

RECEIVED

2011 MAY -5 PM 2: 23

IDAHO PUBLIC
UTILITIES COMMISSION

May 3, 2011

Idaho Public Utilities Commission
472 West Washington Street
PO Box 83720
Boise, ID 83720-0074

Re: Case No. GNR-E-11-01

Dear Idaho Public Utility Commissioners:

I am writing to request that you permanently lower the published avoided cost rate eligibility cap to 100 kW for wind projects.

I must emphasize the word "capacity" and "value" in relation to wind energy. Wind energy is a low value energy source. It has a low capacity factor. Even a more significant grid matter, wind energy has little or no "capacity value"; i.e., the amount of generating capacity that can be counted on to help meet peak electricity demand.

I am submitting a case that was filed in a US District Court in Colorado on April 4, 2011. Please see this whole case for evidence of the technical aspects of wind energy, but I direct your attention specifically to section I (starting on page 7) and Section III (starting on page 21). Experts from across the nation have weighed in on this case as to the true realities and value of wind energy.

For a brief overview of this case, please consider the following 4/13/11 article from *The American Spectator*:

<http://tiny.cc/1xbpf>

"...Law Center director David Schnare's explanation that we are "putting wind energy on trial." What does that have to do with the Commerce Clause?

Well, there's a history. A 1970 Supreme Court decision in *Pike v. Bruce Church, Inc.* established a "balancing test," which said if the effects on interstate commerce are only "incidental" compared to the local benefits a statute establishes, then it will be upheld. But if the burden on interstate commerce "is clearly excessive in relation to the putative local benefits," then it is unconstitutional.

Hence the problem for Colorado [and I will add Idaho]: Wind energy...offers no local benefit compared to other generation sources. In fact, because wind energy produces

dirtier, less dependable and more expensive electricity than the alternatives, it is a detriment.

Most people use electricity without regard for how their utility generates it. They just want it on. But for manufacturers and businesses that depend on timely production and delivery schedules, the losses due to even the slightest interruptions in power supply are in the millions of dollars.

Because the expectation is for electricity to be uninterrupted, the only other aspect where its "quality" can be graded is in its generation. For a long time environmentalists have told us that "renewable" sources like wind and solar deliver superior power because it is cleaner in its generation. That has not proven true.

Studies of Colorado and Texas by BENTEK Energy, LLC, in addition to a study of the Netherlands, found the coercion of utilities to accept wind power means they must suddenly turn on coal and natural gas generators when wind stops blowing -- and then off when it does -- and then on again, etc. These fossil fuel combustion generators create more pollutants (sulfur dioxide, nitrogen oxide, and those dreaded greenhouse gases) when they are operated in this fashion than they would if they ran continually. Also, wind's intermittency puts the electrical grid at greater risk of blackouts and brownouts.

As Kent Hawkins of MasterResource.com noted, "There are not only more emissions with [Renewable Energy Standards] than without them, but also there is duplicate capacity installed (wind) at significantly higher costs, which adds notably to the costs of electricity."

So you see that under the Pike balancing test, no "local benefit" can be cited in order to overturn a determination that Colorado's Renewable Energy Standard is unconstitutional under the Commerce Clause.

And that is what putting wind on trial has to do with it.

So my question to the IPUC commission, can the no "local benefit" under the Pike balancing test be cited in order to control Idaho's PURPA's situation?

Because as I see it, this PURPA situation with the 10aMW cap and the disaggregation of wind projects has created an artificial Renewable Energy Standard for Idaho by forcing the utility companies to purchase this power at a premium rate which is then passed onto the ratepayer. What is happening seems to be unconstitutional under the Commerce Clause.

Even Idaho's House of Representatives leadership agrees that the IPUC's past policy has created this problem. Their April 21, 2011 letter submitted to the IPUC says:

"The Commission's previous policy has allowed projects to artificially disaggregate into 10aMW increments to take advantage of higher, published avoided cost rates, has created an operational burden for Idaho's electric utilities, and, more importantly, will lead to higher energy rates for Idaho consumers."

I am also submitting a graph which shows that Idaho is ahead in wind development and integration of its neighboring states that have an RES. How can this be when we do not have an official RES? This is further evidence that an artificial market has been established for this energy source that is low value for the ratepayer and the utility companies.

In addition, I have another request to ask of the Commission. I have been involved this past legislative session with the numerous issues related to the state's policy on wind energy. During this process, I often saw the wind industry make claims about wind energy, but then they were never asked to show any real proof to back up their claims. At this time, I would respectfully ask that if the wind industry presents any claims in this IPUC case that the Commission would please ask them to back up their claims with independent, real world data; furthermore, that the data is transparent, or in words, could be verified. Although this energy source is built upon computer modeling, estimations, and speculation, and was released to the public upon this foundation; it has now existed long enough to produce actual real world figures.

To summarize once again, I ask the IPUC Commission to a) see the Colorado case as evidence to the true value and realities of wind energy; b) ask for independent, real world data that is transparent (i.e. verifiable) in the event that any claims are made by the wind industry; and c) please permanently lower the published avoided cost rate eligibility cap to 100 kW for wind projects.

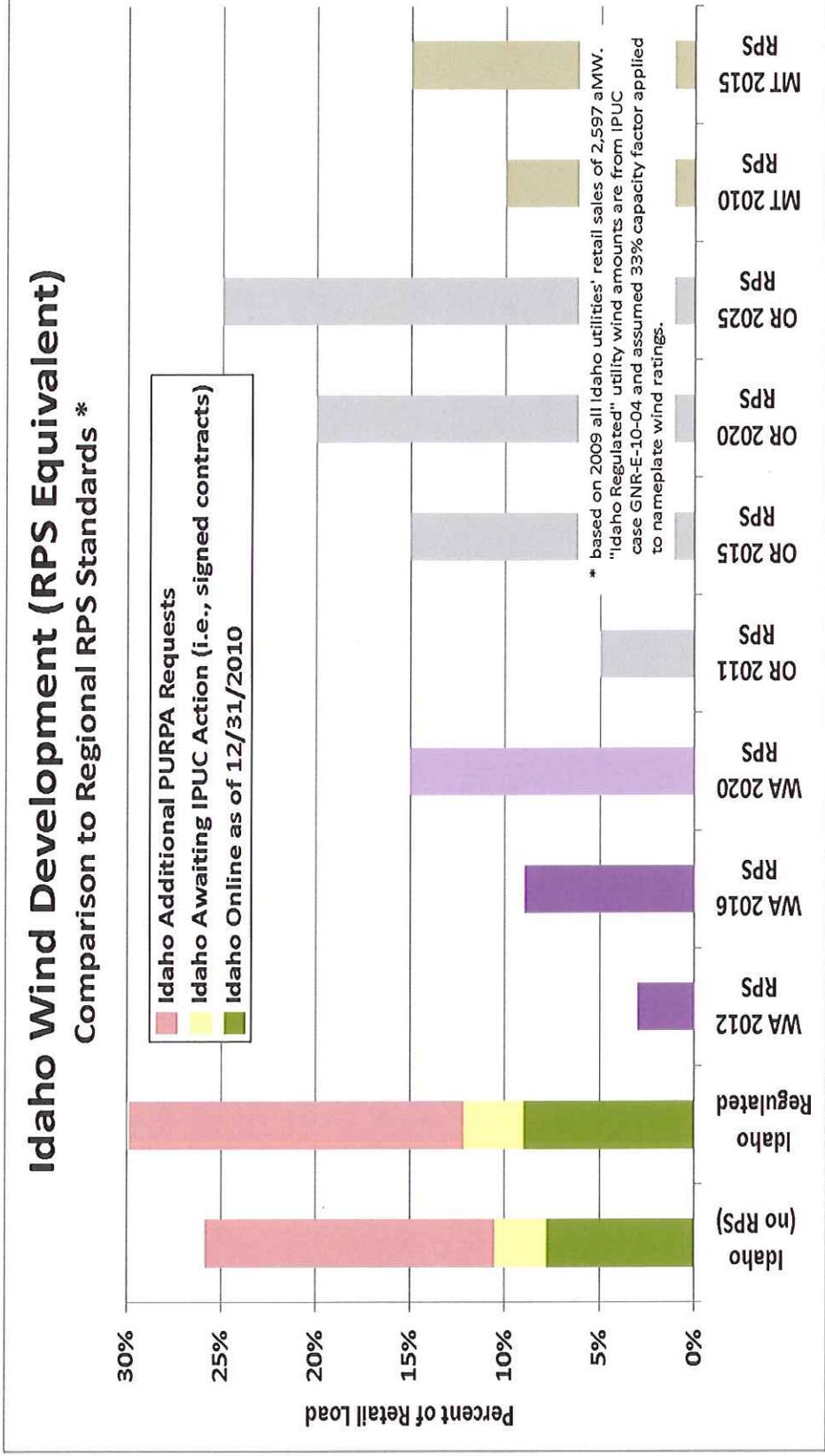
Thank you for your time.

Sincerely,

A handwritten signature in cursive script that reads "Tauna Christensen". The signature is written in black ink and is positioned below the word "Sincerely,".

Tauna Christensen
769 N 1100 E
Shelley, ID 83274
(208) 357-2080

Regional Wind Development Comparison



- Idaho's rate of wind development is radically faster than nearby states. Why?
- Is this desirable and consistent with *Idaho Energy Plan*?

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO**

**AMERICAN TRADITION INSTITUTE,
AMERICAN TRADITION PARTNERSHIP, and
ROD LUECK**

Plaintiffs,

v.

THE STATE OF COLORADO;
JOHN HICKENLOOPER individually, and in his
official capacity as the Governor of Colorado;
BARBARA J. KELLEY, individually, and in her
official capacity as the Executive Director of the
Colorado Department of Regulatory Agencies;
RON BINZ, 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; and
DOUG DEAN, individually, and in his official
capacity as Director of the Colorado Public Utilities
Commission,

Defendants.

Civil Action No. 1:11-cv-00859-WJM-
KLM

**AMENDED COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

NATURE OF THE ACTION

1. The American Tradition Institute (ATI) and the American Tradition Partnership (ATP) bring this civil action on behalf of their members, including the named individual Plaintiff, Rod

Lueck, (jointly, the Plaintiffs), seeking declaratory and injunctive relief pursuant to 28 U.S.C. § 2201, asking the Court to: (1) declare the Colorado renewable energy standard (RES), codified at C.R.S. 40-2-124, unconstitutional under Article I, Section 8 of the United States Constitution; (2) order an award of damages under 42 U.S.C. § 1983, and (3) order such necessary and proper injunctive relief or other injunctive relief as this Court deems just and proper.

