BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 420

In the Matter of PACIFICORP, dba PACIFIC POWER, 2024 Transition Adjustment Mechanism.	**STAFF OPENING BRIEF**

I. Introduction.

This docket concerns PacifiCorp's annual Transition Adjustment Mechanism (TAM) filing. Under the TAM, PacifiCorp is required to make a filing no later than March 1 of each year forecasting its Net Variable Power Costs for the next calendar year. Staff has executed a stipulation resolving all issues Staff raised in this TAM proceeding but one. The only remaining disputed issue between Staff and PacifiCorp is whether $21 million in costs associated with Washington State's Climate Commitment Act (CCA) are properly allocated to Oregon customers under the Multi-state Protocol (MSP) that governs allocation and assignment of PacifiCorp's costs and revenue among states in which it operates. For reasons discussed below, they are not and should be removed from PacifiCorp's forecast of NVCP for the 2024 TAM.

II. Costs associated with the Washington Climate Commitment Act should not be allocated to Oregon customers under the 2020 Multi-State Protocol.

A. Under the MSP, costs of state-specific initiatives are directly assigned to the initiating State.

Costs of "state specific initiatives," such as the requirement to purchase emission allowances, are allocated and assigned on a situs basis to the State adopting the initiative. The pertinent section of the MSP is 3.1.2.1:

> **3.1.2.1. Interim Period State Resources**
> Benefits and costs associated with the three types of State Resources will be assigned or allocated as follows:

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- Demand-Side Management ("DSM") Programs: Costs associated with DSM Programs, including Class 1 DSM Programs, will be allocated on a situs basis to the State in which the investment is made. Benefits from these programs, in the form of reduced consumption and contribution to Coincident Peak, will be reflected in the Load-Based Dynamic Allocation Factors.

- Portfolio Standards: The portion of costs associated with Interim Period Resources acquired to comply with a State's Portfolio Standard adopted, either through legislative enactment or by a State's Commission, that exceed the costs PacifiCorp would have otherwise incurred, will be allocated on a situs basis to the Jurisdiction adopting the Portfolio Standard.

- State-Specific Initiatives: Resources acquired in accordance with a State-specific initiative will be allocated and assigned on a situs basis to the State adopting the initiative. State-specific initiatives include, but are not limited to, the costs and benefits of incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates.[1]

The requirement to obtain compliance instruments for the CCA fits squarely within the description of a "state-specific initiative" included in the MSP.

B. The CCA is a State-specific initiative.

In 2019, the State of Washington enacted the Clean Energy Transformation Act (CETA), which commits Washington to an electricity supply free of greenhouse gas emissions by 2045. [2] The law requires utilities to phase out coal-fired electricity from their state portfolios by 2025.[3] By 2030, their portfolios must be greenhouse gas emissions neutral, which means they may use limited amounts of electricity generated from natural gas if it is offset by other actions.[4] By 2045, utilities must supply Washington customers with electricity that is 100 percent renewable or non-emitting with no provision for offsets.[5] Costs associated with achieving the State of Washington's portfolio standard of zero greenhouse gas emissions by

[1] PacifiCorp/1316, 2020 Protocol, p. 11.

[2] Washington State SB 5116 (2019), codified in part at Revised Code of Washington (RCW) 19.405.010 - .990.

[3] RCW 19.405.030.

[4] RCW 19.405.040.

[5] *Id.*

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2045 are directly assigned to the State under Section 3.1.2.1 of the 2020 Protocol.

In 2021, the State of Washington adopted the Washington CCA to "reduce greenhouse gas emissions over time while new sources of clean power are developed and brought online."[6] To effectuate the reductions, the Act creates a "cap and invest program" under which the Washington Department of Ecology ("Ecology") must set a declining cap on the aggregate emissions from regulated entities that are responsible for greenhouse emissions in the state, referred to as "covered entities."[7] Ecology must also enforce the declining cap on emissions by requiring covered entities to obtain sufficient "compliance instruments" such as emissions allowances to cover their actual emissions and by reducing the number of allowances made available through auction each year.[8]

Because electric utilities are subject to CETA, the Washington legislature granted the utilities "no-cost" allowances to be used for the benefit of retail electricity customers.[9] According to Ecology's statements supporting a motion to dismiss a constitutional challenge to the CCA in federal district court, the legislature chose to provide the no-cost allowances so that retail electricity customers would not be charged twice (under CETA and the CCA) for reducing emissions:

> [T]he Clean Energy Transformation Act (CETA), requires utilities serving Washington customers to reduce their greenhouse gas emissions to neutral by 2030 and to zero by 2045. Critically, these requirements do not apply to generation for out-of-state customers. Thus, the function of the no cost allowances in the Climate Commitment Act is to avoid double-charging Washington customers for the costs of the energy transition to non-emitting generation. This policy applies to *all* utilities serving Washington customers, regardless of whether they are in-state or out-of-state entities.[10]

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[6] See *INVENERGY THERMAL LLC, and GRAYS HARBOR ENERGY LLC, Plaintiffs, v. LAURA WATSON, in her official capacity as Director of the Washington State Department of Ecology, Defendant*, ("*Invenergy v. Ecology")* Defendant's Motion to Dismiss, (February 16, 2023), Western District of Washington case number 3:22-cv-05967, citing RCW 70A.65.005. (Attachment 1)

[7] *Id., citing* RCW 70A.65.010(23), .010(58), .060 –. 080.

[8] *Id., citing* RCW 70A.65.010(18), .060, .100, .200(1).

[9] *Id., citing* RCW 70A.65.110 – .130.

[10] *Id.*

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Notably, the provision of no-cost allowances to electric utilities phases out over time and sunsets completely in 2045—the same year that the Clean Energy Transformation Act requires all electric utilities in Washington to rid fossil fuel sources of electricity from their portfolios.[11]

Simply put, the CCA and CETA are two sides of the same coin. The CETA is a portfolio standard by name and the CCA is a portfolio standard in effect. Under the 2020 Protocol, the treatment of costs associated with a state-specific initiative such a portfolio standard is clear; the costs are situs assigned.

C. The CCA emission allowances are not a tax allocable to all states under the 2020 Protocol.

PacifiCorp disagrees with Staff's interpretation of the 2020 Protocol with respect to the Washington CCA. Staff anticipates PacifiCorp will argue the cost of the emission allowances are not costs of a "state-specific initiative" properly assigned to the initiating state under Section 3.1.2.1 but are related to a fuel tax and therefore properly allocated to all states under section 3.1.7 of the 2020 Protocol regarding miscellaneous costs and taxes. Section 3.1.7 provides:

> **3.1.7 Miscellaneous Costs and Taxes**
>
> Miscellaneous costs described below will be allocated as follows:
>
> - Generation-related dispatch costs and associated plant will be allocated on the SG Factor.
> - Miscellaneous regulatory assets and liabilities, and miscellaneous deferred debits will be allocated with the appropriate allocation factor depending on the related assets or underlying costs.
>
> Taxes and fees will be allocated as follows:
>
> - Income taxes will be calculated using the federal tax rate and PacifiCorp's combined State effective tax rate. State-specific Schedule M and deferred income tax amounts will be allocated using the Company's tax software system. Consistent with prior system allocation methods, the Washington 226 Public Utility Tax is allocated using the SO Factor in lieu of a Washington

[11] RCW 70A.65.120(2)(d); RCW 19.405.010(2).

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income tax.

- Franchise taxes, revenue related taxes, Commission assessments and fees, and usage related taxes are situs or a pass through.
- Property taxes are system allocated based on gross plant and allocated on a Gross Plant System ("GPS") Factor.
- Generation and fuel-related taxes will be allocated using the SG Factor.
- Other taxes such as payroll taxes are embedded in expenses or capital costs.

