APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INVENERGY THERMAL LLC; GRAYS HARBOR ENERGY, LLC, Plaintiffs-Appellants, v. LAURA WATSON, in her official capacity as Director of the Washington State Department of Ecology, Defendant-Appellee.	No. 23-3857 D.C. No. 3:22-cv-05967-BHS MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted November 13, 2024
San Francisco, California

Before: S.R. THOMAS and MILLER, Circuit Judges, and MOLLOY, District Judge.**

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Plaintiffs-Appellants Invenergy Thermal LLC and Grays Harbor Energy LLC (collectively "Appellants") own an electricity-generating natural gas power plant in Washington State. In 2022, they sued Defendant-Appellee Laura Watson, in her official capacity as Director of the Washington State Department of Ecology (the "State"), challenging a provision of Washington's Climate Commitment Act that provides no-cost emissions allowances to electric utilities but requires non-utility owners, like Appellants, to purchase such allowances for their power plants. *See* Wash. Rev. Code § 70A.65.120. Appellants allege that the Act's distribution of no-cost allowances violates the dormant Commerce Clause and the Fourteenth Amendment's Equal Protection Clause. The district court granted the State's motion for judgment on the pleadings, Fed. R. Civ. P. 12(c), after sua sponte finding that Appellants lacked standing. We have jurisdiction under 28 U.S.C. § 1291 and review the district court's decision de novo. *See Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 722 (9th Cir. 2024). We affirm, but not on standing grounds.

I

While the State does not defend the district court's standing decision, standing is jurisdictional and must be addressed. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing."). Appellants have standing. The conduct at issue "threatens to cause financial injury" to Invenergy Thermal LLC, the parent company of Grays Harbor Energy LLC, "by illegally reducing the return on [its] investments in [Grays Harbor] and by lowering the value of [its] stockholdings." *Franchise Tax Bd. of Cal. v. Alcan*

Aluminium Ltd., 493 U.S. 331, 336 (1990). Grays Harbor Energy LLC also has standing because even if it qualifies as an in-state entity, "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997); *see Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265–67 (1984) (holding that in-state liquor wholesalers had standing to raise a dormant Commerce Clause challenge to a Hawaii tax regime exempting certain alcoholic beverages produced in-state from liquor taxes).

Ultimately, while the district court erred by addressing standing without giving the parties an opportunity to be heard, *see Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1060 (9th Cir. 2023) ("Given the due process and fairness concerns presented, a district court generally must provide the parties with adequate notice that it is contemplating invoking a particular procedural device *sua sponte*."), and by proceeding to the merits despite its finding of no standing, *see Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (per curiam) ("[A] court that lacks jurisdiction 'is powerless to reach the merits.'" (quoting *Fleck & Assocs., Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100, 1106–07 (9th Cir. 2006))), standing exists and we affirm on the merits.

II

Appellants fail to plead a viable dormant Commerce Clause claim because the Climate Commitment Act's provision of no-cost allowances to electric utilities neither discriminates against interstate commerce, *see Tracy*, 519 U.S. at 310, nor imposes an impermissible burden on such commerce, *see Exxon Corp. v. Governor of Md.*, 437 U.S.

117, 127 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

First, the Act does not "discriminate[] against out-of-state entities on its face, in its purpose, or in its practical effect" because electric utilities and independent power plant owners like Appellants are not similarly situated. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013). "[W]hen the allegedly competing entities provide different products . . . there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Tracy*, 519 U.S. at 299. If the entities in fact "serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed[,] . . . eliminating the . . . regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id.*

Washington utilities are not similarly situated to Appellants because they primarily serve a separate, captive retail market by distributing power to consumers, even though they also compete with Appellants in the noncaptive market of wholesale electricity generation. *See id.* at 301, 310 (concluding that utilities and natural gas marketers in Ohio were not similarly situated because the latter did not serve the core market of captive retail users). While Washington utilities have the discretion to apply their no-cost allowances to cover the compliance obligations of their power plants, *see* Wash. Admin. Code § 173-446-420(2)(a), the amount of no-cost allowances provided under the Act is tailored to the amount of electricity that a utility supplies to consumers in the captive retail market, *see* Wash. Rev. Code § 70A.65.120(2); Wash. Admin. Code § 173-446-230(2). Thus, any power generated by a utility-owned plant that exceeds this amount—power that can then be sold on the wholesale market in which Appellants operate—does not increase the number of no-cost allowances awarded to that utility. To modify this scheme "could subject [utilities] to economic pressure that in turn could threaten the preservation of an adequate customer base to support continued provision of bundled [electricity] services in the captive market." *Tracy*, 519 U.S. at 309. *Tracy* therefore dictates the outcome here, distinguishing this case from *NextEra Energy Cap. Holdings, Inc. v. Lake*, a Fifth Circuit case relied on heavily by Appellants that did not involve the separate service provided by utilities in a captive market. *See* 48 F.4th 306, 320 (5th Cir. 2022).

Second, Appellants fail to allege a viable dormant Commerce Claim under *Pike*. Even assuming that a nondiscriminatory *Pike* claim remains viable, *see Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 379 (2023), "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another," *Exxon*, 437 U.S. at 127. Rather, the Supreme Court has noted that it "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods." *Id.* at 128. Indeed, contrary to Appellants' characterization, the Court has declined to hold that the incidental effect of mere state regulation on the interstate wholesale energy market is, on its own, a substantial burden on interstate commerce. *See Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv.*

Comm'n, 461 U.S. 375, 395 (1983). Because the Commerce Clause "protects [neither] the particular structure [n]or methods of operation in a retail market," the fact that Appellants may have to alter their operations to either pay for allowances to offset their carbon emissions or reduce their carbon emissions does not "impermissibly *burden*[] interstate commerce." *Exxon*, 437 U.S. at 127.

III

Appellants' final claim arises under the Equal Protection Clause of the Fourteenth Amendment. As discussed above, Appellants are not similarly situated to Washington's electric utilities in this context, which forecloses their equal protection claim. Additionally, Appellants fail to plausibly negate "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Mont. Med. Ass'n v. Knudsen*, 119 F.4th 618, 630 (9th Cir. 2024) (quoting *Olson v. California*, 104 F.4th 66, 77 (9th Cir. 2024)). The classification and differential treatment rationally reflect Washington's interest in balancing the rising cost of energy against the State's desire to reduce greenhouse gases. While the State recognizes that electricity costs will still go up under its no-cost allowance regime, that does not undermine the State's effort to mitigate those rising costs or fight climate change. Even taking as true Appellants' allegation that the Act neither reduces costs nor greenhouse gases, the no-cost allowances are explicitly provided to avoid duplicating the carbon reduction program that separately applies to utilities under the Clean Energy Transformation Act. *See* Wash. Rev. Code § 70A.65.120(1). Accordingly, the district court correctly concluded that Appellants' claim fails as a matter of law because the challenged classification serves legitimate state interests.

IV

"Denial of leave to amend is reviewed for an abuse of discretion." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655 (9th Cir. 2017) (quoting *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011)). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Id.* (quoting *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004)). Amendment need not be permitted when it would be futile—that is, when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim." *Id.* (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). Because additional facts would not undermine the conclusions reached above, we find no abuse of discretion here.

AFFIRMED.

APPENDIX B

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.	CASE NO. 3:22-cv-05967-BHS ORDER

This matter is before the Court on Defendant Washington State Department of Ecology's[1] Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings,[2] Dkt. 21. Plaintiff Invenergy Thermal LLC alleges that, through a subsidiary of a subsidiary, it "wholly owns" Plaintiff Grays Harbor Energy LLC,

[1] The named defendant is Laura Watson, who is sued in her official capacity as the director of the Department of Ecology. For clarity, the Court refers to the defendant as the Department of Ecology.

[2] Ecology captioned this motion as a "FRCP 12(c) Motion to Dismiss." Dkt. 21 at 1. Because this motion is made pursuant to Fed. R. Civ. P. 12(c) and Ecology filed an answer, Dkt. 20, the Court refers to it as a motion for judgment on the pleadings.

Also, each party requests oral argument on this motion. Dkt. 21 at 1, Dkt. 27 at 1. These requests are **DENIED**.

which, in turn, "wholly owns" the Grays Harbor Energy Center—an electricity-generating natural gas power plant located in Washington State. Dkt. 1, ¶¶ 3, 4.

Plaintiffs challenge a provision of Washington's Climate Commitment Act (CCA), chapter 70A.65 RCW, which directs Ecology to allocate to electric utilities—at no cost—allowances to emit a certain amount of greenhouse gases per year. Owners of electricity generating facilities like the Grays Harbor Energy Center, by contrast, must purchase such allowances at auction. Plaintiffs claim that the CCA's allocation of "no-cost allowances"[3] to electric utilities, but not to owners of electricity generating facilities like the Grays Harbor Energy Center, violates the dormant Commerce Clause and the Fourteenth Amendment's Equal Protection Clause.

Plaintiffs argue that this statutory scheme discriminates against them in violation of the dormant Commerce Clause because Invenergy is an out-of-state entity and, according to Plaintiffs, the electric utilities that receive no-cost allowances are all owned by in-state entities. Plaintiffs assert that the Grays Harbor Energy Center competes against these utilities insofar as the utilities operate their own electricity generating facilities. Plaintiffs similarly claim that the CCA violates the Equal Protection Clause by treating electricity generating facilities differently than electric utilities without a rational basis to do so.

Ecology responds that, far from being discriminatory,

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[3] The parties refer to allowances allocated at no cost as "no-cost allowances." *See* Dkt. 1, ¶ 6; Dkt. 21 at 2–3; Dkt. 27 at 6. So does the Court.

the CCA allocates no-cost allowances to in-state entities and out-of-state entities alike. It also contends that electricity generating facilities like the Grays Harbor Energy Center are not substantially similar to electric utilities. This is so, Ecology asserts, because electric utilities sell electricity to the public on the retail market whereas electricity generating facilities sell electricity to larger entities, including electric utilities, on the wholesale market. Ecology finally argues that the challenged statute serves a legitimate governmental interest: to mitigate the cost of electricity sold to public consumers while electric utilities make efforts to reduce their greenhouse gas emissions.

The Court concludes that Invenergy lacks constitutional standing to advance its claims under both the dormant Commerce Clause and the Equal Protection Clause. This is because Invenergy does not own the Grays Harbor Energy Center; a subsidiary three degrees separated from itself does. Grays Harbor Energy LLC also lacks standing to advance its asserted dormant Commerce Clause claims. Unlike Invenergy, Grays Harbor Energy LLC is an in-state entity without any out-of-state economic interests of its own. Under these circumstances, it cannot allege a plausible injury in fact under the dormant Commerce Clause, which, at its core, serves to prevent discrimination against out-of-state economic interests.

Even if Invenergy or Grays Harbor Energy LLC had standing to advance their dormant Commerce Clause claims, these claims would still fail. Under the CCA, there is one out-of-state owner of an electric utility in Washington that is entitled to no-cost allowances, and two other in-state owners of electricity generating facilities that are not so entitled. Thus, the CCA does not discriminate based on an entity's local contacts. At most, it discriminates based on an entity's status as either an electric utility or an electricity generating facility. Because these entities primarily serve different markets, they are not similarly situated and the CCA's differing treatment of them does not offend the dormant Commerce Clause.

