No. 14 – 1216

United States Court of Appeals for the Tenth Circuit

ENERGY & ENVIRONMENT LEGAL INSTITUTE, ET AL.,
Plaintiffs-Appellants

v.

JOSHUA EPEL, ET AL.
Defendants-Appellees

On Appeal from the United States District Court for the District of Colorado (Martinez, J.)
Civil Case No. 1:11-cv-00859-WJM-BNB

APPELLANTS' OPENING BRIEF

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Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(a), Appellant, Energy and Environment Legal Institute (E&ELegal), states that it does not have a parent corporation and no publicly held corporation holds stock in E&ELegal.

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT OF JURISDICTION 3
STATEMENT OF ISSUES 3
STATEMENT OF THE CASE 4
FACTUAL AND PROCEDURAL BACKGROUND 6
I. Statutory Background 6
II. The Interstate Electricity Grid 9
III. Colorado's Justifications For the RES Do Not Allow It to Violate the Constitution 11
A. Rejecting the RES and Upholding the Constitution Is No "Suicide Pact." 11
B. The RES's Renewable Energy Quota Places Colorado Squarely Between a Constitutional Rock and a Hard Place. 14
IV. The Colorado Statute's Extraterritoriality Harms Three Interstate Markets. 17
A. Harm to the Interstate Market for Renewable Energy Credits 17
B. The RES-Created Renewable-Energy Submarket Harms the Interstate Market for Electricity 19
C. Harm to the Interstate Market for Coal 22
V. Proceedings Below 24
SUMMARY OF ARGUMENT 26
STANDARD OF REVIEW 28
ARGUMENT 29
I. The RES's Renewables Quota Unconstitutionally Regulates Wholly Out-of-State Conduct. 29
A. RECs 32
B. Quotas 37
C. *Rocky Mountain* Is Inapposite and Wrongly Decided. 45

II. The Court Improperly Limited Plaintiffs' Advocacy under Rule 56. 50
A. Rule 56(d) Does Not Require a Motion. 51
B. The Merits Decision on Defendants' Motion was Premature and an Abuse of Discretion. 54
III. The Merits Decision on Defendants' Motion was Reversible Error. 58
STATEMENT OF COUNSEL AS TO ORAL ARGUMENT 61
CONCLUSION 61
CERTIFICATE OF COMPLIANCE 63
CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS 64
CERTIFICATE OF SERVICE 65
ATTACHMENTS 66

TABLE OF AUTHORITIES

Cases

Alliance for Clean Coal v. Miller
44 F.3d 591 (7th Cir. 1995) 50

American Beverage Assoc. v. Rick Snyder
700 F.3d 796 (6th Cir. 2013) 32

Amnesty Am. v. Town of W. Hartford
288 F.3d 467 (2d Cir. 2002) 54

Anderson v. Liberty Lobby
477 U.S. 242 (1986) 58

Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apts., LLC
2014 U.S. Dist. LEXIS 8229 (D. Colo. Jan. 22, 2014) 56

Baldwin v. G. A. F. Seelig, Inc.
294 U.S. 511 (1935) ..... passim

Bekaert Corp. v. Std. Sec. Life Ins. Co.
2010 U.S. Dist. LEXIS 107909 (N.D. Ohio Oct. 8, 2010) 54, 56

Bibb v. Navajo Freight Lines, Inc.
359 U.S. 520 (1959) 42

BMW of N. Am. v. Gore
517 U.S. 599 (1996) 42

Bonaparte v. Tax Court
104 U.S. 592 (1881) 31

Boumediene v. Bush
553 U.S. 723 (2008) 39

Camps Newfound/Owatonna v. Town of Harrison
520 U.S. 564 (1997) 49

Carcieri v. Salazar
555 U.S. 379 (2009).....39

Carnes v. Zamani
488 F.3d 1057 (9th Cir. 2007).....53

City of Philadelphia v. New Jersey
437 U.S. 617 (1978).....34

Edgar v. Disability Reinsurance Mgmt. Servs.
741 F. Supp. 2d 1268 (N.D. Ala. 2010).....55

Edgar v. Mite Corp.
457 U.S. 624 (1982)..... 32, 42

Exxon Corp. v. Governor of Maryland
437 U.S. 117 (1978).....42

FERC v. Mississippi
456 U.S. 742 (1982).....10

Fox v. Vice
131 S. Ct. 2205 (2011).....29

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.
528 U.S. 167 (2000).....23

Fulghum v. Embarq Corp.
2009 U.S. Dist. LEXIS 80930 (D. Kan. Aug. 25, 2009).....56

Goodman v. N.H. Ins. Co.
2010 U.S. Dist. LEXIS 111078 (W.D. Wash. Oct. 19, 2010).....55

Ill. Commerce Comm'n (Michigan) v. FERC
721 F.3d 764 (7th Cir. 2013).....37

In re Consumers Power Company
6 N.R.C. 892 (N.R.C. 1977).....10

In re Dorner
343 F.3d 910 (7th Cir. 2003) 53

Ins. Co. v. Nat'l Fire & Marine Ins. Co.
2012 U.S. Dist. LEXIS 138044 (D. Nev. Sept. 26, 2012).....56

Kleinsmith v. Shurtleff
571 F.3d 1033 (10th Cir. 2009) 49

Koon v. United States
518 U.S. 81 (1996).....29

Law Co. v. Mohawk Constr. & Supply Co.
577 F.3d 1164 (10th Cir. 2009) 52

Levy v. Worthington
2011 U.S. Dist. LEXIS 125759 (D. Colo. Oct. 31, 2011).....52

Massachusetts v. E.P.A.
549 U.S. 497 (2007).....14

McKissick v. Yuen
618 F.3d 1177 (10th Cir. 2010) 52, 54

Minnesota v. Clover Leaf Creamery Co.
449 U.S. 456 (1981).....42

Mont. Envtl. Info. Ctr. v. BLM
2013 U.S. Dist. LEXIS 86560 (D. Mont. 2013).....13

National Foreign Trade Council v. Natsios
530 U.S. 33 (2000).....49

National Solid Wastes Management Ass'n v. Meyer
63 F.3d 652 (7th Cir. 1995) 33, 42

New York v. FERC
535 U.S. 1 (2002).....10

NFIB v. Sebelius
132 S. Ct. 2566 (2012).....45

North Dakota v. Heydinger
Case No. 11-cv-3232, 2014 U.S. Dist. LEXIS 53888
(D. Minn. 2014) ..... passim

North Dakota v. Swanson
2012 U.S. Dist. LEXIS 141070,
(D. Minn. Sept. 30, 2012)..... 10, 13, 14, 43

Or. Waste Sys. v. Dep't of Envtl. Quality
511 U.S. 93 (1994).....16

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n
461 U.S. 190 (1983)..... 16, 37

Parson v. Johnson & Johnson
2014 U.S. App. LEXIS 6762 (10th Cir. Apr. 11, 2014).....39

Pharmaceutical Research & Mfrs. of Am. v. Concannon
49 F.3d 66 (1st Cir. 2001).....30

Pike v. Bruce Church Inc.
397 U.S. 137 (1970)..... 55, 56, 57, 58

Quik Payday, Inc. v. Stork
549 F.3d 1302 (10th Cir. 2008) 29, 32, 59

Rocky Mt. Farmers Union v. Corey
730 F.3d 1070 (9th Cir. 2013) 45, 47

Rocky Mt. Farmers Union v. Corey
740 F.3d 507 (9th Cir. 2014) 13, 47, 48, 49

S. Pac. Co. v. Arizona
325 U.S. 761 (1945).....42

TCCMPTF v. M&R Concrete, Inc.
2013 U.S. Dist. LEXIS 5170(D. Colo. Jan. 14, 2013) 55

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.
550 U.S. 330 (2007).....15

United States v. Lopez-Avila
665 F.3d 1216 (10th Cir. 2011) 54, 55

United States v. Ray
699 F.3d 1172 (10th Cir. 2012) 29

United States v. Rentz
735 F.3d 1245 (10th Cir. 2013) 29

Valley Forge Ins. Co. v. Health Care Mgmt. Ptnrs
616 F.3d 1086 (10th Cir. 2010) 55

Wash. Envtl. Council v. Bellon
732 F.3d 1131 (9th Cir. 2013) 13

Waters v. AXL Charter Sch.
2013 U.S. Dist. LEXIS 31643 (D. Colo. Mar. 7, 2013).....52

Wyoming v. Oklahoma
502 U.S. 437 (1992)..... passim

Statutes

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

28 U.S.C. § 2071(f).....53

28 U.S.C. § 2202 4

42 U.S.C. § 1983 4

42 U.S.C. § 7426 14

Colo. Rev. Stat. § 40-2-104(1)(a) 7

Colo. Rev. Stat. § 40-2-124 ..... passim

Colo. Rev. Stat. § 40-2-124(1)(a)&(d) 36

Colo. Rev. Stat. § 40-2-124(1)(a)(II) 19, 35

Colo. Rev. Stat. § 40-2-124(1)(a)(VII) 7, 18, 20

Colo. Rev. Stat. § 40-2-124(1)(c)(I) 7, 20, 34, 39

Colo. Rev. Stat. § 40-2-124(1)(c)(I)(E) 7

Colo. Rev. Stat. § 40-2-124(1)(d) 7, 19, 22, 36

S.B. 13-252 5

Utah Code § 54-17-601(10)(a)(vi) 19, 35

Other Authorities

Judge William Martinez's Practice Standards ..... passim

Rules

4 C.C.R.

§ 723-3-3652(t) 8
§ 723-3-3652(y) 8
§ 723-3-3659(a) 8
§ 723-3-3659(V) 9

D.C. Colo. LCivR 56.1 52

D.C. Colo. LCivR 7.1 ..... 4, 51,52

Fed. R. Civ. Proc. 12(b) 5

Fed. R. Civ. Proc. 56(a) 59

Fed. R. Civ. Proc. 56(c) 59

Fed. R. Civ. Proc. 83(b) 53

Treatises

Farber, D. “Regulators Between a Rock and a Hard Place: The Extraterritorial Dilemma” 15

STATEMENT OF RELATED CASES

None.

GLOSSARY OF TERMS AND ABBREVIATIONS

BA	Balancing Authority
CAA	Clean Air Act, 42 U.S.C. § 7401 *et seq.*
E&ELegal	Energy and Environment Institute (formerly, the American Tradition Institute).
EPA	U.S. Environmental Protection Agency
GHG	Greenhouse Gas
LOLP	Loss-of-load Probability
PSCo	Public Service Company of Colorado
PUC	Colorado Public Utilities Commission
REC	Renewable Energy Credit
RES	Colorado's Renewable Energy Standard statute, Colo. Rev. Stat. § 40-2-124
TP	Transmission Provider
WAPA	Western Area Power Administration
WECC	Western Interconnection and Western Electricity Coordination Council

INTRODUCTION

This case has nothing to do with environmental law or public policy. The core issue is simply whether the State of Colorado may constitutionally regulate wholly out-of-state production practices unrelated to the physical attributes of the regulated good (electricity), when that good may never even enter, let alone be "consumed" in, Colorado.

Colorado has sought to do this through its Renewable Energy Standards ("RES") statute, Colo.Rev.Stat.§40-2-124, which establishes a Renewables Quota requiring Colorado utilities to "generate or cause to be generated" a specified minimum percentage of electricity through Colorado-qualified renewable sources, regardless of where the electricity is generated—or used. The undisputed core purpose of the statute is to displace coal electricity generation inside *and outside* of Colorado with Colorado-qualified renewable-energy generation. Colorado, through the Renewables Quota, seeks to impose its vision of enlightened public policy on its sister States through regulating out-of-state electricity generation where the generation occurs outside of Colorado and any emissions associated with that generation occur entirely outside of Colorado.

The dormant Commerce Clause establishes a bright-line per se bar against State statutes that have the practical effect of controlling out-of-state conduct. The RES has precisely this prohibited effect. There is no *de minimis* exception, and

there are no defenses to this type of constitutional violation. For this reason, the RES is flatly unconstitutional.

Colorado may regulate the quality of goods imported into Colorado. But that is not what the RES does. Unlike a tainted food product or even a fuel emission, electricity is not harmful: electricity generated by nonrenewable sources (e.g., coal) is identical in every way to that generated by Colorado-qualified renewable sources (e.g., wind). The only perceived harms from the regulated activity at issue—electricity generation—occur where the electricity is generated. The product that arrives in Colorado after out-of-state generators inject it onto an interstate, multinational, interconnected electricity grid is always identical, regardless of how it is generated. The citizens of Colorado are thus not harmed in any way by consuming electricity that was, in fact, generated in Wyoming or some other State by coal or any other generation method.

Colorado also has the power to promote renewable-energy generation *within Colorado's borders* by subsidizing in-state renewable-energy generation out of the public fisc using general tax revenue. But the RES goes well beyond this.

Likewise, Colorado undoubtedly has the power to regulate electricity *generation* occurring within its own borders. For example, Colorado may conclude that GHG emissions associated with hydrocarbon-based electricity generation cause "climate change" and, for that reason, ban all nonrenewable

electricity generation within Colorado's borders. That, too, is not what the RES does, and the question here has nothing to do with that environmental issue.

Instead, the question is whether the Colorado Legislature has the power, under the U.S. Constitution, to address that issue through the *means* articulated in the RES. Because the RES's Renewables Quota regulates extraterritorially, the answer to that question is "no."

STATEMENT OF JURISDICTION

The U.S. District Court for the District of Colorado had jurisdiction over this matter under 28 U.S.C. §1331. On May 5, 2014, the district court granted Plaintiff-Appellant Energy & Environment Legal Institute (hereinafter "E&ELegal") relevant standing and, on May 9th, granted summary judgment in favor of Defendant-Appellees (collectively, "Defendants") on all claims, entering final judgment on May 12th. E&ELegal timely filed a notice of appeal on June 2, 2014. This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF ISSUES

(1) Whether Colorado's Renewables Quota, Colo.Rev.Stat.§40-2-124, violates the dormant Commerce Clause's per se bar against extraterritorial regulation, when it has the practical effects of regulating wholly out-of-state electricity generation and use and requiring Colorado's approval for out-of-state electricity transactions.

(2) Whether the district court reversibly erred when it read into D.C.Colo.LCivR 7.1 procedural requirements not mentioned or contemplated by that local rule and misapplied its own Practice Standards to hold that E&ELegal was required to file a separate motion for Federal Rule of Civil Procedure 56(d) relief, when Rule 56(d) only requires an affidavit.

(3) Whether the district court reversibly erred when it concluded at the "early" summary judgment stage that no genuine dispute of material fact existed as to whether the RES's Renewables Quota purposefully and in practical effect discriminates against (and burdens) interstate commerce, even though merits discovery was ongoing.

STATEMENT OF THE CASE

On April 4, 2011, pursuant to 42U.S.C.§1983 and 28U.S.C.§2201, 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, violates the dormant Commerce Clause of the federal Constitution and appropriate injunctive relief under 28U.S.C.§2202. (ECF-1)[1]. The district court had subject matter jurisdiction over those claims under 28U.S.C.§1331.

[1] 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.

Under Fed.R.Civ.Proc.12(b), Defendants moved to dismiss this action, arguing lack of standing. (ECF-37.) The court denied that motion in relevant part (ECF-64).

In light of this lawsuit, the Colorado Legislature passed significant revisions to the RES that mooted some claims.[2] In response, E&ELegal filed a Second Amended Complaint. *See*, Appellant's Appendix (Aplt.App-p.60.)

Subsequently, E&ELegal filed an Early Motion for Summary Judgment seeking summary judgment on all claims. (ECF-180.) Defendants also filed two Early Motions for Partial Summary Judgment, one seeking summary judgment on claims 1 and 2, which relate to the Renewables Quota (ECF-186), and the other again challenging E&ELegal's standing (ECF-188).

On May 1, 2014, the district court denied in relevant part Defendants' motion on standing, dismissing claims 3-6 but granting standing on E&ELegal's challenge to the Renewable Quotas (Claims 1-2)(Aplt.App.-235).