Balances associated with the Trojan Decommissioning will be allocated using the Trojan Decommissioning ("TROJD") Factor. This will not impact State-specific treatment of this item.[12]

PacifiCorp's argument the CCA is properly characterized as a generation or fuel-related tax for purposes of cost allocation under the MSP is not supported by the nature of the CCA itself. An appropriate example of a generation tax is the "Wind Tax" in the State of Wyoming. In Wyoming, persons producing electricity for sale or trade on or after January 1, 2020, must pay a tax of $1.00 per megawatt-hour for production of electricity produced from wind resources on or after January 1, 2012.[13] Staff agrees the Wind Tax is appropriately allocated to all states participating in the MSP under section 3.1.7 of the 2020 Protocol.

D. If the CCA and CETA are not duplicative programs, Washington's no-cost allowances for retail electric customers in Washington are discriminatory.

As noted above, the CCA is being challenged in federal district court on the ground the provision of the law allowing for no-cost allowances for electricity procured for retail electric customers in Washington violates the dormant Commerce Clause. The State of Washington, though its Department of Ecology, defends the disparate treatment of retail customers in Washington on the ground Washington customers are already paying to reduce carbon emissions through the CETA and therefore, are subject to the same costs as those subject to the

[12] PacifiCorp/1316, 2020 Protocol, p. 13.

[13] Wyoming Statutes (W.S.) Sec. 39-22-103.

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CCA.[14]

The State of Washington cannot have it both ways. If paying for the CETA is not the same as paying for the CCA, the no-cost allowances provided to Washington retail customers under the CCA are discriminatory to electric retail customers in other states. If the costs of the CCA and CETA are not discriminatory because they are not distinguishable as the State of Washington claims, the costs are both for a state-specific initiative (zero emissions by 2045) and must be assigned to Washington customers.[15]

PacifiCorp's conundrum rises not from the 2020 Protocol but from the fact the Washington legislature has determined retail electricity customers in Washington should not bear the costs of both the CETA and CCA because the costs are duplicative. The Washington legislature apparently did not take allocation of costs under the 2020 Protocol into account when it statutorily prohibited PacifiCorp from passing the costs of emission allowances acquired to comply with the CCA standard to Washington customers.

Staff sympathizes with PacifiCorp's predicament regarding recovery of costs to comply with Washington's climate protection targets. Under the MSP, PacifiCorp is required to recover costs of the CCA from Washington customers, but under Washington statute, PacifiCorp may be prohibited from doing so. Notwithstanding, Staff cannot support the allocation of costs to Oregon customers that are appropriately assigned to Washington to extricate PacifiCorp from this impasse. The appropriate resolution of the conflict between the Washington legislation and 2020 Protocol must be found in the State of Washington or through a change to the 2020

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[14] *See Invenergy v. Ecology* Motion to Dismiss, *supra*. (Attachment 1) *See also, In re California Independent System Operator Corporation*, Docket No. ER23-474-001, State of Washington Motion to Intervene Out-of-Time and Answer Protest of Utah Division of Public Utilities under ER23-474. (Attachment 2)

[15] If the Commission determines the CETA and CCA are distinguishable and different cost allocation is appropriate, Staff recommends the Commission accept Staff's alternative recommendation based on Staff's assertion the CCA's allocation of no-cost allowances to Washington customers is discriminatory. The adjustment associated with that recommendation is confidential and included in Staff's Rebuttal Testimony.

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Protocol.

Fairness demands that costs of each State's climate-related initiatives are treated the same for purposes of allocation. Under the MSP, Oregon must bear the costs of its Renewable Portfolio Standard, its early exit from coal-fired resources, removal of the Klamath Dams, its own statutorily established zero-emission standards, and multiple other programs aimed at promoting renewables or conservation. It is unfair to require Oregon to also absorb costs of a Washington's climate protection program because Washington has adopted legislation to statutorily preclude PacifiCorp from passing the costs of the Washington program to its Washington customers.

Also, it is unfair to require Oregon to absorb costs of achieving Washington's zero-emission targets because Washington structured its program as a cap-and-trade program rather than a portfolio standard. The fundamental principle that underlies direct assignment of state specific programs applies equally to both programs.

III. PacifiCorp's clarification regarding applicability of the Post-Interim provisions of the MSP is appreciated, but it does not change the outcome of how costs of the Washington CCA should be treated for ratemaking purposes.

At the hearing held on September 7, 2023, PacifiCorp witness Matt McVee testified that Staff's response to a data request in this docket showed that Staff's reliance on section 5.8 of the 2020 Protocol for Staff's argument regarding allocation of the CCA was misplaced. Mr. McVee explained that section 5.8 applied only if the current protocol was no longer in effect and no other protocol had been adopted by the Commissions. Staff appreciates Mr. McVee's correction but notes it does not change the resolution of this issue because the same direction regarding situs allocation of state-specific initiatives is found in the currently effective protocol at section 3.1.2.1.2.

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Section 5.8. State-Specific Initiatives of the Post-Interim Period Protocol, which is not applicable as Mr. McVee noted, provides:

> Costs and benefits resulting from a State-specific initiative will continue to be allocated and assigned on a situs basis to the State adopting the initiative. Historically, these have included, but are not limited to, programs such as incentive programs and customer and community energy generation programs, but have not included local fees or taxes related to the ongoing operation of existing transmission and generation facilities within a State. As new issues arise, PacifiCorp will bring each issue to the MSP Workgroup to discuss whether each issue is a State-specific initiative, and, if not, whether a different allocation method is appropriate.[16]

The same language regarding situs assignment of State-specific initiatives is found in the current MSP at Section 3.1.2.1.2, which provides, in pertinent part:

> - State-Specific Initiatives: Resources acquired in accordance with a State-specific initiative will be allocated and assigned on a situs basis to the State adopting the initiative. State-specific initiatives include, but are not limited to, the costs and benefits of incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates.[17]

If anything, Section 5.8 of the Post-Interim Period MSP offers more flexibility regarding allocation of costs for State-specific initiatives than the currently applicable MSP provision. Under the Post-Interim Period MSP, it is possible states could agree to an alternative allocation method for a state-specific initiative, rather than defaulting to situs assignment. That same flexibility is not present in the currently applicable MSP.

IV. Conclusion.

For the foregoing reasons, Staff asks the Commission to accept its proposed

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[16] PacifiCorp/1316, pp. 40-41.

[17] PacifiCorp/1316, pp. 11-12.

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recommendation to remove CCA-related costs from PacifiCorp's 2024 TAM revenue requirement.

DATED this 22nd day of September 2023.

Respectfully submitted,

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The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

INVENERGY THERMAL LLC, and GRAYS HARBOR ENERGY LLC, Plaintiffs, v. LAURA WATSON, in her official capacity as Director of the Washington State Department of Ecology, Defendant.	NO. 3:22-cv-5967-BHS **DEFENDANT'S FRCP 12(c) MOTION TO DISMISS** NOTE ON MOTION CALENDAR: March 10, 2023 ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The Climate Commitment Act is intended to reduce greenhouse gas emissions over time while new sources of clean power are developed and brought online. But while this transition occurs, the Act also aims to keep in check the retail prices of power sold to consumers by all utilities operating in Washington, regardless of where those utilities are based. The concern over stabilizing consumer energy prices is heightened because of utilities' obligations under another state law, the Clean Energy Transformation Act, which requires utilities to expend significant resources between now and 2045 to completely phase out non-renewable energy sources. To effectuate retail price stabilization and ensure that cost impacts to consumers are blunted, the

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Climate Commitment Act provides "no-cost" allowances to utilities (both in-state and out-of-state) to ensure that utilities are not hit with duplicative statutory mandates and to minimize impacts consumers see from utilities' compliance obligations, especially for low-income customers. This goal—ensuring that consumers have an affordable and reliable supply of power—is unquestionably a public health and safety concern, over which state authority is at its highest ebb in relation to federalism and where courts have exercised the utmost caution before upsetting that authority.

