentives provided by the Fuel Standard if they wish to gain market share in California, but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California.").

Plaintiffs also argue that the Renewables Quota violates the dormant Commerce Clause because it is inconsistent with other state statutes that promote renewable energy. (ECF No. 180 at 23.) For example, Plaintiffs point out that Utah's definition of a renewable energy fuel source includes a facility that derives its energy from methane gas from an abandoned coal mine. (*Id.*) Other states that have a system similar to Colorado's RES permit credit for ocean thermal and wave generation electricity sources. (*Id.*)

This contention by Plaintiffs fails, however, because the Commerce Clause has not been applied so broadly as to strike down any state regulation that differs from other states. The only cases in which the Supreme Court has held that the federal need for uniformity outweighs the state's ability to devise its own regulations involve areas like foreign trade and interstate transportation. See *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979); *Bibb v. Navajo Freight Lines*, Inc., 359 U.S. 520, 526-27, 79 S. Ct. 962, 3 L. Ed. 2d 1003

(1959). Plaintiffs have failed to demonstrate that there exists such a compelling need for uniformity in the market for renewable energy credits that having a system of different or even inconsistent state regulations is unworkable. Moreover, the Renewables Quota extends only to Colorado utilities. As such, any conflict between Colorado's definition of renewable energy and that adopted by a neighboring state would have minimal impact on interstate commerce. See *Rocky Mountain Farmers*, 730 F.3d at 1105 ("So long as California regulates only fuel consumed in California, the Fuel Standard does not present the risk of conflict with similar statutes.").

Finally, Plaintiffs contend that the requirement that out-of-state companies seek approval from the Colorado Public Utility Commission shows that Colorado is forcing its policy decisions onto other states. However, the RES does not at all impose any obligations on an out-of-state company; only Colorado utilities are required to seek approval from the Commission before electricity they purchase can count towards their Renewables Quota. See 4 Colo. Code Regs. § 723-3-3656. Because the RES only requires that electricity generated by out-of-state companies be approved by the Colorado commission when a Colorado utility wants to use that electricity factor to fulfill its Renewables Quota, this requirement neither regulates wholly extraterritorial commerce nor imposes Colorado's policy decisions on other states.

In sum, out-of-state companies are free to generate electricity using whatever method they choose, can sell that electricity to whomever they choose—inside or outside of Colorado—and can do so at whatever price they choose. The RES does not control any aspect of a transaction between two out-of-state entities; it governs only whether electricity purchased by a Colorado utility counts towards that utility's Renewables Quota. As such, the Court finds that Plaintiffs have failed to show that there is any material fact in dispute as to whether the RES improperly regulates wholly out-of-state commerce.

D. *Pike* Test

Under *Pike v. Bruce Church, Inc.*, a state statute that does not directly regulate or discriminate against interstate commerce may nonetheless still be invalid if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* The party challenging the statute bears the burden of establishing a *Pike* violation. See *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992).

The Tenth Circuit has held that, when considering the *Pike* balancing test, the Court must consider four factors: (1) the burden on interstate commerce; (2) the nature of the putative benefits conferred by the statute; (3) whether the burden is "clearly excessive in relation to" the local interests; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce. *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs*, 27 F.3d 1499, 1512 (10th Cir. 1994).

With regard to the burden on interstate commerce, Plaintiffs argue that the RES burdens interstate commerce due to a lack of uniformity in state laws. (ECF No. 193 at 23.) Plaintiffs point out that thirty states and the District of Columbia have mandatory renewable energy standards with various renewables requirements. (*Id.* at 23, n.19.) The Supreme Court has held that a lack of uniformity amongst state laws can be a significant burden to interstate commerce, but those cases involve interstate travel such as railroads and trucking. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978) (striking down statute that limited length of tractor-trailers); *Bibb*, 359 U.S. at 526-27. The Renewables Quota does not make it more difficult for electricity to flow between states that are connected via the same grid. As such, these cases are readily distinguishable. Plaintiffs have failed to explain how the various renewables requirements imposed by the states has limited interstate commerce in the electricity market.

Plaintiffs also contend that the RES burdens interstate commerce by impacting commerce beyond the borders of the state, specifically with regard to the reduction in the market for thermal coal and hydrocarbon electricity generation. (ECF No. 193 at 23.) While Plaintiffs have presented evidence showing that the Renewables Quota has caused an increased demand for renewable energy in Colorado, which correlates to a decrease in the market share for coal and hydro-carbon, Plaintiffs have failed to show that this shift in the market burdens interstate commerce. The critical inquiry is whether market shift caused by the Renewables Quota places a greater burden on interstate commerce than is placed on intrastate commerce. See *V-1 Oil Co. v. Utah Dep't of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997) [**29] ("The incidental burdens of the *Pike* inquiry are the burdens on interstate commerce that exceed the burdens on intrastate commerce."). There is no evidence in the record showing that the Renewables Quota causes greater harm to out-of-state coal and hydrocarbon electricity generators than is caused to in-state coal and hydrocarbon electricity generators. In fact, the record shows that demand for out-of-state coal has increased since the RES was enacted. (ECF No. 186-1 ¶ 23.) As such, Plaintiffs have failed to show that the market shift away from coal and hydrocarbon electricity generation substantially burdens interstate commerce for purposes of the *Pike* test.

Finally, Plaintiffs contend that the Renewables Quota has burdened interstate commerce because it has reduced the size of the market, which alone is sufficient to meet the *Pike* burden. (ECF No. 193 at 23-24.) Though Plaintiffs cite *Exxon Corp.*, in support of their position, that case's holding in fact supports the conclusion that the Renewables Quota does not burden interstate commerce. In *Exxon*, the Supreme Court held that Maryland's statute barring all producers and refiners of petroleum products from operating any retail outlet within the state did not burden interstate commerce. 437 U.S. at 127. Though the statute would cause some petroleum refiners to choose not to do business with Maryland, other refiners would step in to fill that spot in the market. *Id.* The Court held that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.*

Like in *Exxon*, the Renewables Quota has caused a shift from electricity generated from non-renewable sources to electricity generated by renewable sources. However, this shift from one type of supplier to another has not resulted in a decrease in interstate electricity transmission between Colorado and elsewhere. In fact, the record shows that, since the RES was enacted, Colorado's demand for all kinds of electricity—both renewable and non-renewable—has increased. (ECF No. 177-5 at 28-29.) Prior to 2007, Colorado was a net exporter of electricity. (*Id.* at 65.) By 2010, Colorado's electricity sales exceeded in-state production by 2,000 gigawatt-hours. (*Id.*) Plaintiffs have shown only that there has been a shift in the source of electricity generation since the RES was enacted, not that there has been any reduction in the size of the Colorado electricity market or in the amount of electricity imported by Colorado. Thus, Plaintiffs have not shown that the RES has caused an overall decrease in Colorado's market for electricity—either for electricity produced in-state or out-of-state.

In sum, the Court finds that Plaintiffs have failed to show a genuine dispute of material fact as to whether the Renewables Quota or the RES in general burdens interstate commerce for purposes of the *Pike* test. This alone is a sufficient basis to grant summary judgment on this claim. See *Kleinsmith*, 571 F.3d at 1043. However, even if the Court were to presume that Plaintiffs had met their burden with respect to this aspect of the analysis, summary judgment in favor of Defendants would still be appropriate because Plaintiffs have utterly failed to address any of the three other aspects of the *Pike* test.

The Tenth Circuit has held: Any balancing approach, of which *Pike* is an example, requires evidence. It is impossible to tell whether a burden on interstate commerce is clearly excessive in relation to the putative local benefits without understanding the magnitude of both burdens and benefits. Exact figures are not essential (no more than estimates may be possible) and the evidence need not be in the record if it is subject to judicial notice, but it takes more than lawyers' talk to condemn a statute under *Pike*.

Kleinsmith v. Shurtleff, 571 F.3d 1033, 1043-44 (10th Cir. 2009) (quoting *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008)). Plaintiffs make no attempt to address the putative benefits conferred by the Renewables Quota, nor have they made any showing in regards to whether the burden on interstate commerce is "clearly excessive in relation to" these benefits. Plaintiffs also fail to offer any alternative schemes that could promote the same interests with a lesser impact on interstate commerce.

Fifty-four percent of Colorado voters voted to approve renewable energy standards for the state in 2004. (ECF No. 186-2.) The Supreme Court has frequently admonished that courts should not "second-guess the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987); *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S. Ct. 1028, 10 [*1184] L. Ed. 2d 93 (1963) ("[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation."). As Plaintiffs have failed to show that the RES burdens interstate commerce at all, much less that any such burden is clearly excessive in relation to the benefits conferred on the state by the RES, the Court finds that summary judgment in also appropriate with regard to Plaintiffs' claim under the *Pike* test.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiffs' Early Motion for Partial Summary Judgment (ECF No. 180) is DENIED;

2. Defendants and Intervenor-Defendants' Early Motion for Summary Judgment on Claims 1 and 2 (ECF No. 186) is GRANTED; and

3. The Clerk shall enter judgment in favor of Defendants on all claims. Defendants shall have their costs.

Dated this 9th day of May, 2014.

