IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

AMERICAN TRADITION INSTITUTE,
AMERICAN TRADITION PARTNERSHIP, and
ROD 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 Executive Director of the Colorado Department of Regulatory Agencies;
JOSHUA EPEL, individually, and in his official capacity as a 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; and
DOUG DEAN, individually, and in his official capacity as Director of the Colorado Public Utilities Commission,

Defendants,

ENVIRONMENT COLORADO,
COLORADO ENVIRONMENTAL COALITION,
SIERRA CLUB, and
THE WILDERNESS SOCIETY,

Defendant-Intervenors.

PLAINTIFFS' RESPONSE TO DEFENDANT-INTERVENORS' MOTION TO DISMISS

Come now Plaintiffs, by and through their undersigned counsel, and hereby submit their Response to the Defendant-Intervenors' Motion to Dismiss (Int.-Defs.' Mot. to Dismiss, ECF

No. 37).

INTRODUCTION

The Plaintiffs, American Tradition Institute, American Tradition Partnership, and Mr. Rod Lueck, ask the Court to declare that Colorado's Renewable Energy Standard ("RES") Act (codified at Colo. Rev. Stat. § 40-2-124) violates Article I, Section 8 of the United States Constitution. The RES was passed in 2004 after successful political advocacy on the part of Defendant-Intervenors, the Sierra Club, The Wilderness Society, Environment Colorado and the Colorado Environmental Coalition (collectively, the "Political Organizations").[1] The Political Organizations now seek to dismiss the Plaintiffs' challenge to the RES in order to preserve their political victory. In doing so, the Political Organizations suggest the Court evade the substance of the Plaintiffs' challenge by invoking the judicially-created doctrine of prudential standing. However, as explained below, the Political Organizations' strategy must meet defeat.

The Plaintiffs' Response to Defendants' Motion to Dismiss contains argument with respect to prudential standing (Pls.' Response to Defs.' Mot. to Dismiss 6-11, ECF No. 39). To the extent that the argument in said Response is relevant, it is incorporated as though fully set forth herein.

THE PARTIES

The Plaintiffs incorporate Paragraphs 3-12 of their Amended Complaint and Paragraphs 3-4 of the Stipulated Motion to Substitute Party as though fully set forth herein (Pls.' Am. Compl. ¶¶ 3-12; Stipulated Mot. to Substitute Party ¶¶ 3-4, ECF No. 15).

[1] The Defendant-Intervenors sought to intervene based on their political activities in support of the RES statute. Because Plaintiffs ATI and ATP are also environmental and conservation organizations, we wish to minimize confusion and thus identify these groups as the "Political Organizations."

LEGAL STANDARD

The Political Organizations move to dismiss the Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6).[2] Under this rule, the court "must accept as true all material allegation of the complaint and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). A court's role is "not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003). All well-pleaded facts in the complaint are assumed to be true and are viewed in the light most favorable to the plaintiff. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (quoting *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)).

ARGUMENT

I. Prudential Standing Is Within the Discretion of the Court

The Political Organizations argue in their Motion to Dismiss that the Plaintiffs' case should be dismissed pursuant to the Court's exercise of prudential standing. Unlike standing under Article III of the United States Constitution, prudential standing is a matter of judicial discretion, used as a means of self-governance. *Warth*, 422 U.S. 499 (1975) (prudential standing essentially concerns matters of judicial self-governance). Prudential standing adheres to no bright-line rules. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 (1987). As the Supreme Court explained, "[w]e doubt, however, that it is possible to formulate a single [prudential

[2] Although Defendants, the State of Colorado et al., argued lack of jurisdiction based Article III of the United States Constitution (ECD No. 28, p. 6 *et seq.*), the Political Organizations do not challenge Plaintiff's Article III standing (ECD No. 37, p. 4) but rather limit their argument to Prudential Standing.

standing] inquiry that governs all statutory and constitutional claims. *Id.*

In light of the absence of any clearly delineated standards, the Tenth Circuit has recognized the need to venture cautiously and with attention to the case-specific nature of the claims when it conducts its prudential standing analysis. *Schaffer v. Clinton*, 240 F.3d 878, 882 (10th Cir. 2001) (agreeing with Justice Douglas that "generalizations about standing to sue are largely worthless as such.") (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)). The Tenth Circuit admitted that "the standing doctrine is a confusing one," and referenced *Wright's* Federal Practice and Procedure stating "[h]owever reassuring it may seem to describe the elements of standing in … brief phrases, the doctrines have changed continually in recent years. Even at any single moment, there are almost unlimited opportunities to disagree in applying the currently fashionable phrases." *Id.* at fn. 5 (*citing to Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982); 13 Charles Alan Wright et al., Federal Practice and Procedure § 3531, at 347 (2d ed. 1984)).