Simply put, the CCA treats all owners of electric utilities the same, regardless of whether those owners are in-state entities or out-of-state entities. It also treats all owners of electricity generating facilities the same, again regardless of an owner's location. This plainly does not discriminate against out-of-state economic interests.

For this same reason, the CCA also does not violate the Equal Protection Clause, which generally requires similarly situated persons to be treated alike. In any event, as Ecology asserts, the allocation of no-cost allowances to electric utilities, but not to electricity generating facilities like the Grays Harbor Energy Center, is rationally related to a legitimate governmental purpose.

I. BACKGROUND

Invenergy Thermal LLC "is an independent power producer that owns and operates power plants across the United States." Dkt. 1, ¶ 1. It is incorporated in Delaware and headquartered in Chicago, Illinois. *Id.*

Invenergy, "*through other subsidiaries*, wholly owns Grays Harbor Energy LLC, which wholly owns the Grays Harbor Energy Center, a power plant located in Washington." Dkt. 1, ¶ 3 (emphasis added). Specifically, "Grays Harbor Energy LLC is a wholly owned subsidiary of Invenergy Grays Harbor LLC," which, in turn, "is a wholly owned subsidiary of Invenergy Grays Harbor Holdings LLC," which, again in turn, "is a wholly owned subsidiary of Invenergy." *Id.* ¶ 20 n.2.

The record does not indicate where these two "intermediate subsidiaries" are incorporated, headquartered, or otherwise conduct their businesses. However, Grays Harbor Energy LLC is incorporated in Delaware and headquartered in Elma, Washington. Dkt. 1, ¶ 20.

In 2021, the Washington Legislature enacted the CCA to address certain impacts of climate change on the State. *See* RCW 70A.65.005. To aid "covered entities"[4] in reducing their greenhouse gas emissions, the CCA requires Ecology to implement a cap and invest program concerning such emissions. RCW 70A.65.060(1); *see* RCW 70A.65.010(58) (defining "[p]rogram" as "the greenhouse gas emissions cap and invest program"). The parties agree that the Grays Harbor Energy Center is a "covered entity" and thus subject to the cap and invest program. Dkt. 1, ¶ 22; Dkt. 21 at 4.

Under this program, Ecology must (1) implement a cap on greenhouse gas emissions from covered entities, RCW 70A.65.060(1), and (2) distribute "allowances"—meaning, "an authorization to emit up to one metric ton of

[4] Under the CCA, "'[c]overed entity' means a person that is designated by the department as subject to RCW 70A.65.060 through 70A.65.210." RCW 70A.65.010(23). Ecology's regulations define covered entities generally as those whose covered emissions exceed 25,000 metric tons of "carbon dioxide equivalent" per year. *See* WAC 173-446-030; WAC 173-446-060.

carbon dioxide equivalent," RCW 70A.65.010(1)—through auctions open to "covered entities, opt-in entities, and general market participants that are registered entities in good standing." RCW 70A.65.100(4). The CCA requires Ecology to "adopt by rule an auction floor price" for these allowances and prohibits Ecology from "sell[ing] allowances at bids lower than the auction floor price." RCW 70A.65.150(1). Ecology must also "adopt by rule . . . a schedule for the floor price to increase by a predetermined amount every year." *Id.*

However, the following categories of entities must receive an allocation of allowances at no cost: (1) "emissions-intensive and trade-exposed" facilities;[5] (2) "consumer-owned and investor-owned electric utilities"; and (3) "covered entities that are natural gas utilities." RCW 70A.65.110–.130. Although the Grays Harbor Energy Center generates electricity and participates in an electricity market, Plaintiffs acknowledge that it is not an electric utility.[6] *See* Dkt. 1, ¶ 7. Accordingly, the Grays Harbor Energy Center does not qualify for no-cost allowances under the CCA. *See* Dkt. 1, ¶ 7; Dkt. 21 at 5; Dkt. 27 at 6.

Concerning electric utilities, the purpose of these no-cost allowances is "to mitigate the cost burden of the [cap and invest] program on electricity customers." RCW

[5] Emissions-intensive and trade-exposed facilities include entities that engage in petroleum refining or numerous forms of manufacturing. RCW 70A.65.110(1)(a)–(m). They do not include entities that generate, sell, or distribute electricity. *See id.*

[6] Electric utilities sell and distribute electricity to the public on the retail market. Dkt. 1, ¶ 7. Electricity generating facilities do not. *See id.* They instead sell electricity on the wholesale market, which includes selling electricity to electric utilities. *See id.*

70A.65.120(1). The availability of no-cost allowances to electric utilities reduces over time and "[u]nder no circumstances may utilities receive any free allowances after 2045." RCW 70A.65.120(2)(d).

In these respects, the CCA works in tandem with another Washington statute, the Clean Energy Transformation Act (CETA), chapter 19.405 RCW. CETA requires all electric utilities in Washington to become "one hundred percent carbon-neutral by 2030, and one hundred percent carbon-free by 2045." RCW 19.405.010(2). Consistent with the CCA's goal of mitigating the cost burden of its cap and invest program on electricity customers, *see* RCW 70A.65.120(1), CETA provides that "the state must," among other things, "provide safeguards to ensure that the achievement of this policy does not . . . impose unreasonable costs on utility customers." *Id.* Because the Grays Harbor Energy Center is not an electric utility, it is not subject CETA's requirements. *See generally* chapter 19.405 RCW; *see also* Dkt. 21 at 5; Dkt. 27 at 21.

Plaintiffs allege that Ecology's allocation of no-cost allowances under the CCA to electric utilities, but not to electricity generating facilities like the Grays Harbor Energy Center: (1) violates the dormant Commerce Clause "by discriminating in effect against out-of-state economic interests to the benefit of in-state economic interests," Dkt. 1, ¶ 157, (2) violates the dormant Commerce Clause by "excessively burden[ing] interstate commerce without advancing any legitimate local interest," *id.* ¶ 174, and (3) violates the Equal Protection Clause of the Fourteenth Amendment by "treat[ing] independent power plant owners differently from other similarly situated plant owners, namely local utilities," in a manner that "is not rationally related to any legitimate governmental purpose." *Id.* ¶ 187.

Plaintiffs seek a judicial determination that the CCA's requirement that Ecology allocate no-cost allowances to electric utilities, but not to electricity generating facilities like the Grays Harbor Energy Center, is unconstitutional "as applied." Dkt. 1, ¶ 194. Plaintiffs also seek an order "[r]equir[ing] Defendant . . . to provide no-cost allowances to Plaintiffs, or requir[ing] Defendant . . . to re-allocate no-cost allowances or requir[ing] electric utilities to transfer no-cost allowances to Plaintiffs; or otherwise enjoin[ing] Defendant . . . from enforcing the CCA to disadvantage Plaintiffs." *Id.* ¶ 195.

Ecology filed an answer, Dkt. 20, and subsequently moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), Dkt. 21. Plaintiffs oppose this motion. Dkt. 27. The parties' arguments are addressed below.

II. DISCUSSION

A. Federal Rule of Civil Procedure 12(c) Standard

Federal Rule of Civil Procedure 12(c) "is 'functionally identical' to Rule 12(b)(6) and . . . 'the same standard of review' applies to motions brought under either rule." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (quoting *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff's complaint must allege facts to state a claim for relief that is plausible on its face. *Ashcroft* *v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Although courts must accept as true the complaint's well-pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion to dismiss. *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

When granting a Rule 12(b)(6) motion to dismiss, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). Courts may also deny leave to amend when the facts are not in dispute and the sole issue is whether there is liability as a matter of substantive law. *Albrecht v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

B. The proper test for determining whether a state law violates the dormant Commerce Clause.

The Court begins by clarifying the proper test to be applied when determining whether a particular state law violates the dormant Commerce Clause.

The Commerce Clause grants Congress the "Power . . . To regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. "[T]he Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also 'contain[s] a further, negative command,' one effectively forbidding the enforcement of 'certain state [economic regulations] even when Congress has failed to legislate on the subject.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). "This 'negative' aspect of the Commerce Clause" is "generally known as 'the dormant Commerce Clause.'" *Tenn. Wine & Spirits Retailers Association v. Thomas*, 588 U.S. ___, ___, 139 S. Ct. 2449, 2459 (2019) (some internal quotation marks omitted) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

Plaintiffs and Ecology assert that courts apply a two-tiered test for determining whether a particular state law violates the dormant Commerce Clause. Dkt. 21 at 7–8; Dkt. 27 at 14. Under the first tier, they claim, courts consider whether a state law discriminates against out-of-state entities on its face, in its purpose, or in its practical effect. Dkt. 21 at 8 (citing *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 97 F. Supp. 3d 1256, 1267 (W.D. Wash. 2015)); Dkt. 27 at 14 (citing *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013)). If the state law is discriminatory, "'it is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" Dkt. 27 at 14 (quoting *Rocky Mountain Farmers Union*, 730 F.3d at 1087).

Under the second tier, the parties assert, a state law may violate the dormant Commerce Clause even if it does not discriminate against out-of-state entities. Dkt. 21 at 8; Dkt. 27 at 14. They claim that a state law may do so under the Supreme Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Dkt. 21 at 8; Dkt. 27 at 14. Indeed, the Ninth Circuit Court of Appeals has interpreted *Pike* as holding that a state law violates the dormant Commerce Clause when it "places a 'significant' burden on interstate commerce" such that the law's "effect on interstate commerce clearly outweighs [its] local benefits." *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019).

However, after the parties submitted their briefing on Ecology's Rule 12(c) motion, the Supreme Court issued its decision in *National Pork Producers*, which criticized the second tier of this test. In that decision, the Court rejected an argument that, "[u]nder *Pike*, . . . a court must at least assess the burden imposed on interstate commerce by a state law and prevent its enforcement if the law's burdens are clearly excessive in relation to the putative local benefits." *Nat'l Pork Producers*, 598 U.S. at 377 (internal quotation marks omitted). The Court reasoned that this argument "overstate[s] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of [its] dormant Commerce Clause jurisprudence." *Id.*

The Court clarified that the dormant Commerce Clause essentially "prohibits the enforcement of state laws driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers*, 598 U.S. at 369 (internal quotation marks omitted) (quoting *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)). The Court emphasized that "this antidiscrimination principle lies at the 'very core' of [its] dormant Commerce Clause jurisprudence." *Nat'l Pork Producers*, 598 U.S. at 369 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)).

The Court explained that, "if some of [its] cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." *Nat'l Pork Producers*, 598 U.S. at 377. Put differently, "*Pike* serves to '"smoke out" a hidden' protectionism." *Id.* at 379 (quoting parenthetically R. Fallon, The Dynamic Constitution 311 (2d ed. 2013)). Thus, the dormant Commerce Clause is generally "concern[ed] with preventing purposeful discrimination against out-of-state economic interests." *Nat'l Pork Producers*, 598 U.S. at 371.