BY THE COURT:

/s/ William J. Martínez

William J. Martínez

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

———

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

2014 U.S. Dist. LEXIS 60567

———

ENERGY AND ENVIRONMENT LEGAL INSTITUTE; ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL; JAMES TARPEY; PAMELA PATTON, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE COLORADO PUBLIC UTILITIES COMMISSION,

Defendants,

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

Defendants Intervenors

———

Decided May 1, 2014

Filed May 1, 2014

———

Before WILLIAM J. MARTÍNEZ, District Judge

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' EARLY MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LACK OF STANDING

This action challenges the constitutionality of Colorado's Renewable Energy Standard statute, Colo. Rev. Stat. § 40-2-124. Specifically, Plaintiffs seek a declaration that particular provisions of this statute and their implementing regulations violate the Commerce Clause of the United States Constitution and seek injunctive relief preventing enforcement of those provisions. (Am. Compl. (ECF No. 163) pp. 40-45.)

Before the Court is Defendants' Early Motion for Summary Judgment on Plaintiffs' Lack of Standing (ECF No. 188) ("Motion"). For the reasons set forth below, the Motion is granted in part and denied in part.

I. LEGAL STANDARD

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.

P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987).

A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248. The Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Energy and Environment Legal Institute[1] ("EELI") is a non-profit organization dedicated to the

[1] The Energy and Environment Legal Institute was formerly known as the American Tradition Institute. (ECF No. 200.)

advancement of rational, free-market solutions to land, energy, and environmental challenges in the United States. (Am. Compl. ¶ 3.) EELI also promotes coal energy, and believes that the impact human activities have had on the rise in global temperatures is an open question. (ECF No. 188 ¶ 3; ECF No. 194-1.) Plaintiff Rod Lueck is a member of EELI who resides in Colorado. (*Id.* ¶ 4.) Mr. Lueck is the owner and president of Techmate, a financial services company based in Colorado. (*Id.*) Defendants Joshua Epel, James Tarpey, and Pamela Patton are members of the Colorado Public Utilities Commission. (*Id.* ¶¶ 6-8.) Intervenor-Defendant[2] Solar Energy Industries Association is a trade association with member companies in Colorado and throughout the United States whose members are benefitting from the challenged statutes. (ECF No. 75.) For purposes of this Order, the Court's reference to "Defendants" includes the Solar Energy Industries Association.

In 2004, Colorado voters passed Amendment 37, which was intended to promote the development and utilization of renewable energy resources. (*Id.* ¶ 60.)

Plaintiffs represent that this was only a name change and does not impact the purpose or activities of the institute.

[2] The remaining Intervenor-Defendants do not join in the instant Motion, instead filing a Motion for Partial Summary Judgment on Claims 1 & 2. (ECF No. 186.)

Amendment 37 is now codified as the Renewable Energy Standard statute (the "RES") at Colo. Rev. Stat. § 40-2-124. Plaintiffs' Amended Complaint brings six claims—three for declaratory relief and three for injunctive relief—alleging that three discrete provisions of the RES violate the Commerce Clause[3] of the United States Constitution. (*Id.* ¶¶ 137-51.)

First, Plaintiffs challenge Colo. Rev. Stat. §§ 40-2-124(1)(c)(I),(V),(V.5) and 40-2-124(3),(4) and their implementing regulations codified at 4 Colo. Code Regs. §§ 723-3 et seq. (the "Renewables Quota"). The Renewables Quota requires each retail utility to generate, or cause to be generated, renewable energy resources in specified minimum amounts. (*Id.* ¶¶ 137-

[3] The Commerce Clause empowers the U.S. Congress "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. The U.S. Supreme Court has interpreted the Commerce Clause as authorizing Congress to regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." United States v. Morrison, 529 U.S. 598, 609, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). Although the text of the Commerce Clause does not expressly limit the power of states, the Supreme Court has read into the Commerce Clause a "negative implication" — the dormant Commerce Clause — that prohibits states from passing laws that improperly burden or discriminate against interstate commerce. See, e.g., *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-39, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008).

141.) The Renewables Quota is structured so that the percentage of electricity that must be generated from renewable sources increases over time. The Renewables Quota started in 2007, and requires that each qualifying utility obtain at least 3 percent of its electricity from recycled or renewable sources. Colo. Rev. Stat. § 40-2-124(1)(c)(I)(A). The Renewables Quota increases every few years such that, by the year 2020, each qualifying retail utility[4] is required to obtain at least 30% percent of its energy from renewable sources. See Colo. Rev. Stat. § 40-2-124(1)(c)(I)(B)-(E).

Plaintiffs next challenge Colo. Rev. Stat. §§ 40-2-124(1)(c)(I)(C)-(E) and 40-2-124(1)(c)(V)(D) (the "Distributed Generation Provision"). The Distributed Generation Provision governs how much renewable energy must come from "distributed generation" sources. "Distributed generation" means renewable energy that is produced on the site of a customer's facility, or in a facility with a rating of less than thirty megawatts. See Colo. Rev. Stat. § 40-2-124(1)(a)(VIII). Like the Renewables Quota, the Distributed Generation Provision requires that an increasingly

[4] A lower percentage applies to cooperative electric associations, with additional differentiation between those cooperatives that serve less than 100,000 utility meters and those that serve more than 100,000 utility meters. See Colo. Rev. Stat. § 40-2-124(1)(c)(V), (V.5).

large percentage of the renewable energy generated by the utilities come from distributed generation sources. Colo. Rev. Stat. § 40-2-124(1)(c)(I)(C)-(E). In 2013-14, one percent of a utility's retail sales is required to come from distributed generation sources, with this percentage increasing to three percent by the year 2020. *Id.*

Finally, Plaintiffs challenge Colo. Rev. Stat. § 40-2-124(1)(c)(IX) (the "2:1 Provision"). The 2:1 Provision counts each kilowatt hour of renewable electricity generated by rural cooperative electrical associations and municipally owned utilities as two kilowatt hours, for purposes of the Renewables Quota. The 2:1 Provision is intended to "stimulat[e] rural economic development". Colo. Rev. Stat. § 40-2-124(1)(c)(IX).

Defendants previously filed a Motion to Dismiss which argued that Plaintiffs did not have standing to pursue their claims. (ECF Nos. 28.) The Court denied the Motion, finding that Plaintiffs had alleged sufficient facts to survive a Motion to Dismiss based on an alleged injury to unnamed electrical companies and an unnamed coal producer that are members of EELI. (ECF No. 64.) During discovery, Plaintiffs clarified that they were basing their standing to bring this action only on Alpha Natural Resources, Inc. and its related companies ("Alpha"), as well as Plaintiff Rod Lueck. (ECF No. 188-2.) Alpha is a mining company that operates two coal mines in Wyoming, and is a member of EELI. (ECF No. 188 at 4.) At this point, Plaintiffs are not claiming standing based on any electrical companies that are members of EELI. (ECF No. 188-2.)

On September 30, 2013, Defendants filed the instant Early Motion for Summary Judgment on Plaintiffs' Lack of Standing. (ECF No. 188.) Plaintiffs filed their response on October 21, 2013 (ECF No. 194), and Defendants filed their reply on November 18, 2013 (ECF No. 198). The Motion is now ripe for review.

III. ANALYSIS

Article III of the United States Constitution limits the jurisdiction of federal courts to "[c]ases" and "[c]ontrovers[ies]." U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976).

“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "The gist of the question of standing" is whether the plaintiffs have "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, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Standing "is perhaps the most important of the[] doctrines" limiting the federal judicial power. *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

There are two aspects to standing: constitutional standing and prudential standing. The Court will discuss each in turn below.

A. Constitutional Standing

“[T]he irreducible constitutional minimum of standing contains three elements”: the plaintiff must have suffered a "concrete and particularized" injury that is "actual or imminent" (i.e., an "injury in fact"), there must be "a causal connection between the injury and the conduct complained of," and it must be "likely . . . that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61 (quotation marks omitted); see also Allen, 468 U.S. at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

As an association, Plaintiff EELI must establish standing by showing that one of its members has individual standing to challenge the disputed provisions. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (an association has standing to bring suit on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."). EELI asserts associational standing based on two members: Alpha and Lueck. (ECF No. 188-2.) The Court will separately analyze whether either of these members has individual standing to bring this suit.

Generalized or Particularized Standing

To appropriately analyze the instant Motion, the Court must first address the level of specificity with which Plaintiffs must prove their standing. Defendants contend that Plaintiffs must separately prove that they have standing to challenge each of the three provisions of the RES described above. (ECF No. 198 at 6.) Plaintiffs contend that this lawsuit challenges the RES as a whole and, therefore, they are required only to show that the RES as a whole has caused them an injury which is redressable through this lawsuit. (ECF No. 194 at 12.)

"[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 357 n.6, 116 S. Ct. 2174, 135 L.

Ed. 2d 606 (1996). Rather, a party challenging multiple statutory provisions must show that it has been injured by each challenged provision. See *DaimlerChrysler v. Cuno*, 547 U.S. 332, 353, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) (plaintiff's injury caused by a municipal taxing scheme did not give it standing to challenge a state tax scheme that did not injure it); *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) (separately analyzing plaintiff's standing to challenge each provision at issue). The cases cited by Plaintiffs show only that, once a party has established standing to challenge a particular provision, it may assert many different theories for why that provision is invalid. See *DaimlerChrysler*, 547 U.S. at 353 n.5. These cases do not stand for the proposition that a party with standing to challenge one statutory provision may leverage that injury into standing to challenge an entire statutory scheme, or indeed even a separate statutory provision.