In the context of a constitutional challenge,[3] prudential standing stems from the requirement to "insure that concrete adverseness which sharpens presentation of issues on which the courts depend for illumination of difficult constitutional questions." *Chicano Police Officer's*

[3] The Political Organizations attempt to frame the standing issue as involving a zone of interest analysis of the kind applied to municipal and state regulatory mandates. This is in error. The instant case is a Constitutional dormant Commerce Clause challenge to the State's Statute. It is not subject to a regulatory zone of interest test of standing because such a test is applied to claims under the federal Administrative Procedures Act (APA), is "most usefully understood as a gloss" on the scope of standing under the APA and has only once been considered by the Supreme Court when considering a constitutional challenge, and that was an outlier where prudential standing was of no consequence. *Clarke v. Securities Indus. Ass'n*, 479 U.S. at 400 (1987). A regulatory zone of interest test focuses on *Congressional* intent. *Hernandez-Avalos v. INS*, 50 F.3d 842, 847 (10th Cir. Colo. 1995). In the instant case, the Court will ask whether the Founders intended to protect Plaintiffs interests when formulating the Constitution and, in particular, the Commerce Clause. This is a Constitutional zone of interest question.

Asso. v. Stover, 526 F.2d 431, 436-437 (10th Cir. 1975) (reversed on other grounds). Thus, in its constitutional prudential standing inquiry, a Court focuses on the constitutional rights in question and adverseness of the plaintiff's claims to these same constitutional rights.

Having established these precepts, the Plaintiffs now turn to the Political Organizations' specific arguments.

II. The Plaintiffs are Not Barred by Prudential Standing

The Political Organizations' arguments center on two propositions within the prudential standing doctrine: (1) that the plaintiff must assert his, her, or its own rights rather than asserting the legal rights of others; and (2) that the plaintiff's claims must fall within the "zone of interest" to be protected by the constitutional guarantee in question (*Id*.).

These propositions were fully addressed in the Plaintiffs' Response to the Defendants' Motion to Dismiss (Pls.' Response to Defs.' Mot. to Dismiss 6-11). The Plaintiffs will not reiterate such arguments and refer the Court to Section C of the Plaintiffs' Response to Defendants' Motion to Dismiss (Id.). Instead, the Plaintiffs will focus on the arguments made by the Intervenor-Defendants in the following sections.

III. The Political Organizations' Arguments Fail to Negate Plaintiffs' Standing under the Doctrine of Prudential Standing

A. ATI and ATP Utility Members are Protected by the Commerce Clause

The Political Organizations argue that the Plaintiffs are not electric generating and/or transmission utilities who engage in interstate commerce and thus are third-parties barred by prudential standing (Int.-Defs.'Motion to Dismiss 10). However, they are in error. Both ATI and ATP include members that are electric generators and transmission utilities operating within

Colorado and neighboring states engaged in interstate commerce ("Electric Utility Members") (*see*, Exhibit 1, Tanton Decl, ¶ 4). Indeed, the Political Organizations admit such entities are proper parties and would not be barred by prudential standing (Int.-Defs.'Motion to Dismiss 10).

Notably, the ATP and ATI utility members share some of the same injuries suffered by Plaintiff Lueck. Specifically, they suffer due to the unreliability of wind power, the predominant form of mandated renewable energy (*See*, Tanton Decl. ECF No. 12-2, ¶ 36 & 49). The need to cycle their generating facilities to match the rapid variation in wind facility output prematurely ages these ATI and ATP members' facilities (Id.). Further, they suffer economically because they are forced by the RES to operate less economically efficiently (Tanton Decl. Ex. 1¶ 5). Thus, by virtue of the existence of such members and the application of the organizational standing doctrine (*see* Pls.' Response to Defs.' Mot. to Dismiss at 6), it is clear that ATP and ATI do not assert a third-party's rights.

B. ATI and ATP Assert the Rights of their Anonymous Members

The anonymity of the electric utility members who choose not to be identified is constitutionally protected. *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (finding that in resisting a court order that it divulge the names of its members, a Plaintiff could assert the First and Fourteenth Amendments rights of those members to remain anonymous); *see also Singleton v. Wulff*, 428 U.S. 106, 116 (1976).