Plaintiffs, Invenergy Thermal LLC and Grays Harbor Energy LLC, own and operate the Grays Harbor Energy Center, an independent natural gas-fired power plant. Plaintiffs' facility is the fourth largest individual source of climate pollution in Washington, surpassed only by the state's sole coal-fired plant and two of the state's five petroleum refineries. Unlike utilities—which are highly regulated, profit-limited entities that by law must provide consistent, price-stabilized retail power to consumers—independent facilities such as Plaintiffs' are for-profit operations that sell wholesale power to the grid only when market forces make it profitable.

After lobbying for, but failing to receive, a legislative carve-out for their in-state emissions obligations under the Climate Commitment Act, Plaintiffs now challenge the Act's grant of allowances to utilities under the "dormant" Commerce Clause and Equal Protection Clause of the United States Constitution. Specifically, Plaintiffs assert that the allowances provided to public utilities, but not directly provided to electricity generating facilities, are prejudicial to interstate commerce because Plaintiffs' facility is the only generating facility in the state not owned by a utility serving Washington customers. Plaintiffs alternatively claim the Climate Commitment Act places an undue burden on interstate commerce by discouraging out-of-state investment in natural gas generating facilities. But, even taking all of the allegations in their complaint as true, Plaintiffs' claims fail on their face as a matter of law and should be dismissed on the pleadings.

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First, Plaintiffs' discrimination claims are rendered fatally flawed by Plaintiffs' own complaint. Plaintiffs concede that no-cost allowances are provided to both in-state and out-of-state interests alike. This alone is terminal to their Commerce Clause discrimination claim. Moreover, to be successful, both the Commerce Clause and Equal Protection discrimination claims in this context hinge upon a comparison of substantially similar entities. But Plaintiffs' complaint clearly sets out that they are not similarly situated to highly regulated and uniquely burdened utilities for constitutional purposes.

Second, Plaintiffs fail to establish even incidental impacts on interstate commerce for purposes of their excessive burden claim. Even if such impacts did exist, the State's burden to establish a rational basis justifying those impacts is minimal. It should be beyond dispute that regulating energy costs for Washington consumers is a *compelling* public interest that more than amply justifies any incidental impact on interstate commerce. Finally, Plaintiffs' equal protection claim also fails. Again, Plaintiffs cannot establish the requisite discrimination, but even if they could, the Legislature's policy determination must be upheld unless there are *no conceivable facts* upon which that policy choice can be valid. Given the irrefutable policy goals at issue here, Plaintiffs cannot possibly meet the extraordinary burden required to justify this Court substituting its own policy judgment for that of the Legislature.

Plaintiffs' complaint fails to state cognizable causes of action on its face and should be dismissed as a matter of law.

II. BACKGROUND

A. The Climate Commitment Act

In 2021, the Washington Legislature enacted the Climate Commitment Act to substantially reduce Washington's greenhouse gas emissions in response to climate change. *See* Wash. Rev. Code (RCW) § 70A.65.005; *see generally* Laws of 2021, ch. 316. To effectuate reductions, the Act creates a "cap and invest program" under which the Washington Department of Ecology ("Ecology") must set a declining cap on the aggregate emissions from regulated

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entities that are responsible for greenhouse emissions in the state, referred to as "covered entities." RCW 70A.65.010(23), .010(58), .060–.080. Ecology must also enforce the declining cap on emissions by requiring covered entities to obtain sufficient "compliance instruments" such as emissions allowances to cover their actual emissions and by reducing the number of allowances made available through auction each year. RCW 70A.65.010(18), .060, .100, .200(1). Plaintiffs' facility is currently the fourth largest stationary source of greenhouse gasses in Washington rendering Plaintiffs a covered entity under the Act. Request for Judicial Notice in Support of Defendant's Motion to Dismiss (Req. Judicial Ntc.) Ex. 1 (showing that the Grays Harbor Energy Center is the ninth largest greenhouse gas emitter in Washington and that, for individual stationary sources in 2021, the facility was surpassed in greenhouse gas emissions only by TransAlta's coal-fired power plant, the BP Cherry Point refinery, and the Puget Sound Refinery in Anacortes).[1]

In crafting the Climate Commitment Act, and central to this case, the Legislature chose to grant "no-cost" allowances to three categories of covered entities: (1) "emissions-intensive, trade exposed industries;" (2) electric utilities; and (3) natural gas utilities. *See* RCW 70A.65.110–.130. With regard to electric utilities, the Legislature's intent is clear. A separate statute, the Washington Clean Energy Transformation Act (Chapter 19.405 RCW), requires all Washington utilities to rid their energy portfolios of fossil fuel power by 2045—a significant and expensive obligation on the utilities. RCW 19.405.010(2). Thus, the Climate Commitment Act provides that all consumer-owned and investor-owned electric utilities subject to the Clean Energy Transformation Act are eligible for no-cost allowances "in order to mitigate the cost burden of the program on electricity customers." RCW 70A.65.120(1).

As a result, allowances can either be used to cover compliance obligations or consigned to auction; but, if consigned to auction, benefits must be used "for the benefit of ratepayers, with

[1] Defendant has concurrently filed a request for this Court to take judicial notice of certain government documents and data compilations available online, and has provided courtesy copies of the referenced documents as exhibits.

the first priority the mitigation of any rate impacts to low-income customers." RCW 70A.65.120(4). The provision of no-cost allowances to electric utilities phases out over time and sunsets completely in 2045—the same year that the Clean Energy Transformation Act requires all electric utilities in Washington to rid fossil fuel sources of electricity from their portfolios. RCW 70A.65.120(2)(d); RCW 19.405.010(2). The Climate Commitment Act also expressly allows utilities to transfer their no-cost allowances to others in the power market, and the Legislature directed Ecology to adopt rules facilitating such transfers. RCW 70A.65.120(6). Ecology did just that, with the Climate Commitment Act's implementing rules expressly permitting utilities to transfer allowances to any electric generating facility from which it procures power. Wash. Admin. Code § 173-446-425(2).

Because Plaintiffs are not a utility, they are not subject to the obligations established by the Clean Energy Transformation Act. *See* RCW 19.405.020(14), -.040. As a result, while Plaintiffs are authorized to receive no-cost allowances via transfer from a utility, they do not receive them directly. *See* Wash. Admin. Code § 173-446-425.

B. Washington's Electricity Market

As Plaintiffs acknowledge in their complaint, "[e]lectric utilities and electricity generating facilities occupy distinct positions in electricity markets." ECF No. 1 ¶ 7. Electric utilities exist to provide retail power to consumers and come in two forms in Washington: consumer-owned and investor-owned.[2] Consumer-owned utilities are non-profit government entities either organized as a Public Utility District (e.g., Clark Public Utilities), operated directly by a city (e.g., Tacoma Power), or established by a cooperative association pursuant to Chapter 23.86 RCW (e.g., Peninsula Light Co.). As public entities, consumer-owned utilities are directly accountable to the consumers within their boundaries because they are governed either

[2] Washington's utilities, both consumer- and investor-owned, get the power they sell at retail to consumers from a variety of sources. Many own and operate their own generation facilities, largely from hydropower but also some natural gas. Utilities also purchase power from the wholesale market from independent power plants such as Plaintiffs' facility. ECF No. 1 ¶ 7.

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by elected officials—a commission in the case of PUDs or the associated governing bodies of cities or operating agencies—or directly by the ratepayers themselves.

