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
ROD LUECK,

Plaintiffs,

v.

STATE OF COLORADO,
JOHN HICKENLOOPER,
BARBARA J. KELLEY,
JOSHUA EPEL,
JAMES TARPEY,
MATT BAKER, and
DOUG DEAN,

Defendants,

and

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

Defendant-Intervenors.

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

In their Complaint, Plaintiffs American Tradition Institute et al. (collectively, ATI) describe themselves as free-market environmental groups acting on behalf of electricity consumers to address increased air pollution, higher utility bills, and unreliable electric service that allegedly result from Colorado's Renewable Energy Standard law (RES). Dkt. # 12 ¶¶ 3–5. Defendant-Intervenors Environment Colorado et al. (collectively, the Conservation Groups) moved to dismiss the case because ATI lacks prudential standing under the dormant Commerce Clause to assert such consumer and environmental injuries. Dkt. # 37.

Attempting to avoid dismissal, ATI now tells a much different story. ATI claims that it actually brings this case to assert the rights of two anonymous fossil-fuel utilities and a coal company that have allegedly suffered economic harm from Colorado's shift toward renewable energy. Dkt. # 53 at 5–8. These novel allegations cannot save ATI's case. Neither the anonymous utilities, nor the coal company, are mentioned anywhere in ATI's Complaint. Nor do ATI's new allegations establish its standing under the dormant Commerce Clause. And finally, none of ATI's other arguments has merit.

ARGUMENT

I. ATI'S ALLEGATIONS OF STANDING BASED ON ANONYMOUS UTILITIES AND A COAL COMPANY DO NOT DEFEAT THE MOTION TO DISMISS.

A. The Motion to Dismiss Should Be Decided Based on the Allegations in ATI's Amended Complaint.

The Conservation Groups bring their motion to dismiss under Rule 12(b)(6). Dkt. # 37 at 3. When ruling on a Rule 12(b)(6) motion to dismiss, the Court may only consider the facts alleged in the pleadings. Prager v. LaFaver, 180 F.3d 1185, 1188–89 (10th Cir. 1999); David v.

City and Cnty. of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996). Much of ATI's Response, however, relies on a new affidavit asserting that ATI members include not just electricity consumers, but also two anonymous fossil-fuel utilities and a coal company named Alpha Natural Resources (Alpha). Dkt. # 53-1; Dkt. # 53 at 5–8. The affidavit should be disregarded because it alleges new facts that are completely absent from ATI's Complaint.

ATI's Complaint asserts claims based on alleged injuries to its members as consumers of electricity, claiming that the RES "has caused cognizable harm to members of [ATI] through higher electricity costs, less reliable electricity service, greater emissions of pollutants . . . and higher emissions of greenhouse gases." Dkt. # 12 ¶ 4. The only natural person named in the Complaint as an ATI member, Rod Lueck, is described as a consumer of electricity. Id. ¶ 5. The Complaint explains that Mr. Lueck and other ATI members "live in Colorado and purchase electricity," id. ¶ 145 (emphasis added), and the RES will allegedly cause "Colorado working families and businesses" to pay additional electricity costs. Id. ¶ 143; see also id. ¶¶ 146–54. There is no hint in the Complaint that ATI is suing on behalf of fossil fuel producers (such as Alpha) or utilities generating electricity from fossil fuels.

Faced with a motion to dismiss, ATI's Response belatedly attempts to change gears. ATI now claims that it really seeks to vindicate the interests of fossil-fuel producers and utility companies. Dkt. # 53-1; Dkt. # 53 at 5–8. ATI should not be allowed to reshape its lawsuit in this manner. This Court should decide the motion to dismiss based on what ATI has actually alleged in its Complaint—not based on the interests it now claims to represent. See, e.g., David, 101 F.3d at 1352.