Nevertheless, the Supreme Court acknowledged it "has left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens,'" and that "'a small number of [its] cases have invalidated state laws . . . that appear to have been genuinely nondiscriminatory.'" *Nat'l Pork Producers*, 598 U.S. at 371 (quoting *Davis*, 553 U.S. at 353; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997)). "Often, such cases have addressed state laws that impose burdens on the arteries of commerce, on trucks, trains, and the like." *Nat'l Pork Producers*, 598 U.S. at 392 (Sotomayor, J., concurring) (internal quotation marks omitted). And at least one case invalidated a nondiscriminatory state law that regulated tender offers to shareholders. *Id.* (Sotomayor, J., concurring) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982)).

Therefore, with few exceptions, a state law violates the dormant Commerce Clause only if it "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, . . . unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" *Rocky Mountain Farmers Union*, 730 F.3d at 1087 (quoting *Maine v. Taylor*, 447 U.S. 131, 138 (1986)); *accord Nat'l Pork Producers*, 598 U.S. at 377–81.

C. Plaintiffs lack constitutional standing to advance their asserted dormant Commerce Clause claims.

Having clarified the applicable test, the Court considers whether Plaintiffs have constitutional standing to advance their asserted dormant Commerce Clause claims. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1265 (9th Cir. 1999) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.").

"In order to have standing to sue in federal court, Article III of the Constitution of the United States requires that a complainant have," among other things, "suffered an injury in fact, which the Supreme Court has defined as the invasion of a concrete, imminent, and legally cognizable interest."[7] *Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997); *accord Clark v. City of Lakewood*, 259 F.3d 996, 1011 n.7 (9th Cir. 2001). This requires the plaintiff to "allege a distinct and palpable injury to *himself*." *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (emphasis added).

In determining whether Invenergy or Grays Harbor Energy LLC has constitutional standing to advance the asserted dormant Commerce Clause claims, the Court first clarifies which of these entities owns the electricity generating facility at issue: the Grays Harbor Energy Center. Plaintiffs wrongly assert that Invenergy owns it. The core of Plaintiffs' dormant Commerce Clause claims is that, "[u]nder the [CCA], local electric utilities receive free, no-cost allowances, which enables them to run their plants without regard to the greenhouse-gas emissions they produce" whereas "Invenergy Thermal LLC ("Invenergy")[1], an out-of-state owner, on the other hand, must pay for its carbon." Dkt. 27 at 6. The footnote in this sentence states that, because "Invenergy wholly owns Grays Harbor Energy LLC, . . . both Plaintiffs are collectively referred to as 'Invenergy' for purposes of this brief." *Id.* at 6 n.1.

This is misleading. Grays Harbor Energy LLC—not Invenergy Thermal LLC—"wholly owns the Grays Harbor Energy Center." Dkt. 1, ¶ 3. It is immaterial that a subsidiary (Invenergy Grays Harbor LLC) of a

[7] A plaintiff must also establish that the injury is fairly traceable to the challenged action of the defendant, and that it is likely, not merely speculative, that the alleged injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

subsidiary (Invenergy Grays Harbor Holdings LLC) of Invenergy owns Grays Harbor Energy LLC. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Accordingly, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary." *Id.* at 475. It therefore follows with yet even greater force that a corporate parent (here, Invenergy) does not own or have legal title to the *assets* of a subsidiary that is *three degrees* separated from itself (here, Grays Harbor Energy LLC). The Court rejects Plaintiffs' implicit contention otherwise.

Because Invenergy does not own the Grays Harbor Energy Center, *see Dole Food*, 538 U.S. at 474–75, it fails to allege an injury to itself by the CCA's allocation of no-cost allowances to electric utilities, but not to electricity generating facilities like the Grays Harbor Energy Center. *See Warth*, 422 U.S. at 501. The Ninth Circuit has similarly held that a subsidiary that "does not contend that the rights [at issue] belong to it, but to its parent company," "fails to establish standing." *Aschley Creek Properties, L.L.C. v. Larson*, 403 Fed. App'x 273, 274 (9th Cir. 2010) (citing *Dole Food*, 538 U.S. at 474–475)).[8] Under *Dole Food*, the inverse must also be true: a corporate parent that does not own the asset at issue because it is wholly owned by a subsidiary also fails to establish

[8] Although they are not binding precedent, unpublished dispositions of the Ninth Circuit issued on or after January 1, 2007, may be cited in accordance with Federal Rule of Appellate Procedure 32.1. Ninth Cir. R. 36-3(a)–(b).

standing. *See* 538 U.S. at 475. Therefore, Invenergy does not have constitutional standing to advance the asserted dormant Commerce Clause claims.

Nor does Grays Harbor Energy LLC. The complaint concedes that Grays Harbor Energy LLC is an *in-state* entity, not an out-of-state entity. It is headquartered in Grays Harbor County, Washington, Dkt. 1, ¶ 20, and appears to exist primarily, if not solely, to operate the Grays Harbor Energy Center, which is also located in Grays Harbor County. *Id.* ¶ 26. Moreover, "[t]he vast majority of the electricity that Grays Harbor generates is sold to entities within Washington." *Id.* ¶ 38. There is no indication that Grays Harbor Energy LLC does anything but "own and operate the Grays Harbor Energy Center." *Id.*

Given these concessions, Grays Harbor Energy LLC does not plead a plausible "invasion" of a "legally cognizable interest" under the dormant Commerce Clause. *Sargeant*, 130 F.3d at 1069. Its alleged injury under both of its dormant Commerce Clause claims is that "the CCA's distribution of no-cost allowances deprives [it] of the rights, privileges, and immunities under the Commerce Clause." Dkt. 1, ¶¶ 171, 182. But the dormant Commerce Clause generally prohibits state "regulatory measures designed to benefit *in-state* economic interests by burdening *out-of-state* competitors." *Nat'l Pork Producers*, 598 U.S. at 369 (internal quotation marks omitted and emphasis added) (quoting *Davis*, 553 U.S. at 337–38).

The Court is mindful that a "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State discriminates." *Tracy*, 519 U.S. at 286. Beyond this, for example, "customers of that class may also be injured," such as when a "customer is liable for payment of [a] tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." *Id.*

No such scenario exists here. Grays Harbor Energy LLC does not identify *any* out-of-state economic interest of its own against which the CCA *could* discriminate. It also does not even claim to be burdened as the customer of any discriminated-against out-of-state entity, or to be burdened in any similar way. *See Tracy*, 519 U.S. at 286. Accordingly, Grays Harbor Energy LLC also fails to allege a plausible injury in fact under the dormant Commerce Clause.

For these reasons, both Invenergy and Grays Harbor Energy LLC lack constitutional standing to advance their asserted dormant Commerce Clause claims. Because their deficiencies cannot be cured through the allegation of other facts, these claims are **DISMISSED with prejudice**. *See Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002) (dismissal with prejudice on standing was appropriate when appellant "could not have possibly amended his complaint to allege an [Article III] injury in fact"); *accord Fieldturf, Inc. v. Sw. Recreational Indus., Inc.*, 357 F.3d 1266, 1269 (Fed. Cir. 2004) ("Ordinarily, dismissal for lack of standing is without prejudice. On occasion, however, a dismissal with prejudice is appropriate, especially where 'it [is] plainly unlikely that the plaintiff [will be] able to cure the standing problem.'" (internal citation omitted) (quoting *H.R. Tech. v. Astechnologies, Inc.*, 275 F.3d 1378, 1385 (Fed. Cir. 2002)).

D. Even if Plaintiffs had standing to advance their asserted dormant Commerce Clause claims, these claims would fail on the merits.

Even if either Invenergy or Grays Harbor Energy LLC had standing to advance the asserted dormant Commerce Clause claims, these claims would still fail for numerous reasons.

1. Plaintiffs' claim that the CCA imposes an excessive burden on interstate commerce in relation to the putative local benefits is meritless.

Plaintiffs claim that the CCA's allocation of no-cost allowances to electric utilities, but not to electricity generating facilities, violates the dormant Commerce Clause by "excessively burden[ing] interstate commerce without advancing any legitimate local interest." Dkt. 1, ¶ 174. As explained, however, the Supreme Court recently rejected a similar argument, explaining that it "overstate[s] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of [its] dormant Commerce Clause jurisprudence." *Nat'l Pork Producers*, 598 U.S. at 377. This claim accordingly lacks merit.[9]

2. Plaintiffs' claim that the CCA discriminates against out-of-state economic interests is not plausible.

Plaintiffs also claim that the CCA's allocation of no-cost allowances to electric utilities violates the dormant

[9] Plaintiffs do not claim that the CCA burdens the "arteries" of interstate commerce. *Nat'l Pork Producers*, *598 U.S.* at 392 (Sotomayor, J., concurring). The Court, therefore, does not consider any such claim.

Commerce Clause "by discriminating in effect against out-of-state economic interests to the benefit of in-state economic interests." Dkt. 1, ¶ 157. To reiterate, a state statute violates the dormant Commerce Clause if it "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, . . . unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" *Rocky Mountain Farmers Union*, 730 F.3d at 1087 (quoting *Taylor*, 447 U.S. at 138); *accord Nat'l Pork Producers*, 598 U.S. at 377–81. The CCA does not discriminate in any of these respects.

a. The CCA does not discriminate against out-of-state entities on its face.

The CCA does not discriminate against out-of-state entities on its face because electric utilities and electricity generating facilities are not substantially similar entities. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S.at 298. When "different entities serve different markets," they "would continue to do so even if the supposedly discriminatory burden were removed." *Id.* at 299. "If in fact that should be the case, eliminating the . . . regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id.*

Plaintiffs concede that "[e]lectric utilities and electricity generating facilities occupy distinct positions in electricity markets." Dkt. 1, ¶ 7. Whereas "[a]n electric utility distributes and delivers electricity to the public" on the retail market, electricity generating facilities like the Grays Harbor Energy Center do not. *Id.* They instead sell electricity on the wholesale market, which includes selling electricity *to* electric utilities. *See id.* ("Independent power producers . . . regularly sell the electricity generated by their facilities to electric utilities as well as some end-users."). Electric utilities are also subject to various statutory and regulatory requirements that electricity generating facilities are not, such as CETA. *See generally* chapter 19.405 RCW.

Plaintiffs contend that, because "many utilities own and operate power plants and other types of electricity generating facilities," Dkt. 1, ¶ 7, electric utilities and nonutility-operated electricity generating facilities "compete against each other as powerplant owners." Dkt. 27 at 10. In this sense, Plaintiffs argue, the CCA unlawfully discriminates against electricity generating facilities because electric utilities "will use [their no-cost allowances] to cover their plants' compliance obligations." *Id.* at 18.