2. The Colorado RES discriminates on its face against legal, safer, less costly, less polluting and more reliable in-state and out-of-state generators of electricity sold in interstate commerce. This discrimination is forbidden by the Commerce Clause.

PARTIES

3. The American Tradition Institute is a 501(c)(3) organization dedicated to the advancement of rational, free-market solutions to America's land, energy, and environmental challenges. It has members throughout the nation, including in Colorado. The named individual co-Plaintiff is a member of ATI. The Colorado RES has caused cognizable harm to members of ATI through higher electricity costs, less reliable electricity service, greater emissions of pollutants regulated under the federal Clean Air Act and higher emissions of greenhouse gases.

4. American Tradition Partnership is a 501(c)(4) grassroots lobbying organization dedicated to fighting environmental extremism and promoting responsible development and management of land, water, and natural resources in the Rocky Mountain West and across the United States. The Colorado RES has caused cognizable harm to members of ATP through higher electricity costs, less reliable electricity service, greater emissions of pollutants regulated under the federal Clean Air Act and higher emissions of greenhouse gases which place business operations at significant risk.

5. Rod Lueck is a resident of Morrison, Colorado, is a private citizen and businessman and relies on electricity generated within Colorado and from outside Colorado and transmitted through the interstate electric grid serving Colorado. Mr. Lueck states in his declaration, included by reference in this Amended Complaint, that he is the owner and President of Techmate (dba C5 Solutions for Broker Dealers) a company located in and operating in Colorado but serving customers in the interstate market. Techmate has served the financial services industry since 1984. Over the years, the company's products have become the most widely used Broker/Dealer back office systems in the industry. The Techmate products require constant on-line service to its clients. Electricity is an essential resource to his business activities. The cost of electricity directly affects the profitability of the business. Mr. Lueck is a member of ATI and ATP because their missions reflect his strong commitment to environmental stewardship and economic liberty. The Colorado RES has caused and continues to cause cognizable harm to Mr. Lueck through higher electricity costs, less reliable electricity service, greater emissions of pollutants regulated under the federal Clean Air Act and higher emissions of greenhouse gases.

6. The State of Colorado, operating through a voters' initiative and later through legislative action, adopted and revised its RES codified at C.R.S. 40-2-124. The statutory mandates in the RES are forbidden by the Commerce Clause of the U.S. Constitution.

7. John Hickenlooper is the Governor of Colorado. He is named as a defendant in his official capacity and in his individual capacity with respect to the claims for damages under 42 U.S.C. § 1983. The agencies that report to him include the Department of Regulatory Agencies, which includes the Public Utilities Commission which implements the RES. He has publically supported the RES and expansion of its scope and discriminatory effect.

8. Barbara J. Kelley, is the Executive Director of the Colorado Department of Regulatory Agencies. She is named as a defendant in her official capacity and in her individual capacity with respect to the claims for damages under 42 U.S.C. § 1983. The agencies that report to her include the Public Utilities Commission which implements the RES. She has publicly supported the RES and expansion of its scope and discriminatory effect.

9. Ron Binz is Chairman of the Colorado Public Utilities Commission. He is named as a defendant in his official capacity and in his individual capacity with respect to the claims for damages under 42 U.S.C. § 1983. The Public Utilities Commission implements the RES. He has publicly supported the RES and expansion of its scope and discriminatory effect.

10. James Tarpey is a Commissioner of the Colorado Public Utilities Commission. He is named as a defendant in his official capacity and in his individual capacity with respect to the claims for damages under 42 U.S.C. § 1983. The Public Utilities Commission implements the RES. He has publicly supported the RES and expansion of its scope and discriminatory effect.

11. Matt Baker, is a Commissioner of the Colorado Public Utilities Commission. He is named as a defendant in his official capacity and in his individual capacity with respect to the claims for damages under 42 U.S.C. § 1983. The Public Utilities Commission implements the RES. He has publicly supported the RES and expansion of its scope and discriminatory effect.

12. Doug Dean is Director of the Colorado Public Utilities Commission. He is named as a defendant in his official capacity and in his individual capacity with respect to the claims for damages under 42 U.S.C. § 1983. The Public Utilities Commission implements the RES. He has publicly supported the RES and expansion of its scope and discriminatory effect.

JURISDICTION AND VENUE

13. This action arises under the Commerce Clause of the U.S. Constitution and under 42 U.S.C. §1983. This Court has jurisdiction under 28 U.S.C. §1331.

14. Venue is proper in this Court under 28 U.S.C. §§1391(b)(1), (2) and (3).

15. This Court is empowered to provide declaratory relief in this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201(a), and Rule 57 of the Federal Rules of Civil Procedure.

16. This Court is empowered to provide injunctive relief in this action pursuant to, *inter alia*, 28 U.S.C. § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

THE COMMERCE CLAUSE

17. Quoting the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Tenth Circuit recently summarized the governing standards of law under the Commerce Clause of the United States Constitution:

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, 127 S. Ct. 1786, 1792, 167 L. Ed. 2d 655 (2007) (quoting U.S. Const. art. I, § 8, cl. 3). In addition to that express authority, courts have interpreted the Commerce Clause also to restrain state authority implicitly. *See id.*

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. Second, if the statute does not discriminate against interstate commerce, it will nevertheless be invalidated under the *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 . . . (1970), balancing test if it imposes a burden on interstate commerce incommensurate with the local benefits secured. Third, a statute will be invalid *per se* if it has the practical effect of

extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

Pryor, 425 F.3d at 168 (quotation, alteration omitted); *see also United Haulers*, 127 S. Ct. at 1793; *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433, 125 S. Ct. 2419, 162 L. Ed. 2d 407 (2005). "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*, 127 S. Ct. at 1793 (quotation omitted).

KT&G Corp., et al. v. Attorney General of the State of Oklahoma, et al., 535 F.3d 1114, 1143 (10th Cir. 2008).

18. In this matter, the Colorado RES violates the dormant Commerce Clause in each of the three ways identified by the Tenth Circuit.

19. The protection afforded by the Commerce Clause is well-known among energy regulators such as the Defendants.

20. For example, In The Matter of Amendments to the Electric Resource Planning Rules, 4 CCR 723-3, Rules 3600-3615, Docket No. 09I-041E, proponents and opponents to the proposed rule changes discussed at length the applicability of the Commerce Clause to rules affecting interstate electricity generation. All parties recognized that rules affecting price and market conditions in the interstate electricity market are limited by the commerce clause. Indeed, in light of these and other arguments, the Colorado Public Utilities Commission (PUC) held a hearing on July 16, 2009, (transcript page 53) during which it specifically sought input about the limits of the Commerce Clause, based in part on comments in the Docket charging that the PUC's proposed actions violated the commerce clause. *See*, Initial Comments of Tri-State Generation and Transmission Association, Inc., In The Matter Of Amendments To The Electric Resource Planning Rules, CCR 723-3, Rules 3600-3615. Docket No. 09I-041E 4, page 21.

21. The same type of issue that is raised in this Amended Complaint was addressed in a publication prepared for the National Association of Regulatory Utility Commissioners, dated February 2001, titled "The Renewables Portfolio Standard: A Practical Guide." Page A-1 of this publication states as follows (emphasis added):

Some states have limited renewable resource eligibility to production from generation facilities located within the state. Absent a significant change in Supreme Court application of the Commerce Clause of the U.S. Constitution, the restriction to instate generation will, if challenged, be found unconstitutional. The courts have continually found that facial discrimination by a state against out-of-state resources is 'virtually per se invalid.' Philadelphia v. New Jersey, 437 U.S. 617, 624 (invalidating New Jersey's ban on imports of out-of-state garbage). The exclusion of out-of-state generation is sufficiently similar to court precedents to expect invalidation. . . .

FACTS ON INTERSTATE COMMERCE OF ELECTRICITY

22. The Plaintiffs rely upon, and include by reference in this Amended Complaint, the amended declaration of Thomas Tanton and the Declaration of William Yeatman, submitted with this Amended Complaint.

I. RETAIL ELECTRICITY SALES IN COLORADO ARE INTERSTATE COMMERCE

A. Electricity Basics

23. Interstate electrical service is not like a water or gas pipeline. Instead, it is like the ebb and flow of waves on the beach. Electric generators do not push a river of electrons from their plants, through transmission lines and into homes and businesses. They push then pull electrons back and forth within the transmission and distribution lines 60 times each second.

24. This subsection explains a few key electric industry terms that are important in understanding the critically important differences between the *quality* and *value* of (i) the high cost, intermittent, volatile and unreliable electricity produced by wind turbines and (ii) the lower

cost, reliable and more valuable electricity produced by generating units that can be called upon to produce electricity whenever it is needed by electric customers.

25. The number of electrons in motion in a transmission or distribution wire is called the current, and is measured in amps. The force pushing and pulling the electrons is called the voltage and is measured in volts. The power available from an electrical outlet is measured in watts and is a function of the voltage and the available current. Wattage is a measure of the rate of energy conversion. $1 \text{ Watt} = 1 \text{ Volt} \times 1 \text{ Amp}$. A kW is a thousand watts. An MW is a million watts. A kWh is a thousand watts continually delivered over the time period of one hour.

26. Because wind energy constitutes the vast majority of “renewable energy” mandated by Colorado law to be purchased from interstate markets, the unreliability of wind energy, as compared with conventional fossil fuel (non-renewable) sources, underpins an understanding of how Colorado law violates the Commerce Clause. This requires an understanding of some core terms in the electricity industry.

27. “Generating capacity” is measured in kilowatts (kW) or megawatts (MW). This is a measure of a generating unit’s ability to produce electricity at an instant in time. This term can be confusing because there are different legitimate measures of generating capacity:

28. “Nameplate capacity” is the capacity rating shown on the nameplate attached to the generator by the manufacturer. “Rated capacity” is often used synonymously with “nameplate capacity.”

29. For many fossil-fueled units, “summer capacity” and “winter capacity” are often different

from nameplate capacity because the unit's ability to produce is affected by air temperature.

30. "Capacity value" also measured in kW or MW. This is a critically important measure to generating companies and grid managers. It describes the amount of generating capacity that can be counted on to help meet peak electricity demand. For many reasons it differs from any of the above measures. Generally, this number is determined empirically; i.e., with a specific test of what the unit can produce (again in kW or MW) under specific test conditions.