The Supreme Court has recognized that there can be genuine obstacles to a party asserting their rights, and in such situations, "the party who is in court becomes by default the right's best available proponent." *NAACP*, 357 U.S. at 459. In the instant case, genuine obstacles exist for the electric utility members because these members must appear before named

Defendants Joshua Epel, James Tarpey, Matt Baker, and Doug Dean in a number of business-related capacities and their economic existence rests on the decisions of those Defendants. Ex. 1 Tanton Decl. ¶6. In addition, these utility members must work cooperatively with other utilities to ensure reliability in the interstate electrical grid and by appearing in this matter they place the quality of that cooperation at risk. One member has already been accused of underwriting the cost of this litigation, which is not true, and their senior executives have been harmed by the mere fact of those accusations (Tanton Ex. 1 Decl. ¶ 7).

ATI's and ATP's are the best available proponents to assert the Electric Utility Members' rights because these organizations have extensive expertise in environmental matters related to the RES, have the resources necessary to gain information not already possessed, and are willing and able to undertake the steps necessary to protect their member's rights under the dormant Commerce Clause.

C. ATI Coal-producing Members are Protected by the Dormant Commerce Clause

In light of the Political Organizations' Motion to Dismiss, one member has agreed to forego its anonymity – the Alpha Natural Resources family of coal-producing companies ("Alpha") (Ex. 1 Tanton Decl. ¶ 9). Alpha sells coal in the western half of this nation including to coal-fired electric generating units in Colorado and in nearby states connected to the electrical grid that services Colorado (*Id*. at ¶ 9). The mandate for non-coal energy necessarily limits the interstate market for coal in the West, including all coal-fired facilities on the Western Interconnect and the Western Area Power Administration, the sub-system that includes Colorado. The RES directly injures Alpha (*Id*. at ¶ 10). Thus, Alpha suffers a concrete and particularized, actual injury which is fairly traceable to the Colorado RES and which a favorable

court decision will redress.

Like ATI's and ATP's electric utility members, Alpha asserts its own right to an unencumbered interstate market (in coal), suffers a concrete rather than abstract injury and is clearly within the zone of interest of the dormant Commerce Clause. ATI and ATP represent the Alpha families' interests through its organizational standing.

D. Consumers Are Also Protected by the dormant Commerce Clause

In addition to ATI's and ATP's utility members, individual members such as Plaintiff Lueck are also protected by the dormant Commerce Clause. The starting point for a Constitutional prudential standing analysis of consumers is the text of the constitutional provision at issue. *Air Courier Conference of America v. Postal Workers*, 498 U.S. 517, 523-524, (1991). Since, however, the dormant Commerce Clause is an inference rather than a text, the starting point here must be the history and purposes of the inference. *Wyoming v. Oklahoma*, 502 U.S. 437, 470 (U.S. 1992); *and see, Wilderness Soc'y v. Kane County*, 632 F.3d at 1168-1169 (" 'the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.' In some situations, an implied right of action may exist.") (citations omitted).

"Negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market, under which, in Justice Jackson's words, 'every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation [and] <u>every consumer</u> may look to the free competition from every producing area of the Nation to protect him from exploitation.'" *Wyoming v.*

Oklahoma, 502 U.S. 437, 469-470 (emphasis added) (*citing to H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949)). Thus, the dormant Commerce Clause is specifically calculated to protect consumers from exploitation borne of limitations on interstate commerce. *See GMC v. Tracy*, 519 U.S. 278, 286-287 (U.S. 1997) (finding consumers who are not one of the sellers suffering discrimination under the challenged statute, but who suffer injury from a statute forbidden under the Commerce Clause have standing); *Action Wholesale Liquors v. Okla. Alcoholic Bev. Laws Enforcement Comm'n*, 436 F. Supp. 2d 1197, 1201 (W.D. Okla. 2006) (holding that under the Commerce Clause, consumers have a "legally protected interest.").

E. Consumer Plaintiffs Assert Their Own Rights.

The Political Organizations argue that Plaintiffs are barred by prudential standing because they represent third-parties who purchase electricity, citing *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474-75 (1982), which establishes the Constitutional bar to prudential standing, to wit, the plaintiff must assert his, her, or its own rights rather than asserting the legal rights of others. As addressed in Plaintiffs' Response to the Defendants' Motion to Dismiss, Plaintiff Lueck and members of ATI and ATP are electricity consumers directly injured by violation of the Commerce Clause, evidenced by the monthly RESA paid by Plaintiff Lueck to fund the RES (Pls.' Am. Compl. ¶¶ 129-130 ECF No. 12 and Lueck Declaration ECF No. 12-1). They are no different from consumers granted a right to a Commerce Clause free market in the Third, Sixth and Seventh Circuits, *see*, *Freeman v. Corzine*, 629 F.3d 146, 154-155 (3d Cir. N.J. 2010); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000); accord *Baude v. Heath*, No. 05-cv-735, 2007 U.S. Dist. LEXIS 64444, 2007 WL

2479587, at *7-*8 (S.D. Ind. Aug. 29, 2007), rev'd in part on other grounds, 538 F.3d 608 (7th Cir. 2008); *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 607-08 (W.D. Ky. 2006), aff'd sub nom. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008). Plaintiffs in this case assert their own rights under the Constitution. For this reason, the Political Organizations' Motion to Dismiss should be denied.

