

**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,**

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
April 13, 2012
GREGORY C. LANGHAM, CLERK

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.

**PROPOSED SURREPLY TO DEFENDANT-INTERVENORS'
REPLY MEMORANDUM**

Defendant-intervenors introduced a new argument in their Reply, to wit: trash collection fees are not distinguishable from regulated retail electricity rates. Defendant-Intervenors' Reply

[Docket #60] at 11-12. This argument is false.

Defendant-Intervenors offer “waste hauler” cases (*Oehrleins* and *On the Green Apts.*) to suggest that where consumers could dispose of their waste across state lines they have too attenuated a link to interstate commerce to justify prudential standing. They then argue that Plaintiffs are the same kind of consumers. *See*, Docket #60 at 12-13. We are not.

In *Oehrleins*, local consumers shouldering the end-line burden of a purely local regulation had the option of disposing of their waste out of state. In the instant matter, however, Plaintiffs are not able to purchase electricity from out of state retail suppliers that are not regulated or otherwise controlled by the Colorado statute. The link to interstate commerce is direct and manifest. As such, Plaintiffs seek to defend the right guaranteed under the Commerce clause, that “every consumer may look to the free competition from every producing area of the Nation to protect him from exploitation.”¹ For this reason, Plaintiffs are prosecuting this case on their own behalf, and not on behalf of a third party. However even if the court concluded that Plaintiffs were representing a third party, the fact that the Plaintiffs are captives unable to purchase electricity from out of state retail suppliers is “inextricably bound up with the activity the litigant wishes to pursue”, to wit a dormant Commerce Clause challenge, and thus meets the prudential standing requirements.²

On the Green Apartments is also inapposite. In that case, the court found that a municipal ordinance established to fund police powers in the form of a mandatory garbage fee

¹ *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949).

² *See, Singleton v. Wulff*, 428 U.S. 106, 113-116 (U.S. 1976).

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Surreply to Defendant-Intervenors’ Reply Memorandum

did not preclude end-users from obtaining waste disposal from foreign companies. This is akin to a citizen being required to pay for local schools through personal property taxes despite sending her children to a private school in another state. In the instant matter, however, Plaintiffs are not able to purchase electricity from unregulated out of state retail suppliers. They are captives of the statute and related public utility commission rules challenged in this matter.

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.”³ 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. In the instant case, the Plaintiffs are best situated to prosecute a dormant Commerce Clause challenge for the reasons discussed by Justice Breyer in his seminal treatise, “*Breaking the Vicious Circle – Toward Effective Risk Regulation*”.⁴ As he explains therein, public alarm spurs legislative action that produces regulatory actions which then reinforces and expands public alarm. This, Justice Breyer argues, creates a “vicious circle, diminishing public trust in regulatory institutions and thereby inhibiting more rational regulation.” *Id.* Because, under the Colorado statutes and rules, retail electrical utilities are certain to obtain fair profits, they have little incentive to prosecute a dormant Commerce Clause claim. Only the ratepayers have this incentive. These ratepayers, like Plaintiff Lueck, are best suited to prosecute the claims made in this case and thus meet any reasonable requirement for

³ *Chicano Police Officer's Asso. v. Stover*, 526 F.2d 431, 436-437 (10th Cir. 1975) (reversed on other grounds).

⁴ Stephen Breyer, *Breaking the Vicious Circle – Toward Effective Risk Regulation*, 33, (Harvard University Press, (1993).

prudential standing.

Respectfully submitted April ____, 2012.

/s/ David Schnare

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CERTIFICATE OF SERVICE

I hereby certify that on April ____, 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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