It is true that electric utilities may request Ecology to transfer their no-cost allowances to electricity generating facilities that they operate. WAC 173-446-420(2)(a). However, the CCA's allocation of no-cost allowances to electric utilities must be tailored to the amount of electricity that a utility supplies to the public on the retail market—a captive market in which electricity generating facilities do not participate. *See* RCW 70A.65.120(2)(b), (c), (d) (stating that the allocation of no-cost allowances to electric utilities "must be consistent with a forecast . . . of each utility's *supply and demand*, and the cost burden resulting from the inclusion of" covered entities for each compliance period (emphasis added)); WAC 173-446-

230(2)(a) ("Ecology will use utility-specific demand forecasts that provide estimates of *retail* electric load." (Emphasis added)).[10]

As Ecology persuasively asserts: "Because the supply of no-cost allowances is finite and directly tied to the power a utility supplies to its retail customers, any power created by a utility's generating facilities that does not serve this load—i.e., bulk power sold on the wholesale market—does not increase a utility's allocation of no-cost allowances." Dkt. 30 at 5. As a result, the allocation of no-cost allowances applies primarily to grant electric utilities a benefit in the captive market.

To modify this scheme "could subject [utilities] to economic pressure that in turn could threaten the preservation of an adequate customer base to support the continued provision of bundled services to the captive market." *Tracy*, 519 U.S. at 309. This is significant, particularly because "the States' interest in protecting the captive market from the effects of competition for the largest consumers is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." *Id.* at 306. By comparison, "[s]tate regulation of natural gas sales to consumers," for instance, "serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their

[10] The complaint acknowledges this, stating that, under the CCA, electric utilities "will receive enough no-cost allowances to cover the emissions *associated with the electricity they sell to consumers in Washington*." Dkt. 1, ¶ 9 (emphasis added).

houses in the cold months." *Id.* The same is true of state regulation of electricity sales.

The Court accordingly "give[s] the greater weight to the captive market and the . . . utilities' singular role in serving it," and, thus, treats electric utilities and electricity generating facilities "as dissimilar for present purposes." *Tracy*, 519 U.S. at 304; *accord NextEra Energy*, 48 F.4th at 320 ("*Tracy* prevented classifying a law as textually discriminatory . . . because it applied primarily to grant utilities a tax preference in a market where they were monopolies."). Put differently, because the CCA does "not discriminate on the basis of a company's business contacts with the state, but rather on the basis of its status" as either an electric utility or electricity generating facility, "the statute d[oes] not offend the dormant Commerce Clause." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 162 (5th Cir. 2007), *cert. denied*, 552 U.S. 1184 (2008); *accord Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (the dormant Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market").

Therefore, the challenged statute does not discriminate against out-of-state economic interests on its face.

b. The CCA does not discriminate against out-of-state entities in its purpose.

The allocation of no-cost allowances to electric utilities, but not to electricity generating facilities, does not discriminate against out-of-state entities in its purpose. The challenged statute states that "[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*." RCW 70A.65.120(1) (emphasis added). This express purpose plainly does not discriminate against out-of-state economic interests.

c. The CCA does not discriminate against out-of-state entities in effect.

The CCA also does not discriminate in effect. Most importantly, Plaintiffs do not articulate how the CCA discriminates in effect against *any* legally cognizable out-of-state economic interest; again, Grays Harbor Energy LLC—the sole owner of the Grays Harbor Energy Center—is an in-state entity that produces and sells its own electricity in Washington. Separately, because electricity generating facilities and electric utilities are not substantially similar entities for Commerce Clause purposes, the CCA's differing treatment of them does not discriminate in effect. For each of these reasons alone, the CCA's allocation of no-cost allowances to electric utilities does not discriminate in effect.

Plaintiffs additionally fail to plausibly allege that PacifiCorp, the owner of an electric utility in Washington that is entitled to no-cost allowances under the CCA, is an in-state entity. Plaintiffs acknowledge that PacifiCorp "is headquartered in Oregon," Dkt. 1, ¶ 48 n.8, yet they allege that it is an in-state entity because it "conduct[s] significant commercial and political activities in Washington." *Id.* ¶ 48; *see also* Dkt. 27 at 10–11. According to Plaintiffs, "extensive practical connections" to a State, "not corporate formalities, inform whether an entity is an in-state economic interest." Dkt. 27 at 16 (citing *NextEra Energy*, 48 F.4th at 322–24).

The Court is not persuaded that, under these circumstances, an entity headquartered out-of-state qualifies as an in-state entity for dormant Commerce Clause purposes simply because it "conducts significant commercial and political activities in Washington."[11] Dkt. 1, ¶ 48. The plaintiffs in *National Pork Producers*, for example, were out-of-state entities because they produced pork outside of California, even though "California imports almost all the pork it consumes." 598 U.S. at 367. In this way, those plaintiffs undoubtedly conducted significant commercial activities in California. The Court also fails to see the relevance in this case of an entity's political activities in Washington for determining whether it is an in-state entity.

Plaintiffs rely on *NextEra Energy*. There, the Fifth Circuit made several statements that, when read outside the specific context of that case, may appear to support

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[11] Ecology asserts that the Eighth Circuit has "reject[ed] the argument that an out-of-state company with permanent in-state operations is an in-state interest for Commerce Clause purposes." Dkt. 30 at 8 (*citing LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1027–29 (8th Cir. 2020), *cert. denied*, __ U.S. __, 141 S. Ct. 1510 (2021)). In the cited case, however, the Eighth Circuit declined to address this issue, stating: "[W]e have not squarely addressed the issue of whether an entity that has an in-state presence but is headquartered elsewhere is considered an in-state entity for the purpose of dormant Commerce Clause review. We need not do so now." *LSP Transmission Holdings*, 954 F.3d at 1029 n.7. Nevertheless, the court noted "that it would be somewhat awkward to label a [state] law as discriminatory despite benefitting a company that has an operation in [the State] but is principally located or headquartered elsewhere." *Id.*

Plaintiffs' proposed standard. For instance, the court stated that, "[f]or the concern about in-state interests being able to obtain favorable treatment over out-of-state interests, local presence, rather than place of incorporation, should matter." *NextEra Energy*, 48 F.4th at 323. The court also questioned: "Which business is more likely to have the clout to enact protectionist measures: a Delaware corporation that employs thousands of workers in a state, or a company that paid a nominal filing fee to be incorporated in state but has its 'principal operations' elsewhere?" *Id.* The court answered: "[W]here a company is 'based' is not controlling, and the underlying concern about local clout leading to protectionist legislation, a law can discriminate against interstate commerce even though most of the" entities that benefit from the law "are incorporated or headquartered" elsewhere. *Id.* at 323–24.

Yet "'[t]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.'" *Nat'l Pork Producers*, 598 U.S. at 373 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). "Instead, . . . opinions dispose of discrete cases and controversies and they must be read with a careful eye to context." *Nat'l Pork Producers*, 598 U.S. at 373–74.

NextEra Energy in inapposite. It concerned a Texas statute which provided that "the ability to build, own, or operate new [transmission] lines 'that directly [connect] with an existing utility facility . . . may be granted only to the owner of that existing facility.'" *NextEra Energy*, 48 F.4th at 310 (second and third alterations in original) (quoting TEX. UTIL. CODE § 37.056(e)). Under that statute, "the only way a company without a Texas presence can build, operate, or own transmission lines is to buy a utility that already owns a power facility in the state." *Id.* at 314.

The Fifth Circuit found it irrelevant that "most of the in-state incumbents [the statute] protects are incorporated [or headquartered] outside Texas." *Id.* at 322. It explained that "[w]hat matters instead is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas." *Id.* at 324. Because "[a] law that 'discriminates among affected business entities according to the extent of their contacts with the local economy' may violate the Commerce Clause," *id.* (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980)), the Fifth Circuit held that the statute discriminated against out-of-state economic interests. *Id.* at 326.

The CCA does nothing of the sort. Plaintiffs do not claim that the CCA, for example, limits the ownership of electric utilities or electricity generating facilities to entities with an existing presence in Washington, or otherwise imposes a burden on entities without an existing presence in the State. Therefore, Plaintiffs' reliance on *NextEra Energy* is misplaced.

Aside from failing to plausibly allege that PacifiCorp is an in-state owner of an electric utility, Plaintiffs also fail to adequately account for two in-state owners of electricity generating facilities. Specifically, the University of Washington (UW) and Washington State University (WSU) own and operate electricity generating facilities, Dkt. 22-3,[12] that appear to generate more than 25,000

[12] Pursuant to Federal Rule of Evidence 201, Ecology requests the Court to take judicial notice of six documents filed with various

metric tons of carbon dioxide equivalent per year. *See* Dkt. 22-4 at 2 (stating that, in 2021, UW's total emissions amounted to 89,624 metric tons of carbon dioxide equivalent, and WSU's total emissions amounted to 62,454 metric tons of carbon dioxide equivalent). This would make these facilities "covered entities" under the CCA. *See* RCW 70A.65.010(23); WAC 173-446-030; WAC 173-446-060. Because these in-state owners of electricity generating facilities also appear to be subject to the CCA and not entitled to no-cost allowances, Plaintiffs' claim that the CCA discriminates in effect fails.

Plaintiffs argue that "the data [Ecology] provides do not identify whether these power plants produced the recorded emissions." Dkt. 27 at 8 n.3. But Ecology convincingly replies that "there is no other conceivable activity under which either UW or WSU would generate large quantities of greenhouse gas emissions of the type covered by the CCA *but for* these facilities." Dkt. 31 at 2; *see Vasquez*, 487 F.3d at 1249 (on a motion to dismiss, plaintiffs are not entitled to unwarranted inferences in their favor). In any event, *Plaintiffs* bear the burden of pleading a plausible claim, *see Iqbal*, 556 U.S. at 678, and

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federal and state agencies. Dkt. 22 at 1–3. Plaintiffs do not object to the Court taking judicial notice of five of these documents. Dkt. 28 at 1. However, they oppose the Court taking judicial notice of one of these documents—an excerpt of a Washington greenhouse gas reporting program publication, Dkt. 22-4—"to the extent that Defendant claims [the emissions data in this publication] provide a basis for the Court to conclude these universities' power plants qualify as covered entities under the [CCA]." *Id.* at 1–4. This argument essentially asks the Court to not make an unwarranted inference from the disputed document. It does not concern whether the Court may take judicial notice of the document itself. Accordingly, the Court takes judicial notice of all six documents.

they do not plausibly allege that these in-state electricity generating facilities are not subject to the CCA.

Plaintiffs also argue that Ecology "has offered no evidence that these power plants compete against Grays Harbor and the twelve other power plants identified in [the] Complaint." Dkt. 27 at 8 n.3. But again, Plaintiffs bear the burden of pleading a plausible claim. *See Iqbal*, 556 U.S. at 678. Their failure to allege any facts indicating that the Grays Harbor Energy Center does not compete in any way against these facilities is another deficiency in their complaint. Although this particular deficiency might be curable through further amendment, the others are not.

In sum, regardless of whether an electric utility is owned by an in-state entity or an out-of-state entity, the CCA treats that utility the same as any other electric utility: it is entitled to no-cost allowances. Similarly, regardless of whether an electricity generating facility is owned by an in-state entity or an out-of-state entity, the CCA treats that facility the same as any other electricity generating facility: it is not entitled to no-cost allowances. Plaintiffs accordingly fail to plausibly allege that the CCA's allocation of no-cost allowances to electric utilities, but not to electricity generating facilities, discriminates against out-of-state economic interests.

