IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

AMERICAN TRADITION INSTITUTE,
AMERICAN TRADITION PARTNERSHIP, and
RON LUECK,

Plaintiffs,

v.

THE STATE OF COLORADO;
JOHN HICKENLOOPER, individually and in his official capacity as Governor of Colorado;
BARBARA J. KELLEY, individually and in her official capacity as the Executive Director of the Colorado Department of Regulatory Agencies;
JOSHUA EPEL, individually and in his official capacity as Chairman of the Colorado Public Utilities Commission;
JAMES TARPEY, individually and in his official capacity as a Commissioner of the Colorado Public Utilities Commission;
MATT BAKER, individually and in his official capacity as a Commissioner of the Colorado Public Utilities Commission;
DOUG DEAN, individually and in his official capacity as Director of the Colorado Public Utilities Commission,

Defendants.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants, by and through the Office of the Colorado Attorney General, submit the following Reply Brief in support of their Motion to Dismiss.

Plaintiffs address only portions of Defendants' Motion to Dismiss. Defendants will not reiterate their previously-made arguments here, but will instead address in this reply discrete portions of Plaintiffs' Response.

ARGUMENT

I. Plaintiffs Fail to Establish Article III Standing

Plaintiff Lueck relies solely on the argument that he is injured financially by the RES to support his claim that he meets Article III standing. *Response*, p.3, fn 1. However, Lueck must show "an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Federal courts do not adjudicate "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and more appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 474-75.

Here, the RES affects every Xcel energy consumer in Colorado. Lueck shares the exact same treatment by the RES as each of them. Case law cited by Plaintiffs does not alter that calculus, as Plaintiff is unable to show any injury distinct to himself as opposed to one shared by every Xcel customer in the State of Colorado.

II. Plaintiffs Lack Prudential Standing to Bring Claims Under the Dormant Commerce Clause.

Prudential standing "serve[s] to limit the role of the courts in resolving public disputes" by requiring that a claim is raised by the proper party. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Plaintiffs' claims fail because their alleged injuries do not fall within the

zone of interests protected by the dormant Commerce Clause, and because Plaintiffs cannot assert the rights and interests of third parties who are not before the Court.[1]

A. Plaintiffs' Claimed Injuries Do Not Fall Within the Zone of Interests Protected By the Dormant Commerce Clause.

The dormant Commerce Clause prevents states from engaging in economic protectionism by erecting barriers to interstate commerce. *See, e.g., Dennis v. Higgins*, 798 U.S. 439, 448–49 (1991). Consequently, the dormant Commerce Clause's zones of interest do not include the concerns over passed-on costs, or alleged environmental impacts, experienced by consumers like Plaintiffs. *See, e.g., City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 846–48 (9th Cir. 2009); Defs.' Mot. To Dismiss at 15–18.

Plaintiffs are wrong in asserting that purchasing electricity from utilities like Xcel Energy makes them engaged in interstate commerce for purposes of prudential standing. Plaintiffs' own pleadings illustrate this point: to support their position, they cite to paragraphs 53–59 of their amended complaint. Plfs.' Resp. at 10. Those paragraphs, however, describe Xcel Energy's involvement with the interstate electric grid, not the activities of Mr. Lueck or other ATI members. In describing their own interests, Plaintiffs can only allege they purchase electricity from utilities such as Xcel and may pay higher costs. See Am. Compl. ¶¶ 3-5 (Dkt # 12); Decl. of Rod Lueck (Dkt # 12.1).

Courts have repeatedly held that consumers who merely pay passed-on costs when they purchase goods or services from an entity engaged in interstate commerce do not fall within the zone of interests protected by the dormant Commerce Clause. For example,

[1] Notably, Plaintiffs make no effort to address the substantial body of case law limiting prudential standing under the dormant Commerce Clause. *See, e.g.*, Applicants for Intervention's Proposed Mot. to Dismiss at 4–11 (Dkt # 37); Plfs.' Resp. at 9-11. This case law recognizes that consumers do not have prudential standing to raise dormant Commerce Clause claims based only on passed-through costs or similar indirect impacts. *Id.*

customers of waste hauling services fall outside the Commerce Clause's zone of interests even where the regulated waste haulers transport that trash across state lines. *See, e.g., Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1380–82 (8th Cir. 1997); *On the Green Apartments, LLC v. City of Tacoma*, 241 F.3d 1235, 1239–40 (9th Cir. 2001). Purchasing electricity that a utility may have acquired from the interstate power grid does not mean that Plaintiffs can sue under the dormant Commerce Clause, any more than a trash producer can by virtue of purchasing services from a waste management company. Accordingly, Plaintiffs' claims that their interests "fall squarely within the zone of interest of the dormant Commerce Clause" is wrong. *See* Plfs.' Resp. at 11.