On May 9, 2014, without benefit of oral argument, the district court granted Defendants' merits motion and denied E&ELegal's motion, holding that the RES does not regulate extraterritorially in violation of the dormant Commerce Clause and does not unconstitutionally burden interstate markets. (Aplt.App.-256). The

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[2] *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).

district court entered a final judgment in favor of Defendants on all claims on May, 15, 2014. (Aplt.App-279.) E&ELegal timely filed a notice of appeal on June 2, 2014. (Aplt.App-281.) This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statutory Background

In 2004, Colorado voters passed Amendment 37. The Legislative Declaration of Intent 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." (Aplt.App.-183*and see id.* at 177.) Amendment 37 was codified in 2005 as the RES statute at Colo.Rev.Stat.§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 RES is its Renewable Energy Mandate…." (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. Colo.Rev.Stat.§40-2-

124(1)(c)(I),(V)&(V.5); Colo.Rev.Stat.§40-2-124(3)&(4) (emphasis added). The RES thereby facially establishes a Renewables Quota and forces Colorado utilities to cause electricity generation to occur using Colorado-approved production methods. By 2020, investor-owned utilities must obtain 30% of their retail electricity sales from Colorado-qualified (and approved) renewable sources. Colo.Rev.Stat.§40-2-124(1)(c)(I)(E).

The District Court held that the Renewables Quota is a "set aside for renewable energy." (Aplt.App.-245.) 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…." (Aplt.App.-254)

The RES specifies the methods of Colorado-qualified renewable-energy generation that utilities must use to comply with the Renewables Quota. Colo.Rev.Stat.§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"). Colo.Rev.Stat.§40-2-124(1)(d). The RES's definition of "renewable energy resources" includes solar, wind, geothermal, biomass, and hydroelectricity with certain restrictions. Colo.Rev.Stat.§40-2-124(1)(a)(VII). The RES and its

implementing regulations also establish a system of tradable RECs that can be used to comply with the Renewables Quota. Colo.Rev.Stat.§40-2-124(1)(d); 4C.C.R.§723-3.3659(a).

RECs are not energy or electricity. RECs are intangible electricity-related certificates demonstrating use of particular production practices to generate electricity. These production-practice certifications may be bought and sold and can be "retired" by an electric utility in order to meet its Renewables Quota. Solely the creature of state law, RECs are "created" when a certain amount of electricity is generated using a Colorado-qualified method of generation. 4C.C.R.§723-3- 3652(y) (defining "REC" as "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 REC results from one megawatt-hour of electric energy generated from a renewable energy resource").

RECs are simply 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. RECs can be purchased independently from the associated electric energy through "[r]enewable energy credit contract[s]," 4C.C.R§723-3-3652(t); 4C.C.R.§723-3-3659(a); through "[r]enewable energy supply contract[s]…for the sale of renewable energy and the RECs associated with such energy," 4C.C.R.§723-3-3652(y); or "acquired through a system of tradable

renewable energy credits, from exchanges or from brokers," 4C.C.R.§723-3-3659(V). But because Colorado-qualified 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 and displacing non-Colorado-qualified electricity generation.

II. The Interstate Electricity Grid

Through its Renewables Quota and REC definitions, the RES regulates electricity injected into and delivered through an interstate electricity grid.

All Colorado retail electrical service is connected to an interstate electrical "grid"—the wires and associated apparatus between generators and the electrical service line to end users. (Aplt.App.-74 ¶¶53,57; Aplt.App.-112 ¶¶53,57.) All electricity serving Colorado is integrated and pooled through the Western Interconnection, an interstate grid. (Aplt.App.-73 ¶¶50-52; & *id*. p.112, ¶¶50-52.) The grid must be "balanced" on a second-by-second basis—electrical generation on the grid (supply) must always equal the electricity demand from the grid. (Aplt.App.-145; *id*. p.198 pp.47:16-48:1.)

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). (Aplt.App.-45; *id*.

p.141.) As the Court has held in this case, "[E]lectrical grids are inherently interstate commerce…." (Aplt.App.-255.) All retail electricity serving Colorado is in interstate commerce.[3] (Aplt.App.-163 ¶7; *id*. p.203 ¶7.)

Colorado is a net importer of electricity, and energy that is generated in other states, such as Wyoming, is used in Colorado. (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 the grid.[4] (Aplt.App.-164, ¶9; *id*. p.203, ¶9; *see id.* p.44, ¶12.) For example, although wind is a less reliable and more expensive generation source than coal, the electricity generated by coal is identical in every way to that generated by wind. (Aplt.App.-pp.43-44,48-50,53.)

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[3] *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.").

[4] "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.

Unlike lamps or garbage or ethanol, electricity goes where it flows on the grid and cannot be effectively traced from the point of generation to the point of consumption. (Aplt.App.-46, ¶¶23.) Like the Internet, the transmission of electricity over the Western Interconnection grid does not recognize state (or national) boundaries.[5] *See generally North Dakota v. Heydinger*, Case No. 11-cv-3232, 2014 U.S. Dist. LEXIS 53888, *67-71 (D. Minn. 2014). When a non-Colorado entity injects electricity into the grid, it cannot ensure that the electricity will not travel to and be removed in Colorado or a neighboring state. (Aplt.App.-44, ¶13.) This is because electricity cannot be shipped directly from Point A to Point B. (Aplt.App.-140.) The Western Interconnection does not match buyers to sellers, and once electricity enters the grid, it is indistinguishable from the rest of the electricity in the grid. (Aplt.App.-46, ¶23.)

III. Colorado's Justifications For the RES Do Not Allow It to Violate the Constitution.

A. Rejecting the RES and Upholding the Constitution Is No "Suicide Pact."

It is "undisputed" that "[t]he purpose of the RES is to reduce the use of coal for electric generation *into* Colorado," regardless of whether that coal electricity

[5] 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. (Aplt.App.-46-47, ¶23.)

generation occurs in Colorado or Wyoming or another State. (Aplt.App-220, ¶8 (emphasis added); *id*. p.230 (Defendants do not dispute ¶8).) The RES is specifically intended to reduce Greenhouse Gas ("GHG") emissions in Colorado *and in other* States. (*See* Aplt.App.-190-91.) Because of the highly controversial underlying policy issue associated with the legal issues before the Court,[6] it is important to explain what this case is *not* about.[7]

Popular media have cast state renewable-energy statutes as a response to "global warming," but Defendants did not make that argument in their pleadings (ECFs-186&197). Indeed, Defendants did not even depose E&ELegal's climate expert, Paul Knappenberger, perhaps because in his expert report, and using U.S. Environmental Protection Agency ("EPA") models and methods, he calculated that "the amount of global warming averted by a complete cessation of all energy-related carbon dioxide emissions in the state of Colorado amounts to 0.0029°C." (Aplt.App.-132-33.)

In its dispositive order, the district court made no mention of climate change. And other courts that have confronted this issue found no basis for an argument that state-level regulation of GHG emissions (particularly those occurring in *other*

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[6] 46 percent of Colorado voters voted to reject the RES in 2004. (Aplt.App.-277.)
[7] In a recent, similar case, the court explained that regardless of whether "carbon dioxide emissions are a problem that *this country* needs to address," this case has nothing to do with that issue: "The question here is not the environmental issue." *Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *39 (emphasis added).

states) has any local benefits,[8] although in some cases the statutes did violate the dormant Commerce Clause. *See, e.g., Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *38-39. *See generally Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141-47 (9th Cir. 2013) (state-level regulation of GHG emissions does not cause meaningful local benefits). "To the extent carbon dioxide emissions occur, they occur when energy is generated." *North Dakota v. Swanson (Heydinger)*, 2012 U.S. Dist. LEXIS 141070, *45 n.10 (D. Minn. Sept. 30, 2012).[9] Consequently, "[b]ecause the carbon dioxide emissions occur in the state where energy is generated," to the extent that out-of-state renewable energy is used to comply with the RES's Renewables Quota, it "regulate[s] carbon emissions occurring outside of" Colorado. *Id.*

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[8] Even California has admitted that its own constitutionally problematic efforts to regulate GHG emissions in *other* states "will have little to no effect in averting the environmental catastrophe envisioned by" the 2-1 split-panel Ninth Circuit decision the district court relied on to uphold the RES. *See Rocky Mt. Farmers Union v. Corey*, 740 F.3d 507, 512 (9th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc). *Cf. id.* at 511 (Gould, J., concurring) (admitting California's extraterritorial regulation of GHG emissions would have at best "incremental" effect but claiming without evidence that extraterritorial law could be "successful experiment[]"). In any event, "[t]he effects of GHG emissions are diffuse and unpredictable." *Mont. Envtl. Info. Ctr. v. BLM*, 2013 U.S. Dist. LEXIS 86560, *19 (D. Mont. 2013).

[9] *Heydinger* and *Swanson* refer to the same case. Originally filed against Minnesota Attorney General Lori Swanson, after early motions the case was retitled against Beverly Haydinger, Chair of the Public Utility commission. *Swanson* addresses a motion for judgment on the pleadings. *Heydinger* addresses motions for summary judgment.

The RES's Renewables Quota has no local environmental benefits not already guaranteed and protected under existing law. Colorado is subject to the federal Clean Air Act (CAA), which, among other things, allows for national regulation of GHG emissions.[10] *See generally Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007) ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions …. These sovereign prerogatives are now lodged in the Federal Government[.]"); *Swanson*, 2012 U.S. Dist. LEXIS 141070 at *40-45. Nor does Colorado's air quality fall below national standards set by EPA under the CAA. (Aplt.App.-135.) If it did, the CAA itself supplies the fitting remedy: Colorado can petition the EPA to act. *See* 42 U.S.C. § 7426.

The other common thought is that a RES can "save water." But in Colorado it cannot, because the RES does not impact or otherwise alter operation of Colorado's complex water law and the allocation of water resources thereunder. (Aplt.App-137.)

What this case *is* about is whether Colorado has the power to regulate wholly out-of-state conduct without violating the dormant Commerce Clause.

B. The RES's Renewable Energy Quota Places Colorado Squarely Between a Constitutional Rock and a Hard Place.

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[10] Colorado may believe it is acting in the Nation's best interests by regulating electricity generation in its sister States, but under the Constitution, Congress or the legislatures of those States "must supply the fitting remedy"—*not* the legislature of Colorado. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 524 (1935).

Colorado also claims that the RES promotes in-state Colorado-qualified renewable-energy generation and in-state economic development and "create[s] jobs across Colorado." (Aplt.App.-161 *et seq.*, ¶¶2,28-32,45-46; *as admitted by Defendants, id.* p.203 *et seq.* ¶¶ 2,28-32,45-46.) It is true that the only local interests the RES actually furthers are related to economic protectionism and insulating Colorado-qualified renewable-energy generation from out-of-state competition. *Cf. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007) (economic protectionism does not justify discrimination). The RES does this at the expense of Colorado ratepayers, whose electricity bills have increased as a direct result of the Renewables Quota.[11] (*See, e.g.*, Aplt.App.-226; *id.* p.193.)

But regardless of any policy merits of this legislation, the *means* chosen to advance Colorado's policy goals places Colorado's RES squarely between a constitutional rock-and-a-hard-place.[12] If only in-state electricity generators have

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[11] This is because Colorado-qualified renewable energy is more expensive than conventional baseload electricity generation. (Aplt.App.-147-48; *id* p.180.)

[12] Even highly respected law professors who believe that RES-like statutes reflect sound public policy recognize this constitutional rock-and-a-hard-place problem. Farber, D. "Regulators Between a Rock and a Hard Place: The Extraterritorial Dilemma", Legal Planet—The Environmental Law and Policy Blog, BerkeleyLaw & UCLA Law, June 24, 2013, *at* http://legalplanet.wordpress.com/2013/06/24/regulators-between-a-rock-and-a-hard-place-the-extraterritorial-dilemma/ (accessed June 29, 2014).

access to the portion of the Colorado electricity market established by the Renewables Quota and reserved for Colorado-qualified renewable energy, then the RES's Quota violate the dormant Commerce Clause's prohibition against legislation that discriminates against out-of-state business. Colorado may regulate the way in which electricity is generated within its own borders. *See Pac. Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 203-08 (1983). But under controlling Supreme Court precedent, Colorado may not set aside, or reserve, a portion of Colorado's electricity market—no matter how small—for in-state Colorado-qualified renewable-energy generators.[13] *Wyoming v. Oklahoma*, 502 U.S. 437, 455-57 (1992).

The RES's Renewables Quota avoids that constitutional landmine by stepping squarely on another: the Quota, while "open" to out-of-state Colorado-qualified energy generation, projects Colorado law and policy outside of the borders of Colorado and regulates out-of-state production practices. This violates the dormant Commerce Clause's bar against extraterritorial regulation under

[13] Set-asides for in-state renewable-energy generation—which, by definition, discriminate against out-of-state generators—are virtually per se invalid under the dormant Commerce Clause. *Wyoming v. Oklahoma*, 502 U.S. at 455-57; *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100-01 (1994); *see also Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013).

controlling Supreme Court authorities.[14] *Baldwin v. G. A. F. Seelig, Inc*., 294 U.S. 511, 524 (1935).

IV. The Colorado Statute's Extraterritoriality Harms Three Interstate Markets.

The core question before this Court is whether Colorado's decision to regulate wholly out-of-state production practices violates the dormant Commerce Clause's per se bar against extraterritorial regulation. The production practices at issue are those relating to the *generation* of electricity in *other* states. (Aplt.App.-164, ¶¶14-15; *id.* p.203-04, ¶¶14-15.) The RES regulates the method by which electricity is generated even when the electricity is generated in a different state, used in a different state, and does not enter Colorado.[15] (*See* Aplt.App-44,46, ¶¶13, 23.) If the RES's Renewables Quota has the practical effect of regulating beyond Colorado's borders with respect to any one of following three interstate markets—RECs, electricity, and coal—the statute is constitutionally infirm.

A. Harm to the Interstate Market for Renewable Energy Credits

Colorado's REC definitions serve as the vehicle through which Colorado projects its favored methods of renewable-energy generation into other states. *See*

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[14] E&ELegal argued below that either *Wyoming v. Oklahoma* or *Baldwin* controlled and that either way the RES's Quota is unconstitutional. The district court neither addressed nor mentioned either decision in its order.

[15] *See generally Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *68-70 (discussing uniquely boundary-less and interconnected nature of interstate electrical grid).

Colo.Rev.Stat.§40-2-124 (1)(a)(VII) (defining types of energy utilities can use to comply with Renewables Quota); 4CCR§723-3-3652(aa) (defining "renewable energy resource"). The 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. (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 any tangible good being imported into Colorado.[16]

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

The following three examples highlight the RES's extraterritorial effect on the REC 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

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[16] The physical electricity generated by nonrenewable (and non-Colorado-qualified renewable) resources and supplied to the grid is identical in every way to that generated by Colorado-qualified renewable resources. (Aplt.App.-44, ¶12.)

Utah.[17] (Aplt.App-271.) But this type of coal mine methane cannot be used to comply with the RES, as only "naturally escaping" methane can be used for this purpose. *See* Colo.Rev.Stat.§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 may not be used to meet the Colorado RES Quotas. *See* Colo.Rev.Stat.§40-2-124(1)(d).

There is no difference between electricity generated using methods that create Colorado-approved RECS and those that do not. (Aplt.App-140; *id*.p.164, ¶9; *id*.p.203, ¶9.) This is simply Colorado regulating out-of-state conduct.

B. The RES-Created Renewable-Energy Submarket Harms the Interstate Market for Electricity

The trial court held that the RES's Renewables Quota creates a mandatory submarket for electricity generated using Colorado-qualified methods of generation. (Aplt.App-259.) Specifically, the RES statutorily sets aside a

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[17] Utah Code § 54-17-601(10)(a)(vi).

substantial portion of the Colorado electricity market for this Colorado-qualified renewable energy. *E.g.*, Colo.Rev.Stat.§40-2-124(1)(c)(I),(V)&(V.5); Colo.Rev.Stat.§40-2-124(3)&(4) (emphasis added). Colorado controls access to this market through the RES and its implementing regulations, which define qualifying forms of renewable-energy generation. *See* Colo.Rev.Stat.§40-2-124(1)(a)(VII); 4C.C.R.§723-3-3652.

The RES limits access to the Colorado-created renewable electricity submarket to Colorado-qualified methods of renewable generation. Colo.Rev.Stat.§40-2-124(1)(a). The Renewables Quota mandates that out-of-state generators must do business in a particular manner—generating electricity using Colorado-qualified production practices—in order to access Colorado's artificial, State-created "renewables" submarket.[18]

The trial court also held that the RES's Renewables Quota requires utilities to *cause* Colorado-qualified renewable-energy generation. (Aplt.App-238.) To comply with the Renewables Quota, utilities cause both in-state and out-of-state Colorado-qualified renewable-energy generation and use the associated RECs. (Aplt.App-165, ¶¶14-15; *id*.pp.203-04, ¶¶14-15.) When the RES causes out-of-state Colorado-qualified generation, the generation facility is located outside of

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[18] If the RES-created renewable-energy electricity submarket was only open to in-state generators using Colorado-qualified production practices, it would be constitutionally infirm under *Wyoming v. Oklahoma*, 502 U.S. 437, 455-57 (1992).