For these reasons, even if Plaintiffs had standing to advance their dormant Commerce Clause claims, these claims would fail on the merits. Because these claims could not be cured through further amendment, they would be dismissed with prejudice. *See Cook, Perkiss & Liehe*, 911 F.2d at 247.

E. Plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment also fails.

Plaintiffs allege that the CCA's allocation of no-cost allowances to electric utilities, but not to electricity generating facilities like the Grays Harbor Energy Center, violates the Equal Protection Clause of the Fourteenth Amendment by "treat[ing] independent power plant owners differently from other similarly situated plant owners, namely local utilities," in a manner that "is not rationally related to any legitimate governmental purpose." Dkt. 1, ¶ 187.

Ecology asserts that this "claim fails for the simple reason that there is no discrimination to begin with." Dkt. 21 at 21. It also contends that, "even if Plaintiffs were similarly situated and differently treated, Plaintiffs still cannot meet their burden to negate the Legislature's policy determination." *Id.*

Plaintiffs respond that, "[a]s power-plant owners," they are "materially the same" as the utilities that benefit under the CCA—each "own and operate power plants that generate indistinguishable electricity in more-or-less the same manner." Dkt. 27 at 27. Plaintiffs also argue that the CCA's allocation of no-cost allowances to electric utilities does not bear a rational relation to a legitimate end because it actually "increas[es] both greenhouse-gas emissions and electricity costs." *Id.* at 28.

Under the Equal Protection Clause of the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In essence, the clause "mandates that similarly situated persons be treated alike." *Nw. Grocery Ass'n v. City of Seattle*, 526 F. Supp.

3d 884, 893 (W.D. Wash. 2021) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). "[I]f a law neither burdens a fundamental right nor targets a suspect class, [courts] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). A law reviewed under the rational basis standard bears "a strong presumption of validity" and the attacking party has "the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Furthermore, a "[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 113.

As an initial matter, the Court concludes that Invenergy lacks constitutional standing to advance this claim for the same reason that it lacks standing to advance a claim under the dormant Commerce Clause: it does not own the Grays Harbor Energy Center and, therefore, does not allege an injury in fact. Because this standing deficiency cannot be cured through further amendment, Invenergy's claim under the Fourteenth Amendment's Equal Protection Clause is **DISMISSED with prejudice**. *See Schmier*, 279 F.3d at 824 (9th Cir. 2002); *Fieldturf, Inc.*, 357 F.3d at 1269.

Next, Grays Harbor Energy LLC fails to allege a plausible claim under the Equal Protection Clause. Because electric utilities and electricity generating facilities are not similarly situated, the CCA's allocation of no-cost allowances to electric utilities does not discriminate in violation of the Equal Protection Clause. For this reason alone, Grays Harbor Energy LLC fails to state a plausible claim.

Grays Harbor Energy LLC also fails to plausibly allege that the challenged statute does not bear a rational relation to some legitimate end. Again, the purpose of the CCA's allocation of no-cost allowances to electric utilities is "to mitigate the cost burden of the [cap and invest] program on electricity customers." RCW 70A.65.120(1). There can be no debate that this is a legitimate end. *See Tracy*, 519 U.S. at 306. There is also no doubt that the allocation of no-cost allowances to electric utilities—which sell electricity directly to the public—bears a rational relation to this end. Plaintiffs' complaints that the CCA does not achieve this goal effectively and in reality are immaterial. *See Beach Commc'ns*, 508 U.S. at 113.

Accordingly, Grays Harbor Energy LLC fails to allege a plausible claim under the Fourteenth Amendment's Equal Protection Clause. Because this claim cannot possibly be cured by the allegation of other facts, this claim is **DISMISSED with prejudice**. *See Cook, Perkiss & Liehe*, 911 F.2d at 247.

III. ORDER

Therefore, it is hereby **ORDERED** that Ecology's motion for a judgment on the pleadings, Dkt. 21, is **GRANTED.** All of Plaintiffs' claims are **DISMISSED with prejudice** and **without leave to amend**.

The Clerk shall enter a **JUDGMENT** and close the case.

Dated this 3rd day of November, 2023.

Benjamin H. Settle
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

INVENERGY THERMAL LLC, et al., Plaintiff, v. LAURA WATSON, Defendant.	**JUDGMENT IN A CIVIL CASE** CASE NO. 3:22-cv-05967-BHS

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

The Court does hereby find and ORDER as follows:

This case is DISMISSED with prejudice and without leave to amend.

Dated this 3rd day of November, 2023.

Ravi Subramanian
Clerk

s/Ann Duke
Deputy Clerk

APPENDIX D

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

<table>
<tr>
<td>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.</td>
<td>No. 3:22-cv-5967

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE
RELIEF</td>
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Plaintiffs Invenergy Thermal LLC ("Invenergy") and Grays Harbor Energy LLC bring this action for declaratory and injunctive relief against Defendant Laura Watson, in her official capacity as Director of the Washington State Department of Ecology.

PRELIMINARY STATEMENT

1. Invenergy is an independent power producer that owns and operates power plants across the United States. It is headquartered in Chicago, Illinois and incorporated in Delaware. Its affiliates include the world's largest privately held renewable energy company.

2. For the past two decades, Invenergy and its affiliates have committed to decarbonizing the United States' power grid. They have worked to achieve this goal by investing in power projects that deploy the best-available technologies to provide less carbon-intensive electricity than pre-existing generating facilities. They have also made significant investments to ensure the

electricity grid's resilience as Washington and other states transition to carbon-neutral generation. With these investments, Invenergy and its affiliates, again, aim to ensure that they support these transitions in the cleanest and most efficient manner possible.

3. As is relevant here, Invenergy, through other subsidiaries, wholly owns Grays Harbor Energy LLC, which wholly owns the Grays Harbor Energy Center ("Grays Harbor"), a power plant located in Washington.

4. Today, Grays Harbor generates more than 650 megawatts of electricity for distribution to customers in Washington and throughout the Pacific Northwest. In other words, it creates enough electricity to power more than 100,000 homes. Grays Harbor is one of the cleanest and most efficient natural-gas power plants in Washington. It employs state-of-the-art technology to produce electricity efficiently and to minimize greenhouse-gas emissions.

5. In 2021, after several similar attempts to address greenhouse-gas emissions through carbon-pricing legislation and administrative actions, Washington enacted the Climate Commitment Act ("CCA"), Wash. Rev. Code. §§ 70A.65.005-901. The CCA and its implementing regulations require many emissions-producing entities to obtain "allowances" to cover the greenhouse-gas emissions they produce, which regulate the amount of greenhouse gases any single entity can emit.

6. Some entities covered by the CCA will purchase their allowances at auction at a variable price based on market demand. However, the CCA and its implementing regulations provide *free* ("no-cost") allowances to electric

utilities, which will have the effect of reducing those utilities' cost of generating power.

7. Electric utilities and electricity generating facilities occupy distinct positions in electricity markets. An electric utility distributes and delivers electricity to the public. Utilities rely on electricity generating facilities, including power plants, to generate this electricity. Although many utilities own and operate power plants and other types of electricity generating facilities, they often also rely on electricity generating facilities operated by third parties, including federal Power Marketing Administrations and independent power producers. Independent power producers like Invenergy regularly sell the electricity generated by their facilities to electric utilities as well as some end-users.

8. The electric utilities that will receive no-cost allowances under the CCA are all local to Washington. Almost all of these utilities are headquartered in Washington, and they all conduct significant commercial and political activities within the state.

9. In 2023, each local utility will receive enough no-cost allowances to cover the emissions associated with the electricity they sell to consumers in Washington. Wash. Admin. Code § 173-466-230. These free allowances are assigned directly to electric utilities in an attempt to encourage them not to raise electricity prices for ratepayers. Wash. Rev. Code § 70A.65.120.

10. Under the CCA and its implementing regulations, electric utilities can transfer their no-cost allowances to the power plants that they own. Wash. Admin. Code § 173-446-425. Because these power plants are responsible for generating the electricity these utilities sell and the

emissions associated with that electricity, the no-cost allowances, in practice, will eliminate utility-owned power plants' compliance costs. As a result, local utilities will have lower costs in generating electricity than independent power plant owners in Washington. At present, Invenergy is the only independent power plant owner burdened in this manner by the CCA during its first compliance period, which will begin on January 1, 2023 and end on December 31, 2026. *See* Wash. Rev. Code §§ 70A.65.010(20), 70A.65.070(1)(a), 70A.65.110(3)(a)-(b).

11. Including Grays Harbor, there are thirteen power plants in Washington imminently affected by the CCA.[1] Local utilities serving customers in Washington own twelve of these thirteen power plants.

12. Grays Harbor is the *only* one of these power plants owned by an entity without a substantial connection to Washington.

13. More importantly, because the CCA grants no-cost allowances only to local utilities and permits those

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[1] The Spokane Waste to Energy Facility, the Centralia Generation Facility, and the Cedar Hills Landfill Gas-to-Energy Facility generated emissions in 2019 that satisfy the CCA's coverage threshold. *See GHG Reporting Program Publication*, Data.WA.gov (Jan. 12, 2022), https://data.wa.gov/Natural-Resources-Environment/GHG-Reporting-Program-Publication/idhm-59de/data. These plants, however, are exempted from the CCA's first compliance period. As a coal-fired power plant, the Centralia Generation Facility's emissions are entirely exempt under the CCA. Wash. Rev. Code. § 70A.65.080(7)(c). The Cedar Hills Landfill Gas-to-Energy Facility's emissions are also entirely exempt under the CCA because it generates emissions by burning natural gas derived from biomass. *Id.* § 70A.65.080(7)(d). Waste-to-energy facilities like the one in Spokane have no obligations under the CCA until the second compliance period. *Id.* § 70A.65.080(2).

utilities to transfer these allowances to their power plants, Grays Harbor is also the *only* power plant covered during the CCA's first compliance period that must purchase allowances.

14. The CCA's allocation of no-cost allowances uniquely harms Invenergy. Unlike local utilities who may use their no-cost allowances to reduce, if not eliminate, their costs to comply with the CCA, it must bear the costs of ensuring Grays Harbor has sufficient allowances to cover its emissions during the CCA's first compliance period.

15. The CCA's allocation of no-cost allowances, therefore, violates the Constitution. It (1) impermissibly discriminates against out-of-state business in violation of the dormant Commerce Clause; (2) unlawfully burdens interstate commerce in violation of the dormant Commerce Clause; and (3) discriminates against independent owners of natural gas power plants in Washington in violation of the Equal Protection Clause.

16. In addition to being unconstitutional, the CCA undermines its stated purpose of reducing greenhouse-gas emissions in the state in at least two ways. First, because the CCA does not fairly require electric utilities to consider the cost of emissions allowances when making energy-dispatch decisions (or require utilities to bid their carbon costs), the law fails to ensure that utilities prioritize meeting electricity demand with clean power, resulting in overall power generation in Washington that is more carbon intensive. Second, the CCA fails to incentivize further clean-power development by out-of-state investors like Invenergy, notwithstanding the substantial role that out-of-state investors play in clean-

power generation in the state. The CCA, then, will not only imperil Invenergy's current ability to provide clean power in the state, but will also deter Invenergy and other out-of-state companies from investing in clean-power generation in Washington in the future.