Investor-owned utilities are private corporations, and in Washington there are three: Avista Corporation (as Avista Utilities), PacifiCorp (as Pacific Power & Light Company), and Puget Sound Energy. Req. Judicial Ntc. Ex. 2. Investor-owned utilities are governed pursuant to their corporate structures, but they are subject to significant regulation and oversight by the Washington Utilities and Transportation Commission (UTC) pursuant to Chapter 80.28 RCW. Most significantly, investor-owned utilities are profit-limited by law. They earn a fixed return on infrastructure investments, as set by the UTC. But, with regard to retail power, investor-owned utilities essentially can only recover their costs. The UTC strictly sets rates that investor-owned utilities can charge for retail power, and any return more than 0.5 percent above that set rate must be refunded to customers. *See* RCW 80.28.425(6). In all cases, Washington law provides that investor-owned utilities must provide power that is "safe, adequate and efficient, and in all respects just and reasonable." RCW 80.28.010(2).

Plaintiffs do not sell retail power directly to Washington consumers and, thus, are not regulated by the Washington UTC. Instead, Plaintiffs' facility is an independent power plant selling power on the wholesale market to customers all over the country, including utilities. The interstate wholesale market is governed by the Federal Power Act and administered by the Federal Energy Regulatory Commission (FERC). Pursuant to that system, Plaintiffs in 2007 petitioned for—and received—authorization from FERC to negotiate market-based (instead of cost-based) rates for wholesale electric sales. 72 Fed. Reg. 35,045 (June 26, 2007). Plaintiffs, thus, are free to set any rates established by agreement between the Plaintiffs and a purchaser. *See id.* Plaintiffs are not profit-limited in that regard and are not beholden or accountable to retail ratepayers. When Plaintiffs believe they can make a profit off of running their facility, it runs; if not, it sits idle. ECF No. 1 ¶¶ 40–41.

III. LEGAL STANDARD

Federal Rules of Civil Procedure 12(b)(6) and 12(c) are "functionally identical," and the same legal standard applies to both. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Such motions test "the legal sufficiency of a claim." *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011). This standard requires a complaint to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Moreover, "naked assertion[s]" and "labels and conclusions" need not be accepted as true, *Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 557), and leave to amend is not granted where the "court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (internal quotations and citation omitted).

As set out below, there is no set of facts under which Plaintiffs can prevail on their claims. Their complaint should be dismissed with prejudice.

IV. ARGUMENT

A. Plaintiffs Cannot Establish That Providing No-Cost Allowances To Utilities Constitutes a "Dormant" Commerce Clause Violation

The so-called negative or "dormant" aspect of the Commerce Clause "primarily is driven by a concern about economic protectionism—that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). This doctrine prevents states from "erecting taxes, tariffs, or regulations that favor local businesses at the expense of interstate commerce." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 97 F. Supp. 3d 1256, 1266 (W.D. Wash. 2015), *citing Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). A dormant Commerce

Clause analysis is two-tiered: "(1) the anti-discrimination test—which involves heightened scrutiny and (2) the *Pike* balancing test—a lower bar." *Int'l Franchise Ass'n,* 97 F. Supp. 3d at 1267.

The anti-discrimination step asks whether the statute discriminates against interstate commerce facially, purposefully, or in effect. *Id*. While scrutiny is heightened, public health concerns unrelated to economic protectionism justify even overt discrimination. *See General Motors v. Tracy*, 519 U.S. 278, 306–307 (1997). Moreover, establishing discriminatory effect requires the production of substantial evidence showing both that the law discriminates in practice and that it does so for reasons of in-state economic protectionism. *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010) (quotation omitted).

Next, if the law is non-discriminatory, courts then proceed to the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), under which a regulation will be sustained so long as it has only indirect or incidental effects on interstate commerce and the state has any legitimate interest justifying those effects. *Id*. at 142. The balancing question is one of degree: the extent of the burden tolerated "depends on the nature of the local interest." *Int'l Franchise*, 97 F. Supp. 3d at 1277. But the burden on plaintiffs is extraordinarily high. In weighing competing interests, "the Supreme Court has frequently admonished that courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation."[3] *Id*., *citing S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001).

Here, Plaintiffs concede that the Act is not facially or purposefully discriminatory. ECF No. 1 ¶ 95. The Act only grants allowances to utilities subject to the Clean Energy Transformation Act and serving Washington customers, *irrespective of where the utility is located*. Indeed, Plaintiffs admit that one such utility, PacifiCorp, is an out-of-state entity and

[3] Courts also look at whether a state is regulating commerce that occurs entirely outside of its borders and is thus purely extra-territorial. Healy v. Beer Inst., 491 U.S. 324, 335–36 (1989). *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011) (considering potential extraterritorial effects). This aspect of Commerce Clause analysis is not relevant here, where the Climate Commitment Act simply regulates Plaintiffs' extensive in-state emission of greenhouse gas air pollutants.

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that another natural gas facility in Washington is owned by an out-of-state corporation. ECF No.1 ¶ 46, n.7; ¶ 48, n.8. Moreover, there is no dispute in this case that the Act grants allowances in the electricity sector only to utilities based on the cost burden of the program on electricity customers. *See* RCW 70A.65.120(2)(a). Nor is there any question that all generating facilities are ineligible for no-cost allowances based on their emissions, regardless of whether they are "vertically integrated" or independent generating facilities. RCW 70A.65.120; ECF No. 1 ¶ 96. Plaintiffs nevertheless claim that the provision of no-cost allowances to utilities is discriminatory in effect or, in the alternative, creates an indirect burden on interstate commerce that is excessive when balanced against the state's interest.

As set out below, Plaintiffs cannot state a cognizable claim for a dormant Commerce Clause violation under any theory. Their Commerce Clause causes of action should be dismissed with prejudice.

1. The Act does not effectuate "economic protectionism" because the benefits and burdens clearly flow to both in-state and out-of-state economic interests

As noted, the dormant Commerce Clause prohibits discrimination against interstate commerce "on its face or in practical effect." *Black Star Farms,* 600 F.3d at 1230 (quotation omitted). But, in either context, "discrimination" requires "*differential treatment* of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id*., *citing Or. Waste Sys., Inc. v. Dep't of Env't. Quality*, 511 U.S. 93, 99 (1994) (emphasis original). In other words, Commerce Clause discrimination requires in-state economic protectionism. *See id*. Here, Plaintiffs' claims of discrimination under the Commerce Clause stall out of the gate because the undisputed facts fail to establish such protectionism.

First, and critically, Plaintiffs concede that PacifiCorp—which is headquartered in Oregon and primarily operates in other states—is an out-of-state economic interest benefitted in the exact same manner as the in-state utilities Plaintiffs claim benefit from illegal protectionism. ECF No. 1 ¶ 48, n.8. As a result, the Climate Commitment Act's no-cost allowances do not result

in differential treatment of in-state versus out-of-state actors. Rather, as discussed in detail below, to the extent a distinction is drawn, it is rationally (and legally) drawn between that of independent generating facilities such as Plaintiffs' and very differently situated, consumer-focused *utilities*—not in-state versus out-of-state interests. Such a distinction is not prohibited by the Constitution regardless of where such entities are headquartered. *See General Motors*, 519 U.S. at 307.

Plaintiffs' complaint attempts to side-step PacifiCorp's out-of-state status by implying that PacifiCorp qualifies as some sort of quasi in-state interest because it conducts "significant commercial and political activities in Washington." ECF No. 1 ¶ 48. But conducting activities *in* a state does not make a foreign entity an *in-state* economic interest for purposes of the Commerce Clause. Indeed, were that the case Plaintiffs themselves would be an "in-state" interest by virtue of the fact that they own and operate a large industrial facility in Washington. The State is aware of no cases in which a court has held a state regulatory enactment to be discriminatory under the dormant Commerce Clause where the alleged benefits—*both facially and in practice*—clearly flow to in-state and out-of-state interests alike.