Contrary to Plaintiffs' assertion, the Court finds that Plaintiffs' Amended Complaint does not seek to invalidate the RES as a whole. Rather, it challenges three discrete provisions in the RES: the Renewables Quota, the Distributed Generation Provision, and the 2:1 Provision. (Am. Compl. ¶¶ 137-51.) Because these are three separate statutory provisions, the Court concludes that Plaintiffs must show they have standing to challenge each of them. Thus, the Court will review each challenged provision and determine whether Plaintiffs have satisfied each element of standing with regard to that provision.

1. Renewables Quota

Plaintiffs allege that Alpha has standing to challenge the Renewables Quota based on: (1) the actual coal sales that it has lost since the Quota took effect, and (2) the lost ability to compete for that portion of the market now set aside for renewable energy. The Court will discuss each of these theories below.

a. Lost Sales

The evidence shows that, prior to 2009, Xcel Energy—a major electric company in Colorado—bought 100% of its coal for two power plants from Alpha and that, since 2009, these sales have decreased. (Romer Decl. (ECF No. 188-1) ¶ 7.) However, in that same declaration, Xcel further states that the reason it began purchasing coal from Alpha's competitors was due to the fact that these competitors have been offering Xcel a better price. (*Id.* ¶ 8.) Xcel has explicitly stated that the RES is not the reason it has reduced the amount of coal it buys from Alpha. (*Id.*) Plaintiff has offered no evidence to rebut this contention. Therefore, the Court finds that Alpha's lost sales are an injury-in-fact, but that Plaintiffs have not shown that this injury was caused by the Renewables Quota or any other provision of the RES.

Moreover, were the Court to find that the Renewables Quota was unconstitutional, there is no evidence that Alpha would be able to increase its sales.

As such, with regard to the injury of actual lost sales, the Court finds that Plaintiffs have failed to satisfy the causation and redressability elements of standing.

b. Lost Ability to Compete

Plaintiffs also assert that the Renewables Quota has injured Alpha by limiting its ability to compete for that portion of the energy market set aside for renewable energy. (ECF No. 194 at 14-15.)

The Supreme Court has held that, when challenging a set-aside program, "the 'injury in fact' is the inability to compete on an equal footing in the bidding process." See *N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) (holding that contractors had shown an injury due to inability to compete for contracts set aside [*15] for minority-owned businesses); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (Caucasian applicant for medical school had shown an injury in fact based on the inability to compete for spots reserved for minority applicants). "To establish standing, therefore, a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis."[5] N.E. Fla., 508 U.S. at 666.

The Court finds that, under this standard, Plaintiffs have sufficiently alleged an injury in fact. Plaintiffs have shown that the Renewables Quota prevents Alpha—as a coal producer—from being able to compete for 30% of the energy market. Plaintiffs need not show that Alpha would actually have won any contract for this 30% of the market; the loss of the ability to compete is the injury. *Bakke*, 438 U.S. at 281 n.14 (medical school's decision not to let applicant compete for all 100 spots because of his race was injury).

The Court also finds that Alpha's inability to compete for 30% of the energy market is directly caused by the Renewables Quota. Finally, the Court

[5] Defendants contend that this line of cases applies only to claims brought under the Equal Protection Clause. However, the case law does not support this argument. See *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497-98 (7th Cir. 2005) (noting that the holdings in N.E. Fla. and Baake regarding injury for purposes of standing are "not limited to cases alleging a violation of the Equal Protection Clause."). "Whether to apply this analysis depends on the nature of the alleged injury, not the source of the asserted right." *Id.* (citing *Lujan*, 504 U.S. at 576 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.")).

finds that this injury is redressable because, were the Court to hold that the Renewables Quota was invalid, the 30% of the market currently set aside for renewable energy would reopen to non-renewable sources, such as coal producers.

Therefore, the Court finds that Alpha has suffered an injury in fact, which is caused by the Renewables Quota and redressable in this case. Because Alpha would have standing to challenge the Renewables Quota on its own, EELI has standing to bring this case on Alpha's behalf. See Friends of the Earth, 528 U.S. at 181. Accordingly, the Court finds that Plaintiffs have constitutional standing to pursue Claims 1 and 2 of their Amended Complaint.

2. Distributed Generation Provision & 2:1 Provision

Plaintiffs do not attempt to show any specific injury caused by the Distributed Generation Provision or the 2:1 Provision, relying on their argument that they are required only to show a generalized injury arising from the RES to establish standing to bring all of their claims. As discussed above, the Court has rejected this argument and held that Plaintiffs must show that they have standing to challenge each provision of the RES at issue in this case. Because Plaintiffs bear the burden of showing standing, their failure to separately address their standing as to each claim is alone reason to dismiss the claims challenging the Distributed Generation Provision and the 2:1

Provision. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999) ("The party invoking federal jurisdiction bears the burden of coming forward with evidence of specific facts which prove standing."). However, in the interest of completeness, the Court will evaluate whether Plaintiffs have adduced sufficient evidence to show that they have standing to challenge these provisions.

a. Alpha's Standing

The Distributed Generation Provision requires that half of the energy a utility generates to satisfy the Renewables Quota be derived from distributed generation sources. See Colo. Rev. Stat. § 40-2-124(1)(c)(II)(A). For example, if the Renewables Quota requires a utility to generate 30% of its energy using renewable sources, the Distributed Generation Provision requires that half of that 30% (or 15%) be generated by distributed generation sources. The 2:1 Provision counts each kilowatt hour of renewable electricity generated by rural cooperative electrical associations and municipally owned utilities as two kilowatt hours, for purposes of the Renewables Quota. Colo. Rev. Stat. § 40-2-124(1)(c)(IX).

With respect to Alpha, as discussed above, the Court has found that the Renewables Quota caused Alpha to lose the ability to compete for the portion of Colorado's energy market that is set aside for energy from renewable sources. However, the Court finds that this injury is not altered or amplified by the Distributed Generation Provision or the 2:1 Provision. As a coal producer, Alpha cannot compete for any portion [*19] of the market set aside for renewable energy, regardless of whether the renewable energy comes from large-scale wind or solar installations or from distributed generation, and whether it is produced by rural cooperative electrical associations. Neither the Distributed Generation Provision nor the 2:1 Provision enlarge the piece of the pie that, because of the Renewables Quota, is reserved for energy generated from renewable sources. All these provisions do is subdivide that piece of pie in different ways.

Because Alpha's injury is the loss of the ability to compete for the portion of the market set aside for renewable energy, and neither the Distributed Generation Provision nor the 2:1 Provision have any causal effect on this injury, the Court finds that Plaintiffs have failed to show that Alpha has suffered an injury caused by the Distributed Generation Provision or the 2:1 Provision.

Moreover, were the Court to strike down the Distributed Generation Provision or the 2:1 Provision, Alpha's ability to compete in the energy market would be unchanged. Alpha would still be unable to compete for the portion of the energy market reserved for renewable energy. As such, the Court finds that Alpha has not shown any injury caused by the Distributed

Generation Provision or the 2:1 Provision which would be redressed by any relief sought by Plaintiffs in this case.

Because Plaintiffs have not shown that Alpha suffered an injury caused by the Distributed Generation Provision or the 2:1 Provision, or redressable by the relief sought in this case, Alpha does not have standing to challenge these portions of the RES.

b. Rod Lueck's Standing to Challenge this Provision

Despite the above findings, EELI may still have standing to bring its claims challenging the Distributed Generation Provision and/or the 2:1 Provision if Mr. Lueck has individual standing to pursue these claims. With regard to Mr. Lueck, Plaintiffs have alleged three injuries: (1) payment of a monthly fee on his electric bill that is attributable to the RES; (2) the need to purchase backup electrical equipment to protect against potential service interruptions caused by variable power sources; and (3) aesthetic injury due to bird and bat kills, as well as the loss of vistas, near his family home in Northeastern Colorado. (ECF No. 194 at 20.) The Court will address each of these alleged injuries below.

i. RESA Fee

Plaintiffs contend that Mr. Lueck is injured by having to pay the Renewable Energy Standard

Adjustment ("RESA"), a fee utilities are allowed to collect pursuant to Colo. Rev. Stat. § 40-2-124-(1)(g)(I)(B). (ECF No. 20.) Notably, there appears to be a lack of proof regarding whether Mr. Lueck personally pays any RESA fee. (See ECF No. 198 at 14.) However, even if the Court were to assume that he personally pays this fee, and that this fee constitutes an injury for purposes of standing, the record is clear that this injury was not caused by the Distributed Generation Provision or the 2:1 Provision. Rather, an entirely different subsection of the RES—which Plaintiffs do not challenge in this litigation—permits Mr. Lueck's utility to levy this fee. Thus, if Plaintiffs were to prevail on their claims, Mr. Lueck's utility company could still continue to charge him this fee.