17. What is more, the CCA's discriminatory allocation of no-cost allowances will increase electricity costs for ratepayers. Because the no-cost allowances incentivize electric utilities to dispatch their own power plants, these power plants will generate more electricity in the state even though they do so less efficiently than Grays Harbor. As a result, the cost of generating the electricity to meet Washingtonians' demand will increase, and utilities will likely seek to pass those additional costs on to consumers by increasing rates.

18. In short, the CCA's discrimination against Invenergy will likely increase both greenhouse-gas emissions from power plants and consumers' electricity costs over what Washington would have experienced in the coming decades absent the CCA.

PARTIES

19. Plaintiff Invenergy is a Delaware corporation headquartered in Chicago, Illinois.

20. Plaintiff Grays Harbor Energy LLC is a Delaware corporation headquartered in Elma, Washington. It is also a wholly-owned subsidiary of Invenergy.[2]

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[2] Invenergy wholly owns Grays Harbor Energy LLC through two intermediate subsidiaries. Grays Harbor Energy LLC is a wholly owned subsidiary of Invenergy Grays Harbor LLC. Invenergy Grays Harbor LLC is a wholly owned subsidiary of Invenergy Grays Harbor

21. In Washington, both Invenergy and its subsidiary Grays Harbor Energy LLC own and operate one energy generation facility: Grays Harbor.[3]

22. Grays Harbor qualifies as a "covered entity" regulated under the CCA.

23. Defendant Laura Watson is sued in her official capacity as the Director of the Washington State Department of Ecology ("Ecology"). As Ecology's Director, she "ha[s] complete charge of and supervisory powers over the department." Wash. Rev. Code. § 43.21A.050. The CCA tasks Ecology with implementing, overseeing, and enforcing the act's "cap on greenhouse gas emissions." *Id.* § 70A.65.060; *see id.* § 70A.65.200. Accordingly, Ecology is responsible for promulgating the rules to auction allowances for covered entities to purchase and allocate no-cost allowances to certain types of entities identified by statute, including electric utilities, *id.* §§ 70A.65.100, 70A.65.120. *See also id.* § 70A.65.220.

JURISDICTION AND VENUE

24. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

25. The Court has the authority to enjoin enforcement of the CCA under 42 U.S.C. § 1983 and to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

26. This judicial district is the proper venue under 28 U.S.C. § 1391(b)(2) because it is where a substantial part

Holdings LLC. Invenergy Grays Harbor Holdings LLC is a wholly owned subsidiary of Invenergy.

[3] Invenergy's affiliates own one other energy facility in Washington: The Vantage Energy Center, a 90-megawatt wind farm in Kittitas County.

of the events giving rise to the claims occurred and where the effects of the CCA will be felt, as Invenergy and Grays Harbor Energy LLC own and operate the Grays Harbor Energy Center in Grays Harbor County, Washington.

FACTUAL ALLEGATIONS

The Market for Electricity in the Pacific Northwest

27. The United States lacks a single, unified market for electricity, but it also does not have fifty individual electricity markets.

28. Rather, the United States principally contains several regional markets for electricity, each with their own organization and characteristics. Despite these markets' varied character, they fall generally into two camps: traditional markets dominated by vertically integrated utilities and markets overseen by regional transmission organizations and independent system operators.[4]

29. The Pacific Northwest has a more traditional energy market. In this market, vertically integrated utilities have generally been responsible for generating, transmitting, and distributing electricity to serve the region's ratepaying customers. By law, these utilities may set rates so as to recover their costs and a return on capital investments, but may not set rates to generate further profits.

30. The Pacific Northwest also lacks a centralized wholesale market for electricity. Instead, most wholesale

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[4] Fed. Energy Regulatory Comm'n, Energy Primer: A Handbook for Energy Market Basics 61 (2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_Final.pdf.

purchases of electricity are conducted in bilateral transactions. In other words, many power plants or their brokers negotiate electricity sales directly with electricity buyers. Many of these transactions are made at electricity trading hubs. Two of the largest hubs in the region are the Mid-Columbia and California-Oregon-Border hubs.

31. The Bonneville Power Administration, a federal Power Marketing Administration, is the largest supplier of wholesale electricity in the region, largely selling electricity generated from several hydroelectric dams.

32. Several other entities participate in the region's wholesale market, including Invenergy and Grays Harbor Energy LLC.

33. The electricity supplied by the various power plants is indistinguishable and is not actually directed to any particular place on the electrical grid. Instead, each power plant supplies electricity to the grid, and thousands of entities across the Western Interconnection draw from this supply without any regard to which power plant generated each individual kilowatt of electrical energy. Power plants sell electricity on the wholesale market to their customers, including utilities, by agreeing to supply specific amounts of electricity on specified transmission lines at a specified time, which entitles the customer to use that amount of electricity at that time. These transactions are recorded using North American Electric Reliability Corporation Tags, or "E-Tags."

34. Because the Pacific Northwest lacks a centralized market authority, individual utilities decide when and how to dispatch—or make use of—the electricity-generation resources available to them.

35. In making dispatch decisions, utilities consider (1) their own electricity generating facilities, (2) the electricity available to them through long-term supply contracts, and (3) electricity available from third-parties on a short-term basis, or "spot market" transactions.

36. Although electric utilities should theoretically dispatch the resources available to them in the most cost-efficient manner, they often do not do so. Retail demand for electricity is highly inelastic, so utilities often pass additional generating costs on to ratepayers. Further, due to a lack of centralized pricing information, there is little ability for any actor to monitor the efficiency of utilities' dispatch decisions in real time.

Grays Harbor Generates Clean Power in Washington

37. Although natural gas power plants require fossil fuels, natural gas power plants facilitate the transition to a decarbonized electricity sector. Natural gas power plants do so by compensating for the variable output of wind and solar farms.[5] In addition, natural gas plants employing modern technology emit significantly fewer greenhouse gases when generating electricity than typical coal-fired power plants or older natural gas power plants.

38. A subsidiary of Invenergy purchased Grays Harbor in 2005. Today, Grays Harbor generates more than 650 megawatts of electricity for customers throughout the Pacific Northwest. The vast majority of the electricity that Grays Harbor generates is sold to entities within Washington.

39. Grays Harbor employs state-of-the-art

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[5] *Natural Gas*, Invenergy, https://invenergy.com/what-we-do/natural-gas (last visited Dec. 12, 2022).

technology to produce electricity efficiently and minimize greenhouse-gas emissions. In 2021, Invenergy invested millions of dollars to upgrade Grays Harbor with advanced-gas-path technology to further improve its efficiency and reduce the plant's environmental footprint. Even before this upgrade, Grays Harbor was one of Washington's most efficient and cleanest natural gas power plants, and the upgrade further solidified this status.

40. Each day, Grays Harbor must decide whether to run its generators the next day, and, if so, for how long.

41. Although this calculus requires the consideration of several factors, the bottom line decision is straightforward: Based on the information available, does Grays Harbor expect that it will be able to sell electricity for more than it costs to generate that electricity? If the answer is yes, Grays Harbor makes the arrangements needed to run the plant, including purchasing natural gas, and, through its broker, negotiating energy sales. The next day, Grays Harbor generates electricity and dispatches that electricity to its customers. On the other hand, if the answer is no, Grays Harbor does not turn on its generators and waits to decide whether to run the plant the following day.

42. The amount of electricity that Grays Harbor generates—and therefore sells—depends almost entirely on its generation costs and the current demand for electricity.

Grays Harbor Competes Against Locally-Owned Facilities

43. Although hydroelectric dams generate the

majority of Washington's electricity, natural gas power plants are the state's second-largest source of electricity.[6]

44. In this sector, Grays Harbor competes directly with twelve other natural gas power plants in Washington that qualify as covered entities under the CCA during its first compliance period.

45. These facilities are: (1) the Chehalis Generation Facility; (2) the Mint Farm Generating Station; (3) the Goldendale Generating Facility; (4) the River Road Generating Plant; (5) Frederickson Power L.P.; (6) the Ferndale Generating Station (7) the Kettle Falls Generating Station; (8) the Sumas Generating Station; (9) the Encogen Generating Station; (10) the Fredonia Generating Station; (11) the Frederickson Generating Station; and (12) the Boulder Park Generating Station.

46. The following entities own Grays Harbor's competitors: Avista Corp.; Clark Public Utilities; Frederickson Power L.P.[7]; PacifiCorp; and Puget Sound Energy, Inc.

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[6] *Washington: State Profile and Energy Estimates*, U.S. Energy Information Admin. (last updated Feb. 17. 2022), https://www.eia.gov/state/analysis.php?sid=WA.

[7] Frederickson Power L.P. is an entity that is jointly owned and controlled by Atlantic Power Corp and Puget Sound Energy, Inc. *See Frederickson*, AtlanticPower & Utilities, https://www.atlanticpower.com/assets/projects/frederickson (last visited Dec. 12, 2022); Puget Energy, Inc. & Puget Sound Energy, Inc., Annual Report (Form 10-K), 102-03 (Feb. 24, 2022); Atlantic Power Corp., Annual Report (Form 10-K), F-22 (Mar. 4, 2021).

47. The name, location, and owner of the competing facilities in Washington are set out in the table below:

Name of Facility	Location	Owner
Grays Harbor Energy Center	Elma, WA	Invenergy LLC
Chehalis Generation Facility	Chehalis, WA	PacifiCorp
Mint Farm Generating Station	Longview, WA	Puget Sound Energy, Inc.
Goldendale Generating Station	Goldendale, WA	Puget Sound Energy, Inc.
River Road Generating Plant	Vancouver, WA	Clark Public Utilities
Frederickson Power L.P.	Tacoma, WA	Frederickson Power L.P. (Atlantic Power Corp. and Puget Sound Energy)
Ferndale Generating Station	Ferndale, WA	Puget Sound Energy, Inc.
Kettle Falls Generating Station	Kettle Falls, WA	Avista Corp.
Sumas Generating Station	Sumas, WA	Puget Sound Energy, Inc.
Encogen Generating Station	Bellingham, WA	Puget Sound Energy, Inc.
Fredonia Generating Station	Mount Verna, WA	Puget Sound Energy, Inc.

Frederickson Generation Station	Tacoma, WA	Puget Sound Energy, Inc.
Boulder Park Generating Station	Spokane Valley, WA	Avista Corp.

48. The owners of these entities differ from Invenergy in three significant ways: (1) All are local utilities or are directly owned by such utilities; (2) all but one are or are owned by a utility headquartered in Washington[8]; and (3) all these owners or their direct parents conduct significant commercial and political activities in Washington.