Moreover, and to the extent Plaintiffs attempt to lump PacifiCorp in as a "local" economic interest, Plaintiffs' complaint fails to explain (because there is no conceivable reason) why the Climate Commitment Act puts Plaintiffs in any different positon than PacifiCorp when it comes to conducting significant economic or political activities in Washington. Plaintiff Invenergy is a multinational corporation operating "large-scale renewable and other clean energy generation and storage facilities worldwide," including "North America, Latin America, Asia and Europe."[4] According to Invenergy, it has developed 190 projects on four continents totaling over 30,000 megawatts of electricity and powering nearly nine million homes.[5] Thus, even if the

[4] https://invenergy.com/projects/overview
[5] https://invenergy.com/

Court accepts Plaintiffs' claims that they do not participate in "significant commercial and political activities in Washington," that choice is one of their own making.[6] *See* ECF No. 1 ¶ 48.

Second, Plaintiffs also cannot show economic protectionism because the Climate Commitment Act burdens even *state-owned* generation facilities in exactly the same manner as Plaintiffs' facility. Specifically, both the University of Washington and Washington State University own and operate small natural gas-fired heat and electric power plants. Req. Judicial Ntc. Ex. 3. Both of these state-owned facilities generate combined greenhouse gas emissions in quantities that render them covered entities under the Climate Commitment Act and for which they will incur compliance obligations. Req. Judicial Ntc. Ex. 4 (listing Washington State Pullman's 2019 emissions as 66,377 MT CO2e and UW Seattle's as 92,177 MT CO2e, both well above the threshold of 25,000 MT CO2e). Because neither Universities' power plants provide retail power directly to Washington consumers, they do not qualify for no-cost allowances and will be required to acquire allowances at auction or on the secondary market in order to meet their Climate Commitment Act obligations. *See* RCW 70A.65.120. It is difficult to imagine a *less* economically protectionist system than one where a state has deliberately chosen to burden its own facilities in the same manner as out-of-state economic interests—all for reasons specifically related to in-state conduct (i.e., the in-state emission of greenhouse gasses).

In short, Plaintiffs' complaint itself recognizes that the Climate Commitment Act's provision of no-cost allowances flows to both in-state and out-of-state economic interests alike. That fact alone is fatal to Plaintiffs' Commerce Clause discrimination claim. Because the Act does not foment in-state economic protectionism, the Commerce Clause has no job to do here.

[6] Plaintiffs participated heavily in the public participation process for Ecology's rule. ECF No. 1 ¶¶ 79—85. And, critically, Plaintiffs' attempts to minimize their role in Washington also entirely ignores the basic fact that gives rise to this case: Plaintiffs own and operate a major industrial facility in Washington that is the State's fourth largest stationary source of greenhouse gas pollution. ECF No. 1 ¶¶ 3, 19–21; *see also* Req. Judicial Ntc. Ex. 1.

2. Plaintiffs also cannot prevail on their Commerce Clause discrimination claim because they cannot show they are similarly situated to utilities

Plaintiffs' Commerce Clause discrimination also fails because Plaintiffs cannot show that they are similarly situated to the utilities who receive no-cost allowances.

As noted, Plaintiffs claim the Climate Commitment Act discriminates in effect against out-of-state economic interests because other natural gas generating facilities in Washington are owned by utilities that are either in-state or, according to Plaintiffs, are out-of-state but "conduct significant commercial and political activities in Washington." ECF No. 1 ¶¶ 47-48. Because utilities qualify for no-cost allowances under the Act by being subject to Clean Energy Transformation Act requirements, but generating facilities do not, Plaintiffs allege that the utilities receive an unfair advantage in their option to transfer no-cost allowances to their generating facilities to cover the cost of complying with the Act.

But utilities and independent generating facilities are very dissimilar operations. Utilities exist to provide end-of-line retail power directly to consumers, regardless of whether they obtain that power from their own facilities or other in-state or out-of-state power generators. In contrast, Plaintiffs' for-profit independent generating facility delivers electricity to the regional wholesale market only when market forces make it profitable to do so. This fundamental distinction—between utilities and their customer-serving role compared to generating facilitates and their power producing role—is reflected in the Climate Commitment Act, including its requirement that the allocation of allowances to utilities must be set in accordance with "the cost burden of the program on *electricity customers*." RCW 70A.65.120(2)(a) (emphasis added).

Plaintiffs' apples-to-oranges comparison is fatal to their claims of discrimination. "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *General Motors*, 519 U.S. at 298. Thus, as noted above, the "differential treatment" that lies at the heart of any dormant Commerce Clause claim "must be as between entities that are similarly situated." *Int'l Franchise*, 97 F. Supp. 3d at 1272, *citing General Motors*, 519 U.S. at 298–99; *see also,*

Black Star Farms, 600 F.3d at 1230 ("[o]f course, the 'differential treatment' must be as between persons or entities who are similarly situated"). But utilities and independent generating facilities such as Plaintiffs' are far from similarly situated for constitutional purposes—much less *substantially* so.

First, when it comes to their purposes, regulatory obligations, and customer base, consumer- and investor-owned utilities in a regulated energy market such as Washington's exist in a separate legal universe from independent energy generators. *See, generally,* Title 80 RCW; Title 54 RCW. All electric utilities in Washington, whether the fully non-profit public-owned utilities or the profit-limited investor-owned utilities, operate under a limited, "regulated" monopoly. RCW 54.16.040; RCW 80.01.040(3); RCW 80.28.80. But the grant of that monopoly comes with extensive limitations. Investor-owned electrical utilities in Washington fall within the jurisdiction of the Utilities and Transportation Commission (UTC), while public-owned utilities are municipal entities accountable directly to the communities they serve. In both cases, utilities—by law—exist to furnish electricity directly to Washington consumers that is "safe, adequate and efficient, and in all respects just and reasonable." RCW 80.28.010(2); *see also* RCW 54.24.080 (requiring PUDs to provide rates that are "fair" and "nondiscriminatory"). Pursuant to this requirement, profits from sales to retail customers are strictly limited by law. RCW 80.28.425(6). Thus, forecasted power costs are passed through to customers *at cost*, subject to regulatory control and subsequent review. *Id.*; ECF No. 1 ¶ 29.

Plaintiffs are not subject to this same regulatory scheme because independent generating facilities such as Plaintiffs' do not supply power directly to Washington consumers. *See* RCW 80.04.010(12). In fact, they exist in the *deregulatory* environment created by the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645, and can make opportunistic profits from the energy they sell by working with an energy marketing firm to contract for the sale of power to a wide variety of entities on the wholesale energy market. ECF No. 1, ¶¶ 33, 40–42. While regulated by the FERC's authority over energy tariffs,

independent generating facilities are not subject to UTC regulation. *See* RCW 80.01.040(3); RCW 80.04.010(12). There is also no requirement that this energy be consumed in Washington. Indeed, while Plaintiffs claim that the "vast" majority of what it produces is destined for Washington customers, California's greenhouse gas inventory reporting system shows that between 2011 and 2019 (the last year for which data is available), power generated at Plaintiffs' facility was exported to entities in California. Req. Judicial Ntc. Ex. 5. In any event, unlike utilities, independent generating facilities such as Plaintiffs' are not directly accountable to either the State or Washington consumers when it comes to the cost of end-user power.

Second, and critical to this case, all electric utilities in Washington are subject to a host of other requirements not placed upon Plaintiffs. Most importantly, the Clean Energy Transformation Act, Chapter 19.405 RCW, requires electric utilities serving customers in Washington to have portfolios that are greenhouse gas neutral by 2030 and 100 percent renewable or non-emitting by 2045. RCW 19.405.010(2). This is no small task and it will require significant investment on the part of the utilities. Those investments will be passed along to each utility's ratepayers as the required change-over to all renewable and non-emitting resources are reflected in rates. Adding Climate Commitment Act compliance on top of these existing obligations would create a duplicate mandate on utilities, further increasing costs to consumers absent legislative intervention.