B. ATI's Vague Allegations About Anonymous Utility Members Do Not Establish Its Standing.

In any event, ATI's new affidavit does not salvage its case. The affidavit, by ATI Executive Director Thomas Tanton, offers vague, conclusory statements about two anonymous utilities labeled "Company A" and "Company B." Dkt. # 53-1 ¶¶ 4–6. This effort does not support ATI's standing for two reasons.

1. ATI cannot rely on anonymous utilities to show standing.

As the plaintiff, ATI bears the burden of establishing its standing. Wilderness Soc'y v. Kane Cnty., 632 F.3d 1162, 1168 (10th Cir. 2011) (en banc). For an organization claiming to sue on behalf of its members, that burden requires "[a]t the very least, the identity of the party suffering an injury in fact must be firmly established," and courts should not be "left to wonder who, if anybody, has suffered an injury-in-fact." Am. Chemistry Council v. Dep't of Transp., 478 F.3d 810, 820 (D.C. Cir. 2006). If ATI relies on alleged utility members to establish standing, those utilities must be identified and ATI must provide specific details sufficient for the parties and the Court to evaluate that standing. See id.

ATI cannot meet these requirements while shielding the identities of its members. "A trial is a public event," and "[w]hat transpires in the court room is public property." Craig v. Harney, 331 U.S. 367, 374 (1947). Plaintiffs may proceed anonymously only in exceptional cases, where highly sensitive personal issues are raised or when there is a threat of violence. Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs (NCBA), 886 F.2d 1240, 1245 (10th Cir. 1989). Parties are not permitted to maintain anonymity in cases "when only the plaintiff's economic or professional concerns are involved." Id. (dismissing claims brought on

behalf of "unnamed members" of an industry trade association).[1] Moreover, a party seeking to proceed anonymously must first obtain court approval. W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001) (dismissing appeal for failure to meet this requirement).

ATI asserts that the utilities should remain anonymous because their "economic existence" depends on decisions made by defendants on the Public Utilities Commission (PUC), and disclosure would harm their working relationships with other utilities that support the RES. Dkt. # 53 at 6–7. These are exactly the types of "economic and professional concerns" that do not warrant anonymity. NCBA, 886 F.2d at 1245. Moreover, Mr. Tanton's declaration makes no credible claim that the utilities will even suffer any material economic or professional harm. ATI's vague allegation that the utilities' "economic existence" depends on decisions by the PUC does not lead to a conclusion that the PUC will retaliate against them for their involvement in this lawsuit. See Dkt. # 53-1 ¶ 6. Indeed, companies frequently file suit against regulatory agencies. Similarly, while suggesting that Company A wants to remain anonymous to avoid "harm[ing] the level of cooperation" it gets from other utilities, ATI does not explain what "cooperation" could be lost. Id. ¶ 7. Nor does Mr. Tanton claim that any economic harm has resulted or will result from a loss of "cooperation." See id.

[1] The cases cited by ATI are inapposite because they involved highly sensitive personal issues, genuine threats of violence, and an entity that did not initiate litigation. See Singleton v. Wulff, 428 U.S. 106, 114–18 (1976) (ruling that doctors had standing to assert the rights of unnamed patients seeking abortions); NAACP v. Alabama, 357 U.S. 449, 452–54, 462 (1958) (NAACP had not initiated lawsuit but was resisting effort by the State of Alabama to discover the identities of the organization's members, because the members faced physical threats and other serious harms if their identities were disclosed).

The Tanton declaration provides no basis for maintaining the anonymity of the two utilities. ATI cannot establish its standing to bring this case without identifying the members whose rights it now claims to assert. Am. Chemistry Council 478 F.3d at 820.