Because Plaintiffs have not shown that Mr. Lueck's payment of the RESA fee was caused by the Distributed Generation Provision or the 2:1 Provision, or that he could avoid payment of the RESA fee if he prevails in this action, the Court finds that Mr. Lueck's payment of the RESA fee does not give him standing to challenge either the Distributed Generation Provision or the 2:1 Provision.

ii. Purchase of Back Up Electrical Equipment

Plaintiffs next contend that Mr. Lueck was injured because he purchased nearly $100,000 of electrical equipment to ensure that his company's electrical service would not be interrupted. (ECF No. 194 at 21.) First, it is questionable whether this purchase constituted an injury to Mr. Lueck personally, rather than his business. The fact that Mr. Lueck's name appears on the paperwork for the purchase does not mean that he made the purchase on his own behalf rather than in his capacity as president of his company. At his deposition, Mr. Lueck testified that he was "pretty sure [the electrical backup equipment] was paid out of the company because it was for company property." (Lueck Dep. (ECF Nos. 188-3 & 194-5) p. 86.) On this record, the Court finds that Plaintiffs have not shown that Mr. Lueck personally suffered an injury when he purchased the backup electrical equipment.

Moreover, even assuming that this expenditure was an injury personal to him, Mr. Lueck's purchase of the backup electrical equipment was not caused or required by the Distributed Generation Provision or the 2:1 Provision, [*23] and also would not be redressed by the relief sought in this case. Mr. Lueck contends that he needed to purchase the backup electrical equipment because of the unreliability of solar and wind power, which have increased since the RES was enacted. (Lueck Dep. at 118-19.) While this injury could arguably have been caused by the Renewables Quota, which Defendants admit has had the effect of increasing the proportion of electricity generated from renewable sources, Plaintiffs have made no attempt to show how either the Distributed Generation Provision or the 2:1 Provision have contributed to the unreliability of Mr. Lueck's electrical service. Given that Plaintiffs bear the burden of proving standing, this failure of proof alone is fatal to these claims.

Finally, Plaintiffs have failed to show that, if the Court struck the Distributed Generation Provision or the 2:1 Provision from the RES, the electrical grid would become more reliable. The Renewables Quota would still require that up to 30% of the electrical power generated by utilities come from renewable sources. Without the Distributed Generation Provision, the likely result would be more wind and solar power from large-scale installations. [*24] There is no evidence in the record showing that wind and solar power from large-scale installations is more reliable than wind and solar from distributed generation. If the 2:1 Provision is eliminated, rural cooperative electrical associations and municipally owned utilities would have to increase their generation of energy from renewable sources which, if anything, would increase the unreliability of which Plaintiffs complain.

Accordingly, the Court finds that Plaintiffs have failed to show that Mr. Lueck's purchase of backup electrical equipment gives him standing to challenge the Distributed Generation Provision or the 2:1 Provision.

iii. Aesthetic Injury

For his final alleged injury, Mr. Lueck asserts that, since the RES was enacted, there has been an increase in bird and bat kills near family property in Northeastern Colorado, and that his vistas have been disturbed by windmills. (ECF No. 194 at 21.) Having reviewed the record, the Court finds that there is a lack of proof supporting this purported injury. Mr. Lueck testified at his deposition that he has never personally seen any birds or bats killed by windmills. (Lueck Dep. at 142.) He stated that he read articles online about how windmills harmed birds, but could not offer any specific information about kinds of birds, the frequency with which strikes occur, or strikes occurring on or near his property. (*Id.*) The only specific information Mr. Lueck had about bird or bat strikes near his property was a conversation he had with a local farmer, during which the farmer indicated that he would sometimes find bird carcasses on his property. (*Id.* at 143.)

The Court finds that this evidence is insufficient to prove an injury to birds or bats in the area near Mr. Lueck's family property. A farmer talking about a few dead birds is not a sufficient injury to confer standing. In fact, after describing his conversation with the farmer, Mr. Lueck went on to say that radio towers and roads also kill birds and bats. (Lueck Dep. at 143.) In short, there is no evidence specifically linking these bird or bat deaths to the windmills near his family property.

In their Opposition to the Motion, Plaintiffs rely on a 2002 study of the Ponnequin, Colorado wind plant which showed that several dead bats were found over a 3-year period. (ECF No. 194 at 10.) As the Ponnequin facility is over 100 miles from Mr. Lueck's family property, this study does not show that bats were injured near his property. Moreover, the study predates the enactment of the RES by four years, and therefore does not show that any provision in the RES caused the identified bat deaths. In fact, Plaintiffs have failed to link any of the windmills near Mr. Lueck's property to any aspect of the RES, much less the Distributed Generation Provision or the 2:1 Provision. Wind power existed before the RES were enacted, and there is no evidence that the wind power industry would cease to operate if the Court were to strike down any aspect of the RES.

With regard to an injury to the vistas near Mr. Lueck's property, there is similarly a failure of proof of an injury in the record. Plaintiffs have failed to cite any evidence wherein Mr. Lueck discusses his enjoyment of the vistas from his family property, or how the vistas have been harmed by the RES. Moreover, to the extent Plaintiffs have attempted to show any causation, they argue only that the "RES quotas" increase the need for new wind facilities, which is insufficient to link either the Distributed

Generation Provision or the 2:1 Provision to the increase in windmills near Mr. Lueck's property. (ECF No. 194 at 22.) As such, any injury to the vistas surrounding Mr. Lueck's family property does not provide standing to challenge the Distributed Generation Provision or the 2:1 Provision.

Conclusion

In sum, Plaintiffs have failed to adduce sufficient evidence to show that either Mr. Lueck or Alpha would have standing to challenge the Distributed Generation Provision or the 2:1 Provision. Because EELI has not shown that any of its members would have standing to challenge these provisions, EELI lacks associational standing. See *Hunt v. Wash. State Apple Adver. Comm.*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (holding that a member of an association must have standing in his own right in order for the association to have standing). Accordingly, Plaintiffs have failed to show that they have standing to bring Claims 3, 4, 5, and 6 of the Amended Complaint, and such claims must be dismissed without prejudice for lack of jurisdiction on the part of this Court to adjudicated these claims.

B. Prudential Standing

As the Court has found that Plaintiffs have shown that they have constitutional standing to bring claims 1 and 2 of the Amended Complaint challenging the Renewables Quota, the Court must next determine whether they have prudential standing to assert these claims. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) ("Beyond the constitutional requirements [for standing], the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.").

Prudential standing is a set of "judicially self-imposed limits on the exercise of federal jurisdiction". Allen, 468 U.S. at 751. First, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Second, "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id.* And third, "the interest sought to be protected [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970); see also *Allen*, 468 U.S. at 751 (summarizing all three prudential standing principles). This third element—whether Plaintiffs' claims lie within the zone of interests of the Commerce

Clause—is the only aspect of the prudential standing test challenged here.

The dormant Commerce Clause "confer[s] a right to engage in interstate trade free from restrictive state legislation" because it "was intended to benefit those who . . . are engaged in interstate commerce". *Dennis v. Higgins*, 498 U.S. 439, 449, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991). To determine whether Plaintiffs' challenge of the Renewables Quota falls within the zone of interests of the dormant Commerce Clause, the Court must look at: (1) whether the Renewables Quota is facially discriminatory against out-of-state economic interests; or (2) whether the Quota is excessively burdensome to interstate commerce. See *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 475 (5th Cir. 2013).

Plaintiffs do not allege that the Renewables Quota is facially discriminatory against out-of-state economic interests. Indeed, nothing in the Renewables Quota appears to treat energy generated outside the state of Colorado different than energy produced within the state of Colorado. The distinction drawn by the Renewables Quota is between renewable and non-renewable energy, and is not focused on in-state versus out-of-state economic interests.

However, the Court finds that Plaintiffs have prudential standing to challenge the Renewables Quota on the basis that it generally burdens interstate commerce. The "zone of interests" element of prudential standing “is not meant to be especially demanding”. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210, 183 L. Ed. 2d 211 (2012). As long as the interest asserted by the Plaintiffs is “arguably within the zone of interests to be protected or regulated by the statute”, the Court must find that prudential standing has been satisfied. *Id.* "An allegation that the plaintiff is involved in interstate commerce is burdened by the ordinance in question is sufficient to satisfy the zone of interests test with respect to ordinances that assertedly impose an excessive burden on interstate commerce." *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500 (5th Cir. 2004).

Given this low standard, the Court has little difficulty concluding that Plaintiffs' challenge of the Renewables Quota falls within the zone of interests protected by the dormant Commerce Clause. Alpha engages in interstate commerce by selling coal across state lines, and electrical grids are inherently interstate commerce as they run across the entire country. The Renewables Quota mandates that up to 30% of the energy used by Colorado utilities come from renewable sources. This restriction has a significant impact on Alpha's ability to market and sell its coal in Colorado, which gives Plaintiffs prudential standing to bring claims 1 and 2.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Defendants' Early Motion for Summary Judgment on Plaintiffs' Lack of Standing (ECF No. 188) is GRANTED IN PART and DENIED IN PART;

2. Plaintiffs' claims challenging the Distributed Generation Provision (Claims 3 & 4) and the 2:1 Provision (Claims 5 & 6) are DISMISSED WITHOUT PREJUDICE based on the Court's finding that Plaintiffs lack standing to assert these claims;

3. This case shall proceed only on Plaintiffs' claims challenging the Renewables Quota (Claims 1 & 2).

Dated this 1st day of May, 2014.