49. The local utilities' commercial presence in Washington dwarfs Invenergy's. Washington's investor-owned utilities all own several generating facilities in Washington.[9] They also employ an average of more than 3,200 individuals.[10] By contrast, Invenergy owns only one facility in the state, Grays Harbor, and this facility has fewer than 25 employees.[11]

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[8] PacifiCorp is the exception, as it is headquartered in Oregon. Berkshire Hathaway Energy Co., Annual Report (Form 10-K), 3 (Feb. 25, 2022).

[9] *See* Avista Corp., Annual Report (Form 10-K), 36 (Feb. 23, 2022) (9 facilities); Berkshire Hathaway Energy Co., Annual Report, *supra* note 8, at 5 (4 facilities); Puget Energy, Inc. & Puget Sound Energy, Inc., Annual Report, *supra* note 7, at 16 (18 facilities).

[10] *See* Avista Corp., Annual Report, *supra* note 9, at 6 (1,809 employees); Berkshire Hathaway Energy Co., Annual Report, *supra* note 8, at 10 (4,800 employees); Puget Energy, Inc. & Puget Sound Energy, Inc., Annual Report, *supra* note 7, at 27 (3,185 full-time employees)

[11] Invenergy's affiliates have fewer than ten additional employees

50. Similarly, although both Washington's local utilities and Invenergy participate in Washington's politics, local utilities do so on a much larger scale. Washington's investor-owned utilities, on average, dramatically outspent Invenergy's affiliates in total political contributions for elections between 2017 and 2022. In 2021, the year the CCA was passed, the same utilities, on average, spent substantially more on registered lobbyists for their work in Washington than Invenergy's affiliates did.

51. Accordingly, Grays Harbor stands alone as the sole independent natural gas power plant covered under the CCA during its first compliance period, and the only such plant owned by an owner that lacks substantial business and political operations in Washington.

Washington Seeks To Address Greenhouse-Gas Emissions

52. Years before the CCA's enactment, Washington's legislators considered proposals to reduce the state's greenhouse-gas emissions through carbon-pricing legislation. In 2009, the legislature considered H.B. 1819, 61st Leg., 2009 Sess. (Wash. 2009), and S.B. 5735, 61st Leg., 2009 Sess. (Wash. 2009), which would have established a cap-and-trade program in Washington. That program was not enacted into law.

53. In 2015, the legislature considered another similar proposal, the Carbon Pollution Accountability Act.[12] The Act would have established a cap on greenhouse emissions

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within Washington.

[12] *See* H.B. 1314, 64th Leg., 2015 Sess. (Wash. 2015); S.B. 5283, 64th Leg., 2015 Sess. (Wash. 2015).

for the state's largest emitters, required every covered entity to purchase allowances at auction to cover their emissions, and invested the proceeds from those auctions in a variety of initiatives. Like the 2009 proposals, the 2015 proposal was not enacted into law.

54. Around the same time, Initiative 732 was submitted to the legislature. It proposed establishing an initial $15 tax on every metric ton of carbon dioxide associated with fossil fuels and the generation of electricity in the state and a corresponding reduction in other state taxes. After the Washington legislature declined to act on the proposal, Washington's voters considered it in 2016, but it failed to obtain the support of the majority of the electorate.[13]

55. Washington's Senate considered another tax on greenhouse-gas emissions the following year, but S.B. 5127, 65th Leg., 2017 Sess. (Wash. 2017) never gained significant traction.

56. Voters took up the issue of carbon pricing yet again in 2018. They considered Initiative 163, which would have imposed an initial $15 fee (with annual $2 increases) per metric ton of associated carbon emissions on certain large emitters' sale and use of fossil fuels and the

[13] Off. of Program Rsch., Wash. State House of Reps., Summary of Initiative 732 (2016), https://leg.wa.gov/House/Committees/OPR General/Documents/2016/Initiative732Summary.pdf; David Roberts, *The Left vs. a Carbon Tax*, Vox (Nov. 8, 2016, 11:00 AM EST), https://www.vox.com/2016/10/18/13012394/i-732-carbon-tax-washington.

generation of electricity.[14] This second referendum ended like Washington's first.[15]

57. The next year, Washington's legislature considered another cap-and-trade program that, like earlier proposals, did not garner enough support to become law.[16]

58. Unable to enact a carbon-pricing program, Washington legislators pivoted to other forms of emissions-reducing legislation—chiefly proposals focusing on addressing emissions in specific sectors of the economy.[17]

59. One such measure was the Clean Energy Transformation Act ("CETA"), Wash. Rev. Code. §§ 19.405.010–901, enacted in May 2019, which exclusively regulates Washington's utilities.

60. Rather than regulating greenhouse-gas emissions across Washington's economy, CETA seeks to ensure that the state's electric utilities rely on clean sources of electricity. It does so by setting three milestones for utilities' supply portfolios.

61. First, by the end of 2025, all utilities must stop

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[14] Off. of Program Rsch., Wash. State House of Reps., Summary of Initiative 1631 (2018), https://leg.wa.gov/House/Committees/OPR General/Documents/2018/ Initiative1631Summary.pdf.

[15] Hal Bernton, *Washington State Voters Reject Carbon-Fee Initiative*, Seattle Times (Nov. 7, 2018, 5:48 PM), https://www.seattletimes.com/seattle-news/politics/voters-rejecting-carbon-fee-in-first-day-returns/.

[16] *See* S.B. 5981, 66th Leg., 2019 Sess. (Wash. 2019).

[17] Kevin Tempest, Jonah Kurman-Faber & Ruby Wincele, *Building Back Better: Investing in a Resilient Recovery for Washington State*, 11 Wash. J. Env't L. & Pol'y 195, 208-09 (2021).

providing Washingtonians with electricity generated by coal-fired power plants. *Id.* § 19.405.030. Second, every utility's supply portfolio must be greenhouse-gas neutral by 2030. A utility achieves this standard by supplying at least 80% of its electricity from "nonemitting electric generation and renewable resources," and it may achieve the remainder through other measures. *Id.* § 19.405.040. Third, by 2045, utilities may sell to Washingtonians only electricity generated from nonemitting or renewable sources. *Id.* § 19.405.050.

62. To assuage utilities' concerns about the costs of meeting these milestones, CETA provides that a utility will be deemed to comply with the second and third milestones if, during the four-year compliance period, the average annual incremental cost of meeting these milestones exceeds two percent of its revenues. *Id.* § 19.405.060(3)-(4).[18] In other words, CETA protects utilities' bottom lines by capping their compliance costs. However, analyses of CETA's effects demonstrated that utilities' compliance costs are unlikely to exceed this two-percent cap anyway.[19]

63. In 2020, a year after Washington enacted CETA, the legislature enacted new state-wide emissions-reduction targets. 2020 Wash. Sess. Laws 738 (codified as amended at Wash. Rev. Code. §§ 70A.045.005-900). Washington committed to dramatically reducing the

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[18] *See also* David Roberts, *A Closer Look at Washington's Superb New 100% Clean Electricity Bill*, Vox (Apr. 18, 2019, 9:30 AM EDT), https://www.vox.com/energy-and-environment/2019/4/18/18363292 /washington-clean-energy-bill.

[19] Roberts, *A Closer Look at Washington's Superb New 100% Clean Electricity Bill*, *supra* note 18.

state's total greenhouse-gas emissions, aiming to limit them to 5 million metric tons by 2050. Wash. Rev. Code. § 70A.045.020(1). To review the state's progress, Ecology tracks and reports emissions from entities across the state, including power plants. *Id.* § 70A.045.020(1)(d).

64. Against this backdrop, Washington's policymakers developed their agenda for climate legislation in 2021.

Washington Passes the CCA, a Promising Measure Marred by Local Favoritism

65. In 2021, many in Washington remained committed to establishing a carbon-pricing program, and they created such a program when, that year, Washington enacted the CCA. 2021 Wash. Sess. Laws 2606 (codified at Wash. Rev. Code. §§ 70A.65.005-901).

66. Even though many had long considered such programs in general terms, Washington's House and Senate hurriedly enacted the bill at the end of the 2021 legislative session. The initial bill did not receive a vote in the Senate until April 8th, seventeen days before end of the legislative session. Representatives then pushed the bill through two committees, adopted significant amendments, and approved the amended bill in the space of twelve days. The Senate voted to approve the House's amendments on the penultimate day of the legislative session.[20]

67. Unlike past efforts, the CCA received the support of a broad coalition that included environmental groups

[20] *SB 5126 – 2021-22*, Wash. State Legislature, https://app.leg.wa.gov/billsummary?BillNumber=5126&Initiative=false&Year=2021 (last visited Dec. 12, 2022).

and some of the largest corporations in Washington, including local electric utilities.[21]

68. The CCA aims to help Washington achieve dramatic reductions in greenhouse-gas emissions over the next several decades. *See* Wash. Rev. Code. § 70A.65.070(2); *id.* § 70A.45.020. It contributes to these efforts by empowering Ecology to implement a cap on greenhouse-gas emissions for Washington's largest emitters. *Id.* § 70A.65.060. This cap applies to most entities that generated or engaged in certain activities associated with at least 25,000 metric tons of carbon-dioxide emissions annually for any year between 2015 and 2019, *id.* § 70A.65.080(1), though waste-to-energy facilities and railroad companies that have these levels of emissions need not join the program until the second and third compliance periods, respectively, *id.* § 70A.65.080(2)-(3).

69. To implement the emissions cap, the CCA relies on "[a]llowance[s]," or "authorization[s] to emit up to one metric ton of carbon dioxide equivalent." *Id.* § 70A.65.10(1). Under the CCA, a covered entity may emit only as many metric tons of greenhouse gases as it has allowances, though it may cover up to eight percent (eventually decreasing to six percent) of its annual emissions with credits for greenhouse-gas-emissions offsets during the first compliance period. *Id.* §§ 70A.65.170, 70A.65.310. If an entity does not submit sufficient allowances and offsets to cover its emissions, it

[21] Hal Bernton, *Washington State's Carbon Pricing Bill Could Be Most Far-Reaching in Nation. How Will It Work?*, Seattle Times (May 1, 2021, 9:49 AM), https://www.seattletimes.com/seattle-news/washington-states-carbon-pricing-bill-could-be-most-far-reaching-in-nation-so-how-will-it-work/.

must either submit four allowances for every one allowance missing or face penalties of up to $10,000 per day for each violation. *Id.* § 70A.65.200. In each successive year, Ecology will reduce the total number of allowances available, which, in turn, will limit the total number of metric tons of greenhouse gases that the covered entities may collectively emit. *Id.* § 70A.65.070(2).

70. The "invest" portion of the CCA's structure derives from how Ecology allocates these allowances to covered entities. Most covered entities will purchase their allowances at auctions that Ecology holds. *Id.* § 70A.65.100. To control the cost of obtaining allowances, the CCA directs Ecology to establish a minimum price, which increases annually, *id.* § 70A.65.150, and a maximum price, which also increases annually and is set to ensure covered entities invest in reducing emissions, *id.* § 70A.65.160. However, if the price for allowances falls too close to the minimum price, Ecology will automatically withhold and reserve allowances, keeping them in the containment reserve. *Id.* § 70A.65.140. Washington will then use the proceeds to invest in a variety of projects, including climate-change mitigation and environmental justice initiatives. *Id.* § 70A.65.100(7); *see* § 70A.65.230.