F. Environmental Protections and Electrical Reliability are Commerce Clause and dormant Commerce Clause Rights

The Political Organizations make the incredible claim that preventing harm to human health and the environment resulting from air pollution is not one of the purposes of the Commerce Clause, and thus injury to Plaintiffs due to the increased pollution resulting from Colorado's RES does not produce a Commerce Clause-based right to protection from air pollution. The Political Organizations, like ATI and ATP, have among their purposes to promote environmental protection, including through compliance with the Clean Air Act. Plaintiffs will not even begin to list the cases where, for example, the Sierra Club has sought to enforce the Clean Air Act, based on its legitimacy as a federal power authorized by the Commerce Clause.[4] Where a state statute harms Plaintiffs in or affected by an interstate market and those Plaintiffs are otherwise protected under the Commerce Clause, in this case the RES increasing pollution controlled under the Clean Air Act, those Plaintiffs have prudential standing under both the Commerce Clause (for regulatory issues) and the dormant Commerce Clause (for harm from the state statute).

[4] There are 1,534 such cases, based on a targeted LEXIS search of federal cases.

For example, *Allied Local & Reg'l Mfrs. Caucus v. United States EPA*, 215 F.3d 61, 83 (D.C. Cir. 2000) holds that nothing contained in the Court's recent Commerce Clause jurisprudence casts doubt on the validity of the Commerce Clause granting power to protect citizens from air pollution. Just as the dormant Commerce Clause grants a Constitutional right to "every consumer [who] may look to the free competition from every producing area of the Nation to protect him[, her or it] from exploitation," the Commerce Clause grants the consumer the right to protection from exploitation due to air pollution caused by a state statute. *See, Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979), ("[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulations." *See also, Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (quoting and applying *Hughes*).

In like measure, the Federal Energy Regulatory Commission's Office of Electric Reliability helps protect and improve the reliability and security of the nation's bulk power system through effective regulatory oversight as established by Congress and the President in the Energy Policy Act of 2005.[5] This, too, rises as an authority under the Commerce Clause and thus grants consumers the right to protection from exploitation due to losses in the reliability of electrical service caused by a state statute. Thus, Plaintiff Lueck's injuries from air pollution and both Lueck's and ATI's electricity generation members lost electrical reliability[6] are rights

[5] FERC, OER, "About FERC ›› Offices ›› Office of Electric Reliability", *see* http://www.ferc.gov/about/offices/oer.asp (accessed February 26, 2012: 6:16 pm).

[6] The Political Organizations argue that Mr. Lueck has no demonstrated loss of reliability, and that even if he did, the court could not remedy this problem. Both are incorrect. Mr. Lueck has had to purchase back-up generation capability to protect against unreliable service (Lueck Decl. ¶ 10, ECF 12-1), Plaintiffs pled this injury which the court will take as true (Amend. Complaint ¶ 3, 4, 81- 87, ECF 12) and invalidation of the RES will reduce reliance on unreliable sources of wind, thus remedying to some degree the injury.

protected by the dormant Commerce Clause, the Commerce Clause and its subsidiary authorities.

The Plaintiffs' rights are Constitutional and also rise out of a regulatory schema authorized under the Commerce Clause. Thus, Plaintiffs claims are within both the regulatory and Constitutional zones of interest. To consider otherwise would invalidate the standing of the Political Organizations in thousands of cases at law.

G. The Intervenor-Defendants' Reliance on Oehrleins is Misplaced

The Political Organizations argue that Plaintiffs' injuries would exist even if Colorado required all renewable energy be generated entirely out of the state and thus imposed no barriers to interstate commerce (Intv.-Defs.' Motion to Dismiss 8). In making this assertion, the Political Organizations mislead the Court. The proper question is whether the Plaintiffs could obtain a lower cost of electricity if the state did not create a barrier to out of state electricity generators' use of lower cost fuel. Because the state does cause that barrier, it violates the dormant Commerce Clause.