Colorado, the generation itself occurs outside the state, and any emissions associated with the generation occur entirely outside of Colorado.

A Colorado utility cannot ensure that (or know whether) the Colorado-qualified renewable energy it causes to be generated by an out-of-state electricity generator is used only in Colorado.[19] (Aplt.App-140-42; *see id.*pp.43-44.) For example, when a Colorado utility causes Colorado-qualified wind farm electricity generation to occur in Wyoming (Aplt.App-165, ¶¶14-15; *id.*pp.203-04, ¶¶14-15), that electricity may be pulled out of the grid and used to power a home or business located in Oregon, California, or even Canada or Mexico without ever entering Colorado (Aplt.App-pp.44-46.). *See Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *67-71.

Put simply, in practical effect, Colorado forces use of its REC definitions outside its own borders because the RES requires Colorado utilities to "generate or cause to be generated" Colorado-qualified energy in specified minimum amounts. (Aplt.App-258.) Where the "renewable" electricity is "caused to be generated"

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[19] ""Due to the nature of the grid…whether the electricity that a buyer ultimately receives is from the generation resources that it bid into the market or that it contracted for is unknown. '[O]nce the generating facility injects its output into the interconnected transmission network, the electrons move according to physical laws, unresponsive to any state law or contract provisions.'" *Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *8 (citations omitted). "[E]lectrons can and do travel in many different directions under different physical circumstances, such that it is impossible to determine which electrons from which generation units reached which end-use customers." *Id.* at *17.

outside of Colorado, because not enough RECs are available from in-state generators or because out-of-state RECs are less expensive, those out-of-state renewable-energy generators must meet Colorado statutory requirements, even if the actual electricity never enters or is used in Colorado.

Because the RES forces utilities to cause Colorado-qualified renewable-energy generation in *other* States, which but for the RES would not otherwise occur—when there is no guarantee that that electricity even enters Colorado—the RES projects its regulations into those States.

C. Harm to the Interstate Market for Coal

There is an interstate market for coal. (Aplt.App-164, ¶11; *id*.p.203, ¶11.) The RES's Renewables Quota also projects itself outside of Colorado by regulating the market for coal in *other* states. The trial court held the RES does this by causing a reduction in the interstate market for coal, regardless of whether that coal is used to generate electricity in Colorado, other states, and other nations. (Aplt.App-244.) This is the RES's core purpose. (Aplt.App-220, ¶8; *id*.p.230 defendants did not deny E&ELegal's ¶8.)

Under the RES, coal, natural gas, and nuclear generation from out-of-state sources are barred from competing for electricity sales restricted to renewable energy in Colorado. *See* Colo.Rev.Stat.§40-2-124(1)(a)(c). As the district court acknowledged, "the Renewables Quota prevents…[E&ELegal] member Alpha

Natural Resources—as a coal producer—from being able to compete for 30% of the [Colorado] energy market."[20] (Aplt.App-244.) This "has a significant impact on Alpha's ability to market and sell its coal…." (Aplt.App-255.) Coal producers' "inability to compete for 30% of the [Colorado] energy market is directly caused by the Renewables Quota" (Aplt.App-245), which "has caused a shift from electricity generated from non-renewable sources to electricity generated by renewable sources."[21] (Aplt.App-275.) Invalidating the RES's Renewables Quota "would reopen" the "30% of the [Colorado electricity] market currently set aside for renewable energy" to nonrenewable energy producers like Alpha.[22] (Aplt.App-245.)

The RES's extraterritorial effect on the interstate coal market and out-of-state coal electricity generation is compounded by the fact that because supply must always equal demand on the grid, the electricity market is a zero-sum game: an increase in use of renewables necessarily causes a decrease in use of coal.

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[20] "Alpha engages in interstate commerce by selling coal across state lines." (Aplt.App.-255.)

[21] The district court also noted "the fact that th[e RES's] incentive structure may negatively impact the profits of out-of-state generators whose electricity cannot be used to fulfil the Quota…." (Aplt.App.-270.)

[22] Because Alpha is a member of E&ELegal and has standing on its own, E&ELegal has standing to challenge the RES's Renewable Energy Quotas. (Aplt.App.-245 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000)).)

(Aplt.App-pp.155; *id*. p.198:16 to p.199:11, *id*. p.200:17-25.) The District Court concluded the RES's Renewables Quota has directly "caused an increased demand for renewable energy in Colorado, which correlates to a decrease in the market share for coal and hydrocarbon...." (Aplt.App-274.) Even Defendants admit that the RES is a reason why coal electricity generation is being displaced by renewable energy sources. (Aplt.App-228, ¶13.)

V. Proceedings Below

E&ELegal filed its complaint in April, 2011. In July, 2011, Defendants moved to dismiss for lack of standing (ECF-37), immediately followed by an order to stay all proceedings, including discovery, pending resolution of the challenge to standing (ECF-46). A year later, on July 17, 2012, the district court denied Defendants' motion, granting E&ELegal standing (ECF-64) (but allowing the allegations to be tested by evidence) and lifted the stay, ordering commencement of discovery (ECF-65). Two months later, the district court restricted discovery to standing, to be completed before January 21, 2013. (ECF-77.) In March, 2013, after little discovery and extensive motions practice on standing discovery, the district court abandoned a bifurcated discovery process, ordering a new schedule. (Aplt.App-56.) On May 17, 2013, the district court issued a scheduling order. (ECF-149.)

Also in 2013, in response to this litigation, the Colorado Legislature enacted amendments bringing part of its statute back within constitutional limits and mooting several of E&ELegal's claims. This compelled E&ELegal to file a Second Amended Complaint (ECF-163) on June 24, 2013, necessarily redirecting both jurisdictional and merits discovery.

Despite the district court's order rejecting bifurcated discovery, in early August, 2013, Defendants deposed E&ELegal's expert Tom Tanton and Plaintiff Rod Lueck, restricting the depositions only to standing. (Aplt.App-195:4-8.)

Under Judge William Martinez's Practice Standards (the "Practice Standards"), both parties were required to file any "Early Motion for Partial Summary Judgment" (hereinafter "Early Motion") "30 days after entry of the initial scheduling order," which was issued on June 17, 2013. After obtaining repeated extensions, Defendants filed on September 30th . E&ELegal filed its *responsive* briefs on October 21st.

E&ELegal's final "Early Motions" filing was due a month and a half prior to E&ELegal's expert rebuttal reports deadline (filed December 9th) and three months prior to experts' depositions (held January 13th, 20th, 22th). Discovery closed on January 24th. (ECF-208.)

With 19 expert and expert rebuttal reports, totaling 665 pages of dense information, and thousands of discovery documents to review, the parties faced

regular dispositive motions deadlines six weeks later. Further, E&ELegal's Early Motion was due for inclusion on Judge Martinez semi-annual Civil Justice Reform Act report. Given the limited time available to prepare regular dispositive motions, and because resolution of the Early Motions would potentially moot the need for additional dispositive motions, on February 19th the court vacated the scheduling order pending resolution of the Early Motions. (ECF-212.) Eight weeks later, the district court issued its decisions on the Early Motions, denying E&ELegal's extraterritoriality motion; denying in relevant part Defendants' jurisdictional motion and granting E&ELegal standing (again); and granting Defendants' merits motion, holding there was no discrimination in practical effect or burdens to interstate commerce under the dormant Commerce Clause.

SUMMARY OF ARGUMENT

The district court's decision to grant the Defendants' "early" summary judgment motion is reversible error for at least three reasons.

First, the district court erroneously held that the RES's Renewables Quota does not regulate extraterritorially in violation of the dormant Commerce Clause based, in large part, on a fundamental misunderstanding of the unique nature of the electricity market. For that reason, although the district court acknowledged that the RES "may provide an incentive for out-of-state companies to conduct their

business" according to Colorado's terms (Aplt.App-270), it drastically understated the RES's practical extraterritorial effects.

The Renewables Quota expressly requires Colorado utilities to "generate or cause to be generated" Colorado-qualified renewable energy in specified minimum amounts. The RES's REC definitions mandate that this generation occur according to Colorado's terms in *other* States. (If it were otherwise and only in-state Colorado-qualified generation could be used, the RES would violate the dormant Commerce Clause's bar against discriminatory in-state set-asides under *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).) The RES thereby regulates wholly out-of-state production practices unrelated to the physical attributes of the regulated good (electricity). It does this even when the electricity is generated wholly out of state, is used in another state, and does not necessarily even enter Colorado. This is the undisputed core purpose of the RES.

Beginning with *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935), the Supreme Court has repeatedly held that this is unconstitutional. Yet the district court ignored *Baldwin* and the RES's plain language, instead relying on a factually inapposite Ninth Circuit 2-1 split-panel decision that conflicts with Supreme Court precedent to uphold the RES. *Baldwin* controls, and under *Baldwin* the RES is unconstitutional.

Second, the district court reversibly erred when it held that E&ELegal was required under Fed.R.Civ.Proc. 56(d) and the local rules to file a separate, standalone motion to invoke Rule 56(d), when neither Rule 56(d)—which expressly requires an affidavit—nor the local rules require this. The district court's refusal to appropriately apply Rule 56(d) based on this error of law, by definition, constitutes an abuse of discretion.

Third, the district court erroneously held at the "early" summary judgment stage that no genuine dispute of material fact existed as to whether the RES's Renewables Quota purposefully and in practical effect discriminates against (and burdens) interstate commerce, even though merits discovery was ongoing. This holding is contrary to the law of the case, as set forth in the district court's earlier orders on E&ELegal's standing, which recognized the RES's burdens on interstate commerce and acknowledged its discriminatory features. It necessarily follows that, at a minimum, there is a genuine dispute of material fact on this issue. Therefore, this, too, is reversible error.

For these reasons, this Court should reverse the district court and invalidate the RES.

STANDARD OF REVIEW

This Court "review[s] a district court's decision to grant summary judgment *de novo*, viewing all facts in the light most favorable to the party opposing

summary judgment," *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1306 (10th Cir. 2008), and applying the same standard as the district court, *see id.*

This Court reviews *de novo* legal questions, including questions of constitutional law and statutory interpretation. *Id.* (legal questions, including constitutional issues); *and see ACLU v. Johnson*, 194 F.3d 1149, 1153 n.2 (10th Cir. 1999); *see United States v. Rentz*, 735 F.3d 1245, 1248 (10th Cir. 2013) (statutory interpretation).

Where the abuse-of-discretion standard applies, this Court reviews legal conclusions *de novo* and factual findings for clear error. *United States v. Ray*, 699 F.3d 1172, 1179 (10th Cir. 2012). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *Fox v. Vice*, 131 S. Ct. 2205, 2217 (2011) ("A trial court has wide discretion when, but only when, it calls the game by the right rules.").

ARGUMENT

I. The RES's Renewables Quota Unconstitutionally Regulates Wholly Out-of-State Conduct.

The district court reversibly erred when it ignored the controlling Supreme Court precedent of *Baldwin*, 294 U.S. 511; *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *and Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986)—as well as the unique nature of the interstate electricity market (*see*

generally Heydinger, 2014 U.S. Dist. LEXIS 53888)[23]—and instead upheld Colorado's regulation of electricity generation occurring in *other* states. This issue was raised and ruled on in the district court's order. (Aplt.App-266-73.) Review is *de novo.*

The rule is that the dormant Commerce Clause categorically prohibits states from passing laws that have the "'practical effect' of regulating commerce occurring wholly outside that State's borders…." *Healy*, 491 U.S. at 332. "The critical inquiry is whether the practical effect of the regulation is to *control conduct beyond the boundaries of the State*." [24] *Id.* at 336 (*citing Brown-Forman*, 476 U.S., at 579). State statutes that have this prohibited practical effect are automatically constitutionally invalid. *Healy*, 491 U.S. at 336.

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[23] *Heydinger* was decided on April 18, 2014. E&ELegal brought this case to the district court's attention six days later. (ECF-217.)

[24] Defendants may argue that the *result*—as opposed to the *logic*—of *Pharmaceutical Research & Mfrs. of Am. v. Concannon*, 49 F.3d 66, 79 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003), supports the RES and that this decision shows that *Baldwin* and its progeny only apply to price-affirmation statutes. The district court necessarily rejected that claim. (Aplt.App.-267.) The Supreme Court, this Court, and other Circuits have too. *See infra* note 29. *Pharmaceutical Research*, which involved a statute requiring pharmaceutical manufacturers to negotiate a "rebate agreement" with Maine or submit to "prior authorization" before marketing their drugs in Maine, *see* 538 U.S. at 658-59, illustrates by contrast why the RES is unconstitutional. Unlike here, the Maine statute did not in any way penalize pharmaceutical manufacturers for out-of-state business practices. *Id.* at 669. The district court evidently ignored this critical distinction when it misinterpreted and misapplied this decision. (Aplt.App.-270-71.)

The dormant Commerce Clause's bright-line per se bar against extraterritorial regulation is rooted in federalism. It is fundamental to our system of federalism that "[n]o state can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). The rule that one state has no power to project its legislation into another state, *Baldwin*, 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*, 491 U.S. at 335-36.

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." *Id.* 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. A state also "may not project its legislation into other states," and it may not control conduct beyond the boundaries of the State. *Id*. 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, "whether or not the commerce has effects within the State," *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982). 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.[25] The offending statute is simply struck.

Because the RES regulates extraterritorially through its REC definitions and Renewables Quota, it is "invalid per se." *Quik Payday*, 549 F.3d at 1307.

A. RECs

Electricity generated without an attached Colorado-qualified REC is barred from competing for the portion of the Colorado electricity market reserved

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[25] *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 "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.

exclusively for Colorado-qualified renewable energy. This is true even though electricity generated wholly outside of Colorado by Colorado-qualified renewable energy sources and "imported" into Colorado is physically identical to electricity generated wholly outside of Colorado by nonrenewable sources (e.g., coal, nuclear, natural gas, and unqualified "renewable" generation). Thus, the RES is not establishing standards for the physical electricity imported into and used in Colorado but rather is imposing Colorado's standards on electricity produced entirely outside of Colorado. Therefore, the RES is necessarily regulating wholly out-of-state production practices.

A statute will have an unconstitutional extraterritorial reach if it necessarily requires out-of-state commerce to be conducted according to in-state terms. *Healy*, 491 U.S. at 332; *see Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 658-61 (7th Cir. 1995). The RES has precisely this prohibited extraterritorial effect. Colorado's regulation of wholly out-of-state electricity generation practices is analytically indistinguishable from a state statute requiring proof that factory workers who produced a consumer product wholly out-of-state were paid a certain wage by their out-of-state employer, *cf. Baldwin*, 294 U.S. at 524, and is no less unconstitutional.

"If any or every state were to adopt similar legislation" to Colorado's RES "the current marketplace for electricity would come to a grinding halt."

Heydinger, 2014 U.S. Dist. LEXIS 53888 at *72. "Such a scenario is 'just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.'" *Id.* (quoting *Healy*, 491 U.S. at 337).

The fact that the RES's Renewables Quota is linked to "retail electricity sales in Colorado," Colo.Rev.Stat.§40-2-124(1)(c)(I), is constitutionally irrelevant. "The mere fact that the effects of [a State law] are triggered only by sales of [goods] within the State…does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state." *Brown-Forman*, 476 U.S. at 580.

There is no constitutionally significant difference between blocking access to the entire in-state market and only blocking access to a portion of the in-state market, no matter how small. *Wyoming v. Oklahoma*, 502 U.S. at 455-57. The "clearest example of [an abuse] is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (attempt to limit Philadelphia municipal waste from disposal in New Jersey landfills). Thus, an "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade" must be struck without further consideration. *Id.* at 628. This barrier is exactly what the RES overtly accomplishes.