31. "Wind turbine capacity value," i.e., the true capacity value of a wind turbine, is the kW or MW of generating capacity that is available at the actual time of peak electricity demand on the electric grid serving the area. The true capacity value of a wind turbine, wind farm or wind facility is generally less than 10% of nameplate capacity and often 0% or slightly above -- simply because, at the time of peak electricity demand, the wind isn't blowing at a speed that will permit the turbine to produce any or much electricity. Claims of wind turbine capacity value have been exaggerated by wind industry officials and lobbyists, by regulatory agencies, ISOs, RTOs, or other grid manager's arbitrary decisions.

32. Capacity value for reliable ("dispatchable") generating units -- i.e., those designed to be available whenever called upon -- may be less than their "nameplate" (or "summer" or "winter") capacity for a variety of reasons. For example, they may have mechanical problems that prevent them from running at full rated capacity but which problems are not serious enough to take them out of service for repair or overhaul. Grid managers often require that generating unit owners/operators report each day (e.g., around noon) how much capacity can be counted on during the next day from each generating unit.

33. "Availability" means that a unit is physically available and has fuel needed to permit it to generate electricity when needed. Or, put another way, it is NOT out of commission ("off line") for maintenance, repair or overhaul. Wind industry spokespersons often misuse this term by ignoring the critical second criterion; i.e. "has the fuel" (wind) needed to permit it to generate electricity. A wind turbine without wind has no real value to electric customers because it has no capacity to generate electricity.

34. "Generation" is measured in kilowatt-hours (kWh) or megawatt-hours (MWh). This is an after the fact measure of the amount of electricity produced over some period of time (hour, day, week, month, year, etc.).

35. "Capacity factor" is measured as a percentage of nameplate capacity. It is an after the fact measure with the percentage determined by dividing the actual (metered) output (in kWh or MWh), divided by the nameplate capacity (in kW or MW) times the number of hours in the period for which the calculation is done (e.g., 8760 hours for a year).

36. "Wind turbine capacity factors" are low capacity factors because they are dependent on wind speed. They start producing a small amount of electricity with a wind speed of about six (6) or seven (7) miles per hour (mph), reach "rated" capacity around thirty-one (31) mph and cut out around fifty-six (56) mph. Therefore, their output is inherently intermittent, volatile and unreliable. A 1 MW (1,000 kW) wind turbine that produces 2,190,000 kWh of electricity during a year has achieved a capacity factor of 25%. That is 2,190,000 kWh divided by 1,000 kW x 8760 hours; or 2,190,000 divided by 8,760,000 = .25).

37. "Dispatchable unit capacity factors" are capacity factors for reliable or "dispatchable"

generating units and vary widely depending upon (i) the design and intended purpose of the unit (i.e., for baseload, intermediate or peak load service) and (ii) the plans and choices of the operator who is responsible for keeping the electric grid in balance (electricity supply & demand, voltage and frequency).

38. “Baseload” units (often powered by coal or nuclear energy and that heat water to produce steam that spins the turbine that produces electricity) are designed to run all or most of the time and often have annual capacity factors in the 70% to 90% range. They take longer to start up and bring to full generating capacity and cannot be efficiently “ramped” up and down (i.e., output increased or decreased) to balance changes in demand.

39. “Intermediate load” units are those that can be ramped up and down more quickly than units designed for “baseload” service). Some “intermediate load” units will use steam turbines and some will use gas turbines and some will use both. Often these units will be powered by natural gas and, much less often, oil. Their annual capacity factors vary widely, perhaps from percentages in the teens to percentages in the 50s or 60s. As discussed below, these are usually the units that “shadow” (balance) wind energy, increasing generation when winds drop, and decreasing generation when winds increase. Although more efficient when ramping up and down than baseline units, these units remain most efficient when operated in a manner that shadows normal, gradual and usually predictable changes in demand, than when forced to shadow the much more highly variable changes caused by volatility in wind.

40. “Peak load” units are those intended for use primarily when electricity demand is at high levels. Generally these units will use gas turbine technology or internal combustion engines,

powered by natural gas or oil. They can be started up and shut down quickly. Their annual capacity factors will often be in the range of 3% to 7% because they are intended for use only when electricity demand is high. These units are rarely used to shadow wind energy.

41. Hydropower units (falling water turns the turbines) may be used for baseload, intermediate or peak load service – depending on the availability of water in the area. For example, hydropower units provide baseload power in the Pacific Northwest but are used only for peaking service in areas with fewer water resources. Hydropower units are used for “load leveling” (i.e., keeping electricity supply equal to demand) because their output can be controlled instantaneously. In like measure, they can be used to shadow wind energy, however, the highly variable ramping needed to shadow wind consumes considerably more water resources than the small, instantaneous ramping needed to respond to changes in demand. Thus, hydropower units may be limited to only a few hours per day for wind energy shadowing purposes.

42. Units powered by biomass (wood, etc.) or geothermal energy are also “renewable” resources, but unlike wind energy, they are considered “dispatchable” and may also be used in baseload or intermediate service in areas where these energy sources are available. They contribute less than twenty percent (20%) of renewable energy and only tiny fraction of total electricity generation. As indicated above, wind turbines are “intermittent” and neither reliable nor dispatchable because they are dependent on wind speed. Solar photovoltaic panels are also renewable intermittent sources of electricity because they are dependent on sunlight, and for that reason cannot be dispatched.

43. A kilowatt-hour (kWh) of electricity from a wind turbine has less value than a kWh of

electricity from a reliable (“dispatchable”) generating unit; i.e., from a unit that can be called upon to produce electricity whenever the electricity is needed by electric customers.

44. Wind turbines have little or no “capacity value”; i.e., they are unlikely to be producing electricity at the time of peak electricity demand. Therefore, wind turbines are not a substitute for reliable generating capacity needed to provide reliable electric service for electric customers.

45. Because wind energy has little or no capacity value, reliable intermittent capacity must be available to shadow the wind energy and, with the exception of hydropower, that intermittent capacity uses carbon-based fuels.

B. Retail Electricity Is Delivered Through An Interstate “Grid”

46. The wires and associated apparatus between the generators and the electrical service line to end users are known as the electrical “grid”.

47. Power (wattage) moves at near the speed of light through the grid as an electromagnetic wave.

48. Because of the many interconnections of the grid, the power created by any specific generating facility connected to the grid can supply the power demand from any point on the grid. The exception to this is that wind energy is highly variable and thus, while it can supply power from any location on the grid, it cannot do so reliably, unlike fossil fueled sources.

49. The physical electricity generated by renewable sources and supplied to the grid is indistinguishable from electricity generated by non-renewable sources and supplied to the grid, although its reliability is vastly different.

50. Power drawn from any particular point on the grid cannot be attributed to any specific power source on the grid.

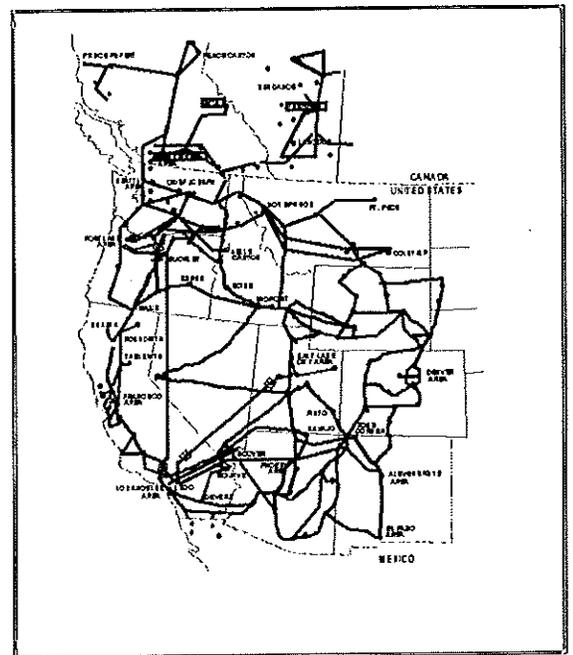
51. The price of retail electricity includes the cost of electricity transmission through the grid.

52. Companies that sell retail electricity drawn from an interstate grid participate in interstate commerce.

C. Colorado Retail Electricity Is Delivered Through An Interstate “Grid”

53. The electricity grid in Colorado is a portion of the Western Interconnection (which is managed by multiple entities). This electricity grid is generally depicted by the accompanying map. The Western Electricity Coordinating Council (WECC) helps manage the Western Interconnection and is a Regional forum for promoting regional electric service reliability in Western Canada and the Western United States.

Western Interconnection ISO (map is illustrative and does not show all transmission lines)



54. Within WECC’s southwest electrical region, the Rocky Mountain Power Area is managed by two balancing authorities, the Public Service Company of Colorado (PSCo) and the Western Area Power Administration - Colorado-Missouri WAPA.

55. The Public Service Company of Colorado (PSCo) is a registered Transmission Provider (TP) and Balancing Authority (BA) within the Western Interconnection and the Western Electricity Coordination Council (WECC). As PSCo is a vertically integrated electric utility, it is

also a Generation Owner (GO) and Load Serving Entity (LSE). The PSCo transmission network is located primarily along the Front Range of Colorado with extensions west to Grand Junction, Colorado and south to Alamosa, Colorado. The main transmission voltages are 230 kV and 115 kV. The BAs adjacent to PSCo are Western Area Power Administration - Loveland, Area Power Administration - Phoenix, and Public Service Company of New Mexico (PNM). PSCo coordinates its ATC calculations with these neighboring transmission providers. PSCo is also connected asynchronously to the Southwest Public Service (SPS) BA in the Southwest Power Pool (SPP) region through an AC/DC/AC converter station at Lamar, Colorado. SPS and PSCo are both operating company subsidiaries of Xcel Energy Inc. and coordinate ATC postings for tie line capacity.

56. Every municipal, private or cooperative electric company in Colorado that sells electricity to the retail market is connected to the grid.

57. As a balancing authority PSCo is the entity responsible for integrating resource plans ahead of time, maintaining load-interchange-generation balance within most of Colorado, and supports interconnection frequency in real time.

58. PSCo not only owns transmission lines within the grid, but also buys and sells power to wholesale customers and sells to retail customers.

59. Colorado retail electricity utilities connected to the PSCo-managed grid draw power from a grid that crosses state boundaries, is an interstate source of electricity and, thus, the Colorado retail electricity utilities subject to Colorado statutes participate in interstate commerce.