Second, Plaintiffs suggest that they have prudential standing because "energy-related laws" are often subject to dormant Commerce Clause challenges. *Id.* at 11. The point of the prudential standing doctrine, however, is that such challenges may be justiciable, but only if the proper party brings suit. Plaintiffs here are not the proper parties because they do not fall within the zone of interests protected by the dormant Commerce Clause. The cases cited by Plaintiffs were brought by entities who bought or sold goods directly from other states, were directly regulated by the law they challenged, or both. *See, e.g., Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 285-87 (1997) (plaintiff purchased gas directly from suppliers in other states).[2] None of the cases cited by Plaintiffs allowed consumers to bring suit based solely on indirect consumer costs or environmental impacts, as Plaintiffs are attempting to do here.[3]

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[2] *See also, Oehrleins*, 115 F.3d at 1380-81 (distinguishing *Tracy* on that basis). The holding in *Tracy*, moreover, addresses only Article III standing—it does not mention prudential standing. *Tracy*, 519 U.S. at 286–87.

[3] *See* Plfs.' Resp. at 11 n.7; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 333 (1982) (plaintiff was electric utility directly subject to an order prohibiting it from selling hydropower out of state); *Wyoming v. Oklahoma*, 502 U.S. 437, 448–49 (1992) (plaintiff was a state facing direct injury from discriminatory law sufficient for Article III standing); *New Energy*

B. Plaintiffs May Not Assert the Rights of Third Parties Who Are Not Before the Court.

In addition, prudential standing requires that a plaintiff assert its own rights, rather than "the legal rights or interests of third parties." *Kane Cnty.*, 632 F.3d at 1168, 1171–72 (quoting *Warth*, 422 U.S. at 499, and *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976)). The Dormant Commerce Clause protects the rights of power generators and other entities directly regulated by the RES that are engaged in interstate commerce – not end-line consumers such as Plaintiffs. Defs.' Mot. to Dismiss at 15–17; *see supra*, subsection A (discussing zone of interests under the dormant Commerce Clause).

Plaintiffs unsuccessfully attempt to avoid this barrier by asserting that they are "directly subject" to the RES because Mr. Lueck's monthly electricity bill contains a line item known as the Renewable Energy Standard Adjustment (RESA) identifying the part of his bill associated with the RES. Plfs.' Resp. at 7. The RESA line on his bill does not make Mr. Lueck regulated by the RES, or give him prudential standing, because all it does is identify the amount of passed-on costs that consumers pay as a result of the RES. "[C]onsumers paying the end-line cost of an economic regulation" cannot claim any personal right under the dormant Commerce Clause. *Oehrleins*, 115 F.3d at 1381; *Farmers State Bank v. Gronstal*, 598 F. Supp. 2d 960, 965-67 (S.D. Iowa *2009).* The RES imposes its mandate to identify the RESA on the utilities issuing the bills—not the consumers who receive them. Colo. Rev. Stat. § 40-2-124(1)(g). For consumers like Lueck, the RESA simply identifies the amount of their passed-on costs.

Co. of Ind. v. Limbach, 486 U.S. 269, 272 (1988) (plaintiff was an ethanol manufacturer whose product was subject to discriminatory tax); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 593 (7th Cir. 1995) (plaintiff was trade association representing coal companies and railroads that sold and transported coal in different states).

Here, Plaintiffs are not directly subject to regulation under the RES, and their claims fall "squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Oehrleins*, 115 F.3d at 1381 (quoting *Warth*, 422 U.S. at 509).[4]

III. The State of Colorado is Immune from Suit.

Plaintiffs concede that the State of Colorado is immune from the claims asserted in their Amended Complaint. (Response, doc. #39 at p. 15). The State should be dismissed from this action.

IV. Plaintiffs' Official Capacity Claims Against Governor Hickenlooper and Barbara Kelley are Barred by the Eleventh Amendment.

Plaintiffs only argument connecting Governor Hickenlooper to the RES is their allegation that the Governor has a general duty to enforce the laws of the State of Colorado. Plaintiffs' only argument connecting Barbara Kelley to the RES is their contention that the PUC reports to Kelley. However, as discussed in detail in Defendants' Motion, under Colorado's constitution and applicable State law, the PUC is the sole body capable of enforcing the RES, not the Governor or Kelley. Both Kelley and the Governor must be dismissed.

Moreover, given the presence of all PUC commissioners as defendants in this case, the Governor's role as the enforcer of Colorado laws, and Kelley's role as Director of the Colorado Department of Regulatory Agencies, are slender connections insufficient to fall within the exception to immunity set forth in *Ex Parte Young*.

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[4] Plaintiffs appear to suggest that Congress "granted [them] a right of action" to assert the rights of others under the Commerce Clause. Plfs.' Resp. at 8 (quoting *Warth*, 422 U.S. at 501). Congress has not provided such a right of action, and Plaintiffs point to no authorities in support of their assertion.