2. ATI's allegations are too vague to establish injury or show prudential standing.

Apart from their anonymity, ATI's vague allegations raise more questions about the two utilities' standing than they answer. Mr. Tanton claims that Companies A and B "are forced to acquire renewable energy" as a result of the RES at a price higher than coal or natural gas-fired generation. Dkt. # 53-1 ¶ 5. But the impact of the RES for purposes of standing under the dormant Commerce Clause cannot be determined without additional information. For example, ATI does not identify where the renewable energy purchased by the anonymous utilities is generated, or whether it displaces any coal-fired generation outside of Colorado. Nor does ATI allege that the RES resulted in the anonymous companies selling less power in interstate commerce than they otherwise would have. See id. ¶¶ 4–5; City of Los Angeles v. Cnty. of Kern, 581 F.3d 841, 848 (9th Cir. 2009) ("financial injury, standing alone" does not support prudential standing unless it is "tied to a barrier imposed on interstate commerce").

In fact, ATI describes Company B as "operat[ing] exclusively within Colorado." Dkt. # 53-1 ¶ 4. If Company B generates electricity in Colorado, and sells it to customers in the same state, it is unclear how any sales of electricity between different states are even impaired by the RES. See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 499 (5th Cir. 2004) (no prudential standing where "these plaintiffs do not ship . . . any waste" across state lines, and do not assert "that they have any plans to do so"). Other questions remain because Mr. Tanton's declaration also is ambiguous as to whether Companies A and B

are among the utilities regulated by the RES. See Dkt. # 53-1 ¶¶ 4–5. Moreover, some Colorado utilities have publicly supported the RES. See, e.g., Ex. A (summary of 2007 testimony from Xcel Energy and Tri-State Generation Cooperative in support of RES bill); Ex. B (2010 testimony from Xcel Energy).[2] If Company A or Company B turns out to be a public supporter of the RES, that inconsistency would undercut any claim that they have been injured or have standing.

Without knowing the identities of the two utilities, and having details sufficient to assess whether they have actually been injured by the RES, this Court cannot determine whether they support ATI's standing to bring this case. Am. Chemistry Council 478 F.3d at 820. ATI's new affidavit fails to provide this necessary information.

C. ATI's Allegations About a Coal Company Do Not Establish Prudential Standing.

ATI also claims that Alpha (the coal company) is harmed by the RES because Alpha sells coal "to coal-fired electric generating units" and allegedly has lost sales as a result of the RES. Dkt. # 53 at 7; Dkt. # 53-1 ¶¶ 9–10. These allegations fail to establish prudential standing because Alpha's alleged injuries fall outside the zone of interests protected by the dormant Commerce Clause. Moreover, Alpha cannot assert the dormant Commerce Clause rights of its utility customers.

First, to establish prudential standing, Alpha must claim an interest protected by the dormant Commerce Clause's zone of interests. See Dkt. # 37 at 4–8. The purpose of the

[2] Exhibits A and B are legislative summaries prepared by the Legislative Council of the Colorado General Assembly, which are posted on the Legislative Council's web site. See http://www.leg.state.co.us/clics/clics2012A/cslFrontPages.nsf/PrevSessionInfo?OpenForm (last visited Apr. 6, 2012).

dormant Commerce Clause is to prevent economic protectionism between states. Id. at 6. Alpha's claimed injury, however, is unrelated to this goal because a loss of coal sales would result from any substitution of renewable energy for fossil fuel power sources. See Dkt. # 53 at 7 (the "mandate for non-coal energy" reduces Alpha's market for coal). That injury would exist even if Colorado required that all renewable energy be generated out-of-state, and thus "impose[d] no barrier to interstate commerce." Cnty. of Kern, 581 F.3d at 847–48 (quoting Individuals for Responsible Gov't, Inc. v. Washoe Cnty., 110 F.3d 699, 703–04 (9th Cir. 1997)). Alpha's interests are in opposing the use of renewable energy—not with any alleged protectionism in the RES. Dkt. # 53 at 5–8.