II. THE STATUTORY MANDATE TO MEET RENEWABLE ENERGY STANDARDS FACIALLY VIOLATES THE INTERSTATE COMMERCE CLAUSE, OR IMPERMISSIBLY IMPOSES A BURDEN ON INTERSTATE COMMERCE INCOMMENSURATE WITH THE LOCAL BENEFITS SECURED.

A. State Mandates That Require A Certain Proportion Of Retail Electricity Sales To Be Generated By Renewable Sources Blocks The Flow Of, And Creates An Impermissible Burden On Interstate Commerce.

60. All Colorado retail electrical service is connected to the interstate grid.

61. 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. This is akin to a corn processor purchasing the produce from a farmer, but taking delivery from the farm coop grain silo. The processor obtains the amount of corn purchased, but has no guarantee that it came from the land owned by the farmer he paid.

62. A mandate that requires a percentage of the retail electrical sales be generated by renewable sources effectively bars a power source connected to the interstate grid from producing non-renewable power equivalent to the percentage of renewable energy required to meet the Colorado law. For this reason, the mandate is facially discriminatory to interstate commerce.

B. Three Purposes of Colorado's Renewable Energy Standard Are Designed To Discriminate or Otherwise Impermissibly Burden Interstate Commerce

63. In 2004, Colorado voters passed an initiative to enact a renewable energy standard, codified at Colorado Revised Statutes (C.R.S.) 40-2-124. The initiated measure, Amendment 37,

included a declaration of intent, to wit:

SECTION 1. Legislative declaration of intent:

Energy is critically important to Colorado's welfare and development, and its use has a profound impact on the economy and environment. Growth of the state's population and economic base will continue to create a need for new energy resources, and Colorado's renewable energy resources are currently underutilized.

Therefore, in order to save consumers and businesses money, attract new businesses and jobs, promote development of rural economies, minimize water use for electricity generation, diversify Colorado's energy resources, reduce the impact of volatile fuel prices, and improve the natural environment of the state, it is in the best interests of the citizens of Colorado to develop and utilize renewable energy resources to the maximum practicable extent.

64. The purpose of requiring retail utilities to generate, or cause to be generated, electricity from renewable sources in order to fully utilize Colorado's renewable energy resources is facially discriminatory to electricity generators operating outside of Colorado.

65. The purpose of requiring retail utilities to generate, or cause to be generated, electricity from renewable sources in order to attract to Colorado new businesses and jobs associated with renewable energy generation is facially discriminatory to lower cost, more reliable non-renewable energy generation supplying power to the interstate grid from outside of Colorado.

66. The purpose of requiring retail utilities to generate, or cause to be generated, electricity from renewable sources in order to promote development of rural economies engaged in interstate commerce from within Colorado is facially discriminatory to rural economies engaged in the same interstate commerce from outside of Colorado.

67. The purpose of requiring retail utilities to generate, or cause to be generated, electricity from renewable sources in order to diversify Colorado's energy resources imposes a burden on interstate commerce incommensurate with the local benefits secured as it closes off the

marketplace to lower cost and more reliable non-renewable energy resources engaged in interstate commerce available from generators inside and outside Colorado, while simultaneously increasing air pollution.

C. The Electric Resource Standards Program and the Municipally Owned Electric Utility Program Are Facially Discriminatory to, or Otherwise Impermissibly Burden Interstate Commerce.

68. C.R.S. 40-2-124(1)(c)(I)&(V) and C.R.S. 40-2-124(3)&(4) require each qualifying retail utility to generate, or cause to be generated, electricity from recycled energy and renewable energy resources in specified minimum amounts. Lower cost, cleaner and more reliable nonrenewable interstate electricity generating sources may not compete for the renewable set-aside portion of the interstate retail electricity market in Colorado due to this mandate. For that reason, the mandate impermissibly burdens interstate commerce.

69. C.R.S. 40-2-124(1)(c)(I)(C) – (I)(E), working through C.R.S. 40-2-124(1)(a)(II), (a)(V) & (a)(VI) and C.R.S. 40-2-124(7) working through C.R.S. 40-2-124(3)&(4), requires each qualifying retail utility to generate, or cause to be generated in specified minimum amounts, electricity from: (i) a renewable energy resource that is located either on the site of a Colorado retail customer's facilities and is interconnected on the customer's side of the utility meter located, a kind of energy defined as "retail distributed generation"; or, (ii) a renewable energy resource in Colorado with a nameplate rating of thirty megawatts or less and that does not qualify as retail distributed generation. Lower cost, more reliable interstate electricity generating sources supplying the interstate grid may not compete for the exclusively Colorado-based distributed generation set-aside portion of the interstate retail electricity market in Colorado due to this mandate. For that reason, the mandate is facially discriminatory to interstate commerce.

70. C.R.S. 40-2-124(1)(c)(III) mandates inflation of the regulatory compliance value of certain renewable sources if they are located in Colorado, thereby establishing a market-bias against otherwise qualifying renewable sources located outside of Colorado. For that reason, the mandate is facially discriminatory to interstate commerce.

71. C.R.S. 40-2-124(1)(c)(IV) requires Colorado retail electricity utilities to enter into interstate wholesale contracts that supply the statutorily mandated proportion of electricity from recycled energy and renewable energy sources, or to acquire an equivalent amount of renewable energy credits, which may be generated through higher-cost, less reliable energy efficiency and conservations programs. Because lower cost, more reliable nonrenewable interstate electricity generating sources may not compete for this set-aside portion of energy demand, the mandate is an impermissible burden to interstate commerce.

72. C.R.S. 40-2-124(1)(c)(VI) mandates inflation of the regulatory compliance value of certain renewable sources if they are located in Colorado and are “community-based projects”, thereby establishing a market-bias against otherwise qualifying renewable sources located outside of Colorado. For that reason, the mandate is facially discriminatory to interstate commerce.

73. C.R.S. 40-2-124(1)(c)(VII) mandates inflation of the regulatory compliance value of solar sources, thereby establishing a market-bias against otherwise non-renewable sources located outside of Colorado. For that reason, the mandate is facially discriminatory to interstate commerce.

74. C.R.S. 40-2-124(1)(c)(IX) mandates inflation of the regulatory compliance value of certain renewable sources if they are located in Colorado and interconnect to electric

transmission or distribution facilities owned by a cooperative electric association or municipally owned utility, thereby establishing an market-bias against otherwise qualifying renewable sources located outside of Colorado. For that reason, the mandate is facially discriminatory to interstate commerce.

D. The Tradable Renewable Energy Credits Limitation Program Impermissibly Imposes Extraterritorial Control Of Commerce

75. C.R.S. 40-2-124(1)(d) authorizes use of tradable renewable energy credits where certain retail electricity utilities are unable to otherwise generate or purchase sufficient renewable power and allows use of commercial interstate renewable energy credit trading systems, but mandates that definitions of “renewable energy” be identical to those set out in Colorado law at C.R.S. 40-1-124(1)(a). The definitions set out in the Colorado statute are not identical to those used under the Northeastern Regional Greenhouse Gas Initiative (RGGI). Nor are they the same as California’s Renewable Portfolio Standard. Of the 28 states with renewable portfolio mandates there is no standard definition of qualifying renewable technologies. Thus, the definitions set out in the Colorado statute stop interstate commerce in renewable energy credits and therefore C.R.S. 40-2-124(1)(d) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of Colorado and thus is invalid per se for its interference with interstate commerce.

E. The Standard Rebate Offer Program Imposes A Burden On Interstate Commerce Incommensurate with the Local Benefits Secured.

76. C.R.S. 40-2-124(1)(e) mandates some, but not all Colorado retail electricity utilities to pay customers who install solar electric generation on the customers’ premises. This imposes a cost on affected Colorado utilities that is not imposed on other domestic and foreign utilities

connected to the same grid and thus burdens the affected Colorado utilities' participation in the interstate electricity market. This mandate imposes a burden on interstate commerce incommensurate with the local benefits secured.

F. **The Recovery of Costs Incentives Program Imposes A Burden On Interstate Commerce Incommensurate with the Local Benefits Secured.**

77. C.R.S. 40-2-124(1)(f)(I) relieves some, but not all Colorado retail electricity utilities from complying with the competitive bidding requirements of the Colorado Public Utility Commission rules, codified at 4 CCR 723-3-3600 *et seq.* This relieves eligible Colorado utilities of a cost that is imposed on non-eligible domestic utilities connected to the same grid and supplying interstate power and thus burdens the ineligible Colorado utilities' participation in the interstate electricity market in a manner incommensurate with the local benefits secured.

G. **The Retail Rate Impact Rule Imposes A Burden On Interstate Commerce Incommensurate with the Local Benefits Secured.**

78. C.R.S. 40-2-124(1)(g) limits the amount of eligible energy resources and renewable energy credits a qualifying utility may acquire, both items of interstate trade and commerce. This imposes on foreign companies a direct limitation on sales of both renewable resources and renewable energy credits to certain Colorado utilities. This mandate imposes a burden on interstate commerce incommensurate with the local benefits secured.

III. **COLORADO RENEWABLE ENERGY STANDARDS IMPOSE BURDENS ON INTERSTATE COMMERCE CLEARLY EXCESSIVE IN RELATION TO THE LOCAL BENEFITS OF THE MANDATES**

A. **Electricity Generation Must Be Reliable**

79. Electricity generation onto an interstate electrical grid must equal the electricity demand from the grid on a second-by-second basis. When the demand exceeds the supply (including

back-up spinning reserve), the voltage and frequency drop, increasing loss-of-load-probability (LOLP). Even small changes in frequency or voltage (either positive or negative) can significantly increase the LOLP. Loss of load implies blackouts and or brownout. In some cases, to prevent such contingencies from cascading and becoming wider spread and unmanageable outages the balancing authorities will impose crisis management protocols such as disconnecting customers from a localized distribution network.

80. Blackouts and brownouts most disrupt industrial and commercial operations. Brownouts reduce the available voltage, causing instability and/or failure of electronic equipment, for example, and can cause protective devices to “trip”, shutting down industrial and commercial equipment. So-called “high tech” commercial and industrial facilities are especially prone to economic harm from voltage or frequency disruptions of even sub-cycle (less than 1/60 of a second) disruption. Blackouts and brownouts can have severe consequences to homeowners as well. For instance, refrigerator compressors can fail with either.