As a result, the Legislature made the policy decision in the Climate Commitment Act to ensure that compliance with the Act would not interfere with clean energy obligations or result in duplicative consumer energy costs from these burdens. RCW 70A.65.120(1). Specifically, the Act provides that those utilities subject to the Clean Energy Transformation Act are eligible for no-cost allowances "in order to mitigate the cost burden of the program on electricity customers." *Id*. Both on its face and in practice, this policy extends to all qualifying utilities, whether located in-state (like Puget Sound Energy) or out-of-state (like PacifiCorp). *Id*. Because Plaintiffs are not subject to the same regulatory and statutory requirements, and are at least a step or more

removed from the provision of power to Washington consumers, granting no-cost allowances to generating facilities such as Plaintiffs would fail to address the problem the Legislature targeted in providing allowances to utilities.

Indeed, a ruling from this Court forcing Ecology to grant Plaintiffs the no-cost allowances they seek would be nonsensical and would, in fact, undermine the purposes of the Climate Commitment Act and its goal of weaning Washington off fossil fuels. If utilities and the generating facilities they own must phase out natural gas by 2045, providing no-cost allowances to facilities such as Plaintiffs' would put utilities at a disadvantage in future years as they are forced to convert or mothball their natural gas generation facilities. Plaintiffs, meanwhile, would never be subject to the Clean Energy Transformation Act (because they are not a utility) and would be effectively exempt from a large portion of their compliance obligation under the Climate Commitment Act via no-cost allowances. Plaintiffs would thus be placed at an unfair *advantage* by being able to provide power directly to large facilities in Washington or provide wholesale power to the regional grid for export out of Washington—all while steadily marching even higher up the list of Washington's largest individual greenhouse gas emitters while other facilities are shuttered.

3. Plaintiffs are also not similarly situated for constitutional purposes because they serve separate markets from utilities

As independent generators, Plaintiffs serve different markets and purposes than Washington's public utilities. This is another reason why they are not similarly situated for constitutional purposes and another basis on which to reject Plaintiffs' Commerce Clause claims. As the Supreme Court established in *General Motors v. Tracy*, a dormant Commerce Clause discrimination claim is underlain by "a threshold question [of] whether the companies are indeed similarly situated for constitutional purposes" when they provide "different products." *General Motors,* 519 U.S. at 299. "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the

supposedly discriminatory burden were removed." *Id*. As Justice Scalia noted in a separate case that same year, *General Motors* "effectively creates what might be called a 'public utilities' exception to the negative Commerce Clause" constituting an additional class "of state actions that [courts] should abstain from scrutinizing under the Commerce Clause." *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 607 (1997) (Scalia, J. dissenting).

General Motors is highly analogous to the case at hand. There, independent suppliers of natural gas challenged an Ohio law providing a tax break on the sale of natural gas from regulated in-state utilities to consumers, while all other natural gas sales were subject to the full tax. *General Motors,* 519 U.S.at 282–283. The Court rejected the out-of-state independent suppliers' dormant Commerce Clause discrimination arguments as a threshold matter. Despite the fact that both provided natural gas to customers in the same geographic area, the Court found that the state-regulated utilities were not similarly situated to the independent suppliers and rejected the independent suppliers' Commerce Clause claims on that basis. *Id*. at 301–302.

The Court did so because of the different markets each served and the public health and safety component of the market forming the core of the utilities' user base. Specifically, while there was competition between Ohio utilities and the independent suppliers for the "noncaptive" customer base, the utilities primarily served a captive, residential core of smaller consumers who relied on price stability provided by highly-regulated utilities. *Id*. As with Plaintiffs' in this case, the independent suppliers in *General Motors* tended to serve larger, more sophisticated entities purchasing in larger volumes and for whom the transactional costs of individual purchases on the open market were economically feasible. *Id*. Thus, the local utilities' price-stabilized, bundled product "reflect[ed] the demand of a market neither susceptible to competition by the interstate sellers nor likely to be served except by [the utilities] historically suppl[ying] its needs." *Id*. at 303. These differences—despite the fact that utilities and independent suppliers were in *direct competition* in some respects—justified treating them as dissimilar for Commerce Clause purposes. *Id*. at 307, 310. The Court was also extremely hesitant to risk "weakening or

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destroying" a regulatory scheme blessed by a legislative branch of government attempting to effectuate policy. *Id*. at 309–10.

This logic applies with force to this case. Washington's vertically integrated utilities are directly analogous to the natural gas utilities in *General Motors*: they are highly-regulated, limited monopoly public utilities primarily providing bundled energy services to a "captive" market of largely residential customers. It is undisputed that Plaintiffs do not directly serve this market. Even taking as true Plaintiffs' naked assertion that the majority of energy the Grays Harbor facility supplies to the grid is "sold to entities in Washington," ECF No. 1 ¶ 38, Plaintiffs provide that power *at wholesale* to larger, more sophisticated entities (including the utilities), not directly to Washington consumers. ECF No. 1 ¶¶ 32–33. Plaintiffs are thus directly analogous to the independent suppliers in *General Motors*. As in *General Motors*, while the generating facilities owned and operated by the vertically integrated utilities may also directly compete with Plaintiffs in the wholesale market, the fact that utilities primarily exist to serve the captive market renders them categorically dissimilar for purposes of the Commerce Clause. *See General Motors*, 519 U.S. at 310. There is no theory under which Plaintiffs' claims of Commerce Clause discrimination can prevail.

4. Even if this Court agrees that Plaintiffs are similarly situated to utilities, Plaintiffs fail to plausibly establish that discrimination will even occur

Even if the Court does not dismiss Plaintiffs' Commerce Clause discrimination claim as a threshold matter, it should still dismiss the claim as non-justiciable.

As noted, in addition to easing the impact of the Climate Commitment Act on utilities subject to the Clean Energy Transformation Act, the no-cost allowances granted to utilities are also intended to ensure that consumer prices remain stable. *All* generating facilities, whether in-state or out-of-state, are eligible to receive transfers of no-cost allowances from the utilities to whom they are allocated. Wash. Admin. Code § 173-446-425. Indeed, such transfers are intended to serve the core purpose of no-cost allowances—reducing the cost burden

on consumers—and Ecology's Climate Commitment Act rule expressly facilitates such transfers. *Id*.

Utilities seeking to lower their cost of purchasing energy from wholesale suppliers are highly incentivized to use the transfer of no-cost allowances to generating facilities as a means of contracting for lowered wholesale costs. Plaintiffs, thus, may well receive the no-cost allowances they seek even in the absence of judicial intervention as the program takes effect and future contracts are negotiated. Indeed, as Ecology stated in response to Plaintiffs' request that Ecology adopt a rule forcing utilities to transfer their allowances to Plaintiffs, Ecology's hesitation in that regard was based on its reluctance to become a "financial regulator of utilities" and inappropriately insert itself into "contractual or financial negotiations in the power sector." Req. Judicial Ntc. Ex. 6 at 229.

As a result, and even if this Court were to agree with Plaintiffs that they are similarly situated to vertically integrated utilities, at most Plaintiffs present a purely hypothetical claim at this point that is unripe and non-justiciable. If this Court disagrees that Plaintiffs' Commerce Clause discrimination claim is legally deficient, the claim should still be dismissed on ripeness grounds because Plaintiffs cannot establish that they have, in fact, been denied the benefits of no-cost allowances. *See United States v. Linares*, 921 F.2d 841, 843–44 (9th Cir. 1990) (noting that courts should dismiss a case as unripe when a party challenges a hypothetical situation that has not occurred and may not occur).

5. Plaintiffs cannot prevail on their excessive burden claim under the *Pike* balancing test because the State has a clearly rational basis for providing allowances to utilities but not to generating facilities

Plaintiffs' complaint also includes an "excessive burden" dormant Commerce Clause claim. ECF No. 1 ¶¶ 172–183. Plaintiffs hypothesize that the provision of no-cost allowances to utilities, but not to generating facilities, will obstruct in-state investments in natural gas power plants. *Id*. Like Plaintiffs' discrimination claim, this claim fails to meet threshold requirements and should be dismissed as a matter of law.