Second, Alpha cannot assert the dormant Commerce Clause rights of its customers. A 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." Kane Cnty., 632 F.3d at 1168 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)); Dkt. # 37 at 9–11. The rights provided by the dormant Commerce Clause accrue to entities regulated by the challenged law, or who are attempting to do business across state boundaries. See Dennis v. Higgins, 498 U.S. 439, 448 (1991); Dkt. # 37 at 9. ATI, however, does not allege that Alpha is a Colorado utility regulated under the RES statute. Nor does ATI claim allege that Alpha seeks to sell electricity in Colorado from another state. See Dkt. # 53-1 ¶¶ 9–10.[3]

[3] Moreover, Mr. Tanton's declaration fails to allege that Alpha is even selling coal in interstate commerce. Alpha apparently produces coal in Wyoming. See http://www.alphanr.com/poweringthefuture/Pages/default.aspx (last visited Apr. 6, 2012). While his declaration is very vague, Mr. Tanton does not allege that Alpha sells (or sold) any such coal to utilities located in Colorado. See Dkt. # 53-1 ¶¶ 9–10 (Alpha sells coal "used to generate electricity for the Western Interconnect" [electrical grid], and "Alpha is shut out of that part of the interstate market for coal that would have existed but for the Colorado RES.").

Merely selling coal to power plants does not give Alpha rights under the dormant Commerce Clause. Any alleged injury to Alpha is merely "the economic consequence of the [RES's] restriction" on those power generators, and "[a]ny relief due [ATI] turns on the rights of the" utilities under the dormant Commerce Clause. See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty., 115 F.3d 1372, 1381 (8th Cir. 1997). Companies cannot bring dormant Commerce Clause cases based solely on such indirect impacts. See Farmers State Bank v. Gronstal, 598 F. Supp. 2d 960, 964, 966–67 (S.D. Iowa 2009) ("derivative injury" to bank that contracted with regulated company lacked prudential standing to challenge regulation affecting company but not bank itself); see also On the Green Apartments, LLC v. City of Tacoma, 241 F.3d 1235, 1240 (9th Cir. 2001) ("If [the plaintiff] does not qualify as a self-hauler under the law . . . it does not have standing to challenge" restrictions on self-hauling waste disposal).

D. The Court Should Not Consider ATI's New Affidavit Because It Fails To Offer Admissible Evidence.

ATI's new allegations—contained in an affidavit rather than its Complaint—should also be disregarded because they do not meet the requirements of the Federal Rules of Civil Procedure. When a party presents "matters outside the pleadings" to oppose a Rule 12(b)(6) motion to dismiss, the Court has the option of considering those materials. Fed. R. Civ. P. 12(d). If it does so, however, the motion must be treated as one for summary judgment under Rule 56. Id.; David, 101 F.3d at 1352.

Under Rule 56, ATI must offer admissible evidence in order to avoid summary judgment. An affidavit opposing summary judgment must: (a) "be made on personal knowledge, [b] set out facts that would be admissible in evidence, and [c] show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

The Tanton declaration fails to meet these requirements. As a result, it cannot establish ATI's standing, even under a Rule 56 summary judgment standard, and should not be considered. See, e.g., Sierra Club v. Young Life Campaign, Inc., 176 F. Supp. 2d 1070, 1077 (D. Colo. 2001) (declining to consider extraneous materials to motion to dismiss). Mr. Tanton does not claim that the allegations in his declaration are based on his personal knowledge. Nor does his declaration offer any showing that he is "competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). For example, Mr. Tanton does not claim to be an employee of the two anonymous utilities, or of Alpha. In fact, nothing in Mr. Tanton's declaration shows how he allegedly knows that the anonymous utilities have incurred higher costs from the RES statutes, or that those companies do business in certain states. See Dkt. # 53-1 ¶¶ 4–5. Nor does Mr. Tanton offer any foundation for his statement that Alpha has lost sales of coal due to the RES law. Id. ¶ 10. Without any evidentiary foundation, Mr. Tanton's allegations do not meet the requirements of Rule 56. See Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1199–1200 (10th Cir. 2006) (granting summary judgment for defendant where plaintiff's opposing affidavit was not based on his personal knowledge); W. Ridge Grp., LLC v. First Trust Co. of Onaga, No. 07-cv-01587-WYD-BNB, 2009 WL 641258, at *3–4 (D. Colo. Mar. 10, 2009) (striking affidavit that offered statements not based on personal knowledge).