81. The Colorado Energy Forum, *Colorado's Electricity Future*, 2006, reports that 355,120 commercial and industrial Colorado customers (28% of all such customers) suffered economic losses of \$1.8 Billion due to blackouts in a single year. Untold additional costs arise from brownouts.

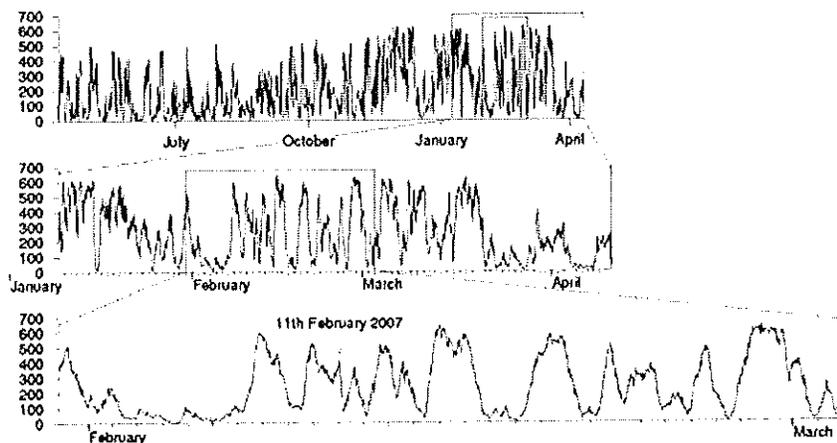
82. Outage costs tend to be driven by the frequency rather than the duration of reliability events. Momentary power interruptions, which are more frequent, have a stronger impact on the total cost of interruptions than sustained interruptions.

B. The Mandated Renewable Energy Is Unreliable

83. Renewable energy in Colorado is generated by hydropower from river flow (28%) and

wind facilities (72%). Hydropower from pumped storage (26% of all renewable energy) can only be used for four hours at a time. Thus, the vast majority of Colorado's renewable energy comes from wind facilities that directly supply the grid.

84. Wind facilities can only produce electricity when the wind blows within a very specific range of wind speeds. Winds are unpredictable and often gusty. Even with widely distributed wind facilities connected together in order to produce the greatest possible reliability, they remain undependable. The graphic below shows how the output from the 60 wind facilities (over 1,000 turbines) built throughout all Ireland dropped to nearly zero in an unpredictable manner and from hours to weeks at a time. Similar data is available from Australia, PJM Interconnection (PJM; originally named after Pennsylvania, New Jersey and Maryland has since expanded yet retained its original acronym based name) and California Independent System Operator (CaISO). In California, peak day output of wind turbines seldom exceeds 5% of wind turbine installed capacity.



85. The Colorado balancing independent system operators (ISOs) also known as “balancing

authorities” claim that their wind capacity is no more than 12.5 percent of nameplate capacity, but also admits: “[Colorado wind] capacity is only available when wind conditions are sufficiently high enough to support the noted generation values above. Therefore, the on-demand net maximum capacity is zero.”

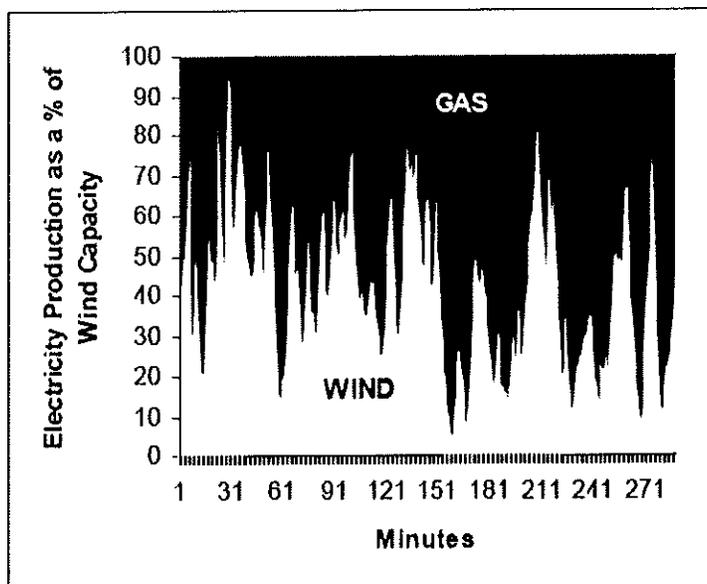
86. This unreliability in wind energy caused known brownouts in Texas. The lack of transparency in Colorado wind generation recordkeeping precludes determination of the number of similar Colorado brownouts due to wind energy irregularities.

87. Modeling of blackouts and brownouts indicates that the higher percentage of wind power on the grid, the greater the unreliability of the grid and the greater the likelihood of blackouts and brownouts. This risk increases exponentially, not linearly, with increasing levels of wind generation.

C. Unreliable Sources Must Be Mated With Reliable Sources

88. To ensure electricity generation (supply) equals demand on a second-by-second basis, ISOs increase and reduce generation as needed, often using automated generation control (AGC).

89. When demand increases or other supplies become unavailable, the ISO directs a generating facility operator to “ramp up” their generation. When demand drops, the ISO directs a “ramp down” in generation. Prior to the advent of wind generation, these ramp ups and ramp downs reflected daily life and followed a



predictable schedule that prevented the need for saw-tooth ramping to balance the second-by-second variation in wind generation connected to the grid. The graphic above shows how reliable generation sources, in this example gas fired, must be ramped up and down to account for the variation in wind energy.

90. When wind speed increases (but remains below the maximum speed allowed by the turbines), generation companies curtail generation from their intermediate load units sufficient to accommodate the wind power. Intermediate load units are usually natural gas powered generators, but, as discussed below, must on occasion be slow-to-respond coal-fired units. When the wind subsequently slows, generation from the intermediate load units is increased or otherwise brought back online as needed. The process by which generation is ramped up and down at a plant due to wind or any other factor is called cycling. Integrating erratic and unpredictable wind resources with established coal and natural gas generation resources requires the electricity generators to cycle their intermediate load coal and natural gas-fired units. This wind-energy-caused cycling results in significantly less efficient performance of fossil fuel facilities. The net result is increased emissions and fuel use.

91. Most utilities operate their wind generation as a “must-take” resource because of the RES mandates. In other words, electricity generation companies will operate their intermediate load units (coal and gas-fired plants) in a manner that allows it to take as much generation from wind as possible without allowing generation from their fossil fuel facilities to fall below their design minimum generation levels.

92. Wind resources tend to be strongest and most predictable at night. During that time period, generation from coal comprises approximately 62% of the generation mix and gas-fired

generation falls to 20% within the PSCo system, for example. If there is not enough gas-fired generation to safely cycle gas plants, coal plants must be cycled instead. Later in the night, coal-fired generation is the only resource available to absorb wind power and thus PSCo has cycled its coal facilities.

93. How frequently wind affects coal or natural gas-fired generation is difficult to determine. PSCo, like most wind operators, does not publish hourly wind generation data. Nevertheless, PSCo acknowledges that wind impacts coal as well as gas generation.

94. While Texas has more coal plants and wind farms than Colorado and the wind undoubtedly exhibits somewhat different behavior in Texas, an unimpeached, objective and quantitative analysis concludes that the effect of wind in Colorado and Texas are similar enough for a valid comparison. Even in Texas, which has one of the nation's largest gas-fired generation bases, coal plants are frequently cycled. Several independent studies have shown the cycling and net-increase-in-emissions from reliance on wind generation in places other than Colorado. It stands to reason that the same happens in Colorado.

D. Renewable Sources Do Not Save Consumers and Businesses Money

95. The price of mandatory wind power is generally higher, and in many cases significantly higher, than current prices for market based alternatives.

96. A quantitative analysis by an authoritative body comparing the cost of coal, natural gas and wind electricity generation in a mature mixture of all three sources with significant reliance on wind energy documents natural gas to be 27% more expensive than coal, coastal wind to be 62% more expensive than coal and inland wind to be 89% more expensive than coal. These general trends are confirmed by the U.S. Department of Energy, Energy Information

Administration (EIA). According to the EIA December 2009 projection of future electricity costs, in 2016 wind power will be and nearly 80 percent more expensive than natural gas. Thermal solar generation is projected to be 200 percent more expensive than gas. In December 2010, the EIA updated its projections. According to the new projections, in 2016, wind power will be almost 50 percent more expensive than gas. Thermal solar is projected to be more than 300 percent costlier than gas.

97. States that adopted an RES program subsequently experienced a 0.35% larger annual increase in average retail prices than those that did not adopt renewable energy portfolio standards (RPS). The analysis includes the years from 1990 through 2005, controlling for natural gas prices, coal prices, and the generation mix for each state thereby filtering out these other price effects, allowing discovery of the specific effect strictly due to RES.

98. The additional 0.35% increase will have a cumulative effect over time. A state can expect that, after ten years, rates will be about 3.5% higher with RES than they otherwise would have been without RPS. Further, these increases do not include other costs such as the added cost of extra interstate transmission lines needed by wind facilities.

99. The U.S. Department of Energy, Energy Information Administration tracks electricity prices by state over time. Currently Colorado has the nation's 21st highest electricity rate, degrading from 31st in 1990.

100. One reason retail prices in Colorado and other RES mandate states have grown reflects the need to use more natural gas generation, compared to coal generation, because natural gas generation is better able to adapt to the cycling required due to intermittent and erratic wind

generation. Since the cost per megawatt-hour (MWh) of natural gas is higher than coal, prices have risen in the RES mandate states.

101. In addition to the shift from coal to natural gas, the effect of cycling itself causes generation inefficiencies that increase wholesale, and thus retail prices. Coal-fired and combined cycle natural gas electricity generating facilities are not designed to rapidly cycle up and down. Analysis of the operational effects of wind-caused cycling of coal plants has shown that it took more fuel to generate a MWh. One or more studies of plant operations over periods as short as two days have found that coal consumption at one Colorado plant was actually 22 tons greater than if the plant had not been cycled and generation had remained stable. The same is true for combined-cycle natural gas-fired electricity generation facilities (CCNG).

102. Because coal-fired facilities were not designed for cycling, cycling coal plants causes damage to the plant itself. The financial cost of this damage is seen in an immediate increase in plant maintenance and reduction of useful plant life – a cost that can be very high. This too adds to the wholesale and retail price of electricity.