First, Plaintiffs' complaint fails to establish that providing no-cost allowances to utilities will have incidental impacts on interstate commerce. For one, Plaintiffs' assertions regarding potential impacts on in-state investment as a result of the Climate Commitment Act's no-cost allowance system are pure, unsupported speculation that this Court need not accept even at the motion to dismiss stage. *See Twombly*, 550 U.S. at 545 ("[f]actual allegations must be enough to raise a right to relief above the speculative level. . . .").

But even accepting that assertion as true, Plaintiffs still fail to establish cognizable impacts. All manner of regulatory requirements have an impact on the cost of doing business where such requirements apply. The Climate Commitment Act is no exception. Regulatory enactments that merely impact the cost of doing business in a particular state do not constitute a burden on interstate commerce. Indeed, if Plaintiffs are correct, virtually any regulatory requirement a state might impose on purely in-state conduct—from environmental protections, to minimum wage requirements, to workers' compensation laws—would run afoul of the dormant Commerce Clause because it might discourage in-state investment from out-of-state companies. Such an extreme interpretation would be antithetical to how both the Supreme Court and courts in this Circuit have interpreted the Commerce Clause and should be soundly rejected by this Court.

Second, even if Plaintiffs could show incidental impacts to interstate commerce, their claim still fails. "[T]he Supreme Court has frequently admonished that courts should not second-guess the empirical judgements of lawmakers concerning the utility of legislation." *S.D. Myers,* 253 F.3d at 471. Thus, "for a facially neutral statute to violate the Commerce Clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational." *Int'l Franchise*, 97 F. Supp. 3d at 1277, *citing Alaskan Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991). This sets an exceptionally high bar for plaintiffs: as this Court has recognized, "[a] challenge to the legislative judgment must establish that the legislative facts on which the classification is apparently based could not reasonably be

conceived to be true by the governmental decision-maker." *Int'l Franchise,* 97 F. Supp. 3d at 1277*, citing Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005).

Given this standard, Plaintiffs cannot meet their burden under *Pike* to show that the alleged impacts are sufficient to outweigh the State's interest in controlling energy prices and justify the extraordinary remedy of this Court upending the statutory scheme. Plaintiffs' complaint does not assert that the Legislature's goal of mitigating increased energy costs to consumers is either unreasonable or irrational. Nor could it. It is beyond debate that affordable energy is a public health and safety concern. *See General Motors*, 519 U.S. at 306. Instead, Plaintiffs argue that the Act's no-cost allowances are unreasonable in relation to the alleged burden on interstate commerce because Plaintiffs believe the allowances will ultimately fail to prevent energy prices from rising. ECF No. 1 ¶ 178. The State disagrees with this unsupported assertion. But, even if Plaintiffs were correct, falling short of achieving a legislative policy goal does not make the efforts to achieve even the partial fulfilment of that goal constitutionally infirm—especially under the highly permissive standard applicable here. *See Spoklie*, 411 F.3d at 1059. Instead, it should be a matter of common sense that providing what amounts to a direct compliance subsidy to the very entities providing power to Washington consumers, and aimed directly at the cost of *providing* that power, will deliver a valid and effective means of controlling costs to those end users. There are no circumstances Plaintiffs could put forward to establish that the Legislature's provision of allowances to utilities is based on patently false assumptions. Plaintiffs "substantial burden" claim should be dismissed.

B. Plaintiffs Cannot Establish an Equal Protection Violation Because There Is No Discrimination and, Even if There Were, the State Has a Basis for Doing So

This Court has accurately and succinctly summarized Plaintiffs' extraordinary burden to establish an equal protection claim. "Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Int'l Franchise*, 97 F. Supp. 3d at 1277, *citing F.C.C. v. Beach*

Commc'n Inc., 508 U.S. 307, 313 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Int'l Franchise,* 97 F. Supp. 3d at 1277–78 (emphasis original). "Thus, those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id*. at 1278, *quoting Beach Commc'n*, 508 U.S. at 315.

Plaintiffs' burden to negate every conceivable basis for a statutory choice then runs into a further hurdle: in defending against an equal protection claim, the State is not required to articulate its reasoning for the statute in question because such reasoning is "entirely irrelevant for constitutional purposes." *Id*., *citing U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Rather, a legislative choice is immune "to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id*., *citing Vance v. Bradley*, 440 U.S. 93, 111 (1979). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id*., *quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).

Plaintiffs cannot surmount this standard under any set of facts, and certainly not under those facts alleged in the complaint. For one, even without this unforgiving burden, Plaintiffs' equal protection claim fails for the simple reason that there is no discrimination to begin with. As set out in detail in Section IV.A.2 above, Plaintiffs' independent generating facility is not similarly situated to the local utilities and their vertically integrated generating facilities—a fact that is as fatal to Plaintiffs' equal protection discrimination claim as it is to Plaintiffs' Commerce Clause claim. But, even if Plaintiffs were similarly situated and differentially treated, Plaintiffs still cannot meet their burden to negate the Legislature's policy determination.

The Climate Commitment Act's provision of no-cost allowances to utilities rather than generating facilities is based on the Legislature's policy determination that: (1) it is necessary to prevent duplication of utilities' substantial obligations under the Clean Energy Transformation Act; and (2) doing so is the most effective means of ensuring that Washington consumers do not see dramatically increased energy costs. Far beyond merely being *conceivable*, providing utilities with relief from the additional costs they may face due to the Climate Commitment Act will enable those utilities to absorb those costs and protect Washington consumers. This is true regardless of whether the costs are incurred at generating facilities the utilities themselves own, or from purchasing power from independent operators or from out-of-state. Moreover, while the State does not concede that there is no evidence or empirical data to confirm the wisdom of that decision, it is irrelevant to the constitutional question if there were indeed no such evidence. *See Vance*, 440 U.S. at 111. The State's rational explanation is all that is required, and this Court should decline Plaintiffs' request that it "overstep and replace its judgment for the judgment of lawmakers." *Int'l Franchise*, 97 F. Supp. 3d at 1279, *citing Lehnhausen*, 410 U.S. at 365.

V. CONCLUSION

The State respectfully requests that Plaintiffs' complaint be dismissed on the pleadings. Plaintiffs' dormant Commerce Clause claims are fundamentally and fatally flawed. It is beyond dispute in this case that the very benefits Plaintiffs claim are denied to out-of-state economic interest will, in fact, flow to both in-state and out-of-state entities, or that the burdens of compliance fall equally on all electricity generators. Moreover, even without this defect in their Commerce Clause claim, Plaintiffs cannot establish that they are similarly situated to public utilities and cannot show that the benefit of minimizing impacts to Washington consumers' energy costs is outweighed by any indirect and incidental impact on interstate commerce. Finally, Plaintiffs' equal protection claim similarly cannot be proved under any set of facts.

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Again, Plaintiffs fail to establish discrimination. And, even if they could show some discrimination, Plaintiffs cannot possibly overcome their burden to show that the challenged legislative policy choice is unsupported by any reasonably conceivable set of facts. Plaintiffs' claims are legally deficient. The Court should grant this motion and dismiss this case with prejudice.

I certify that this motion contains 7,348 words, in compliance with the Local Civil Rules.

DATED this 16th day of February, 2023.

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CERTIFICATE OF SERVICE

I certify that on February 16, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the counsel of record who are registered with the CM/ECF system as follows:

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	**)** **)** **)**	**Docket No. ER23-474-000**

STATE OF WASHINGTON'S MOTION TO INTERVENE OUT OF TIME AND ANSWER PROTEST OF UTAH DIVISION OF PUBLIC UTILITIES

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, .214, the State of Washington, by and through Attorney General Robert W. Ferguson, hereby seeks to intervene out if time in Docket No. ER23-474-000, concerning the California Independent System Operator Corporation's (CAISO) application for a tariff amendment to implement reference level changes for Washington resources to reflect compliance costs associated with Washington's Climate Commitment Act. Washington also moves to submit the incorporated answer to the Utah Division of Public Utilities (UDPU) December 8, 2022, proposed protest to CAISO's tariff amendment application, pursuant to Commission Rule 213, 18 C.F.R. § 385.213(a)(2).