Colorado controls the out-of-state production of electricity, and thus bars access to the "renewable" submarket, in several ways. For example, Colorado's

RES defines what methane may be considered renewable energy based upon what portion of methane captured from coal mining operations is used to generate electricity. The statute only allows that methane "escaping to the atmosphere"—and in the case of active mines, only that vented in the normal course of mine operations that is naturally escaping to the atmosphere—to be considered "renewable." Colo.Rev.Stat.§40-2-124(1)(a)(II). The only state within the Western Interconnect that also defines coal mine methane as a renewable energy fuel source is Utah.

In Utah, their statute defines a renewable energy source as a generation facility that derives its energy from, among other things, "waste gas and waste heat capture or recovery whether or not it is renewable, including methane gas from an abandoned coal mine; or a coal degassing operation associated with a state-approved mine permit. Utah Code 54-17-601(10)(a)(vi). In Utah, degassing methane counts; in Colorado, it does not.

In order to sell RECs generated from Utah coal mine methane, the Utah generator would need to be qualified through Colorado PUC review and approval of that generation. In so doing, it would need to go the extra step of distinguishing which coal mine methane generation came from naturally escaping methane, versus that portion rising from degassing operations—a factual determination that can only be conducted by the Utah facility when it prepares its RECs for sale.

Other nearby states whose electricity generation is connected to the grid either have no renewable energy statute (e.g., Wyoming) or do not define coal mine methane as a renewable generation fuel (e.g., California). Coal mine methane RECs generated from within those states would only be regulated under Colorado laws. With regard to coal mine methane, then, Colorado improperly projects its rules onto other states and electricity generated from these fuels, like coal, cannot otherwise compete for that portion of the Colorado electricity market that is reserved exclusively for Colorado-qualified generation.

In like measure, hydropower generation from a facility with a nameplate capacity of greater than 30 megawatts qualifies for RECs for the federal government and for California, but cannot be used to meet Colorado RES quotas. *See* 4C.C.R.§723-3-3652(aa). And, where a Colorado cooperative (Intermountain Rural Electric Association) received federal non-conforming hydropower RECs as part of a bundled energy contract with PSCo, the Colorado RES does not allow the coop to resell them to utilities in Colorado for RES compliance. (Aplt.App-166-67, ¶¶ 24-25; *id.* p.205, ¶¶24-25.) Further, RECs generated from sources that will never be available to Colorado generation sources, such as ocean thermal and ocean wave generation (California), are barred from use to meet the Colorado RES quotas because Colorado does not include those sources within its definition of renewable energy. Colo.Rev.Stat.§40-2-124(1)(a)&(d).

In each of these instances, Colorado's RES's extraterritorial reach necessarily requires out-of-state commerce to be conducted according to in-state terms, *Healy*, 491 U.S. at 336, and this extraterritorial regulation of RECs is constitutionally impermissible.

B. Quotas

The district court correctly characterized the RES's Renewables Quota as a "set aside for renewable energy." (Aplt.App-245.) Such a set-aside places the Colorado squarely between a constitutional rock-and-hard-place.[26] This is because while states can regulate electricity generation occurring within their own borders, *see Pac. Gas & Elec.*, 461 U.S. at 203-08, state statutes that create in-state set-asides violate the dormant Commerce Clause's bar against legislation that discriminates against out-of-state businesses, *Wyoming v. Oklahoma*, 502 U.S. at 455-57 (requiring in-state utilities to generate electricity using at least 10% in-state coal violates dormant Commerce Clause). For this reason, a state "cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy." *Ill. Commerce Comm'n (Michigan) v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013). The only way for the RES's Renewables Quota to avoid this constitutional trap is to fall into another that is just as fatal: the dormant Commerce Clause's categorical per se bar against extraterritorial regulation.

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[26] *See supra* Section III.B.

The RES's Renewables Quota necessarily has the practical effect of either reserving a portion of the Colorado electricity market for in-state renewable-energy generation, *see Wyoming v. Oklahoma*, 502 U.S. at 455-57, or projecting Colorado's regulations extraterritorially on wholly out-of-state renewable and non-renewable energy generation and on the interstate market for hydrocarbon fuels used in electrical generation, *see Healy*, 491 at 335-37; *Baldwin*, 294 U.S. at 523-26. If the RES applies exclusively to in-state renewable generation, it creates an unconstitutional in-state preference and must be struck. *Wyoming v. Oklahoma*, 502 U.S. at 455-57; *see Brown-Forman*, 476 U.S. at 578-79. But the RES's practical effect has been to allow utilities to use out-of-state renewable generation to meet the Renewables Quota. (Aplt.App-165, ¶¶14-15; *id*.pp.203-04, ¶¶14-15.)

Although the district court acknowledged that "[s]tatutes that attempt to impose one state's policy decisions on other states are [constitutionally]…invalid" (Aplt.App-267), it reversibly erred when it held that the RES does not have this prohibited practical effect (*id*.pp.268-73). Plainly, Colorado may regulate the characteristics of in-state products. But that is not what the RES does.

The district court found that the RES regulates out-of-state energy companies that "do business with Colorado energy generators." (Aplt.App-268.) It noted 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." (Aplt.App-270.) But the district court ignored the uniquely interstate characteristics of the electricity grid and for this reason dramatically understated the practical extraterritorial effects of the RES. The RES's Renewables Quota "is a classic example of extraterritorial regulation *because of the manner in which the electricity industry operates*." *Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *65 (emphasis added).

The district court also ignored the plain language of the statute. The RES expressly requires utilities to "generate *or cause to be generated*" minimum amounts of electricity using Colorado-approved production methods. *E.g.*, Colo.Rev.Stat.§40-2-124(1)(c)(I),(V) &(V.5). "[T]erms used in a statute should be given their plain meaning." *Parson v. Johnson & Johnson*, 2014 U.S. App. LEXIS 6762, *9 (10th Cir. Apr. 11, 2014); *see, e.g*, *Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *42-46 (applying rule in course of invalidating state statute regulating out-of-state electricity generation). For "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009), and "cannot ignore the text and purpose of a statute in order to save it," *Boumediene v. Bush*, 553 U.S. 723, 787 (2008).

Here, the RES's plain text makes clear that it mandates electricity generation according to Colorado's terms—regardless of whether that generation occurs

within Colorado. The statute makes no reference to the location where the product (electricity) is to be used, let alone where it is to be generated. And, because RECs can be sold separately from the electricity generated to create them, the electricity associated with a REC used to comply with the RES's Renewables Quota may not be used in (or even enter) Colorado. On its face, the RES thereby regulates wholly out-of-state electricity production practices without reference to any physical attribute of the electricity itself.

This is flatly unconstitutional under *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935). Comparison of the RES's Renewables Quota with the facts of *Baldwin* confirms that it violates the dormant Commerce Clause's categorical proscription against extraterritorial regulation. *Baldwin* involved a state licensing statute requiring milk dealers to pay a minimum price for milk purchased out of state. *Id.* at 521. The state argued that regulating the price paid for out-of-state milk was necessary because otherwise farmers who are underpaid will be tempted to save the expense of sanitary precautions. *See id.* at 523-24. For that reason, according to the state, "exclusion of milk paid for in Vermont below the New York minimum will tend…to impose a higher standard of quality and thereby promote health." *Id.* at 524. The Court rejected this argument, reasoning that, while a state may regulate products that are imported into its jurisdiction, it cannot statutorily

pressure out-of-state producers to adopt *its preferred standards and production practices. See id.*

New York's license requirement in *Baldwin* is indistinguishable from Colorado's RES. *Baldwin* (and *Brown-Forman* and *Healy*) controls. Under *Baldwin*, the RES's regulation based on "retail sales" of electricity—a uniquely untraceable commodity—is unconstitutional.[27] Whether the purpose of the Colorado RES is economic development, increased diversity in electricity generation, environmental quality, or prevention of climate change, as *Baldwin* explains, "the legislature of Vermont [Wyoming or California or Utah or Canada or Mexico] and not that of New York [Colorado] must supply the fitting remedy" within their states. *Id*. at 523-24.

As *Baldwin* illustrates, the dormant Commerce Clause forbids states from enacting legislation that, as a practical matter, controls production practices in other states. A state can "regulate the importation of unhealthy swine or cattle or decayed or noxious foods" and enact "inspection laws, game laws, [and] laws

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[27] There is simply no certain, predictable, and reliable way to segregate electricity that will be "sold" in Colorado from electricity that will not be "sold" or used in Colorado. Since one cannot know what generation-type of electricity is actually being consumed within Colorado, the State of Colorado has created the (unconstitutional) fiction of a Colorado-approved renewable-energy electricity submarket, which has the prohibited practical effect of controlling out-of-state production methods. *See Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *63-71.

intended to curb fraud or exterminate disease."[28] *Id.* at 525. But "[o]ne state may not put [indirect] pressure…upon others to reform their…standards," for "[t]he next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business." *Id.* at 524.

Baldwin provides as an example of this bright-line rule a state law that conditioned importation on proof of a state-approved minimum wage to illustrate a broader rule.[29] While a state can regulate "the quality of the product" being

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[28] There is little doubt that a state can regulate the harmful effects of products *produced or consumed inside the State*, *see Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456 (1981), or of *in-state* business methods, *see Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). But that is not what the RES does. As the district court acknowledged, the RES aims to change wholly out-of-state electricity-generation practices. (Aplt.App.-270.)

[29] The Supreme Court has applied the dormant Commerce Clause's bar on extraterritorial regulation in a wide variety of contexts. *See, e.g., S. Pac. Co. v. Arizona*, 325 U.S. 761, 779-84 (1945) (state statute regulating train lengths constitutes unconstitutional extraterritorial regulation where "practical effect of such regulation is to control train operations beyond the boundaries of the state"); *BMW of N. Am. v. Gore*, 517 U.S. 599 (1996) (invalidating state statute prohibiting selling repainted cars without disclosing that car had been repainted because repainting could have occurred in a different state); *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520 (1959) (invalidating state statute requiring certain type of mudguard on semis because other states allowed different mudguards and one state actually required a different type of mudguard); *Edgar v. Mite Corp*., 457 U.S. 624, 641-43 (1982); *see Healy*, 491 U.S. at 333-337 & ns. 9 & 14. This Court has too. *See ACLU v. Johnson*, 194 F.3d 1149, 1160-1161 (10th Cir. 1999) (statute regulating Internet regulates extraterritorially); *accord Am. Bev. Ass'n*, 700 F.3d at 810 (applying *Healy* and *Brown-Forman* to "novel issue of an 'unusual extraterritoriality question'"); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) ("Although cases like *Healy* and *Brown-Forman* involved

imported and even protect public health by requiring "appropriate certificates" concerning the physical properties of the product (for example, whether milk was produced in a sanitary way) as a condition of importation, a state cannot regulate out-of-state production practices unrelated to the physical commodity being imported.[30] *See id.* at 523-24; *see also C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("States…may not attach restrictions to…imports in order to control commerce in other States."). The RES violates this rule.

The RES's unconstitutionality is further confirmed by comparison with an April 2014 decision, *North Dakota v. (Swanson) Heydinger*, 2014 U.S. Dist. LEXIS 53888. In *Heydinger*, the Minnesota statute aimed to reduce carbon dioxide emissions associated with coal electricity generation, regardless of where the generation occurred. *See Swanson*, 2012 U.S. Dist. LEXIS 141070 at *2-5, *44-45 n.10. Because these emissions occur in the state where the energy is generated, the statute sought to regulate emissions occurring outside of Minnesota. *Id.* at *45 n.10. It did this even though it is impossible to determine whether

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price affirmation statutes, the principles set forth in these decisions are not limited to that context .").

[30] This is because "whatever relation there may be between" wholly out-of-state production practices unrelated to the physical properties of the product (e.g., what the minimum wage is in another state) and a state's legitimate interest in protecting its citizens from purchasing dangerous products "is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." *Baldwin*, 294 U.S. at 524.

electricity generated outside of Minnesota's borders is used in or ever enters Minnesota's borders. *See id.* at *68. And because electrons are electrons, consumers can never know the source of the power that they consume. *See id.* In *Heydinger*, a Minnesota district court invalidated Minnesota's efforts to regulate out-of-state electricity generation based in large measure on the practical realities of the interstate electricity market, *see id.* at *65, holding that the statute at issue regulated extraterritorially in violation of the dormant Commerce Clause. *See id.* at *72.

Here, like *Heydinger*, the admitted purpose of the RES is reduction of electricity generation in a manner Colorado finds offensive (coal), regardless of location. (Aplt.App-220, ¶8; *id*.p.230 *Defendants fail to deny ¶8*.) And, like the statute at issue in *Heydinger*, the RES causes electricity generation to occur according to Colorado's terms in other States. (Aplt.App-165, ¶¶14-15; *id*.pp.203-04, ¶¶14-15.) As discussed above, in all salient respects the RES is identical to the statute at issue in *Heydinger*.

As *Baldwin* and *Heydinger* illustrate, the RES's Renewables Quota's extraterritoriality exceeds bright-line limits on Colorado's authority. This is a *per se* dormant Commerce Clause violation. The Renewables Quota is the "centerpiece" of the statute. (Aplt.App-173, ¶8). The remainder is not severable,

as the RES cannot operate as intended without it. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2668-69 (2012). The RES should therefore be struck in its entirety.

C. *Rocky Mountain* Is Inapposite and Wrongly Decided.

The district court ignored these authorities, however, and instead relied primarily on a factually inapposite, nonbinding case that conflicts with Supreme Court precedent to hold that Colorado may regulate out-of-state electricity generation.

The lynchpin of the district court's rationale for upholding the RES against E&ELegal's extraterritoriality challenge is a split-panel Ninth Circuit decision, *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). (*See* Aplt.App-268-72 (citing case seven times).) For example, the district court cited *Rocky Mountain Farmers* to support its assertion that "the RES does not impose conditions on the importation of electricity into Colorado" (Aplt.App-269), while recognizing elsewhere that E&ELegal demonstrated that the RES prevents coal producers "from being able to compete for 30% of the [Colorado] energy market" (Aplt.App-244). Relying solely on *Rocky Mountain Farmers*, the district court reasoned that "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…does not make the statute improper. (Aplt.App-270) That is reversible error for at least two reasons.

First, *Rocky Mountain Farmers* is factually inapposite. The ethanol market is fundamentally different from the electricity market. As has been previously recognized at law, "[b]ecause of the boundary-less nature of the electricity grid, the effect of" the RES's "regulatory scheme on interstate commerce is much different than that of the statute[] at issue in…*Rocky Mountain*,…[which] dealt with the regulation of [a] tangible product[] (…ethanol…) that could be shipped directly from point A to point B." *Heydinger*, 2014 U.S. Dist. LEXIS 53888 at *69. Unlike tangible products such as ethanol, "electricity cannot be shipped directly from Point A to Point B." *Id.* at *70. The grid balancing authority "does not match buyers to sellers, and once electricity enters the grid, it is indistinguishable from the rest of the electricity in the grid." *Id*. For this reason the RES's Renewables Quota violates the dormant Commerce Clause's bar against extraterritorial regulation. *See id.* at *69-70 (reasoning that "[b]ecause of the boundary-less nature of the electricity grid, the effect of" the regulation "is much different than that of the statute[] at issue in…*Rocky Mountain*" and invalidating Minnesota's attempt to regulate electricity generation in other states).

Second, the *Rocky Mountain Farmers* split-panel decision directly conflicts with controlling Supreme Court authorities and this Circuit's dormant Commerce Clause precedent. The 2-1 majority broke with centuries of well-established Supreme Court jurisprudence because it apparently decided to carve out a "global

warming" exception to the U.S. Constitution's dormant Commerce Clause based on what it characterized as compelling public policy considerations, *see Rocky Mt. Farmers*, 730 F.3d at 1106-07, something it may not do.[31]

As the dissent explained, the majority's sharp departure from binding precedent to look to California's reasons for enacting the challenged law "put the cart before the horse," as this "approach is inconsistent with Supreme Court precedent…." *Id.* at 1108 (Murguia, J., dissenting). Shortly thereafter, the *Rocky Mountain Farmers* plaintiffs filed a petition for rehearing en banc. Six other Ninth Circuit judges echoed Judge Murguia: "[T]he 2-1 majority…disregards longstanding dormant Commerce Clause doctrine, and places the law of this circuit squarely at odds with Supreme Court precedent."[32] *Rocky Mt. Farmers Union v. Corey*, 740 F.3d 507, 512 (9th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc). They explained that, among other things, "the majority abjures

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[31] Notwithstanding its misplaced reliance on *Rocky Mountain Farmers*, the district court correctly observed that state "[s]tatutes that attempt to impose one state's policy decisions on other states are…invalid," noting that "[t]he legislative intent behind a statutory scheme is irrelevant" for extraterritoriality analysis. (Aplt.App.-267.)