103. While most of a typical coal-fired plant is designed to be able to cycle, the change in generation has direct impact on the plant water systems, pulverizers, boilers, scrubbers, heat exchangers, and generators. Catastrophic failures as a result of many unit cycles are most commonly in the form of fatigue, corrosion, and cycling-related creep. These failures eventually cause plant shutdowns, and high capital cost often in the tens of millions of dollars due to necessary replacement of the damaged equipment. Typically such failures cause multiple unplanned outages that, in turn, force ISOs to direct other facilities to ramp up in an inefficient

manner. To date, most of the wind integration studies (including those of PSCo), have ignored these costs.

E. Renewable sources do not minimize water use for electricity generation

104. Because of low generation costs, hydropower is used to the greatest extent possible, as it always has been. Implementation of the Colorado RES has not significantly altered use of hydropower and thus has not minimized water use for this form of electricity generation.

105. Because wind power requires an equal amount of fossil fuel backup generation to be immediately available to the grid, fossil fuel plants must remain on line, using the same amount of water, typically for cooling purposes, as they would use if they were the primary rather than the backup generation. As described above, the cycling imposed inefficiency losses may likely increase water demands.

F. Renewable sources do not reduce the impact of volatile fuel prices

106. The volatility of fuel prices is unrelated to the availability of renewable sources and instead reflects the international supply and demand for fuel. Coal prices have increased due to increased demand in Asia. Natural gas prices have varied due to the expanding sources of natural gas in the United States, as well as the increased demand from an expanding natural gas electricity generation market. Because wind power requires an equal amount of fossil fuel backup, an RES places greater significance on the availability of natural gas and as a result increase the impacts and volatility of fuel prices.

G. Renewable sources cause more pollution and do not improve the natural environment of the state

107. The erratic and highly variable nature of wind power has been found to increase rather than decrease emissions of pollutants regulated under the Clean Air Act. This occurs because the cycling of coal and natural gas plants results in inefficient operation of both the combustion processes and the pollution control processes, as well as from the increases of fuel used to product a MWh of electricity.

108. Examination of the effects of wind variability on the cycling of fossil fuel plants needed to balance grid voltage and frequency demonstrates use of wind causes more pollution emissions than it prevents. Operation of the Cherokee coal plant during a two day period illustrates the emission impacts of cycling coal units. The Cherokee Plant was chosen by the analyst due to its proximity to Denver and because it appears to be frequently cycled.

109. The two most significant pollutants regulated under the federal Clean Air Act and emitted by fossil fuel electricity generation units are sulfur dioxide (SO₂) which causes acid rain and nitrogen oxides (NO_x) which causes smog. Another pollutant now being controlled under the Clean Air Act is the greenhouse gas carbon dioxide (CO₂).

110. By netting out the emissions associated with the coal-fired generation that are avoided by using wind, the result is that due to wind generation, SO₂ and NO_x emissions are significantly higher (approximately 23% and approximately 27%, respectively) than they would have been if the coal plants had not been cycled to compensate for wind generation. In addition, more tons of CO₂ (approximately 2%) were emitted than if the erratic variability of wind had not caused the plants to be cycled.

111. In a second two-day analysis of the effects of wind variability and subsequent cycling of fossil fuel plants, use of wind power resulted in an increase of approximately 18% in SO₂

pollution emissions and an increase of approximately 10% in NO_x pollution emissions more than would have been emitted had coal not been cycled.

112. In addition to emissions increases in Clean Air Act pollutants and emissions of greenhouse gases due to the variability in wind power generation, renewable energy mandates cause other environmental problems. With competition for limited biomass and open land resources (to grow biomass) with ethanol feedstocks (required to meet existing renewable fuel standards), food crops and forest industry products, higher RES requirements will materially increase the risk of forest land shortages and higher prices for food and feedstocks.

113. Wind energy is a threat to wildlife and endangered species. Wind resource areas often are coincident with critical habitat and/or migratory flyways. Many of these conflicts are for protected, threatened and endangered species. Wind energy development has long had significant issues with avian and bat mortality, even given the relatively few wind turbines installed to date. More wind turbines will pose greater threats. For example, in California's Altamont Pass area, one of the nation's oldest wind power development areas, forty to 120 Golden Eagles are slaughtered each year. Research by raptor experts for the California Energy Commission indicates that the facility's turbines kill more than 1,000 birds of prey from 40 different species each year, violating federal and state wildlife protection laws such as the Bald Eagle and Golden Eagle Protection Act, the Migratory Bird Treaty Act, and several California Fish and Game Code provisions. Further, the additional transmission lines necessary to serve wind development areas pose special threats to birds as well.

114. Colorado is an important part of both the Pacific Flyway and Central Flyway for migratory birds, with thousands of migratory birds transiting to and through the State. Both

protected and endangered species are included within this mass migration each year.

115. The threat of significant avian mortality has caused partial shutdowns and required equipment replacement in the Altamont Wind Resource Area in California due to a lawsuit brought by the Center for Biological Diversity.

116. The potential deaths of California Condors from wind turbine development is one of several reasons given by the Administrative Law Judge (ALJ) in denying a permit to Pacific Gas and Electric Co. for a Certificate of Public Convenience and Necessity for a large turbine installation in California. The ALJ found the Manzana Wind Project to not be cost-competitive and to pose unacceptable risks to ratepayers. It will subject the ratepayers to unacceptable risks due to potential cost increases resulting from project under-performance, less than forecasted project life, and any delays which might occur concerning transmission upgrades and commercial online date. Ratepayers would be at risk if the project underperforms. In particular, if the Manzana Wind Project fails to achieve production as expected for any reason such as construction delays or curtailments as a result of a collision with a California condor, shareholders face no risks while customers could incur increased costs. Under different ownership and financing schemes (e.g. power purchase agreement with a third party owned wind project) ratepayers are only partially, if at all, protected from lack of production. In the event a project fails to produce, ratepayers will be exposed to higher prices for makeup power and/or physical shortages of power.

117. Living too close to wind turbines imposes health and safety risks to the public. The tip speed of modern wind turbines approaches 200 MPH when operating. Ice and blade throw, from the top of a 300 foot tower, while infrequent, poses serious safety risks to the public within about

three-quarters to a mile. Further, the noise from wind turbines can cause health effects, as documented by Dr. Nina Pierpont and others. Industrial wind turbines produce significant amounts of audible and low-frequency noise. Dr. Oguz A. Soysal, Professor and Chairman of the Dept. of Physics and Engineering at Frostburg State University in Maryland, measured sound levels over half a mile away from the Meyersdale, PA, 20-turbine wind farm. Typical audible (A-weighted) dB (decibel) levels were in the 50-60 range, and audible plus low-frequency (C-weighted) dB were in the 65-70 range. 65-70 dB is the loudness of a washing machine, vacuum cleaner, or hair dryer. A difference of 10 dB between A and C weighting represents a significant amount of low-frequency sound by World Health Organization standards. The noise produced by wind turbines has a thumping, pulsing character, especially at night, when it is more audible. The noise is louder at night because of the contrast between the still, cool air at ground level and the steady stream of wind at the level of the turbine hubs. This nighttime noise travels a long distance. It has been documented to be disturbing to residents 1.2 miles away from wind turbines in regular rolling terrain, and 1.5 miles away in Appalachian valleys. At night, the World Health Organization (WHO) recommends, the level of continuous noise at the outside a dwelling should be 45 dB or less, and inside, 30 dB or less. These thresholds should be even lower if there is a significant low-frequency component to the sound, – as there is for wind turbines. Higher levels of noise disturb sleep and produce a host of effects on health, well-being, and productivity. Effects of noise-induced sleep disturbance include fatigue, depressed mood or well-being, decreased performance, and increased use of sedatives or sleeping pills. Measured physiologic effects of noise during sleep are increased blood pressure and heart rate, changes in breathing pattern, and cardiac arrhythmias.

118. The decibel is logarithmic. Increasing the dB level by 10 multiplies the sound pressure level by 10. Increasing the dB level by 20 multiplies the sound pressure level by 100 (and 30 dB multiplies by 1000, etc.). Thus the 65 dB measured day and night half a mile from the Meyersdale wind farm, for example, has a measured intensity 100 times greater than the loudest continuous outdoor nighttime noise (45 dB) recommended by the World Health Organization (WHO.)

H. Renewable Mandates Do Not Create New Jobs or Grow the Economy

119. Quantitative economic analysis of electricity generation indicates that renewable energy generation causes a net reduction in the economy. In addition to this finding, the use of more land for capturing renewable energy flows has a similar negative effect on long run economic growth.

120. The effect of a mandate for wind energy, which is the practical effect of the Colorado RES, results in the condition that above-market wind energy costs have the deleterious effects of reshuffling consumer spending and increasing the cost of production for businesses. Increased costs for households and employers reduced the otherwise positive employment impacts of renewable energy capital investment and the ongoing operational repair and maintenance activities.

121. As a result, the claim that wind power creates significant numbers of new jobs is substantially false. The net gain in employment is far less than conventionally thought with long term winners and losers by economic sector. Moreover, there exist the potentially detrimental impacts of diverting capital investment away from more productive opportunities.

122. The majority of wind turbine installations continue to use wind turbines imported from

foreign sources, further reducing job creation for Coloradans and Americans.

123. Wind energy has other adverse impacts on the economy. There is no penalty for wind developers to submit a bid for a certain amount of future power (e.g. 10 MWH for tomorrow afternoon) and then not supply it (due to winds not being as forecasted). Conventional power sources are penalized if they can't supply what they bid. This is *defacto* favoritism of a generation source, to the disadvantage of the other sources, including interstate sources; and is reflected in the larger bills consumers must pay when a last minute substitution for wind energy has to be made. The lack of a penalty for wind energy's inability to supply what is expected of it results in higher prices to all customers than if wind were available or if wind were not on the grid and the ISO did not need to add otherwise unnecessary intermittent generation.

I. The objectives of the renewable energy standards could be promoted as well with a lesser impact on interstate activities

124. The statement of purpose for the Colorado RES establishes six objectives for the RES that could be promoted as well with a lesser impact on interstate activities: (i) to fully use Colorado's renewable energy resources that are currently underutilized; (ii) to save consumers and businesses money; (iii) to attract new businesses and jobs; (iv) to promote development of rural economies; (v) to minimize water use for electricity generation; (vi) to reduce the impact of volatile fuel prices; and (vii) to improve the natural environment of the state.

125. In each case, asserted hereinabove, the use of coal and natural gas fuels to generate electricity would better serve to accomplish the six objectives of the Colorado RES and would reduce prices in the interstate wholesale electricity market, while also significantly increasing the reliability and operational stability of the interstate grid.