Ex Parte Young arose from a challenge to a law requiring railroads to adhere to rates established by the Minnesota legislature for the transportation of certain commodities. 209 U.S. 123, 129 (1907). Railroad company stockholders sought to enjoin Minnesota's attorney general (Young) from enforcing the law. A court granted the stockholders a temporary injunction. In spite of the injunction, Young sought and obtained an order from another court requiring railroad companies to comply with the law, and the first court held Young in contempt. The matter came before the United States Supreme Court on Young's petition for writ of habeus corpus to secure his release from custody.

The Court rejected Young's claim that the stockholder suit against him was barred on Eleventh Amendment grounds. The fact that Young had, in fact, sought enforcement of the law was central to the Court's analysis. ("If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution . . . he is in that case stripped of his official or representative character . . . and is subjected in his person to the consequences of his individual conduct.") *Id.* at 159 – 60.

Plaintiffs here misapprehend the meaning of the *Young* case. The case does not stand for the proposition that the Eleventh Amendment allows suits against all state officials with any possible connection to the enforcement of an allegedly unconstitutional state statute. The fact that a state official has "some" connection with the enforcement of a statute "is important" and "material," but it is not determinative. *Id.* at 157. As the Court observed, making a state official with a tenuous connection to the enforcement of an unconstitutional law a defendant in a lawsuit "is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* In the *Young* case, the Court rejected the theory Plaintiffs use in this case: that the constitutionality of every state statute can be

tested by suing the state's governor (or other state officials) because the they are charged generally with the execution of state laws. *Id.* at 157. The Court noted that such lawsuits "cannot be applied to the states of the Union consistently with the fundamental principle that [the states] cannot, without their assent, be brought into any court at the suit of private persons." *Id.*

Colorado's PUC is a constitutional entity charged with the duty of regulating public utilities, service and rates. Colo. Const. Art. XXV. The PUC "implements the RES," a point Plaintiffs acknowledge repeatedly in their Amended Complaint. (Amended Complaint, doc. #12, ¶ ¶ 7, 8, 9, 10, 11, 12). PUC commissioners are official-capacity defendants in this case precisely because "the PUC implements the RES." *Id.* at ¶ ¶ 9, 10, 11.

In contrast, Plaintiffs have not claimed that Kelley has any enforcement authority with respect to the RES. Kelley is sued because the PUC reports to her. (doc. #12, ¶ 8). Absent even an allegation that Kelley has enforcement authority, she cannot be sued for injunctive relief.

Governor Hickenlooper is sued because Plaintiffs believe he has a duty to enforce all state laws. Doc. #12, ¶ 8. However, Plaintiffs point to no actions taken by Governor Hickenlooper to enforce the RES. Plaintiffs' assertions are insufficient to come within any exception to Eleventh Amendment immunity. *Ex Parte Young*, 209 U.S. at 157; *Bishop v. Oklahoma*, 2009 WL 1566802 *3 (10th Cir. 2009) (governor's general duty to enforce state laws deemed insufficient to subject governor to a suit challenging the law's constitutionality); *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 – 331 (4th Cir. 2001) (governor's general duty to enforce state law deemed insufficient to subject governor to suit); *Okpalobi v. Foster*, 244 F.3d 405, 422-425 (5th Cir. 2001) (suit against

governor and attorney general challenging the constitutionality of a state statute is barred by *Ex Parte Young* because these officials lack sufficient enforcement connection); *1st Westco Corp. v. School District of Philadelphia*, 6 F.3d 108, 112 – 113 (3rd Cir. 1993) (same). Finding otherwise would allow the exception to become the rule and abrogate state immunity.

V. Barbara Kelley and Governor Hickenlooper, in their individual capacities, must be dismissed for lack of personal participation.

Plaintiffs allege, with no explanation, that Kelley and Governor Hickenlooper violated their constitutional rights. (doc. #39, at p. 15). Mere allegations of unconstitutional action cannot support a § 1983 claim.

In their Amended Complaint, Plaintiffs claim that Kelley is individually liable under § 1983 because the PUC reports to Kelley. *See* doc. #12, ¶ 8. They claim that Governor Hickenlooper is individually liable because "agencies," including the Department of Regulatory Agencies, report to him. (doc. #12, p. 3). Even if true, these allegation are insufficient to state a § 1983 claim, as a defendant may not be held liable in a § 1983 action merely because of his or her supervisory position. *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996). There must be an affirmative link between the constitutional deprivation and the supervisor's personal participation, control, or direction. *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008). Plaintiffs have failed to show any affirmative link between Kelley's conduct, or Governor Hickenlooper's conduct, and the constitutional violations they allege.

VI. James Epel, in his individual capacity, must be dismissed for lack of personal participation.

Plaintiffs have conceded that their individual capacity claims against James Epel should be dismissed. (doc. #39 at p. 15).

CONCLUSION

For the reasons set forth in Defendants' Motion to Dismiss and herein, State Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on September 12, 2011 I electronically filed the foregoing Reply in Support of Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification of the filing to the following:

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