[32] Perhaps encouraged by this, Rocky Mountain Farmers subsequently petitioned for certiorari, notwithstanding the procedural posture of the case. (Merits discovery had yet to commence; the case was remanded for *Pike* balancing; the regulations at issue were being reissued; and, given the unusual nature of the decision, no Circuit split has yet emerged.) The case was selected for conference but cert was denied.

the rule that a state law that has the practical effect of regulating commerce occurring wholly outside that State's borders is invalid…." *Id.* at 519.

As noted above, the district court accepted the fact that the RES incentivizes out-of-state companies to generate out-of-state electricity according to Colorado's terms regardless of whether it is used in or enters Colorado but mistakenly relied on *Rocky Mountain Farmers* for the proposition that states have the power to do this. (ECF-221 at 15.) The *six* Ninth Circuit Judges squarely rejected this argument:

> California's ethanol regulations suffer from a[] constitutional defect: they seek to control conduct in other states…. It is no answer to assert, as the [*Rocky Mountain Farmers*] majority does, that the Fuel Standard merely provides incentives" that might influence out-of-state conduct. By penalizing certain out-of-state practices, California's regulations control out-of-state conduct just as surely as a mandate would…. Thus, whether California's scheme is characterized as providing incentives" or establishing mandates," it has the practical effect of regulating interstate commerce.[33]

Rocky Mountain Farmers, 740 F.3d at 517, 519. They explained that the *Rocky Mountain Farmers* panel decision ignores and conflicts with the controlling Supreme Court authorities, including *Healy* and *Baldwin*, discussed above. *See id.*

The majority's novel and unprecedented distinction between "incentive" and "control" directly contradicts the Supreme Court's stated rule in *Healy* that the "practical effect" of the regulation is the relevant inquiry. *Healy*, 491 U.S. at 336.

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[33] Defendants agree that the Renewables Quota is a "Renewable Energy Mandate." (Aplt.App.-173, ¶8.)

Likewise, *Rocky Mountain Farmers*—like the district court here—ignored *Baldwin*, which bars states from regulating out-of-state production practices unrelated to the physical attributes of the goods imported. 294 U.S. at 523-25; *see also Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *C&A Carbone*, 511 U.S. at 393.

The Court has made clear that there is no constitutionally significant distinction between a "prohibition" and a "strong incentive." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 578 (1997). For this reason, Judge Smith explained: "[T]he ethanol regulations plainly have extraterritorial reach, as they seek to influence out-of-state land use decisions and production methods. In concluding otherwise, the majority disregards controlling precedent and departs from the holdings of the Supreme Court and our sister circuits." *Rocky Mountain Farmers*, 740 F.3d at 517, 519. *Rocky Mountain Farmers* also conflicts with this Court's precedent, *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009) (evaluating whether state law discriminates against commerce *before* looking at its purpose), as well as that of other Circuits.[34]

[34] The *Rocky Mountain Farmers* majority ignored, for example, *National Foreign Trade Council v. Natsios*, in which the First Circuit invalidated on

The district court's misplaced reliance on *Rocky Mountain Farmers* in the face of contrary Supreme Court precedent fatally infects its decision with reversible legal error.

II. The Court Improperly Limited Plaintiffs' Advocacy under Rule 56.

In response to Defendants' Early Motion on Claims 1 and 2, E&ELegal argued that, under Rule 56(d), the motion was premature and that material facts were in dispute. (Aplt.App-211.) As required by Rule 56(d), E&ELegal supported that argument with a detailed affidavit explaining why additional discovery was necessary. (Aplt.App-215.) Yet, the district court erroneously concluded that E&ELegal's Rule 56(d) affidavit was "insufficient to function as a request" for Rule 56(d) relief because such relief is only available through a separate, standalone motion. (Aplt.App-265.) For this reason, the court refused to appropriately apply Rule 56, instead granting Defendants' Early Motion. (Aplt.App-265,277-78.)

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extraterritoriality grounds a Massachusetts statute that imposed a 10 percent penalty on State contract bids by companies that did business in Burma.181 F.3d 38, 69 (1st Cir. 1999), aff'd on other grounds *sub nom.* , 530 U.S. 363 (2000). That penalty was an incentive not to do business in Burma, but did not require any company to stop business there. *See also Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995) (rejecting State's argument that all a law did was "encourage," but not require, the favored conduct).

This issue was raised and ruled on in the district court's order. (Aplt.App-264-65.) Review is for abuse of discretion. The district court's legal conclusions are reviewed de novo, and its factual findings are reviewed for clear error.

A. Rule 56(d) Does Not Require a Motion.

At issue is an "Early Motion for Partial Summary Judgment," which, under the Practice Standards, must be filed within 30 days of the scheduling order, well prior to the close of discovery. (ECF-180). E&ELegal opposed Defendants' Early Motion on Claims 1 and 2 in its response brief (ECF-193) supported by a detailed Rule 56(d) affidavit (Aplt.App-216-17, ¶¶5,7-11). E&ELegal argued that the motion was premature because "discovery relevant to such arguments remains underway" (Aplt.App-211) and without discovery it "cannot mount a complete defense of any discrimination argument under Counts 1 & 2 that it may need to make." (Aplt.App-217, ¶10.)

The court below refused to consider E&ELegal's Rule 56(d) argument, holding that E&ELegal was required to file a separate, standalone motion to invoke Rule 56(d), citing to a local rule, D.C.Colo.LCivR7.1, and the Practice Standards. (Aplt.App-265.) This is not in accord with Federal or local rules and for that reason is reversible error.

Fed.R.Civ.Proc. 56(d) establishes the prerogatives available to the court "if a non-movant shows by affidavit or declaration that, for specified reasons, it cannot

present facts essential to justify its opposition." Rule 56(d) "expressly requires" an affidavit. *McKissick v. Yuen*, 618 F.3d 1177, 1190 (10th Cir. 2010). It does not require the non-movant to cross-file a motion to request Rule 56(d) relief. *See id.*

Neither Colorado's local rules nor the district court's "Practice Standards" can "validly conflict with" Rule 56, *Law Co. v. Mohawk Constr. & Supply Co.*, 577 F.3d 1164, 1170 n.5 (10th Cir. 2009). Under Rule 83(a)(1), "local rule[s] must be consistent with…federal…rules." Fed.R.Civ.Proc. 83(a)(1). Fairly read, D.C.Colo.LCivR 7.1 does not conflict with Rule 56.[35] It only sets forth the general requirements for motions. *See* D.C.Colo.LCivR 7.1. It does not purport to impose requirements beyond those expressly required by Rule 56(d). For this reason, *Colorado* district courts routinely consider (and grant) Rule 56(d) requests supported solely by affidavits.[36]

The same is true for the Practice Standards, which pin a requirement for a separate motion to a "request for the Court to take any action, make any type of

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[35] The local summary judgment rule, D.C.Colo.LCivR56.1, allows for a cross-motion and states that any such motion must be made in a separate motion, but does not require a motion to invoke the rule. D.C.Colo.LCivR 56.1(B). Tellingly, the district court did not cite this local rule as a basis for refusing to consider E&ELegal's Rule 56(d) request.

[36] *E.g., Waters v. AXL Charter Sch.*, 2013 U.S. Dist. LEXIS 31643, *20-21 (D. Colo. Mar. 7, 2013); *Levy v. Worthington*, 2011 U.S. Dist. LEXIS 125759, 4-7 (D. Colo. Oct. 31, 2011). Indeed, if that local rule did impose such a formal requirement, enforcing it against E&ELegal by refusing to consider the Rule 56(d) request would violate Fed.R.Civ.Proc. 83(a)(2).

ruling, or provide any type of relief." (Practice Standards at 4, ATT-48[37]) E&ELegal made no such "request" and did not need to. On their face, the Practice Standards do not purport to contravene the plain language of Rule 56(d) by requiring a separate motion, nor could they. Fed.R.Civ.Proc. 83(b) only "allows a judge to regulate the practice in his court when there is no other controlling law." *Carnes v. Zamani*, 488 F.3d 1057, 1059 (9th Cir. 2007). Here, Rule 56(d) supplies controlling law. Thus, the district court has no authority to fundamentally alter its requirements.

A district court may not establish such a motions requirement unless Congress or the Supreme Court does so first. 28 U.S.C. § 2071(f). Absent a requirement to invoke Rule 56(d) through a motion in the Federal rules or valid local rules, the court cannot create such a rule through a holding. To hold that invocation of Rule 56(d) requires a separate motion fundamentally alters and impermissibly conflicts with the Rule. *See In re Dorner*, 343 F.3d 910, 913-14 (7th Cir. 2003). To the extent that the Practice Standards can be read to impose a separate motions requirement, they violate the Rules Enabling Act. *See id*. (citing 28 U.S.C. § 2077(b); 28 U.S.C. § 2071(b)-(d)).

Nor is a requirement for such an "early" motion the common practice in federal litigation. *See, e.g., Bekaert Corp. v. Std. Sec. Life Ins. Co.*, 2010 U.S. Dist.

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[37] Judge Martinez' Practice standards are provided in the attachments to this brief.

LEXIS 107909, 15-16 (N.D. Ohio Oct. 8, 2010) (motion requesting leave to file an "early motion for partial summary judgment" under Rule 56 denied based on responsive brief in opposition to the motion, including the appropriate affidavit.).

Even if the Practice Standards could possibly trump Rule 56(d)'s plain text and the local rules, E&ELegal could not have reasonably foreseen that the district court would interpret them to conflict with Rule 56(d), as interpreted by this Court. *See McKissick v. Yuen*, 618 F.3d at 1190. Because E&ELegal was not on actual notice of the district court's modifications of Rule 56(d)—nowhere mentioned in the Federal (or local) rules—until these were sprung on E&ELegal for the first time in the court's order, E&ELegal should not be penalized for complying with Rule 56(d)'s affidavit requirement. *See Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 471 (2d Cir. 2002).

E&ELegal's Rule 56(d) argument through a pleading and detailed affidavit is sufficient to invoke Rule 56(d). The district court's refusal to consider it (Aplt.App-265) is "[a]n error of law and[, which] is per se an abuse of discretion." *United States v. Lopez-Avila*, 665 F.3d 1216, 1219 (10th Cir. 2011).

B. The Merits Decision on Defendants' Motion was Premature and an Abuse of Discretion.

Because the district court refused to consider E&ELegal's Rule 56(d) affidavit, it did not apply the necessary multi-factored legal analysis for whether the affidavit satisfied Rule 56(d)'s requirements for relief. *Valley Forge Ins. Co. v.*

Health Care Mgmt. Ptnrs., 616 F.3d 1086, 1096 (10th Cir. 2010) (setting forth relevant analysis). That, too, is reversible legal error, which is a "per se…abuse of discretion." *Lopez-Avila*, 665 F.3d at 1219. But even if the district court applied the correct legal standard, denial of Rule 56(d) relief would still "exceed the bounds of rationally available choices given the facts and the applicable law in th[is] case," *Valley Forge*, 616 F.3d at 1096, and thus constitute an abuse of discretion.

To begin with, if E&ELegal had fully engaged with Defendants' *Pike* arguments,[38] it would have potentially waived its rights under Rule 56(d). *See, e.g.*, *TCCMPTF v. M&R Concrete, Inc.*, 2013 U.S. Dist. LEXIS 5170, *9-10 (D. Colo. Jan. 14, 2013). For this reason, E&ELegal consistently maintained those arguments were premature because they are fact-intensive and merits discovery was ongoing.

Early motions for partial summary judgment are not a common practice. Other than this one, there are only five reported cases by the Federal judiciary[39]

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[38] A state statute that does not discriminate against interstate commerce will nonetheless be invalidated under the *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970), balancing test if it imposes a burden on interstate commerce incommensurate with the local benefits secured. *See Quick Payday*, 549 F.3d at 1307.

[39] *Edgar v. Disability Reinsurance Mgmt. Servs.*, 741 F. Supp. 2d 1268, 1269-70 (N.D. Ala. 2010); *Goodman v. N.H. Ins. Co.*, 2010 U.S. Dist. LEXIS 111078, 4-5, (W.D. Wash. Oct. 19, 2010); *Fulghum v. Embarq Corp.*, 2009 U.S. Dist. LEXIS

that have adjudicated such "early motions," and of these, the only judge in the United States with a practice standard about them is Judge Martinez. The reason for this rarity is clear. As suggested by Chief Magistrate Judge Boland in this case—fact-intensive merits claims cannot (and should not) be adjudicated until the dispositive motions deadline, where, as here, merits discovery is ongoing. And where, as here, standing discovery is intertwined with merits discovery on certain claims, bifurcated discovery is inappropriate. (*See* Aplt.App-58.) Despite Judge Boland's admonition, Defendants did bifurcated discovery, further delaying merits discovery. (Aplt.App.-195.)

These Early Motions are appropriate under Rule 56(d) only in the rare cases where judicial review is limited to an administrative record and the issue is exclusively legal, *see, e.g.*, *Edgar*, 741 F. Supp. 2d 1268, or where discovery is not necessary, *see*, *e.g.*, *Nat'l Fire & Marine Ins. Co.*, 2012 U.S. Dist. LEXIS 138044; *Auraria Student Hous.*, 2014 U.S. Dist. LEXIS 8229. *Pike* testing is not that rare case.

Here, discovery was both necessary for fact-intensive *Pike* testing and fact-based arguments on the RES's discriminatory effect and far from completed. More

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80930, 17 (D. Kan. Aug. 25, 2009); *Ins. Co. v. Nat'l Fire & Marine Ins. Co.*, 2012 U.S. Dist. LEXIS 138044, 5 (D. Nev. Sept. 26, 2012); *Bekaert Corp. v. Std. Sec. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 107909, 15-16 (N.D. Ohio Oct. 8, 2010); *Auraria Student Hous. at the Regency v. Campus Vill. Apts.*, 2014 U.S. Dist. LEXIS 8229, 1 (D. Colo. Jan. 22, 2014).

importantly, discovery had hardly begun when E&ELegal's responsive filing on Defendants' merits motion was due. Further, the parties asked the court to stay the normal post-discovery dispositive motions schedule, in part because of the case's complexity and the need to digest some 665 pages of expert reports and several thousands of documents produced during discovery. The magistrate judge agreed for reasons of "judicial economy" and conserving "parties' resources." (Aplt.App.-233.)

E&ELegal opposed the Defendants' merits motion under Rule56(d), specifically identifying the need for discovery on the putative local benefits the court would assess under a *Pike* test, including the economic consequences of the statute (Aplt.App.-216 ¶¶7-8). Indeed, E&ELegal's expert testified under oath at a deposition—held over than three months *after* E&ELegal filed its final brief on Defendant's merits motion—that the putative local benefits were negative. [40] He further testified that the Colorado statute would cause the premature death of up to 250 Colorado citizens in 2015 alone, with that number rising in future years, for the reasons set forth in his December 7, 2013, rebuttal report.

E&ELegal also specified the need for additional information on "both the

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[40] *See* Thomas Tanton Dep. Trans., Vol. II (Jan. 22, 2014); Rebuttal Report of Thomas Tanton, 14-17 (Dec. 7, 2013). E&ELegal notes this solely for the purpose of illustrating the types of materials that are not in the record because the district court did not consider E&ELegal's Rule 56(d) request. E&ELegal will provide the Court with these documents upon request.

market for coal used to generate electricity and the market for electricity from non-renewable sources" (Aplt.App.-217 ¶9), as well as "the confusion and uncertainty associated with the different renewable quotas and definitions within the electrical grid serving Colorado" (*id*. ¶11). E&ELegal further noted that, at that time, Defendants had not even designated their expert witnesses or provided expert reports, and that neither party had designated rebuttal experts or their reports, and had no duty to do so for two more months. (*Id.* ¶12.) This was all that E&ELegal was required to do to comply with Rule 56(d).

Under Rule 56(d), the court had few options. Because E&ELegal demonstrated that it could not "present facts essential to justify its opposition," the court had three choices: "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed.R.Civ.Proc. 56(d). "Rule 56[(d) requires] that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n.5 (1986). Granting Defendants' merits motion under these circumstances was an abuse of discretion.

III. The Merits Decision on Defendants' Motion was Reversible Error.

The district court also reversibly erred when it granted summary judgment on E&ELegal's discrimination and *Pike* claims. This issue was raised and ruled on

in the district court's order. (Aplt.App.-277.) Review is *de novo*.