HARM TO THE PLAINTIFFS AND TO THE PUBLIC

126. The members of the American Tradition Institute, the members of the American Tradition Partnership, and Rod Lueck are being harmed and will continue to be harmed by the discriminatory effects of the Colorado Electric Resource Standards Program, the Municipally Owned Electric Utility Program, the Recovery of Costs Incentives Program and the Retail Rate Impact Rule.

127. The public is also being harmed and will continue to be harmed by the discriminatory effects of the Colorado Electric Resource Standards Program, the Municipally Owned Electric Utility Program, the Recovery of Costs Incentives Program and the Retail Rate Impact Rule.

I. THE ELECTRIC RESOURCE STANDARDS PROGRAM AND THE MUNICIPALLY OWNED ELECTRIC UTILITY PROGRAM INCREASE COSTS

128. The cost of retail electricity purchased from of the Public Service Company (PSCo, but better known as Xcel Energy), Colorado's largest utility, demonstrates the true costs of the RES.

129. The statute provides for an incremental increase in the retail rate of 2 percent above the cost of non-renewable electricity and PSCo has charged at this level. The incremental costs are listed on consumers' bills as the Renewable Energy Standard Adjustment (RESA). Since January 2009, the RESA charge has been set at 2 percent, the rate impact limit. For a consumer with a \$150 PSCO bill, a 2% RESA charge would be \$3 monthly, \$36 annually.

130. PSCo defines the RESA on the monthly statements as representing "2% of an electric bill and funds the renewable energy program as required by Colorado law that asks utilities to generate increasing portions of their electricity from sun, wind and biomass." PSCo employs two accounting mechanisms in order to circumvent the 2 percent retail rate impact limit. These budgeting techniques artificially increase conventional energy costs or artificially decrease

renewable energy costs. Either way, it suppresses the incremental cost, which allows PSCo to charge rates higher than the retail rate impact limit in the law.

131. The first artificial adjustment is a \$20 per ton “carbon adder,” which was introduced in PSCo’s 2010 RES Compliance Plan application. This fee is meant to incorporate the cost of greenhouse gas regulations into the model used to calculate the incremental cost. Yet no such regulations exist. As a result, the only function of the carbon adder is to suppress the incremental costs by artificially increasing the price of conventional energy.

132. PSCo concedes that it would violate the 2 percent retail rate impact limit without the carbon adder. According to its Statement of Position on its proposed 2010 RES compliance plan, “Retroactively changing the modeling assumptions to assume no carbon regulation prior to 2014 would significantly increase the incremental costs of the resources” Because the RESA, which collects the incremental costs, is already set at the 2 percent maximum retail rate impact limit, “significantly” increasing incremental costs would necessarily violate the retail rate impact.

133. By 2012, this accounting would shield almost \$50 million from the RESA retail rate impact. That is almost double the projected RESA fee for that year.

134. The other mechanism to circumvent the retail rate impact is a \$4 per kilowatt- hour monthly “surplus capacity credit” for renewable energy, starting in 2012. This credit gives renewable energy value where none exists.

135. Renewable energy is intermittent. For example, because the wind does not blow consistently, PSCo’s own forecasting methods rely on only 12.5 percent of wind power’s

nameplate capacity. Therefore, when the utility contracts for 150 megawatts of wind, it expects only 18.75 megawatts of electricity generation.

136. The \$4 per kilowatt-hour monthly “surplus capacity credit” gives intermittent resources value for their nameplate capacity, when no such value exists. The credit is subtracted from the cost of the renewable resource. According to the PUC Trial Staff, “This decreases the cost of the RES plan,” which also decreases the incremental costs subject to the retail rate limit. Xcel concedes that incremental costs would exceed the 2 percent retail rate impact without this capacity credit.

137. Even with these accounting manipulations, PSCo has been unable to stay under the RESA cap. In 2009, it exceeded the cap by almost \$20 million, and the year before by almost \$10 million. In 2010, Xcel added another \$11 million to the RESA deficit. This year, Xcel acknowledges that it will overshoot the 2 percent rate cap by at least \$47 million, which will bring the deficit to almost \$93 million. This burgeoning deficit is placed into a deferred account, on which PSCo earns 4.225 percent annual interest. That rate will increase to 7.88 percent in August, 2011.

138. The Public Utilities Commission also has permitted PSCo to exclude significant renewable energy costs from retail rate impact calculations. In a 2007 decision, the Public Utilities Commission granted PSCo a waiver allowing the utility to treat as “sunk” the costs of 775 megawatts of new wind energy resources. “Sunk” costs are not considered when determining the incremental costs (and therefore the retail rate impact). However, the electricity generated by the 775 megawatts counted towards RES compliance.

139. These “off the books” wind energy costs amounted to \$144 million in 2008, \$147 million

in 2009, and \$155 million in 2010, but do not show up as RES costs on the ratepayer's bills, but instead are hidden in another account and still paid by the retail customers.

140. These "non-incremental costs," which are the total renewable energy costs minus the incremental costs, are recovered through a different monthly fee, the Electric Commodity Adjustment (ECA).

141. According to PSCO's 2010 RES Compliance Plan, the ECA is projected to be \$6.3 million this year, before it balloons to \$141 million in 2012. It then increases exponentially to \$738 million in 2020, or almost 23 percent of total retail electricity sales—none of which would count against the 2 percent retail rate impact.

142. Assuming 1.5 million ratepayers in Colorado (current figure is 1.3 million) in 2020, and the mandated 20 percent renewable standard, the ECA cost alone will average nearly \$500 per year per ratepayer.

143. All tolled, over the next decade, Colorado working families and businesses will have to pay nearly \$3.8 billion in additional electricity costs that will not be subject to any rate cap in order to meet the RES and will be collected from ratepayers via the ECA. They will also assume the costs, roughly \$2 billion, of a new solar power plant with storage project. Like the ECA charges, these costs will not be subject to any rate cap, while the energy produced will count towards meeting the RES.

144. There is no evidence that, absent the Colorado RES mandates, PSCo would have built and operated these highly inefficient, high cost renewable generation facilities. There is, however, some evidence that the Public Utility Commission and/or the Federal Energy Regulatory Commission would have rejected requests to build these wind facilities had there

been no RES, based alone on the high costs to the retail consumers.

145. Plaintiff Rod Lueck and over 200 members of ATI and ATP live in Colorado and purchase electricity obtained through the interstate grid, including from PSCo. Both Colorado and out-of-state companies generating electricity from non-renewable sources are prohibited from participating in that portion of the interstate electricity market set aside by Colorado exclusively for renewable generation sources under the Electric Resource Standards Program and the Municipally Owned Electric Utility Program (the Programs) codified at C.R.S. 40-2-124(1)(c) and C.R.S. 40-2-124(3)&(4), respectively. Were it not for discrimination against both Colorado and out-of-state producers of electricity generated from non-renewable sources, the Plaintiffs would have received and could receive significantly lower cost, cleaner and more reliable electricity, and not suffer the increase in cost, reduction in environmental quality and interruption of service associated with mandated renewable resource development.

146. In like measure, the Programs harm, and will continue to harm, the public living and investing in both Colorado and other states. The Programs distort the path of commerce, inflate the price of electricity and divert monies the public pays for electricity to inefficient renewable energy generators, both within and outside of Colorado. The Programs also increase air pollution and otherwise harm environmental quality in both Colorado and other states. And the Programs redirect investment from lower cost electricity generation to higher cost generation, thus artificially mandating a reduction in the value of energy investments within an interstate investment market.

II. TRADABLE RENEWABLE ENERGY CREDITS LIMITATION PROGRAM

147. Plaintiff Rod Lueck and over 200 members of ATI and ATP live in Colorado and

purchase electricity obtained from renewable sources through the interstate grid. C.R.S. 40-2-124(1)(d) authorizes use of tradable renewable energy credits where certain retail electricity utilities are unable to otherwise generate or purchase sufficient renewable power and allows use of commercial interstate renewable energy credit trading systems, but mandates that definitions of “renewable energy” be identical to those set out in Colorado law at C.R.S. 40-1-124(1)(a). Because out-of-state “regional” trading systems do not define “renewable” in the identical manner as does the Colorado statute, they are prohibited from participating in credit trading under Colorado law and rule. When prohibited credit markets offer equivalent, but not identically defined renewable energy, especially at a lower cost, Plaintiffs are forced to pay higher prices for electricity.

148. In like measure, the energy credits limitation program harms, and will continue to harm, the public living in Colorado.

III. THE STANDARD REBATE OFFER PROGRAM

149. Plaintiff Rod Lueck and over 200 members of ATI and ATP live in Colorado and purchase electricity obtained from renewable sources through the interstate grid. The standard rebate offer program, codified at C.R.S. 40-2-124(1)(e), mandates some, but not all Colorado retail electricity utilities to pay customers who install solar electric generation on the customers’ premises. This imposes a cost on affected Colorado utilities that is not imposed on other domestic and foreign utilities connected to the same grid and thus burdens, and thus imposes increased costs on the Plaintiffs.

150. In like measure, the standard rebate offer program harms, and will continue to harm, the public living in Colorado.

IV. THE RECOVERY OF COSTS INCENTIVES PROGRAM

151. Plaintiff Rod Lueck and over 200 members of ATI and ATP live in Colorado and purchase electricity obtained from renewable sources through the interstate grid. The recovery of costs incentives program, codified at C.R.S. 40-2-124(1)(f)(I) relieves some, but not all Colorado retail electricity utilities from complying with the competitive bidding requirements of the Colorado Public Utility Commission rules, codified at 4 CCR 723-3-3600 *et seq.* This relieves eligible Colorado utilities of a cost that is imposed on non-eligible domestic utilities connected to the same grid and supplying interstate power and thus burdens the ineligible Colorado utilities' participation in the interstate electricity market. Governmental intervention in competitive contracting for electricity results in more expensive electricity and thus higher prices to the Plaintiffs.

152. In like measure, the recovery of costs incentives program harms, and will continue to harm, the public living in Colorado.

V. THE RETAIL RATE IMPACT RULE

153. Plaintiff Rod Lueck and over 200 Colorado members of ATI and ATP purchase electricity obtained from renewable sources through the interstate grid. The retail rate impact rule, codified at C.R.S. 40-2-124(1)(g) limits the amount of eligible energy resources and renewable energy credits a qualifying utility may acquire. Because this rule imposes on foreign companies a direct limitation on the price of both renewable resources and renewable energy credits to certain Colorado utilities, it limits the value of investments in renewable energy sources that have been or could be made by the Plaintiffs.