BY THE COURT:

/s/ William J. Martínez

William J. Martínez

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

———

Magistrate Judge Boyd N. Boland
Civil Action No. 11-cv-00859-WJM-BNB

———

ENERGY & ENVIRONMENT LEGAL INSTITUTE, AND
ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL, JAMES TARPEY, and PAMELA PATTON,

Defendants,

and

ENVIRONMENT COLORADO, CONSERVATION COLORADO EDUCATION FUND, SIERRA CLUB,

THE WILDERNESS SOCIETY, SOLAR ENERGY INDUSTRIES ASSOCIATION, AND INTERWEST ENERGY ALLIANCE,

Intervenor-Defendants,

February 19, 2014

ORDER

The parties requested a status conference "to determine whether remaining deadlines in this case should be stayed until pending motions are resolved." Unopposed Motion Seeking a Status Conference [Doc. # 209, filed 2/7/2014] at p. 1. The status conference occurred today.

I discussed with the parties the pending motions for summary judgment (the "Early Motions"), i.e., (1) Plaintiffs' Early Motion for Partial Summary Judgment [Doc. # 180, filed 8/30/2013] which argues that the Colorado Renewable Energy Standard, section 40-2-124, C.R.S. (the "Colorado RES"), is unconstitutional because it violates the dormant Commerce Clause; (2) Defendants and Defendant-Intervenors' Early Motion for Summary Judgment on Claims 1 and 2 [Doc. # 186, filed 9/30/2013] which is the mirror image of the Plaintiffs' Early Motion and argues that the defendants/intervenors are entitled to summary judgment dismissing the plaintiffs' first and second claims because the Colorado RES does not violate the Commerce Clause and is not unconstitutional; and (3) Defendants' Early Motion for Summary Judgment on Plaintiffs' Lack of Standing [Doc. # 188, filed 9/30/2013] arguing that the plaintiffs lack standing to assert their claims and that there is no justiciable case or controversy as required by Article III of the Constitution. The parties insist that resolution of the Early Motions will materially impact how the litigation proceeds and the focus of the parties going forward. They urge the entry of an order postponing the dispositive motion deadline and the final pretrial conference until the Early Motions are decided.

I am persuaded that judicial economy and economy of the parties' resources will be served by delaying the dispositive motion deadline and the final pretrial conference as the parties request.

IT IS ORDERED:

(1) The dispositive motion deadline (March 5, 2014)
and the pretrial conference (May 29, 2014) and
related deadlines are VACATED, to be reset by
further order of the court;

and

(2) The parties shall file a status report within 14 days after an order by the district judge resolving any of the Early Motions describing the order, addressing its impact on the case, and discussing whether additional pretrial deadlines, particularly the dispositive motion

deadline and the final pretrial conference, should be reset.

Dated February 19, 2014.

BY THE COURT:

s/ Boyd N. Boland

United States Magistrate Judge

APPENDIX E

COLORADO REVISED STATUTES

TITLE 40. UTILITIES
PUBLIC UTILITIES

ARTICLE 2. PUBLIC UTILITIES COMMISSION - RENEWABLE ENERGY STANDARD

C.R.S. 40-2-124 (2015)

40-2-124. Renewable energy standard - definitions - net metering

(1) Each provider of retail electric service in the state of Colorado, other than municipally owned utilities that serve forty thousand customers or fewer, is a qualifying retail utility. Each qualifying retail utility, with the exception of cooperative electric associations that have voted to exempt themselves from commission jurisdiction pursuant to section 40-9.5-104and municipally owned utilities, is subject to the rules established under this article by the commission. No additional regulatory authority is provided to the commission other than that specifically contained in this section. In accordance with article 4 of title 24, C.R.S., the commission shall

revise or clarify existing rules to establish the following:

(a) Definitions of eligible energy resources that can be used to meet the standards. "Eligible energy resources" means recycled energy and renewable energy resources. In addition, resources using coal mine methane and synthetic gas produced by pyrolysis of municipal solid waste are eligible energy resources if the commission determines that the electricity generated by those resources is greenhouse gas neutral. The commission shall determine, following an evidentiary hearing, the extent to which such electric generation technologies utilized in an optional pricing program may be used to comply with this standard. A fuel cell using hydrogen derived from an eligible energy resource is also an eligible electric generation technology. Fossil and nuclear fuels and their derivatives are not eligible energy resources. For purposes of this section:

(I) "Biomass" means:

(A) Nontoxic plant matter consisting of agricultural crops or their byproducts, urban wood waste, mill residue, slash, or brush; (B) Animal wastes and products of animal wastes; or

(C) Methane produced at landfills or as a by-product of the treatment of wastewater residuals.

(II) "Coal mine methane" means methane captured from active and inactive coal mines where the methane is escaping to the atmosphere. In the case of methane escaping from active mines, only methane vented in the normal course of mine operations that is naturally escaping to the atmosphere is coal mine methane for purposes of eligibility under this section.

(III) "Distributed renewable electric generation" or "distributed generation" means:

(A) Retail distributed generation; and

(B) Wholesale distributed generation.

(IV) "Greenhouse gas neutral", with respect to electricity generated by a coal mine methane or synthetic gas facility, means that the volume of greenhouse gases emitted into the atmosphere from the conversion of fuel to electricity is no greater than the volume of greenhouse gases that would have been emitted into the atmosphere over the next five years, beginning with the planned date of operation of the facility, if the fuel had not been converted to electricity, where greenhouse gases are measured in terms of carbon dioxide equivalent.

(V) "Pyrolysis" means the thermochemical decomposition of material at elevated temperatures without the participation of oxygen.

(VI) "Recycled energy" means energy produced by a generation unit with a nameplate capacity of not more than fifteen megawatts that converts the otherwise lost energy from the heat from exhaust stacks or pipes to electricity and that does not combust additional fossil fuel. "Recycled energy" does not include energy produced by any system that uses energy, lost or otherwise, from a process whose primary purpose is the generation of electricity, including, without limitation, any process involving engine-driven generation or pumped hydroelectricity generation.

(VII) "Renewable energy resources" means solar, wind, geothermal, biomass, 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.

(VIII) "Retail distributed generation" means a renewable energy resource that is located on the site of a customer's facilities and is interconnected on the customer's side of the utility meter. In addition, retail distributed generation shall provide electric energy primarily to serve the customer's load and shall be sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the customer at that site. For purposes of this subparagraph (VIII), the customer's "site" includes all contiguous property owned or leased by the customer without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.

(IX) "Wholesale distributed generation" means a renewable energy resource with a nameplate rating of thirty megawatts or less and that does not qualify as retail distributed generation.

(b) Standards for the design, placement, and management of electric generation technologies that use eligible energy resources to ensure that the environmental impacts of such facilities are minimized.

(c) Electric resource standards:

(I) Except as provided in subparagraph (V) of this paragraph (c), the electric resource standards shall require each qualifying retail utility to generate, or cause to be generated, electricity from eligible energy resources in the following minimum amounts:

(A) Three percent of its retail electricity sales in Colorado for the year 2007;

(B) Five percent of its retail electricity sales in Colorado for the years 2008 through 2010;

(C) Twelve percent of its retail electricity sales in Colorado for the years 2011 through 2014, with distributed generation equaling at least one percent of its retail electricity sales in 2011 and 2012 and one and one-fourth percent of its retail electricity sales in 2013 and 2014;

(D) Twenty percent of its retail electricity sales in Colorado for the years 2015 through 2019, with distributed generation equaling at least one and three-fourths percent of its retail electricity sales in 2015 and 2016 and two percent of its retail electricity sales in 2017, 2018, and 2019; and

(E) Thirty percent of its retail electricity sales in Colorado for the years 2020 and thereafter, with distributed generation equaling at least three percent of its retail electricity sales.

(II) (A) Of the amounts of distributed generation in sub-subparagraphs (C), (D), and

(E) of subparagraph (I), sub-subparagraph (D) of subparagraph (V), and subparagraph (V.5) of this paragraph (c), at least one-half must be derived from retail distributed generation; except that this sub-subparagraph (A) does not apply to a qualifying retail utility that is a municipal utility.

(A.5) Notwithstanding sub-subparagraph (A) of this subparagraph (II), a qualifying retail utility that is a cooperative electric association may subtract industrial retail sales from total retail sales in calculating its minimum retail distributed generation requirement.

(B) Solar generating equipment located on-site at customers' facilities shall be sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the consumer at that site. For purposes of this sub-subparagraph (B), the consumer's "site" shall include all contiguous property owned or leased by the consumer, without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.

(C) Distributed generation amounts in the electric resource standard for the years 2015 and thereafter may be changed by the commission for the period after December 31, 2014, if the commission finds, upon application by a qualifying retail utility, that these percentage requirements are no longer in the public interest. If such a finding is made, the commission may set the lower distributed generation requirements, if any, that shall apply after December 31, 2014. If the commission finds that the public interest requires an increase in the distributed generation requirements, the commission shall report its findings to the general assembly.

(D) For purposes of a cooperative electric association's compliance with the retail distributed generation requirement set forth in sub-subparagraph (A) of this subparagraph (II), an electric generation facility constitutes retail distributed generation if it uses only renewable energy resources; has a nameplate rating of two megawatts or less; is located within the service territory of a cooperative electric association; generates electricity for the beneficial use of subscribers who are members of the cooperative electric association in the service territory in which the facility is located; and has at least four subscribers if the facility has a nameplate rating of fifty kilowatts or less and at least ten subscribers if the facility has a nameplate rating of more than fifty kilowatts. A subscriber's share of the production from the facility may not exceed one hundred twenty percent of the subscriber's average annual consumption. Each cooperative electric association may establish, in the manner it deems appropriate, the: Subscriber; subscription; pricing, including consideration of low-income members; metering; accounting; renewable energy credit ownership; and other requirements and terms associated with electric generation facilities described in this sub-subparagraph (D).