Moreover, Mr. Tanton's allegations appear to do nothing more than repeat out-of-court statements by unidentified sources for the truth of the matters asserted. If so, they represent inadmissible hearsay that is incapable of defeating summary judgment. Fed. R. Evid. 801(c); Fed. R. Civ. P. 56(c)(4); see also Argo, 452 F.3d at 1199 (courts considering summary judgment

motions "should disregard inadmissible hearsay statements contained in affidavits"); W. Ridge Grp., 2009 WL 641258, at *4 (striking affidavit containing hearsay).

Because ATI has not submitted admissible evidence that meets the requirements of Rule 56, this Court should dismiss the Complaint or grant judgment against ATI.

II. ATI'S OTHER ARGUMENTS FAIL.

ATI also offers a collection of additional arguments that do not depend on the anonymous utilities or the coal company. These theories—asserting that electricity consumers have prudential standing to bring dormant Commerce Clause challenges—are meritless.

A. Prudential Standing is Not Discretionary.

ATI first suggests that this Court can choose to disregard the requirements of prudential standing because they are merely "a matter of judicial discretion." Dkt. # 53 at 3. This theory is plainly incorrect. While prudential standing is a matter of federal common law, as opposed to a constitutional requirement, district courts are not free to disregard the doctrine.

The Tenth Circuit's recent en banc decision in Kane County demonstrated this point when the court reversed a lower court decision that did not require plaintiffs to establish prudential standing. 632 F.3d at 1172. The court applied a de novo, rather than abuse of discretion, standard of review and held that "[a]lthough Congress may relieve parties of meeting prudential standing requirements, the doctrine applies 'unless it is expressly negated.'" Id. at 1168, 1170 (quoting Bennett v. Spear, 520 U.S. 154, 163 (1997)) (emphasis added). The court directed the district court to dismiss the case for lack of prudential standing. Id. at 1174. Kane County could not have reached this holding if prudential standing were merely a matter of the

district court's discretion. ATI's theory cannot be reconciled with this controlling Tenth Circuit precedent.[4]

B. Electricity Consumers Do Not Have Prudential Standing Under the Dormant Commerce Clause Based on Passed-On Regulatory Costs.

The consumers described in ATI's Complaint are not the proper parties to bring a dormant Commerce Clause claim against the Colorado RES because: (1) their alleged injuries do not fall within the zone of interests protected by the dormant Commerce Clause, and (2) they attempt to assert the rights and interests of third parties who are not before the Court. See Dkt. # 37 at 4–11. ATI's response to the State's motion to dismiss (Dkt. # 39), and its response to the Conservation Groups' motion (Dkt. # 53), raise several meritless counter-arguments.

1. ATI's Claimed Injuries Do Not Fall Within the Zone of Interests Protected By the Dormant Commerce Clause.

The dormant Commerce Clause is concerned with preventing economic protectionism between states. As a result, the dormant Commerce Clause's zone of interests does not extend to consumers who claim to pay more for goods and services because of the passed-on costs of regulation, or who experience alleged environmental impacts. See Dkt. # 37 at 6–8.

ATI is wrong in arguing that "the dormant Commerce Clause is specifically calculated to protect consumers from exploitation borne of limitations on interstate commerce." Dkt. # 53 at 9. ATI cannot cite a single case allowing consumers to challenge a law based on solely on indirect consumer costs, as ATI attempts to do here. Contrary to ATI's characterization, the cases it relies on were not brought by end-line consumers. Instead, they involved plaintiffs who

[4] ATI also asserts that the motion to dismiss mistakenly relies on a "regulatory zone of interest" theory applicable to the Administrative Procedure Act, rather than constitutional claims. Dkt. # 53 at 4 n.3. This is wrong—the Conservation Groups' motion applies case law rejecting the same type of dormant Commerce Clause claims presented by ATI. Dkt. # 37 at 5–11.