154. In like measure, and as discussed above, the retail rate impact rule harms, and will

continue to harm, the public living in Colorado.

SUMMARY

155. When Colorado imposes rules whose practical effect is more expensive, dirtier and less reliable electricity generation, consumers and businesses in Colorado and throughout the Rocky Mountain and Southwestern states suffer the consequences. These mandates do not accomplish the stated purposes of the Colorado statute, but they do impose impermissible burdens on interstate commerce that result in harm to the Plaintiffs and the public at large.

CLAIMS FOR RELIEF

First Claim for Relief Colorado Electric Resource [Renewable Energy] Standards Program – Declaratory Judgment

156. The Plaintiffs incorporate by reference paragraphs 1 – 155 above.

157. C.R.S. 40-2-124(1)(c)(I)&(V) violate the Commerce Clause of the U.S. Constitution because they do not allow lower cost, cleaner and more reliable nonrenewable interstate electricity generating sources located within and outside Colorado to compete for the renewable set-aside portion of the interstate retail electricity market in Colorado.

158. C.R.S. 40-2-124(1)(c)(I)(C) – (I)(E), working through C.R.S. 40-2-124(1)(a)(II), (a)(V) & (a)(VI) and C.R.S. 40-2-124(1)(c)(IV) violates the Commerce Clause of the U.S. Constitution for the same reason, and because they discriminate in favor of Colorado renewable sources.

159. C.R.S. 40-2-124(1)(c)(III), (VI), (VII) and (IX) violate the Commerce Clause of the U.S. Constitution because they favor renewable energy generators located within the State of Colorado.

160. The Court should enter a judgment declaring that the portions of C.R.S. 40-2-124(1)(c) cited hereinabove, and their implementing regulations codified at 4 C.C.R 723-3 et seq., are unconstitutional, invalid and unenforceable to the extent they limit sales of electricity generated from sources that participate in the interstate retail electricity market in Colorado and discriminate in favor of Colorado generation.

Second Claim for Relief
**Colorado Electric Resource [Renewable Energy] Standards Program –
Injunctive Relief**

161. The Plaintiffs incorporate by reference paragraphs 1 – 160 above.

162. The Court should enter a preliminary injunction and a permanent injunction ordering the Defendants to not enforce the provisions of C.R.S. 40-2-124(1)(c) cited hereinabove, and their implementing regulations codified at 4 C.C.R 723-3 et seq. to the extent they impermissibly limit sales of electricity generated from sources that participate in the interstate retail electricity market in Colorado.

Third Claim For Relief
**The Municipally Owned Electric Utility Program –
Declaratory Judgment**

163. The Plaintiffs incorporate by reference paragraphs 1 – 162 above.

164. C.R.S. 40-2-124(3)&(4) violate the Commerce Clause of the U.S. Constitution because they do not allow lower cost, cleaner and more reliable nonrenewable interstate electricity generating sources located within and outside Colorado to compete for the renewable set-aside portion of the interstate retail electricity market in Colorado.

165. C.R.S. 40-2-124(7) working through C.R.S. 40-2-124(3)&(4) violates the Commerce Clause of the U.S. Constitution because they do not allow lower cost, cleaner and more reliable

nonrenewable interstate electricity generating sources located within and outside Colorado to compete for the renewable set-aside portion of the interstate retail electricity market in Colorado.

166. The Court should enter a judgment declaring that C.R.S. 40-2-124(3), (4) & (7), and their implementing regulations codified at 4 C.C.R 723-3 et seq., are unconstitutional, invalid and unenforceable to the extent they impermissibly limit sales of electricity generated from sources that participate in the interstate retail electricity market in Colorado.

Fourth Claim for Relief
**The Municipally Owned Electric Utility Program –
Injunctive Relief**

167. The Plaintiffs incorporate by reference paragraphs 1 – 166 above.

168. The Court should enter a preliminary injunction and a permanent injunction ordering the Defendants to not enforce the provisions of C.R.S. 40-2-124(3), (4) & (7) and their implementing regulations codified at 4 C.C.R 723-3 et seq. to the extent they do not allow interstate electricity generating sources located within and outside Colorado to compete for the renewable set-aside portion of the interstate retail electricity market in Colorado

Fifth Claim for Relief
**Tradable Renewable Energy Credits Limitation Program –
Declaratory Judgment**

169. The Plaintiffs incorporate by reference paragraphs 1 – 168 above.

170. C.R.S. 40-2-124(1)(d) violates the Commerce Clause of the U.S. Constitution because, even where they are equivalent in effect, out-of-state “regional” trading systems that do not define “renewable” in the identical manner as does the Colorado statute are prohibited from participating in the interstate credit trading market.

171. The Court should enter a judgment declaring that C.R.S. 40-2-124(1)(d), and its implementing regulations codified at 4 C.C.R 723-3 et seq., are unconstitutional, invalid and unenforceable to the extent it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

Sixth Claim for Relief
**Tradable Renewable Energy Credits Limitation Program –
Injunctive Relief**

172. The Plaintiffs incorporate by reference paragraphs 1 – 171 above.

173. The Court should enter a preliminary injunction and a permanent injunction ordering the Defendants to not enforce the provisions of C.R.S. 40-2-124(1)(d) and its implementing regulations codified at 4 C.C.R 723-3 et seq. to the extent it prohibits out-of-state “regional” trading systems that do not define “renewable” in the identical manner as does the Colorado statute from participating in the interstate credit trading market.

Seventh Claim for Relief
**The Standard Rebate Offer Program –
Declaratory Judgment**

174. The Plaintiffs incorporate by reference paragraphs 1 – 173 above.

175. C.R.S. 40-2-124(1)(e) violates the Commerce Clause of the U.S. Constitution because it imposes a cost on some affected Colorado utilities that is not imposed on other domestic and foreign utilities connected to the same grid and thus burdens the affected Colorado utilities’ participation in the interstate electricity market.

176. The Court should enter a judgment declaring that C.R.S. 40-2-124(1)(e) and its implementing regulations codified at 4 C.C.R 723-3 et seq. are unconstitutional, invalid and

unenforceable to the extent it mandates any Colorado retail electricity utilities to pay customers who install solar electric generation on the customers' premises.

Eighth Claim for Relief
**The Standard Rebate Offer Program –
Injunctive Relief**

177. The Plaintiffs incorporate by reference paragraphs 1 – 176 above.

178. The Court should enter a preliminary injunction and a permanent injunction ordering the Defendants to not enforce the provisions of C.R.S. 40-2-124(1)(e) and its implementing regulations codified at 4 C.C.R 723-3 et seq. to the extent it imposes a cost on some affected Colorado utility customers that is not imposed on other domestic and foreign utilities' customers receiving electricity from the same interstate market.

Ninth Claim for Relief
**The Recovery Of Costs Incentives Program –
Declaratory Judgment**

179. The Plaintiffs incorporate by reference paragraphs 1 – 178 above.

180. C.R.S. 40-2-124(1)(f)(I) violates the Commerce Clause of the U.S. Constitution because it imposes costs on “non-eligible” utilities that are not imposed on “eligible” domestic utilities connected to the same grid and supplying interstate power and thus burdens the ineligible Colorado utilities' participation in the interstate electricity market.

181. The Court should enter a judgment declaring that C.R.S. 40-2-124(1)(f)(I) and its implementing regulations codified at 4 C.C.R 723-3 et seq. are unconstitutional, invalid and unenforceable to the extent it imposes costs on “non-eligible” utilities that are not imposed on “eligible” domestic utilities connected to the same grid and supplying interstate power.

Tenth Claim for Relief
**The Recovery Of Costs Incentives Program –
Injunctive Relief**

182. The Plaintiffs incorporate by reference paragraphs 1 – 181 above.

183. The Court should enter a preliminary injunction and a permanent injunction ordering the Defendants to not enforce the provisions of C.R.S. 40-2-124(1)(f)(I) and its implementing regulations codified at 4 C.C.R 723-3 et seq. to the extent it burdens the ineligible Colorado utilities' participation in the interstate electricity market.

Eleventh Claim for Relief
**The Retail Rate Impact Rule –
Declaratory Judgment**

184. The Plaintiffs incorporate by reference paragraphs 1 – 183 above.

185. C.R.S. 40-2-124(1)(g) violates the Commerce Clause of the U.S. Constitution because it limits the value of investments in renewable energy sources made in an interstate investment market.

186. The Court should enter a judgment declaring that C.R.S. 40-2-124(1)(g) and its implementing regulations codified at 4 C.C.R 723-3 et seq. are unconstitutional, invalid and unenforceable to the extent it imposes on foreign companies a direct limitation on the amount of renewable resources and renewable energy credits for sale in Colorado.

Twelfth Claim for Relief
**The Retail Rate Impact Rule –
Injunctive Relief**

187. The Plaintiffs incorporate by reference paragraphs 1 – 186 above.

188. The Court should enter a preliminary injunction and a permanent injunction ordering the Defendants to not enforce the provisions of C.R.S. 40-2-124(1)(g) and its implementing regulations codified at 4 C.C.R 723-3 et seq. to the extent they limit the amount of eligible energy resources and renewable energy credits a qualifying utility may acquire.

Thirteenth Claim For Relief
Damages

189. The Plaintiffs incorporate by reference paragraphs 1 - 188 above.

190. The Plaintiffs are entitled to an award of damages in accordance with 42 U.S.C. § 1983 in such amount as shall be proven at trial.

WHEREFORE, Plaintiffs request the declaratory and injunctive relief herein sought, together with an award of damages as shall be proven at the time of trial, and for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 22nd day of April, 2011.

HOLSINGER LAW, LLC

/s/ Kent Holsinger
Kent Holsinger, Colorado Reg. 33907
kholsinger@holsingerlaw.com

/s/ Laura L. Chartrand
Laura L. Chartrand, Colorado Reg. 39220
lchartrand@holsingerlaw.com

/s/ Jack Silver
Jack Silver, Colorado Reg. No. 03891

jsilver@holsingerlaw.com
104 Broadway, Third Floor
Denver, CO 80203
Telephone: (303) 722-2828
Facsimile: (303) 496-1025

Attorneys for Plaintiffs:

AMERICAN TRADITION INSTITUTE,
AMERICAN TRADITION
PARTNERSHIP, and
ROD LUECK