Summary judgment is only appropriate if there is no dispute of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.Proc.56(a). Factual disputes that "might affect the outcome of the suit under the governing law" preclude summary judgment. *Anderson*, 477 U.S. at 248.

In opposing summary judgment, E&ELegal properly relied on previous filings addressing the same questions of fact, including E&ELegal's response to Defendants' standing motion (ECF-194). *See* Fed.R.Civ.Proc.56(c). These filings show that there are genuine disputes of facts material to determining whether the RES unconstitutionally discriminates against interstate commerce.

State statutes that "discriminate[] against interstate commerce in favor of intrastate commerce…[are] virtually invalid per se. *Quik Payday*, 549 F.3d at 1307. Here, the court stated that Defendants' moved for summary judgment on the argument that "the Renewables Quota does not discriminate against interstate commerce on its face, or in its purpose or effect." (Aplt.App.-266.) In error, the court thereafter stated: "In response to this argument, Plaintiffs have made no attempt to identify specific facts showing that there is a genuine issue for trial." *Id*. This is not accurate.

In its response brief, E&ELegal specifically explained the practical effect of the Renewables Quota's discrimination against interstate commerce, stating that

"the RES mandate to replace hydrocarbon fuels (thermal coal and natural gas) with renewables reduces the market for those fuels, and that forced reduction in the interstate market indeed creates a burden on interstate commerce." (Aplt.App.-211.) In making this statement, E&ELegal relied on its extensive, fact-filled standing arguments. (Aplt.App.-221-25).

This genuine dispute of material fact was hardly hidden to the district court, as it specifically cited to these facts when granting E&ELegal standing (Aplt.App.-244-45.) As discussed in Section IV.C., above, the district court repeatedly acknowledged the RES's harms to (and discrimination against) the interstate coal market.

Based on the district court's holding on standing, it is the law of the case that the Renewables Quota is discriminatory in practical effect. Because the standing decision predated the merits decision, it is controlling. Thus, either there is a material fact at issue, or the law of the case impeaches a holding that there is no discriminatory effect. In either case, the court's holding that there is no discriminatory effect and thus no dormant Commerce Clause violation is reversible error.

Moreover, the record is replete with undisputed or unrebutted evidence that the RES discriminates against and burdens interstate commerce (*see, e.g.*,

Aplt.App.-162-63,167-68, ¶¶2,28-31; *as admitted by Defendants at id* pp.203,206 ¶¶2,28-31), all of which the district court ignored.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the important constitutional question of first impression presented, the novel nature of the challenged statutory scheme, the unique nature of the interstate electricity market, and because E&ELegal has never had the opportunity to appear in open court and speak to these issues, counsel believes that oral argument may be helpful to the Court.

CONCLUSION

For the foregoing reasons, E&ELegal respectfully requests that this Court reverse the district court's order granting the Defendants' motion for summary judgment and denying E&ELegal's motion for summary judgment, grant E&ELegal's Early Motion for Partial Summary Judgment on Claims 1 & 2, and grant costs and fees as sought in its Second Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 13,688 words, not including those elements excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

I relied on my word processor to obtain the count and it is Word Version 2010:

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses by Norton Internet Security and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served to the following by U.S. Priority Mail on the 17th day of July, 2014, and through the Electronic Filing System on the 21st day of July, 2014.

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ATTACHMENTS

1. Final Order on Standing (ECF-219).....ATT-1
2. Final Order on Merits (ECF-221).....ATT-22
3. William J. Martinez Practice Standards ATT-45

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

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

ENERGY AND ENVIRONMENT LEGAL INSTITUTE, and
ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL,
JAMES TARPEY, and
PAMELA PATTON, in their official capacities as Commissioners of the Colorado Public Utilities Commission,

Defendants,

and

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

Intervenor-Defendants,

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 (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 (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

[1] 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.

organization 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.) 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.) 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.)

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[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.)

[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 (2000). Although the text of the Commerce Clause does not expressly limit the power of states, the

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*. ¶¶ 137-141.) 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

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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 (2008).

[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).

Quota, the Distributed Generation Provision requires that an increasingly 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. § 42-2-124(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. § 42-2-124(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 (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 (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 (1962). Standing "is perhaps the most important of the[] doctrines" limiting the federal judicial power. *Allen v. Wright*, 468 U.S. 737, 750 (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 (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 (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 (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 (1993) (holding that contractors had shown an injury due to inability to compete for contracts set aside for minority-owned businesses); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 (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

[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.")).

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 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. Babbit*, 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. § 42-2-124(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 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)(1)(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, 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. 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 (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 (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 (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 (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 (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:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

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

ENERGY AND ENVIRONMENT LEGAL INSTITUTE, and
ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL,
JAMES TARPEY, and
PAMELA PATTON, in their official capacities as Commissioners of the Colorado Public Utilities Commission,

Defendants,

and

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

Intervenor-Defendants,

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 (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 (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 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 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

[1] 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.

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*. § 40-2-104(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*. § 40-2-104(1)(a)(VI). The RES's definition of renewable energy resources includes solar, wind, geothermal, biomass, and hydroelectricity with certain restrictions. *Id*. § 40-2-104(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 fulfil its Renewables Quota. Colo. Rev. Stat. § 40-1-104(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 provides 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 (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 (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 (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 extra-territorial 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 ; 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 (1996) (quoting *Or. Waste*

Sys., Inc. v. Dep't of Envl. Quality of Or., 511 U.S. 93, 99 (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 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 (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 (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 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 (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 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 extraterritorality 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 (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. 664, 679 (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 (1979); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-27 (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 (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 (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) ("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 *Pik*e 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 (1987); *Ferguson v. Skrupa*, 372 U.S. 726, 729 (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:

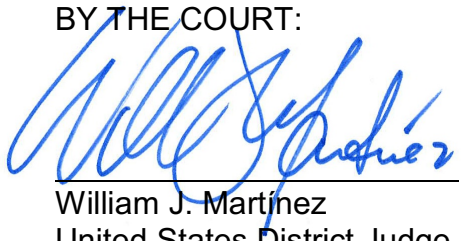
1. Plaintiffs' Early Motion for Partial Summary Judgment (ECF No. 180) is DENIED;

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:



William J. Martínez
United States District Judge

PRACTICE STANDARDS

For Civil and Criminal Matters Before

William J. Martínez
United States District Judge
U.S. District Court for the District of Colorado

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"Justice, sir, is the great interest of man on Earth." **Daniel Webster, 1845**

Revised and effective 1 December 2012

I. INTRODUCTION

A. Purpose and Authority

1. These Revised Practice Standards are adopted to secure the just, speedy, and inexpensive determination of every action. Except as otherwise provided, they shall apply to all matters addressed by the Court on or after 1 December 2012. These Revised Practice Standards may be further revised without notice and may be modified by orders entered in specific cases. They have the force and effect of the orders of this District Court, and are to be cited as "WJM Revised Practice Standards".

2. Failure to follow the Local Rules of Practice for the United States District Court for the District of Colorado (the "Local Rules") or the procedures outlined herein may result in an order striking the noncompliant filing or otherwise addressing the noncompliant action. Repeated failure to follow these procedures may result in an order granting other proper relief, including sanctions.

B. Relation to Local Rules

The procedures outlined in these Revised Practice Standards are in *addition* to the requirements set forth in the Local Rules of Practice for the United States District Court for the District of Colorado ("Local Rules").

II. GENERAL PROCEDURES

A. Applicable Rules

Those appearing in the District Court must know and follow:

1. The Federal Rules of Civil Procedure and/or the Federal Rules of Criminal Procedure;

2. The Federal Rules of Evidence;

3. The Local Rules; and

4. The Electronic Case Filing Procedures (Civil and Criminal).

B. Communications with Chambers

1. For information about the status of a motion or document, please utilize the CM/ECF system, or contact my Docket Clerk, Eileen Van Alphen, at 303/335-2045.

2. For information about courtroom technology, trial preparation, use of deposition transcripts, the submission of trial exhibits and witness lists, or the use of exhibits at trial, please contact my Courtroom Deputy Clerk, Deb Hansen, at 303/335-2102.

3. If you need to reach my Court Reporter or wish to order a transcript, please contact Gwen Daniel at 303/335-2111.

4. For other information or assistance, you may contact my Chambers at 303/335-2805. **Please do not contact my Chambers about substantive matters.** My staff is not authorized to give legal advice or grant oral requests over the telephone.

5. *Ex parte* communications: Unless specifically authorized, neither counsel nor *pro se* litigants may communicate about a case by letter to the Court. All communications must be made in the form of a motion, brief, notice, or status report, served on all opposing counsel and *pro se* parties.

C. Pretrial Matters Handled by the Magistrate Judge

The Magistrate Judge and I will work together as a team to manage your case and administer justice to the best of our abilities. Among other responsibilities s/he has in your case, the Magistrate Judge will generally manage pretrial discovery and adjudicate any pretrial discovery disputes which might arise. I reserve the right, however, to handle any pretrial matters that I deem necessary, including matters relating to pretrial discovery disputes.

D. Deadlines

1. Fed. R. Civ. P. 6 controls the computation of all time requirements in these procedures, and to all pretrial motions filed in criminal cases.

2. Motions seeking an extension of time to file a document, or for the continuance of a hearing, must be sought by way of an appropriate written motion filed as far in advance of the deadline or setting as possible. All such motions must clearly establish good cause for the requested extension or continuance. Absent a true emergency, no motion for an extension of time to file a document shall be considered unless it is filed on or before **the court business day preceding the original deadline**. Absent a true emergency, no motion for the continuance of a hearing shall be considered unless it is filed on or before **the second court business day prior to the original hearing date**.

3. Due to the extraordinary disruption to the Court's calendar caused by the rescheduling of trials, motions for continuance of a trial date (jury or bench) are

heavily discouraged and will rarely be granted. Such motions will be denied absent a showing of substantial good cause arising out of truly compelling circumstances.

E. Citations

1. Citations shall be made pursuant to the most current edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n *et al*. eds., (19th ed. 2010)).

2. General references to cases, pleadings, depositions, or documents are insufficient if the document is over one page in length. The parties shall provide specific references in the form of precise citations, including page number or paragraph number to identify those portions of the cases, pleadings, depositions, or documents relevant to the argument presented.

F. Testimony by Telephone or Video Conference

1. Together with Fed. R. Civ. P. 43(a) for trials and 43(c) for motions, this Practice Standard governs requesting and taking testimony by telephone or video conference. A party may request that testimony be presented by telephone or video conference at a trial or hearing. A request for presentation of testimony by telephone or video conference shall be made by written motion or stipulation filed at least 7 days before the trial or hearing at which testimony is proposed to be taken by telephone or video conference.

2. I will determine whether in the interests of justice the testimony may be taken by telephone or video conference. The granting of such motion is also subject to the availability of necessary equipment. If I order testimony to be taken by telephone or video conference, I may also issue such orders as are appropriate to protect the integrity of the proceedings.

III. MOTIONS PRACTICE

A. General

All motions should be accompanied by a proposed Order sent to my Chambers via e-mail (martinez_chambers@cod.uscourts.gov), preferably in WordPerfect, Arial, 12 point font.

B. Separate Motion Required

All requests for the Court to take any action, make any type of ruling, or provide any type of relief must be contained in a **separate**, written motion. A request of

this nature contained within a brief, notice, status report or other written filing does not fulfill this Practice Standard. This requirement applies to all civil and criminal actions.

C. Page Limitations

Apart from papers filed in relation to a motion for summary judgment brought pursuant to Fed. R. Civ. P. 56, all motions, including papers filed in relation to an early motion for partial summary judgment filed within 30 days after entry of the initial scheduling order (see WJM Revised Practice Standard E.2, below), shall comply with the following requirements:

1. Opening and responsive briefs shall not exceed 15 pages, and any reply brief shall not exceed 10 pages. Motions and briefs shall be combined and will be considered one paper for purposes of computing page limitations. These page limitations shall include all text, with the exception of the attorney or party signature block(s) and the certificate of service.

2. Exceptions to the above page limitations will be made only in exceptional circumstances where I decide that the complexity or numerosity of the issues compel briefs of greater length. Permission to file briefs of greater length shall be sought by way of an appropriate motion filed well in advance of the deadline for filing the brief. A motion requesting such permission must include sufficient detail to allow me to discern the necessity of additional pages.

D. Special Instructions Concerning Motions to Dismiss

1. In my view the overuse of motions filed pursuant to Fed. R. Civ. P. 12(b)(6) in this District unreasonably delays the progress of civil litigation. Motions brought pursuant to this Rule are strongly discouraged if the defect is correctable by the filing of an amended pleading. Counsel should confer prior to the filing of a Rule 12(b)(6) motion to determine whether the deficiency (*e.g.*, failure to plead fraud with specificity) can be corrected by amendment, and should exercise their best efforts to stipulate to appropriate amendments. If such a motion is nonetheless filed, counsel for the movant shall include in the motion a conspicuous statement describing the specific efforts undertaken to comply with this Practice Standard. Counsel are on notice that failure to comply with this Practice Standard may subject them to an award of attorney's fees and costs assessed personally against them. This Practice Standard shall not apply in cases where the non-movant is proceeding *pro se.*

2. All motions to dismiss shall state in the caption or in the opening paragraph under which rule or subsection thereof such motion is filed. All requests for relief under any part of Fed. R. Civ. P. 12 must be brought in a single motion.

3. If a motion to dismiss is filed pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6) and matters outside the pleadings are presented with the motion, the motion

shall include a brief statement addressing whether the motion should be converted to a motion for summary judgment.

E. Special Instructions Concerning Motions for Summary Judgment

1. In my view the overuse of motions filed pursuant to Fed. R. Civ. P. 56 in this District unreasonably delays the progress of civil litigation. Counsel are well-advised to avoid reflexively filing a motion for summary judgment.

2. Subject to any other order I might enter in a particular case with regard to motions filed under Fed. R. Civ. P. 56, each party shall be limited to the filing of a single motion for summary judgment customarily filed at the conclusion of pretrial discovery. In addition, however, within 30 days after entry of the initial scheduling order, a party may also file one early motion for partial summary judgment ("Early Motion for Partial Summary Judgment") which presents a substantial and well-supported argument for significantly reducing the claims or issues in the case. No party may file a second motion for summary judgment, or a second Early Motion for Partial Summary Judgment, without prior leave of court, which shall be granted in only the most extraordinary circumstances.

3. Opening and responsive briefs on motions for summary judgment (other than Early Motions for Partial Summary Judgment) shall not exceed 20 pages, and any reply brief shall not exceed 12 pages. Motions and briefs shall be combined and will be considered one paper for purposes of computing page limitations. These page limitations shall exclude the statements of fact sections described below, but will otherwise include all text apart from the attorney or party signature block(s) and the certificate of service.

4. All motions for summary judgment, including Early Motions for Partial Summary Judgment, must contain a section entitled "Movant's Statement of Material Facts." This Statement shall set forth in simple, declarative sentences, all of which are separately numbered and paragraphed, each material fact the movant believes supports movant's claim that movant is entitled to judgment as a matter of law. Each statement of fact must be accompanied by a specific reference to admissible material in the record which establishes that fact.

5. Any party opposing the motion for summary judgment, or an Early Motion for Partial Summary Judgment, shall provide a "Response to Movant's Material Facts" in its brief, admitting or denying the asserted material facts set forth by the movant. The admission or denial shall be made in paragraphs numbered to correspond to movant's paragraph numbering. Any denial shall be accompanied by a brief factual explanation of the reason(s) for the denial and a specific reference to material in the record supporting the denial.

6. If the party opposing the motion for summary judgment, or the Early Motion for Partial Summary Judgment, believes there are additional disputed questions which have not been adequately addressed by the movant, the party shall, in a separate section of the party's brief styled "Statement of Additional Disputed Facts," set forth in simple declarative sentences, separately numbered and paragraphed, each additional material disputed fact which undercuts movant's claim that movant is entitled to judgment as a matter of law. Each separately numbered and paragraphed fact shall be accompanied by specific reference to material in the record which establishes the fact or demonstrates that it is disputed.