(III) Each kilowatt-hour of electricity generated from eligible energy resources, other than retail distributed generation and other than eligible energy resources beginning operation on or after January 1, 2015, counts as one and one-fourth kilowatt-hours for the purposes of compliance with this standard.

(IV) To the extent that the ability of a qualifying retail utility to acquire eligible energy resources is limited by a requirements contract with a wholesale electric supplier, the qualifying retail utility shall acquire the maximum amount allowed by the contract. For any shortfalls to the amounts established by the commission pursuant to subparagraph (I) of this paragraph (c), the qualifying retail utility shall acquire an equivalent amount of either renewable energy credits; documented and verified energy savings through energy efficiency and conservation programs; or a combination of both. Any contract entered into by a qualifying retail utility after December 1, 2004, shall not conflict with this section.

(V) Notwithstanding any other provision of law but subject to subsection (4) of this section, the electric resource standards must require each cooperative electric association that is a qualifying retail utility and that provides service to fewer than one hundred thousand meters, and each municipally owned utility that is a qualifying retail utility, to generate, or cause to be generated, electricity from eligible energy resources in the following minimum amounts:

(A) One percent of its retail electricity sales in Colorado for the years 2008 through 2010;

(B) Three percent of retail electricity sales in Colorado for the years 2011 through 2014;

(C) Six percent of retail electricity sales in Colorado for the years 2015 through 2019; and

(D) Ten percent of retail electricity sales in Colorado for the years 2020 and thereafter.

(V.5) Notwithstanding any other provision of law, each cooperative electric association that provides electricity at retail to its customers and serves one hundred thousand or more meters shall generate or cause to be generated at least twenty percent of the energy it provides to its customers from eligible energy resources in the years 2020 and thereafter.

(VI) Each kilowatt-hour of electricity generated from eligible energy resources at a community-based project must be counted as one and one-half kilowatt-hours. For purposes of this subparagraph (VI), "community-based project" means a project:

(A) That is owned by individual residents of a community, by an organization or cooperative that is controlled by individual residents of the community, or by a local government entity or tribal council;

(B) The generating capacity of which does not exceed thirty megawatts; and

(C) For which there is a resolution of support adopted by the local governing body of each local jurisdiction in which the project is to be located.

(VII) (A) For purposes of compliance with the standards set forth in subparagraphs (V) and (V.5) of this paragraph (c), each kilowatt-hour of renewable electricity generated from solar electric generation technologies shall be counted as three kilowatt-hours.

(B) For each qualifying retail utility that is a cooperative electric association, sub-subparagraph (A) of this subparagraph (VII) applies only to solar electric technologies that begin producing electricity prior to July 1, 2015, and for solar electric technologies that begin producing electricity on or after July 1, 2015, each kilowatt-hour of renewable electricity shall be counted as one kilowatt-hour for purposes of compliance with the renewable energy standard.

(C) For each qualifying retail utility that is a municipally owned utility, sub-subparagraph (A) of this subparagraph (VII) applies only to solar electric technologies that are under contract for development prior to August 1, 2015, and begin producing electricity prior to December 31, 2016, and for solar electric technologies that are not under contract for development prior to August 1, 2015, and begin producing electricity on or after December 31, 2016, each kilowatt-hour of renewable electricity shall be counted as one kilowatt-hour for purposes of compliance with the renewable energy standard.

(VIII) Electricity from eligible energy resources shall be subject to only one of the methods for counting kilowatt-hours set forth in subparagraphs (III), (VI), and (VII) of this paragraph (c).

(IX) For purposes of stimulating rural economic development and for projects up to thirty megawatts of nameplate capacity that have a point of interconnection rated at sixty-nine kilovolts or less, each kilowatt hour of electricity generated from renewable energy resources that interconnects to electric transmission or distribution facilities owned by a cooperative electric association or municipally owned utility may be counted for the life of the project as two kilowatt hours for compliance with the requirements of this paragraph (c) by qualifying retail utilities. This multiplier shall not be claimed for interconnections that first occur after December 31, 2014, and shall not be used in conjunction with another compliance multiplier. For qualifying retail utilities other than investor-owned utilities, the benefits described in this subparagraph (IX) apply only to the aggregate first one hundred megawatts of nameplate capacity of projects statewide that report having achieved commercial operations to the commission pursuant to the procedure described in this subparagraph (IX). To the extent that a qualifying retail utility claims the benefit described in this subparagraph (IX), those kilowatt-hours of electricity do not qualify for satisfaction of the distributed generation requirement of subparagraph (I) of this paragraph (c). The commission shall analyze the implementation of this subparagraph (IX) and submit a report to the senate local government and energy committee and the house of representatives committee on transportation and energy, or their successor committees, by December 31, 2011, regarding implementation of this subparagraph (IX), including how many megawatts of electricity have been installed or are subject to a power purchase agreement pursuant to this subparagraph (IX) and whether the commission recommends that the multiplier established by this subparagraph (IX) should be changed either in magnitude or expiration date. Any entity that owns or develops a project that will take advantage of the benefits of this subparagraph (IX) shall notify the commission within thirty days after signing a power purchase agreement and within thirty days after beginning commercial operations of an applicable project.

(X) Of the minimum amounts of electricity required to be generated or caused to be generated by qualifying retail utilities in accordance with subparagraph (V.5) and sub-subparagraph (D) of subparagraph (V) of this paragraph (c), one-tenth, or one percent of total retail electricity sales, must be from distributed generation; except that:

(A) For a cooperative electric association that is a qualifying retail utility and that provides service to fewer than ten thousand meters, the distributed generation component may be three-quarters of one percent of total retail electricity sales; and

(B) This subparagraph (X) does not apply to a qualifying retail utility that is a municipal utility.

(d) A system of tradable renewable energy credits that may be used by a qualifying retail utility to comply with this standard. The commission shall also analyze the effectiveness of utilizing any regional system of renewable energy credits in existence at the time of its rule-making process and determine whether the system is governed by rules that are consistent with the rules established for this article. The commission shall not restrict the qualifying retail utility's ownership of renewable energy credits if the qualifying retail utility complies with the electric resource standard of paragraph (c) of this subsection (1), uses definitions of eligible energy resources that are limited to those identified in paragraph (a) of this subsection (1), as clarified by the commission, and does not exceed the retail rate impact established by paragraph (g) of this subsection (1). Once a qualifying retail utility either receives a permit pursuant to article 7 or 8 of title 25, C.R.S., for a generation facility that relies on or is affected by the definitions of eligible energy resources or enters into a contract that relies on or is affected by the definitions of eligible energy resources, such definitions apply to the contract or facility notwithstanding any subsequent alteration of the definitions, whether by statute or rule. For purposes of compliance with the renewable energy standard, if a generation system uses a combination of fossil fuel and eligible renewable energy resources to generate electricity, a qualified retail utility that is not an investor-owned utility may count as eligible renewable energy only the proportion of the total electric output of the generation system that results from the use of eligible renewable energy resources.

(e) A standard rebate offer program, under which:

(I) (A) Each qualifying retail utility, except for cooperative electric associations and municipally owned utilities, shall make available to its retail electricity customers a standard rebate offer of a specified amount per watt for the installation of eligible solar electric generation on customers' premises up to a maximum of one hundred kilowatts per installation.

(B) The standard rebate offer shall allow the customer's retail electricity consumption to be offset by the solar electricity generated. To the extent that solar electricity generation exceeds the customer's consumption during a billing month, such excess electricity shall be carried forward as a credit to the following month's consumption. To the extent that solar electricity generation exceeds the customer's consumption during a calendar year, the customer shall be reimbursed by the qualifying retail utility at its average hourly incremental cost of electricity supply over the prior twelve-month period unless the customer makes a one-time election, in writing, to request that the excess electricity be carried forward as a credit from month to month indefinitely until the customer terminates service with the qualifying retail utility, at which time no payment shall be required from the qualifying retail utility for any remaining excess electricity supplied by the customer. The qualifying retail utility shall not apply unreasonably burdensome interconnection requirements in connection with this standard rebate offer. Electricity generated under this program shall be eligible for the qualifying retail utility's compliance with this article.

(I.5) The amount of the standard rebate offer shall be two dollars per watt; except that the commission may set the rebate at a lower amount if the commission determines, based upon a qualifying retail utility's renewable resource plan or application, that market changes support the change.

(II) Sales of electricity to a consumer may be made by the owner or operator of the solar electric generation facilities located on the site of the consumer's property if the solar generating equipment is sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the consumer at that site. For purposes of this subparagraph (II), the consumer's site shall include all contiguous property owned or leased by the consumer, without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way. If the solar electric generation facility is not owned by the consumer, then the qualifying retail utility shall not be required by the commission to pay for the renewable energy credits generated by the facility on any basis other than a metered basis. The owner or operator of the solar electric generation facility shall pay the cost of installing the production meter.