bought or sold goods directly from other states, or were the states themselves, or were directly subject to the law they were challenging. See, e.g., Gen. Motors Corp. v. Tracy, 519 U.S. 278, 285–87 (1997) (plaintiff that purchased gas directly from suppliers in other states challenged its liability for allegedly discriminatory tax) (cited at Dkt. # 53 at 9).[5] In contrast, courts have not allowed consumers to bring the type of dormant Commerce Clause challenges asserted by ATI. See, e.g., Oehrleins, 115 F.3d at 1380–81 (distinguishing Tracy).

In response to the State's motion to dismiss, ATI also asserted that purchasing electricity from utilities like Xcel Energy means its members are directly engaged in interstate commerce for purposes of prudential standing. Dkt. # 39 at 10–11. ATI's theory flies in the face of the case law addressing this issue.[6] For example, consumers who contract with trash collection companies that may dispose of their waste across state lines could, like ATI's members, be said to have some indirect link to interstate commerce. Courts, however, have held that merely buying a good or service from a company engaged in interstate commerce is too attenuated a connection to bring a consumer within the zone of interests protected by the dormant Commerce Clause. See, e.g., On the Green Apartments, 241 F.3d at 1239–40; Oehrleins, 115 F.3d at 1378–

[5] See also 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); Action Wholesale Liquors v. Okla. Alcoholic Beverage Laws Enforcement Comm'n, 436 F. Supp. 2d 1197, 1198, 1204 (W.D. Okla. 2006) (liquor wholesalers purchasing wine from out-of-state wineries had Article III standing to challenge state law favoring in-state wineries). In responding to the State's motion to dismiss, ATI cites several additional cases. Dkt. # 39 at 11 n.7. These are also inapposite because they involved plaintiffs that were directly regulated by the law they challenged or were buying or selling goods directly from other states. See Dkt. # 49 at 4 n.3 (distinguishing ATI's cases).

[6] As the State notes, ATI's own Complaint undercuts its argument because it alleges that Xcel Energy—not Plaintiff Rod Lueck or other ATI members—is directly involved with the interstate grid. See Dkt. # 49 at 3; Dkt. # 12 ¶¶ 53–59 (cited by ATI at Dkt. # 39 at 10). By contrast, ATI alleges that its members have been injured in the course of purchasing electricity from utilities such as Xcel. See Dkt. # 12 ¶¶ 3–5; Decl. of Rod Lueck (Dkt. # 12.1).

82. The same reasoning applies here: while ATI members buy electricity from utilities, the connection between ATI's claimed injuries and the interstate electric grid is too attenuated to support prudential standing. See Dkt. # 37 at 6–8.

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

ATI also lacks prudential standing because it is attempting to assert the rights of third parties who are not before the Court. The dormant Commerce Clause protects the rights of entities directly engaged in interstate commerce—such as utilities regulated by the RES—not the consumer members of ATI. Dkt. # 37 at 5–11.

In response, ATI argues that its members are "directly subject" to the RES because their monthly electricity bills identify the amount of the charges associated with the RES. Dkt. # 39 at 7; Dkt. # 53 at 9. This line item, known as the Renewable Energy Standard Adjustment (RESA), does not subject consumers to regulation under the RES. Instead, the RESA merely informs consumers of the amount of passed-on costs that they are paying as a result of the RES. The requirement to calculate and disclose the RESA applies to the utility issuing the bill, not the customer who receives it. Colo. Rev. Stat. § 40-2-124(1)(g).