7. The statement of facts sections in opening and responsive briefs on motions for summary judgment shall not exceed 20 pages, and the statement of facts sections in any reply brief to such motion shall not exceed 8 pages. The statement of facts sections in opening and responsive briefs on Early Motions for Partial Summary Judgment shall not exceed 10 pages, and the statement of facts sections in any reply brief shall not exceed 5 pages. Statement of facts sections in excess of these page limits will be stricken, unless leave of court for the filing of longer fact sections has previously been obtained. The statement of facts sections are intended to comprise a comprehensive recital of all facts material to the motion. Any recitation of material facts set forth outside of these statement of facts sections shall count against the page limits on legal argument set forth above.

8. If a reply brief is filed pursuant to D.C.COLO.LCivR 56.1, it shall contain:

a. A separate section titled "Reply Concerning Undisputed Facts," containing any factual reply which movant cares to make regarding the facts asserted in movant's motion to be undisputed. Any such factual reply shall be made in separate paragraphs numbered to correspond to the movant's motion and the opposing party's response and shall be supported by specific references to material in the record.

b. A separate section titled "Response Concerning Additional Disputed Facts" admitting or denying the additional disputed facts set forth by the non-moving party. The admission or denial shall be made in paragraphs numbered to correspond to the non-moving party's paragraph numbering. Any denial shall be accompanied by a brief factual explanation of the reason(s) for the denial and a specific reference to material in the record supporting the denial.

9. Exceptions to the above page limitations will be made only in extraordinary circumstances where I decide that the complexity or numerosity of the issues and/or disputed facts compel briefs of greater length. Permission to file briefs in excess of these page limitations shall be sought by way of an appropriate motion filed well in advance of the current filing deadline. A motion requesting such permission must include sufficient detail to allow me to discern the necessity of additional pages.

F. Motions *in Limine*, Motions Under Fed. R. Evid. 702, & Trial Briefs

1. Motions *in limine* are permitted. Those motions *in limine* which are evidence-driven and/or depend for their resolution upon the context in which the evidence is offered will almost certainly, however, not be ruled upon until trial.

2. Each party shall be limited to one motion *in limine,* which motion shall address all difficult or unusual evidentiary issues the party anticipates will arise at trial. Each such motion shall be limited to 8 pages, and each response thereto shall be limited to 4 pages. **No reply brief in support of a motion *in limine* will be permitted.** In cases with multiple plaintiffs and/or multiple defendants, only one motion *in limine* or one joint motion *in limine* per side shall be permitted. In these cases, the motion or joint motion shall be limited to 10 pages, and the response thereto shall be limited to 5 pages. **No reply brief in support of a joint motion *in limine* will be permitted.** All text in these filings will count against said page limits except for the attorney or party signature block(s) and the certificate of service. Motions or responses in excess of the foregoing page limits will be permitted only upon a showing of substantial good cause. Upon the filing of a motion, or joint motion, *in limine*, I will promptly set a deadline for filing the response thereto, which generally will be shorter than that permitted under Local Rule and well in advance of the date of the Final Trial Preparation Conference.

3. In civil cases, all motions *in limine* must be filed not later than 21 days prior to the Final Trial Preparation Conference. In criminal cases, all motions *in limine* must be filed not later than 7 days prior to the Final Trial Preparation Conference

4. Motions under Fed. R. Evid. 702 often require additional time for the Court to fully analyze. Thus, parties should file such motions as early as is practicable and, in all civil cases, not later than 70 days (ten weeks) prior to the Final Trial Preparation Conference. All Rule 702 motions shall identify with specificity each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) on which each opinion is challenged, *e.g.,* relevancy, sufficiency of facts and data, or methodology. The movant shall also specifically state whether an evidentiary hearing is being requested. If the motion includes such a request, the movant shall discuss why the applicable law compels an evidentiary hearing. In the responsive filing, the non-moving party shall specifically address the issue of whether the circumstances do or do not require an evidentiary hearing. Rule 702 motions requiring an evidentiary hearing may be referred to the assigned Magistrate Judge for hearing and decision.

5. I will determine prior to the Final Trial Preparation Conference whether trial briefs will be accepted from counsel in any particular case. If so, the parties shall contemporaneously file their trial briefs within such time and page limits as I shall direct, addressing *only* those issues as to which I have stated I am seeking input. No responsive or reply trial briefs shall be accepted.

G. Oral Argument and Evidentiary Hearings

While oral argument and/or evidentiary hearings on motions may be requested by a party, they will be scheduled at my sole discretion. Requests for oral argument which do not effectively address why the parties' written submissions inadequately address the matter at hand will be ignored.

H. Motion for Leave to Cite Supplemental Authority

A motion for leave to cite new relevant authority may be filed if the supplemental authority was issued after briefing on a motion had closed. Such a motion shall be limited to the case title, citation, date of decision, and a single-sentence reference to the issue to which the movant believes the new decision pertains. No comment on the significance of the decision, or its interpretation, may be made, and no responsive comment will be permitted.

I. Sur-Reply or Supplemental Brief/Notice

No sur-reply, supplemental brief, or supplemental "notice" may be filed without prior leave of Court granted for good cause shown.

IV. FINAL PRETRIAL CONFERENCE AND FINAL TRIAL PREPARATION CONFERENCE

A. Final Pretrial Conference

1. Unless ordered otherwise, the Final Pretrial Conference will be conducted by the Magistrate Judge assigned to the case. The Proposed Final Pretrial Order shall be prepared in accordance with the Instructions for Preparation of Final Pretrial Order as set forth in D.C.COLO.LCivR, Appendix G.

2. Voluminous Evidence: In preparation for trial, parties shall either: (1) redact voluminous evidence to reflect only the relevant portions and portions necessary for context; or (2) consistent with the requirements of Fed. R. Evid. 1006, prepare and offer charts, summaries, or calculations to communicate the contents of voluminous evidence to the Court and jury. Although a complete original or copy of the evidence on which a redacted exhibit or Rule 1006 chart, summary, or calculation is based need not be offered and admitted into evidence, such underlying evidence must itself be admissible and available to the parties for examination or copying and to the Court for production if so ordered.

The parties shall include any redacted evidence or Rule 1006 chart, summary, or calculation they intend to use at trial in the list of exhibits set forth in the Final Pretrial Order and in the exhibit copies exchanged following the Final Pretrial Conference. The voluminous evidence on which such redacted, summary, chart, or

calculation exhibit is based shall be identified in an appendix to the exhibit list and such underlying evidence shall be made available to the other parties at the time the parties exchange exhibits.

B. Final Trial Preparation Conference

1. I will preside over the Final Trial Preparation Conference, which generally will be scheduled approximately 2 weeks before trial in civil cases, and approximately 1 week before trial in criminal matters. Counsel who will try the case, as well as all *pro se* parties, must attend the Final Trial Preparation Conference. Failure of chief trial counsel or *pro se* parties to attend the conference may result in sanctions, including, without limitation, vacating the trial date, striking claims or defenses, and/or awarding attorney's fees.

2. The Final Trial Preparation Conference is counsel's opportunity to invite my attention to any significant problems or issues which need to be resolved or addressed before trial, or which may arise during the course of trial. At the Final Trial Preparation Conference, I will inform counsel whether and as to which specific issues contemporaneous trial briefs will be permitted pursuant to WJM Revised Practice Standard III.F.5. In addition, at this Conference, I will discuss some or all of the following matters with counsel, as appropriate to the case at bar:

a. Length of opening statements beyond the presumptive 20 minutes per side allowed by these Revised Practice Standards;

b. The timing and presentation of witnesses and evidence;

c. Anticipated evidentiary issues, including the need for scheduling of hearings outside the presence of the jury;

d. Stipulations as to fact or law;

e. Anticipated trial testimony via deposition, including compliance with WJM Revised Practice Standard V.G;

f. Any outstanding motions;

g. The identity of all counsel and parties/parties' representatives who will be present at trial; and

h. The continuing viability (if any) of settlement discussions.

Finally, at the Conference I will review with counsel the parties' compliance with the filing requirements set forth in WJM Revised Practice Standard IV.B.4, below.

3. At Final Trial Preparation Conferences held in criminal cases only, I will also discuss the following items with counsel:

a. Compliance with any Discovery & Scheduling Order requirements regarding notice of intent by the prosecution to introduce evidence pursuant to Fed. R. Evid. 404(b); and

b. Seating of the alternate juror as it relates to following the Criminal Jury Selection Protocol I will use in criminal trials; see WJM Revised Practice Standard V.M, below.

4. Not later than 7 days prior to the Final Trial Preparation Conference in all cases, counsel for the parties shall file the following:

a. A Final Witness List (using the form below) containing the name of each witness to be called, the proposed date(s) of the witnesses' testimony, and the anticipated length of the witnesses' direct and cross examination testimony. Witnesses not listed in the Final Pretrial Order may not be included in the Final Witness List without prior leave of Court for substantial good cause shown.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Case No. _____ Date: _____

Case Title: _____

_____ FINAL WITNESS LIST
(Plaintiff/Defendant)

WITNESS	PROPOSED DATE(S) AND LENGTH OF TESTIMONY
_____	_____
_____	_____
_____	_____

Copies of this form are available on the District Court's website or my Courtroom Deputy.

b. A Final List of Proposed Exhibits (using the form below). Plaintiff's Exhibits shall be numbered (1, 2, 3, etc.) and Defendant's Exhibits shall be lettered (A, B, C, etc.). If Defendant has more than 26 proposed exhibits, it shall

use every letter (A-Z) for the first 26 exhibits, and it shall then mark the remaining exhibits A1 through A99, B1 through B99, etc. Defendant shall not use double or triple letters for any of its exhibits (*e.g.*, AA, BB, or AAA, etc.). In addition, there shall be no duplicate exhibits (*i.e.,* exhibits listed on both Plaintiff's and Defendant's exhibit lists). Counsel shall stipulate to the admissibility of exhibits to the maximum extent possible and indicate all stipulated exhibits on the list submitted at the Final Trial Preparation Conference.

FINAL LIST OF PROPOSED EXHIBITS

CASE NO._____ PLAINTIFF'S LIST_____ DEFENDANT'S LIST____ THIRD PTY DEFTS. LIST____

CASE CAPTION:_____ vs. _____ PAGE NO. _____ DATE_____

LIST PLAINTIFF'S EXHIBITS BY NUMBERS (1, 2, 3, etc.) and DEFENDANT'S BY LETTER (A, B, C, etc.)

EXHIBIT NO./LTR	WITNESS	DESCRIPTION	ADM/AUTH	STIP	OFFER	REC'D	REFUSED	RULING RSVD.	COMMENTS/ INFO.

Please retain all column headings on all separate pages of this form included in a party's exhibit binder(s). Copies of this form are available from the District Court website or from my Courtroom Deputy Clerk.

c. Proposed *voir dire* questions. On the morning of the first day of trial I will inform counsel whether they are precluded from asking any of their proposed *voir dire* questions, and at that time I will also inform the parties of the length of attorney *voir dire* questioning that will be permitted. Apart from reasonable follow up questions, counsel will not be permitted to ask questions during attorney *voir dire* which I have not previously approved.

d. Any stipulated or proposed amendments to the Final Pretrial Order for consideration by the Court. The Final Pretrial Order will not be amended without prior leave of Court to prevent manifest injustice.

e. A list of issues and/or motions that require resolution prior to, or at, trial. Do not repeat here issues raised in a party's motion in limine and/or trial brief, if any.

f. In trials to the Court, the parties shall also submit **Preliminary** Proposed Findings of Fact and Conclusions of Law, along with a Proposed Order for Judgment or other remedy or relief.

1. Findings of Fact: To the maximum extent possible, the parties shall stipulate to the material facts. Proposed findings of fact should be stated as nearly as possible in the same order as their anticipated order of proof at trial. To the extent that the parties cannot agree on one version of facts, each party shall submit their own proposals and underline all disputed facts.

2. Conclusions of Law: Conclusions of law need not be underlined even if disputed. Counsel shall key their closing arguments to their preliminary proposed findings and conclusions so as to point out the evidence upon which they rely to support their proposed findings and conclusions.

V. COURTROOM PROCEDURES FOR TRIALS AND HEARINGS

A. Hard Copy Transcripts

If you require hourly or daily copy transcripts for a trial, you must make arrangements with my Court Reporter at least 10 days before trial. If you require hourly or daily copy transcripts for a hearing or oral argument, my Court Reporter appreciates as much advance notice as is possible.

B. Realtime Reporting

If you require realtime reporting to your laptop or other electronic device during the course of a trial, hearing, or oral argument, you must consult with my Court Reporter **prior** to the date of the proceeding to ensure that all technical issues have been resolved prior to commencement of the proceeding.

C. Trial Setting

In civil cases, my staff will set dates for a Final Trial Preparation Conference and Trial following entry by the Magistrate Judge of the Final Pretrial Order. In criminal cases, my staff will set the case for a Final Trial Preparation Conference and Trial following the Discovery Conference with the Magistrate Judge.

D. Length of Trial in Civil Cases

Should the parties request a trial in a civil case lasting longer than 5 days, counsel and/or *pro se* parties shall contact Chambers not later than 3 days after entry of the Final Pretrial Order in order to schedule a status conference with me. At this status conference the parties will address the reasons they believe a trial longer than five days is necessary. **No** trial in excess of 5 days will be set in a civil case until such a status conference is conducted.

E. Trials

1. General Scheduling Matters

Unless directed otherwise, trials will generally be set Monday through Friday, with occasional settings in other matters scheduled at the beginning or end of a trial day. On the first day of trial, counsel must be present at 8:00 a.m. to go over any final matters before trial begins. On subsequent trial days counsel must be present in the courtroom no later than 8:30 a.m. A normal trial day in my Courtroom begins at 8:45 a.m. and will continue until 5:00 – 5:15 p.m. The Court will recess for a lunch break as well as short mid-morning and mid-afternoon breaks.

2. Opening Statements

Opening statements shall generally be limited to 20 minutes per side unless, in my discretion, a short amount of additional time is required, particularly in cases with numerous parties.

3. Bench Conferences

Bench (or "side bar") conferences are discouraged and will be minimized. Matters that may otherwise justify a bench conference should ordinarily be raised either before or after the trial day, or during a break, and outside the jury's presence.

4. Closing Arguments

After all the evidence is presented, I will inform counsel how much time will be allotted for closing arguments. The length of the trial is not necessarily determinative of the amount of time counsel will be given to argue his or her case. Plaintiff (or the Government in a criminal case) may use no more than 1/3 of its allotted time in rebuttal. Counsel must inform the Courtroom Deputy Clerk how you will divide your argument and whether you want a warning before your time expires.

F. Exhibits

1. **I require counsel to meet and confer in person** prior to the Final Trial Preparation Conference or evidentiary hearing, to review the lists of exhibits they expect to offer into evidence. To the maximum extent possible, the parties are directed to stipulate to the authenticity and admissibility of their proposed exhibits. All such stipulations should be indicated on the Final List of Proposed Exhibits.

2. Please provide three copies of your Final List of Proposed Exhibits to my Courtroom Deputy Clerk on the morning of trial or prior to an evidentiary hearing. All exhibits must be marked with exhibit labels which identify the case number and exhibit number or letter. Counsel are encouraged to mark exhibits in a simple fashion to

make a cleaner record. For clarity of the record, each exhibit shall consist of one document and not a group of documents as one exhibit.

3. Original Exhibits (for witness use): All original exhibits shall be submitted to my Courtroom Deputy Clerk in three-ring binders at the start of the trial or hearing. Include all exhibits in these notebooks, including those as to which there is no stipulation from opposing counsel.

a. A label shall be placed on the spine of each binder that shows the volume number and which exhibits are contained within each binder.

b. Each original exhibit shall bear an extended tab showing the number or letter of the exhibit.

c. Each document including any attachments thereto shall be paginated.

4. Copies of Exhibits: In addition to the original exhibits, one copy of all exhibits shall be provided to the Court for all trials and evidentiary hearings. The copies shall be submitted in the same format as the original exhibits. The parties shall provide the Court Reporter with a disk containing copies of all proposed exhibits in a current .pdf format.

5. Exhibits for Jurors: Due to the technological equipment available in the courtroom, exhibit notebooks for jurors are no longer permitted.

6. Use of Exhibits at Trial or Evidentiary Hearing: The Courtroom Deputy Clerk will present the exhibit binder(s) to the witnesses. This will permit examining counsel to state simply: “Please look at Exhibit No. 1”. Counsel need not approach the witness as part of this examination process.

G. Depositions

The use of depositions is governed by Fed. R. Civ. P. 32 and the following procedures. All original deposition transcripts should be delivered to the Courtroom Deputy Clerk before the start of trial by the party in possession of same.