I. MOTION TO INTERVENE

Washington respectfully requests that the Commission grant its motion to intervene out of time and requests that the Commission grant it full rights as a party to this proceeding. There is good cause to waive the time limitation for intervention. While Washington has tracked and supports CAISO's proposed tariff amendment, Washington only recently learned that a

proposed intervenor to this proceeding, UDPU, asserts constitutional arguments against Washington's Climate Commitment Act as a basis to deny the tariff amendment. Washington began preparing this motion immediately upon learning of these arguments, and Washington's proposed answer to UPDU's protest is filed within the 15-day period under which the Commission by practice allows for such answers. Washington also satisfies other elements supporting intervention. Under normal circumstances, Washington has an express right to intervene pursuant to 18 C.F.R. § 385.214(a)(2). And, while filed out of time in this case, Washington notes that at this early point in the proceeding Washington's intervention would cause no disruption or prejudice to existing parties. Moreover, Washington has a clear interest in explaining the parameters, and defending the constitutionality, of its own statute to the extent the Commission engages in such an analysis. That interest is not adequately represented by any existing parties.

II. MOTION TO ANSWER PROTEST

Washington respectfully requests that the Commission, pursuant to Rules 212 and 213 (18 C.F.R. §§ 385.212, .213) waives Rule 213(a)(2) (18 C.F.R. § 385.213(a)(2), and accepts Washington's below answer to UDPU's December 8, 2022, protest to CAISO's tariff amendment. Good cause exists for waiver. Because UDPU's protest expressly concerns the operation of a Washington statute, Washington's answer and perspective will aid the Commission's understanding of the issues, inform its decision-making, and ensure a complete and accurate record.[1]

[1] *See, e.g., Equitrans, L.P.*, 134 FERC ¶ 61,250 at p. 6 (2011).

A. The Commission Is Not Empowered to Deny the Tariff Amendment Based on Constitutional Arguments.

As noted, Washington recently learned that UDPU has raised allegations over the constitutionality of Washington's Climate Commitment Act in its protest to CAISO's tariff amendment petition. Washington vigorously disagrees with UDPU's Supremacy Clause and "dormant" Commerce Clause arguments and asserts that the Climate Commitment Act is fully consistent with all relevant constitutional limitations.

More critically, however, UDPU fails to establish how its constitutional arguments are relevant to CAISO's tariff application or how the Commission has jurisdiction to opine on the constitutionality of a duly enacted state law as a basis to determine the reasonableness of a tariff amendment. Specifically, it is well settled—both among federal courts and the Commission's own rulings—that the constitutionality of legislative enactments is beyond the scope of administrative agencies, including the Commission.[2] This is not just true of direct constitutional claims. Even constitutional questions that are merely "implicated" by a petition are inappropriate for the Commission to consider unless strictly necessary for a particular decision.[3]

Opining on the constitutionality of the Climate Commitment Act is not "strictly" necessary here, and the Commission should reject UDPU's Supremacy Clause and Commerce Clause arguments. Such arguments have nothing to do with the reasonableness of the tariff

[2] *See, e.g., Ostereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *see also PennEast Pipeline Company*, *LLC*, 170 FERC P 61064 at 61499 (Jan. 30, 2020) *citing Osterich*.
[3] *PennEast Pipeline* at 61499; *see also*, *Bayport Refining Company and Malcom M. Turner*, 51 FERC P 63011 at 65051 (May 15, 1990) (finding that separation of powers concerns make constitutional issues "out of the agency's jurisdiction" as a basis of imposing liability).

amendment itself, and indeed do not address the amendment in any way. As a result, the Commission should: (1) disregard those arguments as it considers CAISO's proposed tariff amendment; (2) presume that the Washington Climate Commitment Act satisfies constitutional requirements; and (3) approve CAISO's tariff amendment if the Commission finds that it is "just and reasonable" consistent with the Federal Power Act.

B. Even If the Commission Could Review the Climate Commitment Act, UDPU Fails to Raise a Cognizable Constitutional Violation.

Even if the Commission did possess jurisdiction to opine on the constitutionality of the Climate Commitment Act, UDPU's protest fails to identify a cognizable deficiency. With regard to the Commerce Clause, UDPU fails to recognize that no cost allowances are only provided to utilities that are already subject to the cost burdens of energy transition requirements imposed under a separate state law that applies only to those serving Washington customers.[4] That law, the Clean Energy Transformation Act (CETA)[5], requires utilities serving Washington customers to reduce their greenhouse gas emissions to neutral by 2030 and to zero by 2045. Critically, these requirements do not apply to generation for out-of-state customers. Thus, the function of the no cost allowances in the Climate Commitment Act is to avoid double-charging Washington customers for the costs of the energy transition to non-emitting generation. This policy applies to *all* utilities serving Washington customers, regardless of whether they are in-state or out-of-state entities.

[4] RCW 80A.65.120(1). This statute provides, "[t]he legislature intends by this section to allow all consumer-owned electric utilities and investor-owned electric utilities subject to the requirements of Chapter 19.405 RCW, the Washington clean energy transformation act, to be eligible for allowance allocation as provided in this section in order to mitigate the cost burden of the program on electricity customers." *Id*.
[5] Chapter 19.405 RCW.

Additionally, UDPU also fails to point out that PacificCorp's Chehalis generating facility (the sole out-of-state facility UDPU asserts is mandatorily subject to the Climate Commitment Act) may receive and use "no cost" allowances under the statute because PacifiCorp's subsidiary utility, Pacific Power, serves Washington customers and can transfer those allowances to the Chehalis facility in *exactly* the same manner as all utilities serving Washington customers. Finally, UDPU fails to address the fact that Washington's rules implementing the Climate Commitment Act expressly allow utilities to transfer allowances to *any* generating facility delivering power to the Washington grid, including out-of-state facilities, rendering UDPU's facial arguments a nullity and any as-applied challenges unripe.[6] Any one of these facts is fatal to UDPU's Commerce Clause arguments.

UDPU's Supremacy Clause arguments are similarly unpersuasive. For one, UDPU's argument that the CAISO adders interfere with the Commission's authority to regulate wholesale electricity sales ring especially hollow within the context of a proceeding whereby the Commission is, in fact, exercising its exclusive authority to approve those adders. But UDPU also fails to properly delineate the bounds of the Federal Power Act in this context. The Supreme Court has made clear that the Federal Power Act "leaves to the States alone" the regulation of retail sales of electricity.[7] To the extent UDPU's Supremacy Clause argument even stretches to the Climate Commitment Act, UDPU itself points out that the purpose of the "no cost" allowances provided to utilities serving Washington ratepayers in the early years of the Act's compliance period are aimed at ensuring utilities have the flexibility to avoid an initial

[6] *See* Washington Administrative Code §§ 173-446-425 and -230 (6).
[7] *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 154 (2016).

spike in energy costs to ratepayers.[8] In other words, the allowances are intended to address the retail sale of power, not the wholesale market. That policy choice remains fully within the scope of authority expressly reserved to state legislatures.

III. CONCLUSION

Washington respectfully requests that the Commission grant its motion to intervene, making Washington a full party participant, and further requests that the Commission grant its motion to submit the included answer to UPUD's protest.

Respectfully Submitted,

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[8] Motion to Intervene and Protest of the Utah Division of Public Utilities at 5; Rev. Code Wash. § 70A.65.120 (1); Wash. Admin. Code § WAC 173-446-230.

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