ATI fails to cite a single case holding that paying such indirect costs makes a consumer subject to regulation for standing purposes. The cases cited by ATI involve plaintiffs who directly purchased wine from out-of-state wineries and asserted their right to engage in that interstate commerce when it was restricted by state laws.[7] ATI's claims are more analogous to a

[7] See Dkt. # 53 at 9–10, 12; Freeman v. Corzine, 629 F.3d 146, 156–57 (3d Cir. 2010); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849–50 (7th Cir. 2000); Baude v. Heath, No. 1:05-cv-0735-JDT-TAB, 2007 WL 2479587, at *1–2, 7–8 (S.D. Ind. Aug. 29, 2007), rev'd on other grounds, 538 F.3d 608 (7th Cir. 2008); Cherry Hill Vineyards, LLC v. Hudgins, 488 F.

situation not addressed in those cases: customers of in-state liquor stores attempting to challenge a law based solely on having to pay a higher retail price for a bottle of wine at those stores. Under those facts, courts have ruled that paying that "end-line cost of an economic regulation" does not give consumers any personal right under the dormant Commerce Clause. Oehrleins, 115 F.3d at 1381. The consumers identified in ATI's Complaint are not subject to regulation under the RES, and they cannot assert dormant Commerce Clause rights held by utilities or other entities. Id.; Gronstal, 598 F. Supp. 2d at 965–67.

C. ATI Confuses the Dormant Commerce Clause with Congress' Power to Regulate Interstate Commerce.

ATI also argues that its alleged goal of preventing environmental harm gives it prudential standing under the Commerce Clause. Dkt. # 53 at 10–12. This argument confuses the express Commerce Clause—which gives Congress the authority to address environmental issues as part of regulating interstate commerce—with the dormant Commerce Clause's limitations on discriminatory state laws. See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (describing distinction); City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) (same).

The claims in this case involve the dormant Commerce Clause—they have nothing to do with Congress' power to regulate interstate commerce. While ATI attempts to conflate these two distinct concepts, none of the cases it cites allow environmental injuries to support prudential standing under the dormant Commerce Clause. See Dkt. # 53 at 11 (citing express Commerce Clause case, and dormant Commerce Clause cases brought by plaintiffs who asserted economic

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Supp. 2d 601, 606–08 (W.D. Ky. 2006); see also Houlton Citizens' Coal. v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999) (waste hauler had standing to challenge disposal law).

injuries). As the Conservation Groups have explained, environmental injuries do not fall within the zone of interests protected by the dormant Commerce Clause. See Dkt. # 37 at 6, 8.

D. Colorado's Regulatory Powers Would Be Threatened By Granting Plaintiffs Such as ATI Prudential Standing Under the Dormant Commerce Clause.

In their motion, the Conservation Groups noted that allowing any consumer in Colorado to bring a derivative dormant Commerce Clause challenge would expose the State to potentially enormous damages claims, and thus make legitimate economic regulation much more difficult. Dkt. # 37 at 11–12.

To dispute this point, ATI argues that the threat of large damages claims is unlikely, citing judicial caseload statistics that "constitutional challenges to state laws . . . are a mere 0.4 percent of" district court case loads. Dkt. # 53 at 13–14.[8] These statistics are meaningless because courts have not permitted the type of consumer standing ATI advocates here. As a result, ATI's figures reflect current caseloads—not potential litigation if dormant Commerce Clause standing is expanded. Notably, ATI offers no evidence that any of the current caseload involves dormant Commerce Clause litigation based on such consumer standing. ATI's inability to identify any such cases just underscores the lack of support for its prudential standing argument.

CONCLUSION

ATI's Complaint should be dismissed, or summary judgment granted for the Defendants.

[8] ATI also claims wrongly that the Conservation Groups "begin their argument" with a dissent from the Wyoming v. Oklahoma Supreme Court case. Dkt. # 53 at 13. The Conservation Groups' argument does not mention (much less rely on) that case, which did not involve consumer standing. See Dkt. # 37 at 11–12; Wyoming, 502 U.S. at 440 (original action brought in the Supreme Court between the States of Wyoming and Oklahoma).

Respectfully submitted April 6, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2012, I filed the foregoing DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION TO DISMISS with the Court's electronic filing system, thereby generating service upon the following parties of record:

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