(III) The qualifying retail utility may establish one or more standard offers to purchase renewable energy credits generated from the eligible solar electric generation on the customer's premises so long as the generation meets the size and location requirements set forth in subparagraph (II) of this paragraph (e) and so long as the generation is five hundred kilowatts or less in size. When establishing the standard offers, the prices for renewable energy credits should be set at levels sufficient to encourage increased customer-sited solar generation in the size ranges covered by each standard offer, but at levels that will still allow the qualifying retail utility to comply with the electric resource standards set forth in paragraph (c) of this subsection (1) without exceeding the retail rate impact limit in paragraph (g) of this subsection (1). The commission shall encourage qualifying retail utilities to design solar programs that allow consumers of all income levels to obtain the benefits offered by solar electricity generation and shall allow programs that are designed to extend participation to customers in market segments that have not been responding to the standard offer program.

(f) Policies for the recovery of costs incurred with respect to these standards for qualifying retail utilities that are subject to rate regulation by the commission. These policies must provide incentives to qualifying retail utilities to invest in eligible energy resources and must include:

(I) Allowing a qualifying retail utility to develop and own as utility rate-based property up to twenty-five percent of the total new eligible energy resources the utility acquires from entering into power purchase agreements and from developing and owning resources after March 27, 2007, if the new eligible energy resources proposed to be developed and owned by the utility can be constructed at reasonable cost compared to the cost of similar eligible energy resources available in the market. The qualifying retail utility shall be allowed to develop and own as utility rate-based property more than twenty-five percent but not more than fifty percent of total new eligible energy resources acquired after March 27, 2007, if the qualifying retail utility shows that its proposal would provide significant economic development, employment, energy security, or other benefits to the state of Colorado. The qualifying retail utility may develop and own these resources either by itself or jointly with other owners, and, if owned jointly, the entire jointly owned resource shall count toward the percentage limitations in this subparagraph (I). For the resources addressed in this subparagraph (I), the qualifying retail utility shall not be required to comply with the competitive bidding requirements of the commission's rules; except that nothing in this subparagraph (I) shall preclude the qualifying retail utility from bidding to own a greater percentage of new eligible energy resources than permitted by this subparagraph (I). In addition, nothing in this subparagraph (I) shall prevent the commission from waiving, repealing, or revising any commission rule in a manner otherwise consistent with applicable law.

(II) Allowing qualifying retail utilities to earn an extra profit on their investment in eligible energy resource technologies if these investments provide net economic benefits to customers as determined by the commission. The allowable extra profit in any year shall be the qualifying retail utility's most recent commission authorized rate of return plus a bonus limited to fifty percent of the net economic benefit.

(III) Allowing qualifying retail utilities to earn their most recent commission authorized rate of return, but no bonus, on investments in eligible energy resource technologies if these investments do not provide a net economic benefit to customers.

(IV) Considering, when the qualifying retail utility applies for a certificate of public convenience and necessity under section 40-5-101, rate recovery mechanisms that provide for earlier and timely recovery of costs prudently and reasonably incurred by the qualifying retail utility in developing, constructing, and operating the eligible energy resource, including:

(A) Rate adjustment clauses until the costs of the eligible energy resource can be included in the utility's base rates; and

(B) A current return on the utility's capital expenditures during construction at the utility's weighted average cost of capital, including its most recently authorized rate of return on equity, during the construction, startup, and operation phases of the eligible energy resource.

(V) If the commission approves the terms and conditions of an eligible energy resource contract between the qualifying retail utility and another party, the contract and its terms and conditions shall be deemed to be a prudent investment, and the commission shall approve retail rates sufficient to recover all just and reasonable costs associated with the contract. All contracts for acquisition of eligible energy resources shall have a minimum term of twenty years; except that the contract term may be shortened at the sole discretion of the seller. All contracts for the acquisition of renewable energy credits from solar electric technologies located on site at customer facilities shall also have a minimum term of twenty years; except that such contracts for systems of between one hundred kilowatts and one megawatt may have a different term if mutually agreed to by the parties.

(VI) A requirement that qualifying retail utilities consider proposals offered by third parties for the sale of renewable energy or renewable energy credits. The commission may develop standard terms for the submission of such proposals.

(VII) A requirement that all distributed renewable electric generation facilities with a nameplate rating of one megawatt or more be registered with a renewable energy generation information tracking system designated by the commission.

(g) Retail rate impact rule:

(I) (A) Except as otherwise provided in subparagraph (IV) of this paragraph (g), for each qualifying utility, the commission shall establish a maximum retail rate impact for this section for compliance with the electric resource standards of two percent of the total electric bill annually for each customer. The retail rate impact shall be determined net of new alternative sources of electricity supply from noneligible energy resources that are reasonably available at the time of the determination.

(B) If the retail rate impact does not exceed the maximum impact permitted by this paragraph (g), the qualifying utility may acquire more than the minimum amount of eligible energy resources and renewable energy credits required by this section. At the request of the qualifying retail utility and upon the commission's approval, the qualifying retail utility may advance funds from year to year to augment the amounts collected from retail customers under this paragraph (g) for the acquisition of more eligible energy resources. Such funds shall be repaid from future retail rate collections, with interest calculated at the qualifying retail utility's after-tax weighted average cost of capital, so long as the retail rate impact does not exceed two percent of the total annual electric bill for each customer.

(C) As between residential and nonresidential retail distributed generation, the commission shall direct the utility to allocate its expenditures according to the proportion of the utility's revenue derived from each of these customer groups; except that the utility may acquire retail distributed generation at levels that differ from these group allocations based upon market response to the utility's programs.

(II) Each wholesale energy provider shall offer to its wholesale customers that are cooperative electric associations the opportunity to purchase their load ratio share of the wholesale energy provider's electricity from eligible energy resources. If a wholesale customer agrees to pay the full costs associated with the acquisition of eligible energy resources and associated renewable energy credits by its wholesale provider by providing notice of its intent to pay the full costs within sixty days after the wholesale provider extends the offer, the wholesale customer shall be entitled to receive the appropriate credit toward the renewable energy standard as well as any associated renewable energy credits. To the extent that the full costs are not recovered from wholesale customers, a qualifying retail utility shall be entitled to recover those costs from retail customers.

(III) Subject to the maximum retail rate impact permitted by this paragraph (g), the qualifying retail utility shall have the discretion to determine, in a nondiscriminatory manner, the price it will pay for renewable energy credits from on-site customer facilities that are no larger than five hundred kilowatts.

(IV) (A) For cooperative electric associations, the maximum retail rate impact for this section is two percent of the total electric bill annually for each customer.

(B) Notwithstanding subparagraph (I) of this paragraph (g), the commission may ensure that customers who install distributed generation continue to contribute, in a nondiscriminatory fashion, their fair share to their utility's renewable energy program fund or equivalent renewable energy support mechanism even if such contribution results in a charge that exceeds two percent of such customers' annual electric bills.

(h) Annual reports. Each qualifying retail utility shall submit to the commission an annual report that provides information relating to the actions taken to comply with this article including the costs and benefits of expenditures for renewable energy. The report shall be within the time prescribed and in a format approved by the commission.

(i) Rules necessary for the administration of this article including enforcement mechanisms necessary to ensure that each qualifying retail utility complies with this standard, and provisions governing the imposition of administrative penalties assessed after a hearing held by the commission pursuant to section 40-6-109. The commission shall exempt a qualifying retail utility from administrative penalties for an individual compliance year if the utility demonstrates that the retail rate impact cap described in paragraph (g) of this subsection (1) has been reached and the utility has not achieved full compliance with paragraph (c) of this subsection (1). The qualifying retail utility's actions under an approved compliance plan shall carry a rebuttable presumption of prudence. Under no circumstances shall the costs of administrative penalties be recovered from Colorado retail customers.

(1.5) Notwithstanding any provision of law to the contrary, paragraph (e) of subsection (1) of this section shall not apply to a municipally owned utility or to a cooperative electric association.

(2) (Deleted by amendment, L. 2007, p. 257, § 1, effective March 27, 2007.)

(3) Each municipally owned electric utility that is a qualifying retail utility shall implement a renewable energy standard substantially similar to this section. The municipally owned utility shall submit a statement to the commission that demonstrates such municipal utility has a substantially similar renewable energy standard. The statement submitted by the municipally owned utility is for informational purposes and is not subject to approval by the commission. Upon filing of the certification statement, the municipally owned utility shall have no further obligations under subsection (1) of this section. The renewable energy standard of a municipally owned utility shall, at a minimum, meet the following criteria:

(a) The eligible energy resources shall be limited to those identified in paragraph (a) of subsection (1) of this section;

(b) The percentage requirements shall be equal to or greater in the same years than those identified in subparagraph (V) of paragraph (c) of subsection (1) of this section, counted in the manner allowed

(c) The utility must have an optional pricing program in effect that allows retail customers the option to support through utility rates emerging renewable energy technologies.

(4) For municipal utilities that become qualifying retail utilities after December 31, 2006, the percentage requirements identified in subparagraph (V) of paragraph (c) of subsection (1) of this section shall begin in the first calendar year following qualification as follows:

(a) Years one through three: One percent of retail electricity sales;

(b) Years four through seven: Three percent of retail electricity sales;

(c) Years eight through twelve: Six percent of retail electricity sales; and(d) Years thirteen and thereafter: Ten percent of retail electricity sales.

(5) Procedure for exemption and inclusion - election.

(a) (Deleted by amendment, L. 2007, p. 257, § 1, effective March 27, 2007.)

