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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

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

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

15 After lobbying for, but failing to receive, a legislative carve-out for their in-state
16 emissions obligations under the Climate Commitment Act, Plaintiffs now challenge the Act’s
17 grant of allowances to utilities under the “dormant” Commerce Clause and Equal Protection
18 Clause of the United States Constitution. Specifically, Plaintiffs assert that the allowances
19 provided to public utilities, but not directly provided to electricity generating facilities, are
20 prejudicial to interstate commerce because Plaintiffs’ facility is the only generating facility in
21 the state not owned by a utility serving Washington customers. Plaintiffs alternatively claim the
22 Climate Commitment Act places an undue burden on interstate commerce by discouraging out-
23 of-state investment in natural gas generating facilities. But, even taking all of the allegations in
24 their complaint as true, Plaintiffs’ claims fail on their face as a matter of law and should be
25 dismissed on the pleadings.
26

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

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

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

20 **II. BACKGROUND**

21 **A. The Climate Commitment Act**

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

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

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

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

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

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

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

15 **B. Washington’s Electricity Market**

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

24
 25 ² Washington’s utilities, both consumer- and investor-owned, get the power they sell at retail to
 26 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.

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

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

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

1 **III. LEGAL STANDARD**

2 Federal Rules of Civil Procedure 12(b)(6) and 12(c) are “functionally identical,” and the
3 same legal standard applies to both. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192
4 (9th Cir. 1989). Such motions test “the legal sufficiency of a claim.” *Conservation Force v.*
5 *Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011). This standard requires a complaint to “contain
6 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, “a plaintiff’s obligation to provide the grounds
8 of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation
9 of a cause of action’s elements will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545
10 (2007). Moreover, “naked assertion[s]” and “labels and conclusions” need not be accepted as
11 true, *Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 557), and leave to amend is
12 not granted where the “court determines that the allegation of other facts consistent with the
13 challenged pleading could not possibly cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*,
14 957 F.2d 655, 658 (9th Cir. 1992) (internal quotations and citation omitted).

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

17 **IV. ARGUMENT**

18 **A. Plaintiffs Cannot Establish That Providing No-Cost Allowances To Utilities**
19 **Constitutes a “Dormant” Commerce Clause Violation**

20 The so-called negative or “dormant” aspect of the Commerce Clause “primarily is driven
21 by a concern about economic protectionism—that is regulatory measures designed to benefit in-
22 state economic interests by burdening out-of-state competitors.” *Nat’l Ass’n of Optometrists &*
23 *Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). This doctrine prevents states from
24 “erecting taxes, tariffs, or regulations that favor local businesses at the expense of interstate
25 commerce.” *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 97 F. Supp. 3d 1256, 1266 (W.D. Wash.
26 2015), citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). A dormant Commerce

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

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

11 Next, if the law is non-discriminatory, courts then proceed to the balancing test set out in
12 *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), under which a regulation will be sustained so
13 long as it has only indirect or incidental effects on interstate commerce and the state has any
14 legitimate interest justifying those effects. *Id.* at 142. The balancing question is one of degree:
15 the extent of the burden tolerated “depends on the nature of the local interest.” *Int’l Franchise*,
16 97 F. Supp. 3d at 1277. But the burden on plaintiffs is extraordinarily high. In weighing
17 competing interests, “the Supreme Court has frequently admonished that courts should not
18 second-guess the empirical judgments of lawmakers concerning the utility of legislation.”³ *Id.*,
19 *citing S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001).

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

24 _____
25 ³ Courts also look at whether a state is regulating commerce that occurs entirely outside of its borders and
26 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.

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

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

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

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

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

1 in differential treatment of in-state versus out-of-state actors. Rather, as discussed in detail
2 below, to the extent a distinction is drawn, it is rationally (and legally) drawn between that of
3 independent generating facilities such as Plaintiffs’ and very differently situated, consumer-
4 focused *utilities*—not in-state versus out-of-state interests. Such a distinction is not prohibited
5 by the Constitution regardless of where such entities are headquartered. *See General Motors*,
6 519 U.S. at 307.

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

16 Moreover, and to the extent Plaintiffs attempt to lump PacifiCorp in as a “local”
17 economic interest, Plaintiffs’ complaint fails to explain (because there is no conceivable reason)
18 why the Climate Commitment Act puts Plaintiffs in any different position than PacifiCorp when
19 it comes to conducting significant economic or political activities in Washington. Plaintiff
20 Invenergy is a multinational corporation operating “large-scale renewable and other clean energy
21 generation and storage facilities worldwide,” including “North America, Latin America, Asia
22 and Europe.”⁴ According to Invenergy, it has developed 190 projects on four continents totaling
23 over 30,000 megawatts of electricity and powering nearly nine million homes.⁵ Thus, even if the
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26 ⁴ <https://invenergy.com/projects/overview>

⁵ <https://invenergy.com/>

1 Court accepts Plaintiffs’ claims that they do not participate in “significant commercial and
2 political activities in Washington,” that choice is one of their own making.⁶ See ECF No. 1 ¶ 48.

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

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

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 Second, even if Plaintiffs could show incidental impacts to interstate commerce, their
19 claim still fails. “[T]he Supreme Court has frequently admonished that courts should not second-
20 guess the empirical judgements of lawmakers concerning the utility of legislation.” *S.D. Myers*,
21 253 F.3d at 471. Thus, “for a facially neutral statute to violate the Commerce Clause, the burdens
22 of the statute must so outweigh the putative benefits as to make the statute unreasonable or
23 irrational.” *Int’l Franchise*, 97 F. Supp. 3d at 1277, *citing Alaskan Airlines, Inc. v. City of Long*
24 *Beach*, 951 F.2d 977 (9th Cir. 1991). This sets an exceptionally high bar for plaintiffs: as this
25 Court has recognized, “[a] challenge to the legislative judgment must establish that the
26 legislative facts on which the classification is apparently based could not reasonably be

1 conceived to be true by the governmental decision-maker.” *Int’l Franchise*, 97 F. Supp. 3d at
2 1277, citing *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005).

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

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

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

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

8 Plaintiffs’ burden to negate every conceivable basis for a statutory choice then runs into
9 a further hurdle: in defending against an equal protection claim, the State is not required to
10 articulate its reasoning for the statute in question because such reasoning is “entirely irrelevant
11 for constitutional purposes.” *Id.*, citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).
12 Rather, a legislative choice is immune “to courtroom fact-finding and may be based on rational
13 speculation unsupported by evidence or empirical data.” *Id.*, citing *Vance v. Bradley*,
14 440 U.S. 93, 111 (1979). “Only by faithful adherence to this guiding principle of judicial
15 review of legislation is it possible to preserve to the legislative branch its rightful independence
16 and its ability to function.” *Id.*, quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356,
17 365 (1973).

18 Plaintiffs cannot surmount this standard under any set of facts, and certainly not under
19 those facts alleged in the complaint. For one, even without this unforgiving burden, Plaintiffs’
20 equal protection claim fails for the simple reason that there is no discrimination to begin with.
21 As set out in detail in Section IV.A.2 above, Plaintiffs’ independent generating facility is not
22 similarly situated to the local utilities and their vertically integrated generating facilities—a fact
23 that is as fatal to Plaintiffs’ equal protection discrimination claim as it is to Plaintiffs’ Commerce
24 Clause claim. But, even if Plaintiffs were similarly situated and differentially treated, Plaintiffs
25 still cannot meet their burden to negate the Legislature’s policy determination.
26

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

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

7 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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DATED February 16, 2023, in Olympia, Washington.

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