The Political Organizations' rely on *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 81 (8th Cir. 1997), arguing the in-state consumers who were not the target of the regulation have no prudential standing. Reliance on *Oehrleins* is misplaced, however, because its plaintiffs were in-state consumers who were not the target of the regulation. In the instant case, however, the Plaintiffs' electric utility members are the target of the regulation.[7, 8]

[7] The Political Organizations also make an argument that consumers paying the end-line cost of an economic regulation cannot claim any personal right under the dormant Commerce Clause. Plaintiffs believe this case is not in accord with prudential standing as required by Justice Jackson in *H. P. Hood & Sons. See, Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999) ("an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce

III. Colorado Undertook the Risk of Commerce Clause Enforcement

The Political Organizations suggest that, as a matter of policy, courts should not entertain "derivative" Commerce Clause challenges from consumers because they would expose the state to "potentially crippling damages claims and make legitimate economic and environmental regulation far more difficult" (Def-Int. Mot. to Dismiss 11).

The Political Organization's alleged concerns about consumer challenges are over exaggerated (Def-Int. Mot. to Dismiss 11). The Political Organizations begin their argument with Justice Scalia's dissent in *Wyoming v. Oklahoma*: "we can expect a sharp increase in state against state Commerce Clause suits; and if its rejection of the zone-of-interests test is applied logically, we can expect a sharp increase in all constitutional litigation." *Wyoming v. Oklahoma*, 502 U.S. at 473. The problem with such predictions is that, over time, they can be tested. This one has and it has been found lacking. Over the past decade, constitutional challenges to state laws in U.S. District Courts have been level, averaging 287 cases filed with a standard deviation by year of 10 percent.[9] These cases are a mere 0.4 percent of the District Court caseload.[10] On average, the U.S. Circuit Courts of Appeal have fielded 105 cases per year over the last decade,

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Clause has standing to challenge that law.") (emphasis added); *and see*, *Action Wholesale Liquors v. Okla. Alcoholic Bev. Laws Enforcement Comm'n*, 436 F. Supp. 2d 1197, 1201 (W.D. Okla. 2006) (under the dormant Commerce Clause, consumers have a "legally protected interest"). It is not necessary, however, to resolve this matter now as Plaintiffs have sufficient bases for prudential standing beyond being end-of-line consumers.

[8] The Political Organizations also cite to *Nat'l Solid Waste Mgmt Assoc. v. Pine Belt Reg'l Solid Waste Mgmt Auth.*, 389 F.3d 491, 499 (5th Cir. 2004) *and Farmers State Bank v. Gronstal*, 598 F. Supp. 2d 960, 965-67 (S.D. Iowa 2009), arguing they hold no prudential standing for consumers. In each case, however, there was no interstate market involved, and thus no basis for Commerce Clause standing, unlike the instant case.

[9] *See*, United States Courts, "Federal Judicial Caseload Statistics" District Courts 2000-2011 http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx (accessed 2/28/2012).

[10] *See*, Administrative Office of the United States Courts, "Federal Judicial Caseload: Recent Trends" (2002) http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/20015yr.pdf (accessed 2/28/2012 5:14 pm).

from 86 in 2002 to a high of 129 in 2011. The Political Organizations offer no evidence disputing these numbers. Indeed, they offer no evidence whatever supporting their concerns about the impacts of such cases. They fail to cite to a single instance where a constitutional challenge under the dormant Commerce Clause bankrupted a state, and this case cannot do so, even if Plaintiffs prevail on all counts.

The fear of such an outcome, however, is valuable. States have a propensity to write laws that favor their own businesses over those operating in other states. States have a duty to ensure legitimate economic and environmental regulation does not violate the dormant Commerce Clause, regardless of the difficulty. More significantly, Colorado was on notice that its RES would not be held constitutional and, despite this notice to Colorado that required no effort on their part whatever, the State chose to enact its statute nonetheless.[11]

CONCLUSION

For the reasons stated above, Defendant-Intervenors Motion to Dismiss should be denied. The Plaintiffs are not barred by prudential standing. ATI and ATP utility members; coal-producing members and members who consume electricity are protected by the dormant Commerce Clause. Members adversely impacted by increased air pollutant emissions and by reduced electrical reliability have a right to protection under the Commerce Clause and the

[11] Amend. Comp., ECF No. 12 at ¶ 21.

dormant Commerce Clause. Colorado undertook the risk of Commerce Clause enforcement and this case promotes state compliance with the dormant Commerce Clause.

Respectfully submitted this 8th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2012, I caused the foregoing to be served by filing the same through the Electronic Case Filing System (ECF) to the following attorneys of record:

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