(b) The board of directors of each municipally owned electric utility not subject to this section may, at its option, submit the question of its inclusion in this section to its consumers on a one meter equals one vote basis. Approval by a majority of those voting in the election shall be required for such inclusion, providing that a minimum of twenty-five percent of eligible consumers participates in the election.

(5.5) Each cooperative electric association that is a qualifying retail utility shall submit an annual compliance report to the commission no later than June 1 of each year in which the cooperative electric association is subject to the renewable energy standard requirements established in this section. The annual compliance report shall describe the steps taken by the cooperative electric association to comply with the renewable energy standards and shall include the same information set forth in the rules of the commission for jurisdictional utilities. Cooperative electric associations shall not be subject to any part of the compliance report review process as provided in the rules for jurisdictional utilities. Cooperative electric associations shall not be required to obtain commission approval of annual compliance reports, and no additional regulatory authority of the commission other than that specifically contained in this subsection (5.5) is created or implied by this subsection (5.5).

(6) (Deleted by amendment, L. 2007, p. 257, § 1, effective March 27, 2007.)

(7) (a) Definitions. For purposes of this subsection (7), unless the context otherwise requires:

(I) "Customer-generator" means an end-use electricity customer that generates electricity on the customer's side of the meter using eligible energy resources.

(II) "Municipally owned utility" means a municipally owned utility that serves five thousand customers or more.

(b) Each municipally owned utility shall allow a customer-generator's retail electricity consumption to be offset by the electricity generated from eligible energy resources on the customer-generator's side of the meter that are interconnected with the facilities of the municipally owned utility, subject to the following:

(I) Monthly excess generation. If a customer-generator generates electricity in excess of the customer-generator's monthly consumption, all such excess energy, expressed in kilowatt-hours, shall be carried forward from month to month and credited at a ratio of one to one against the customer-generator's energy consumption, expressed in kilowatt-hours, in subsequent months.

(II) Annual excess generation. Within sixty days after the end of each annual period, or within sixty days after the customer-generator terminates its retail service, the municipally owned utility shall account for any excess energy generation, expressed in kilowatt-hours, accrued by the customer-generator and shall credit such excess generation to the customer-generator in a manner deemed appropriate by the municipally owned utility.

(III) Nondiscriminatory rates. A municipally owned utility shall provide net metering service at nondiscriminatory rates.

(IV) Interconnection standards. Each municipally owned utility shall adopt and post small generation interconnection standards and insurance requirements that are functionally similar to those established in the rules promulgated by the public utilities commission pursuant to this section; except that the municipally owned utility may reduce or waive any of the insurance requirements. If any customer-generator subject to the size specifications specified in subparagraph (V) of this paragraph (b) is denied interconnection by the municipally owned utility, the utility shall provide a written technical or economic explanation of such denial to the customer.

(V) Size specifications. Each municipally owned utility may allow customer-generators to generate electricity subject to net metering in amounts in excess of those specified in this subparagraph (V), and shall allow:

(A) Residential customer-generators to generate electricity subject to net metering up to ten kilowatts; and

(B) Commercial or industrial customer-generators to generate electricity subject to net metering up to twenty-five kilowatts.

(8) Qualifying wholesale utilities - definition - electric resource standard - tradable credits - reports.

(a) Definition. Each generation and transmission cooperative electric association that provides wholesale electric service directly to Colorado electric associations that are its members is a qualifying wholesale utility. Commission rules adopted under subsections (1) to (7) of this section do not apply directly to qualifying wholesale utilities, and this subsection (8) does not provide the commission with additional regulatory authority over qualifying wholesale utilities.

(b) Electric resource standard. Notwithstanding any other provision of law, each qualifying wholesale utility shall generate, or cause to be generated, at least twenty percent of the energy it provides to its Colorado members at wholesale from eligible energy resources in the year 2020 and thereafter. If, and to the extent that, the purchase of energy generated from eligible energy resources by a Colorado member from a qualifying wholesale utility would cause an increase in rates for the Colorado member that exceeds the retail rate impact limitation in sub-subparagraph (A) of subparagraph (IV) of paragraph (g) of subsection (1) of this section, the obligation imposed on the qualifying wholesale utility is reduced by the amount of such energy necessary to enable the Colorado member to comply with the rate impact limitation.

(c) A qualifying wholesale utility may count the energy generated or caused to be generated from eligible energy resources by its Colorado members or by the qualifying wholesale utility on behalf of its Colorado members pursuant to subparagraph (V) of paragraph (c) of subsection (1) of this section toward compliance with the energy resource standard established in this subsection (8).

(d) Preferences for certain eligible energy resources and the limit on their applicability established in subparagraph (VIII) of paragraph (c) of subsection (1) of this section may be used by a qualifying wholesale utility in meeting the energy resource standard established in this subsection (8).

(e) Tradable renewable energy credits. A qualifying wholesale utility shall use a system of tradable renewable energy credits to comply with the electric resource standard established in this subsection (8); except that a renewable energy credit acquired under this subsection (8) expires at the end of the fifth calendar year following the calendar year in which it was generated.

(f) In implementing the electric resource standard established in this subsection (8), a qualifying wholesale utility shall assure that the costs, both direct and indirect, attributable to compliance with the standard are recovered from its Colorado members. The qualifying wholesale utility shall employ such cost allocation methods as are required to assure that any direct or indirect costs attributable to compliance with the standard established in this subsection (8) do not affect the cost or price of the qualifying wholesale utility's sales to customers outside of Colorado.

(g) Reports. Each qualifying wholesale utility shall submit an annual report to the commission no later than June 1, 2014, and June 1 of each year thereafter. In addition, the qualifying wholesale utility shall post an electronic copy of each report on its web site and shall provide the commission with an electronic copy of the report. In each report, the qualifying wholesale utility shall:

(I) Describe the steps it took during the immediately preceding twelve months to comply with the electric resource standard established in this subsection (8);

(II) In the years before 2020, describe whether it is making sufficient progress toward meeting the standard in 2020 or is likely to meet the 2020 standard early. If it is not making sufficient progress toward meeting the standard in 2020, it shall explain why and shall indicate the steps it intends to take to increase the pace of progress; and

(III) In 2020 and thereafter, describe whether it has achieved compliance with the electric resource standard established in this subsection (8) and whether it anticipates continuing to do so. If it has not achieved such compliance or does not anticipate continuing to do so, it shall explain why and shall indicate the steps it intends to take to meet the standard and by what date.

(h) Nothing in this subsection (8) amends or waives any provision of subsections (1) to (7) of this section.

HISTORY: Source: Initiated 2004: Entire section added, see L. 2005, p. 2337, effective December 1, 2004, proclamation of the Governor issued December 1, 2004.L. 2005: Entire section amended, p. 234, § 1, effective August 8; (6) added by revision, see L. 2005, p. 2340, § 3.L. 2007: Entire section amended, p. 257, § 1, effective March 27.L. 2008: (7) added, p. 190, § 3, effective August 5.L. 2009: (1)(c)(II), (1)(e), and (1)(f)(V) amended and (1.5) added, (SB 09-051), ch. 157, p. 678, § 11, effective September 1.L. 2010: IP(1), (1)(a), (1)(c)(I), (1)(c)(II), (1)(c)(III), (1)(c)(IV), (1)(c)(VIII), (1)(e)(I), (1)(f)(IV), (1)(g)(I), (1)(g)(III), (1)(g)(IV), and (1)(i) amended and (1)(e)(I.5) and (1)(f)(VII) added, (HB 10-1001), ch. 37, pp. 144, 147, 148, § § 1, 2, 3, effective August 11; (1)(c)(VI)(A) amended and (1)(c)(IX) added, (HB 10-1418), ch. 406, p. 2007, § 1, effective August 11; (1)(d) amended, (SB 10-177), ch. 392, p. 1864, § 7, effective August 11.L. 2013: IP(1), (1)(a), (1)(c)(II)(A), (1)(c)(III), IP(1)(c)(V), IP(1)(c)(VI), (1)(c)(VII)(A), IP(1)(f), (1)(g)(I)(A), and (1)(g)(IV)(A) amended and (1)(c)(V.5), (1)(c)(X), and (8) added, (SB 13-252), ch. 414, p. 2452, § 1, effective July 1.L. 2015: (1)(c)(VII) amended, (SB 15-254), ch. 257, p. 934, § 1, effective May 29; (1)(c)(II)(A.5) added, (SB 15-046), ch. 142, p. 433, § 1, effective August 5; (1)(c)(II)(D) added, (HB 15-1377), ch. 200, p. 691, § 1, effective August 5.

Editor's note: (1) A declaration of intent was contained in the initiated measure, Amendment 37, and is reproduced below:

SECTION 1. Legislative declaration of intent:

Energy is critically important to Colorado's welfare and development, and its use has a profound impact on the economy and environment. Growth of the state's population and economic base will continue to create a need for new energy resources, and Colorado's renewable energy resources are currently underutilized.

Therefore, in order to save consumers and businesses money, attract new businesses and jobs, promote development of rural economies, minimize water use for electricity generation, diversify Colorado's energy resources, reduce the impact of volatile fuel prices, and improve the natural environment of the state, it is in the best interests of the citizens of Colorado to develop and utilize renewable energy resources to the maximum practicable extent.(2) This initiated measure was approved by a vote of the registered electors of the state of Colorado on November 2, 2004. The vote count for the measure was as follows: FOR: 1,066,023 AGAINST: 922,577