1. Videotaped Depositions: If videotaped deposition testimony is to be used, the Court and all parties must be given at least 10 days advance notice. The party offering the testimony must arrange any necessary technological equipment.

2. Deposition Testimony: The following requirements govern the use of depositions as testimony at trial:

a. Use with Live Witnesses: Unless otherwise permitted for good cause shown, if any party will be calling a witness to testify in person at trial, testimony by that witness via deposition on behalf of any party for substantive (as opposed to impeachment) purposes will **not** be allowed.

b. All Trials: Not later than 21 days prior to trial, counsel shall exchange with each other their designation of anticipated deposition and videotape deposition testimony. Plaintiff's designations shall be highlighted in yellow and Defendant's designations highlighted in blue. In sufficient time to allow for the filing of final objections with the Court as set forth in WJM Revised Practice Standard V.G.3 below, subsequent to the original exchange, counsel shall notify opposing counsel of any counter-designated deposition testimony, exchange objections to all designated testimony, and make a good-faith attempt to resolve such objections.

c. Jury Trials: The party offering non-videotape deposition testimony is required to provide a person to read the answers from the witness stand at trial.

d. Court Trials: At the Final Trial Preparation Conference I will determine how depositions will be used at trial. In general, depositions will not be read in open court in bench trials.

3. Objections to Use of a Deposition: Not later than 7 days prior to trial, the parties shall file with the Court their designated deposition testimony, highlighted as set forth above, along with the objections thereto highlighted in red, and with a notation as to the basis for the objection. I will endeavor to notify the parties of my rulings on these objections the morning of the first day of trial or of the evidentiary hearing.

H. Witness Lists

Prior to the commencement of trial or hearing, each party shall provide the Courtroom Deputy Clerk with 3 copies of its Final Witness List. Counsel at this time shall also provide one copy of the Final Witness List to the Court Reporter.

I. Glossary of Technical Terms

If testimonial evidence is expected to include more than the isolated use of technical, scientific, or otherwise unusual verbiage, at the beginning of the trial or hearing, counsel offering such evidence shall provide the Court, as well as the Court Reporter and all opposing counsel or parties, with a glossary of all such terms.

J. Trials to the Court

1. Unless ordered otherwise, not later than 14 days after a trial to the Court has concluded, each party shall file **Final** Proposed Findings of Fact, Conclusions of Law, and Proposed Orders and/or Judgment. The parties should state their proposed findings of fact as nearly as possible in the same order as their proof came in at trial. In their Final Proposed Findings of Fact the parties shall also separately set forth all facts as to which the parties have reached a stipulation.

2. In trials to the Court, a comprehensive résumé or curriculum vitae, marked and introduced as an exhibit, generally will suffice for the determination of an expert witness's qualification.

K. Selection of Juries in Civil Jury Trials

In accordance with Fed. R. Civ. P. 47(a) and (b), I will use the following jury selection process in civil cases:

1. The jury in a civil matter shall consist of 8 jurors with no designated alternates. The first 14 prospective jurors on the randomly-selected list generated by the Clerk's office list will be seated in the jury box.

2. I will conduct initial *voir dire* of the prospective jurors. Each ***side*** will then be permitted *voir dire* examination not to exceed the time limit I impose on the first morning of trial. *Voir dire* by counsel or a *pro se* party shall be limited to previously approved questions and appropriate follow-up questions.

3. After *voir dire* is complete, I will entertain challenges for cause. No challenges for cause or statements that the panel is acceptable may be made in front of the jury panel. I alone will conduct the v*oir dire* of any replacement juror(s).

4. After any for cause challenges have been resolved, each ***side*** will be allowed to make 3 peremptory strikes, which shall be made using a strike sheet in alternating fashion, beginning with Plaintiff.

L. *Batson* Challenges

In civil cases, a *Batson* challenge needs to be made at the conclusion of the exercise of peremptory strikes and immediately prior to the jury being seated and sworn. In criminal cases, a *Batson* challenge needs to be made before the juror(s) in question is/are excused from the courtroom.

M. Selection of Juries in Criminal Jury Trials

In criminal cases I will employ the jury selection process set forth in the Jury Selection Protocol (Criminal Jury Trials) found on the District Court's website. WJM Revised Practice Standards V.K.2, V.K.3 & V.L apply as well to criminal jury trials.

VI. JURY INSTRUCTIONS AND VERDICT FORMS

A. General Information

The parties shall submit proposed jury instructions and proposed verdict forms as set forth below not later than 14 days prior to the Final Trial Preparation Conference in civil cases, and not later than 7 days prior to the Final Trial Preparation Conference in criminal cases. Preliminary instructions need not be submitted because it is my practice to read my own set of preliminary instructions to the jury.

B. Stipulated Instructions

To the maximum extent possible, the parties shall agree on one stipulated set of proposed jury instructions; only true conflict or uncertainty in binding substantive law should prevent such agreement. The parties will also at that time submit a proposed stipulated "Statement of the Case" instruction **not more than one paragraph in length**. I generally will follow the form of preliminary instructions and instructions on substantive legal claims contained in the most current editions of the FEDERAL JURY PRACTICE AND INSTRUCTIONS, TENTH CIRCUIT PATTERN CRIMINAL INSTRUCTIONS and the COLORADO JURY INSTRUCTIONS (Civil & Criminal).

C. Disputed Instructions

To the extent that counsel are unable to agree on proposed instructions, each side may tender a set of disputed instructions. Plaintiff's disputed instructions should be clearly labeled as "Plaintiff's" (numbered 1, 2, 3, etc.) and Defendant's disputed instructions should be clearly labeled as "Defendant's" (lettered A, B, C, etc.).

D. Authority for Stipulated and Disputed Instructions

For each stipulated and disputed instruction, the party submitting the instruction shall indicate the source and authority for the instruction. If the source is a pattern instruction not included in the authorities listed in WJM Revised Practice Standard VI.B, a copy of the pattern instruction and the identity of the authority underlying the pattern instruction shall be provided to the Court.

E. Special Procedure for the Party Objecting to a Disputed Instruction

The party objecting to a disputed instruction shall file an objection which contains: (1) an explanation for its objection; (2) the authority relied on in support of its objection; (3) whether it has submitted an alternate instruction to the disputed instruction, along with the alternate instruction's number or letter; and (4) an explanation for why the alternate instruction should be given, and the authority relied on in support thereof. In civil cases, such objection shall be filed not later than 7 days prior to the Final Trial Preparation Conference. In criminal cases, such objection shall be filed not later than the court business day immediately prior to the Final Trial Preparation Conference.

F. Form of Submission

Parties shall file with the Court **and** submit via electronic mail to martinez_chambers@cod.uscourts.gov (preferably in WordPerfect, Arial, 12 point format) the following sets of jury instructions and proposed verdict form: (1) Stipulated Set with Authority; (2) Plaintiff's Disputed Set with Authority; (3) Defendant's Disputed Set with Authority; (4) Plaintiff's Proposed Verdict Form; (5) Defendant's Proposed Verdict Form (OR a Stipulated Proposed Verdict Form); and (6) Stipulated Statement of the Case.

G. Jury Instruction Conference

I will hold a charging conference before the case goes to the jury. At the charging conference, I will review the proposed final instructions and verdict forms with the parties. I will also at that time address unanticipated matters which have arisen during trial and which require changes to the jury instructions. The parties will have an opportunity to request changes to the proposed instructions and to state their objections to the final instructions on the record. Court staff will prepare a final, clean set of instructions and a verdict form for the jury, to which counsel may refer in the course of their closing arguments. I will instruct the jury before closing argument.

H. Juror Notes & Instructions

Unless I order otherwise, jurors will be permitted to take notes during trial, and will be permitted to consult such notes during their deliberations. In addition, each juror will be given her or his own copy of the written jury instructions for his or her use and consideration during deliberations. The jurors' notes will be destroyed after the jury is discharged.

VII. MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMARY INJUNCTION

A. To minimize delays, I strongly encourage counsel who seek a temporary restraining order to confer in advance with the opposing party's counsel (or, if not yet represented, with the party itself). Counsel need not wait at the Courthouse after filing the motion; the Court will contact counsel if a hearing is required.

B. As a general rule, *ex parte* motions for issuance of temporary restraining orders will be granted only upon strict compliance with Fed. R. Civ. P. 65(b) and (c). In appropriate circumstances, I may instead issue an order to show cause, directing the person sought to be enjoined to appear at a hearing to show cause why the temporary restraining order should not be issued; may deny the motion; or may set a hearing, requiring the movant to serve the order and all underlying papers on the respondent in accordance with Fed. R. Civ. P. 4 and within the time specified in the order. A continuance of the scheduled return date on the order to show cause will ordinarily not be granted absent a stipulation by the parties.

C. At my discretion, a hearing on a motion for temporary restraining order may take the form of an evidentiary hearing at which I apply a relaxed version of the Federal Rules of Evidence, or it may be a non-evidentiary hearing at which a proffer is made by counsel as to the evidence they would present at such an evidentiary hearing, or a combination of the two approaches. If I schedule an evidentiary hearing on a motion for temporary restraining order, the provisions of WJM Revised Practice Standards V.F.1-4 involving the use of exhibits shall apply. At all such hearings, counsel must be prepared to present appropriate legal argument.

D. A hearing on a motion for preliminary injunction hearing will be a formal evidentiary hearing. All parties must be prepared to present evidence in accordance with the Federal Rules of Evidence. The provisions of WJM Revised Practice Standards V.F.1-4, V.G & V.H, involving the use of exhibits, depositions, and witness lists, shall apply to all hearings scheduled on motions for preliminary injunction.

E. If appropriate, I may refer a motion for preliminary injunction to the assigned Magistrate Judge for hearing and recommended decision or, with the consent of the parties pursuant to 28 U.S.C. §636(c), for hearing and disposition by order.

VIII. STANDING ORDER FOR CERTAIN EMPLOYMENT CASES

This Court is participating in a Pilot Program for INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION ("Initial Discovery Protocols"), initiated by the Advisory Committee on Federal Rules of Civil Procedure (see "Discovery Protocol for Employment Cases," under "Educational Programs and Materials" at www.fjc.gov).

A. These Initial Discovery Protocols will apply in all employment cases filed with this Court on or after the effective date of these Revised Practice Standards, and which challenge one or more employment actions alleged to be adverse, **except**:

1. Class Actions;
2. Cases in which the allegations involve **only** the following:
   a. Discrimination in hiring;
   b. Harassment /hostile work environment;
   c. Violations of wage and hour laws under the Fair Labor Standards Act;
   d. Failure to provide reasonable accommodations under the Americans with Disabilities Act;
   e. Violations of the Family Medical Leave Act; or
   f. Violations of the Employee Retirement Income Security Act.

B. Parties and counsel in the Pilot Program shall comply with the Initial Discovery Protocols, located on the District Court's website. Within 30 days following the Defendant's submission of a responsive pleading or motion, the parties shall provide to one another the documents and information described in the Initial Discovery Protocols for the relevant time period. **This obligation supersedes the parties' obligations to provide initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1).** The parties shall use the documents and information exchanged in accordance with the Initial Discovery Protocols to prepare the Fed. R. Civ. P. 26(f) discovery plan.

C. The parties' responses to the Initial Discovery Protocols shall comply with the Fed. R. Civ. P. obligations to certify and supplement discovery responses, as well as the form of production standards for documents and electronically stored information. As set forth in the Initial Discovery Protocols, this Initial Discovery is not subject to objections, except upon the grounds set forth in Fed. R. Civ. P. 26(b)(2)(B).

D. If any party believes that there is good cause why a particular case should be exempted from the Initial Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

IX. SPECIAL INSTRUCTIONS FOR CRIMINAL MATTERS

A. General Information

Unless specifically stated otherwise and where applicable, all of the Revised Practice Standards set forth in this document apply with full force and effect to all criminal matters.

B. Deadlines

The method of computing time set forth in Fed. R. Civ. P. 6 applies to all pretrial motions filed in criminal matters.

C. Trial Settings

Criminal cases will be set for trial immediately following the Discovery Conference. See D.C.COLO.LCrR 17.1.1. Unless otherwise instructed by the Magistrate Judge, counsel and *pro se* parties shall report to Chambers (Room A841) immediately following the Discovery Conference to set the case for a Final Trial Preparation Conference and Trial.

D. Order to Confer Regarding Discovery Motions

I will not consider any motion related to the disclosure or production of discovery that is addressed by the Discovery Memorandum and Order and/or Fed. R. Crim. P. 16, unless prior to filing the motion counsel for the moving party has conferred or made reasonable, good-faith efforts to confer with opposing counsel in an effort to resolve the disputed matter. If the parties are unable to resolve the dispute, the moving party shall state in the motion the specific efforts which were taken to comply with this Order to Confer. Counsel for the moving party shall submit a proposed order with all such motions, opposed and unopposed. Opposed disclosure or discovery motions which do not demonstrate meaningful compliance with this Order to Confer will be stricken.

E. Expert Disclosures

Expert witness disclosures pursuant to Fed. R. Crim. P. 16 shall be made not later than 7 days before the pretrial motion deadline, and any challenges to such experts shall be made by said deadline. Disclosures regarding rebuttal expert witnesses shall be made not later than 7 days after the pretrial motion deadline, and any challenges to such rebuttal experts shall be made not later than 14 days after said deadline.

F. Plea Agreements

Other than in exceptional circumstances in which the interests of justice require otherwise, I do not accept plea agreements prepared pursuant to Fed. R. Crim. P. 11(c)(1)(c).

G. Notices of Disposition

Any Notice of Disposition filed pursuant to D.C.COLO.LCrR 11.1A shall be treated as a pretrial motion within the meaning of 18 U.S.C. § 3161(h)(1)(F) for the

purpose of computing time under the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174. In accordance with the same local rule, absent an Order permitting or directing otherwise, a Notice of Disposition shall be filed no later than 14 days before the trial date.

H. Joint Motions

In all criminal cases involving two or more defendants, counsel for defendants are strongly encouraged, to the fullest extent possible given the similarity of the facts and legal positions between or among each other, to file joint, as opposed to individual, motions on all issues and matters of common ground or interest.

I. Hearings

1. Change of Plea Hearing

a. Upon the filing of a Notice of Disposition, my staff will set a change of plea hearing on the Court's calendar.

b. Pursuant to D.C.COLO.LCrR 11.1F, counsel must always bring the signed original and one copy of the "Statement by Defendant in Advance of Change of Plea" and the "Plea Agreement and Statement of Facts" to the courtroom at the time of the hearing. In addition, a copy of the plea documents must be e-mailed to Chambers no less than 7 days before the change of plea hearing. Failure to timely provide these documents to Chambers may cause the hearing to be vacated. All counsel should read the Court's "Order Setting Change of Plea Hearing" carefully.

c. The AUSA assigned to a criminal matter must be present at the change of plea hearing. If that AUSA cannot attend in person, s/he must be present by phone and a fully-briefed substitute AUSA must be physically present in the courtroom.

2. Sentencing Hearing & Related Filings

a. At the change of plea hearing, my Courtroom Deputy Clerk will set a sentencing hearing on the Court's calendar. The sentencing hearing will generally be set approximately 12 weeks after the change of plea hearing.

b. All sentencing-related motions must be filed no later than 14 days prior to the date of the sentencing hearing. Responses to such motions must be filed at least 7 days prior to the date of the sentencing hearing. In addition, sentencing-related filings are not to be filed under seal unless counsel is able to provide a compelling reason for sealing the filing. In my view, the mere

inclusion of information of a personal nature in a filing is not a compelling reason to seal such a filing.

c. Sentencing-related filings not in compliance with this Practice Standard may result in a continuance of the sentencing hearing. The deadlines for filing such papers will be extended only upon the showing of good cause.

d. The above deadlines do not in any way alter or affect deadlines for the filing of objections or other pleadings established pursuant to Fed. R. Crim. P. 32.

3. Final Hearing on Petition on Supervised Release

a. The Probation Officer shall file the Supervised Release Violation Report with the Court not later than 14 days prior to the Final Hearing on Supervised Release.

b. All motions, statements or memoranda regarding any matter to be taken up at the Final Hearing must be filed not later than 10 days prior to the Hearing. Responses to such papers must be filed not later than 5 days prior to the Final Hearing.

c. All filings not in compliance with this Practice Standard may result in a continuance of the Final Hearing. The deadlines for filing such papers will be extended only upon the showing of good cause.