71. Not all covered entities, however, must pay for their allowances. The CCA provides that facilities in so-called "emissions-intensive, trade-exposed industries," such as the aerospace and computer manufacturing industries, *id.* § 70A.65.110, electric utilities, *id.* § 70A.65.120, and natural gas utilities, *id.* § 70A.65.120, receive allowances for free.

72. With respect to electric utilities,[22] the CCA directs

[22] The CCA does not define utilities, but they are identified as the

Ecology to create schedules for the number of allowances allocated to them in the forthcoming compliance periods. *Id.* § 70A.65.120(2).

73. By providing no-cost allowances to electric utilities, the CCA extends a boon to natural-gas-burning power plants owned by local utilities, even though it purports to provide this benefit "to mitigate the cost burden" of the cap-and-invest program "on electricity customers," *id.* § 70A.65.120(1).

74. Local utilities own twelve of the thirteen natural gas power plants which are imminently regulated under the CCA. All these utilities have substantial presences in Washington.

75. Grays Harbor is the sole exception. It is the only power plant which is imminently regulated under the CCA that does not benefit from the statute's allocation of no-cost allowances. Its owner, Invenergy, unlike the local utilities allocated no-cost allowances, lacks a substantial presence in Washington.

Ecology Doubles Down on the CCA's Flaws, Ignoring Alternatives for Implementing the Cap-And-Invest Program

76. Ecology began considering promulgating a new rule to implement the CCA, Wash. Admin. Code §§ 173-446-010 to -700, on August 4, 2021.[23] Over the following ten months, Ecology developed and drafted the rule,

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customer- and investor-owned utilities subject to CETA. Wash. Rev. Code § 70A.65.120(1).

[23] Wash. Dep't of Ecology, Preproposal Statement of Inquiry, WSR 21-16-111 (Aug. 4, 2021), https://ecology.wa.gov/DOE/files/88/88755dce-3e17-4c1d-b734-42a35a5f400c.pdf.

holding public meetings and taking comments.[24]

77. On May 16, 2022, it proposed a draft rule (the "Draft Rule"), opening up a new period for hearings and comments.[25] The Draft Rule provided that Ecology would allocate no-cost allowances to electric utilities, with the amount based largely on forecasts for their retail electricity loads and forecasts of emissions associated with supplying enough electricity to meet those loads.[26] Electric utilities would also begin to receive additional no-cost allowances to cover their administrative costs associated with complying with the CCA during the CCA's second compliance period.[27]

78. The Draft Rule also contained new regulations governing when and how utilities could transfer their allowances to power plants. Under the proposal, Ecology would permit such a transfer only if (1) the utility operates the power plant or (2) the utility "has an agreement to purchase imported electricity or a power purchase agreement" with that plant.[28]

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[24] Wash. State Dep't of Ecology, *Chapter 173-446 WAC*, https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-446#:~:text=On%20September%2029%2C%202022%2C%20Ecology,greenhouse%20gas%20emissions%20by%202050.

[25] Wash. State Dep't of Ecology, Proposed Rulemaking, WSR 22-11-067 (May 16, 2022), https://ecology.wa.gov/DOE/files/9e/9efa9889-b72c-4448-8444-6a576e8d1377.pdf.

[26] Proposed Language for Chapter 173-446 WAC: Climate Commitment Act Program Rule § 173-446-230(1) (May 16, 2022), https://ecology.wa.gov/DOE/files/4f/4ffb375b-2bec-4b66-afb3-9b613645896e.pdf [Hereinafter "Draft Rule"].

[27] *Id.* § 173-446-230(1)(f).

[28] *Id.* § 173-446-425.

79. During the following sixty-day comment period, Ecology received 1,401 comments.[29] Several comments addressed the CCA's allocation of no-cost allowances to electric utilities as implemented by the Draft Rule.[30] Invenergy, through Grays Harbor Energy LLC, was one such commenter. Because Grays Harbor was the only power plant covered during the CCA's first compliance period that was not owned by or affiliated with an entity that received no-cost allowances, Invenergy urged Ecology to consider several alternatives.

80. First, Invenergy recommended that Ecology "level the playing field" by allocating no-cost allowances to all covered power plants.[31]

81. Second, Invenergy proposed that Ecology require utilities to price the cost of allowances into their dispatch decisions. This solution would ensure that the most cost-effective and emissions-reducing facilities would be dispatched first, as no utility could rely on their free allowances to ignore the compliance costs associated with dispatching their own, less efficient generating facilities.[32]

82. Third, Invenergy asked Ecology to reconsider its

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[29] Wash. Dep't of Ecology, No. 22-02-046, Concise Explanatory Statement: Chapter 173-446, Climate Commitment Act 1 (2022), https://apps.ecology.wa.gov/publications/documents/2202046.pdf. [Hereinafter "Concise Explanatory Statement"].

[30] *Id.* at 227-34.

[31] Grays Harbor Energy, LLC, Comment Letter on Chapter 173-446 WAC – Climate Commitment Act Program Rulemaking 1 (July 15, 2022), https://scs-public.s3-us-gov-west-1.amazonaws.com/env_production/oid100/did1008/pid_202884/assets/merged/5y03ih2_document.pdf?v=N8TSJVMGQ.

[32] *Id.* at 1-2.

provisions regarding the transfers of no-cost allowances. Rather than simply permit such transfers, Invenergy recommended that Ecology require utilities to transfer these allowances whenever they purchased electricity to serve their retail loads, as their allowance allocations were meant to cover the electricity they used to meet their customers' demand, regardless of that electricity's source.[33] This solution would not only remedy the Draft Rule's discrimination against Grays Harbor but also incentivize utilities to dispatch the most cost- and carbon-efficient generators rather than the ones they owned.

83. Moreover, the Draft Rule as written appeared to prohibit transfers in a variety of common electricity purchase arrangements. Notably, it appeared to leave out the possibility of transferring allowances in transactions brokered by third parties and cast doubt on electric utilities' ability to transfer allowances when they purchased electricity on the spot market. Invenergy suggested revisions to address these concerns as well.[34]

84. Although Invenergy noted that adopting these measures would also benefit Grays Harbor by removing or mitigating utility-owned generators' unfair advantage, it explained that a revised rule would better serve the ends of the CCA. Under the Draft Rule, the CCA incentivized utilities to rely on their own power plants "regardless of whether other, lower-emitting resources [were] available."[35] Indeed, even though Grays Harbor "has lower emissions per [megawatt-hour] produced" than covered utility-owned power plants, the allocation of

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[33] *Id.* at 5-7.

[34] *Id.*

[35] *Id.* at 5.

allowances encouraged utilities to get electricity from their own plants instead.[36] For that reason, Invenergy warned that the CCA would result in more greenhouse-gas emissions than what would be expected if there were no free allowances at all.[37]

85. Moreover, Invenergy explained that the incentive structure created by the CCA as implemented by the Draft Rule harmed consumers. Even though Ecology aimed to prevent increases in retail electricity rates through the provision of no-cost allowances, giving these allowances to utilities alone enabled the utilities to choose to dispatch electricity with less sensitivity to cost. As a result, consumers would face higher rates.[38]

86. Ecology brushed aside Invenergy's concerns about unfair treatment. It insisted that the CCA "treat[s] [all covered power plants] identically" because no power plant directly "receive[s] free ('no cost') allowances under the CCA cap and invest program."[39] But Ecology admitted that "there is a potential pathway by which the utility recipients of [the CCA's] no cost allowances could use those allowances to cover some or all of the emissions from an electrical generation facility that [the] utility owns or operates . . . ."[40] While Ecology insisted that utilities could choose to transfer these allowances to Grays Harbor,[41] it failed to acknowledge that the Draft Rule provided that a utility could transfer an allowance to a

[36] *Id.* at 4-5.

[37] *Id.* at 5.

[38] *Id.* at 1-2.

[39] Concise Explanatory Statement, *supra* note 29, at 227-28.

[40] *Id.*

[41] *Id.*

plant that it does not own only when the utility and that plant "ha[ve] an agreement to purchase imported electricity or a power purchase agreement[.]"[42] Finally, it suggested that utilities and Grays Harbor were treated the same insofar as they would both need allowances to cover any electricity they exported outside of Washington.[43]

87. Ecology similarly rejected Invenergy's proposed solutions. It maintained that the CCA provided no basis for Grays Harbor to receive no-cost allowances.[44] It also balked at requiring utilities to transfer allowances when purchasing electricity. Even though the CCA expressly tasked Ecology with overseeing allowances, Ecology insisted that this role was too unfamiliar and too far beyond its ken for it to take on.[45]

88. Ecology did little to revise the provisions governing the allocation of no-cost allowances in the final version of Chapter 173-446 of the Washington Administrative Code (the "Final Rule").

89. Section 173-446-230(1) of the Final Rule confirms that only electric utilities regulated under CETA, not independent power producers, will receive no-cost allowances. It provides that Ecology will allocate each utility a certain number of allowances based on the forecast for each utility's retail electricity load and the forecasted emissions associated with supplying that load. *Id.* § 173-446-230(2). Moreover, under the Final Rule,

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[42] Draft Rule, *supra* note 26, § 173-446-425(2)(b).

[43] Concise Explanatory Statement, *supra* note 29, at 227-28.

[44] *Id.*

[45] *Id.* at 229.

Ecology will provide additional no-cost allowances to utilities "to account for the administrative costs of the program." *Id.* § 173-446-230(2)(h).

90. The Final Rule also restricts utilities' ability to transfer their allowances to independent power plants. A utility cannot transfer a no-cost allowance to an independent power plant unless it "has an agreement to purchase imported electricity or a power purchase agreement." *Id.* § 173-446-425(2)(b). Accordingly, a Washington independent power plant's eligibility to receive a no-cost allowance turns on whether a utility elects to enter "a power purchase agreement"—a term neither the CCA nor the Final Rule defines—with that power plant. By contrast, a utility may transfer no-cost allowances to the power plants it owns without any sort of formal agreement under the Final Rule.

91. What is more, even if a utility and an independent power plant conclude a power purchase agreement, the utility has no obligation to transfer no-cost allowances to that power plant. Rather, a utility may choose whether or not to transfer a no-cost allowance to its counterparty. *See* Wash. Admin. Code. § 173-446-230(6).

92. Ecology does not justify its preferential treatment for electric utilities in terms of environmental benefits. Instead, it offers utilities no-cost allowances to "mitigat[e]" the CCA's potential effects on consumers' electricity rates. *Id.* § 173-446-230(1) ("Allowances will be allocated to qualifying electric utilities for the purposes of mitigating the cost burden of the program based on the cost burden effect of the program."); *see id.* § 173-446-020 (defining "Cost burden" as "the impact on rates or charges to customers of electric utilities in Washington for the

incremental cost of electricity service to serve load due to the compliance cost for [greenhouse-gas] emissions caused by the program").

93. Despite these measures, Ecology still expects the CCA to raise electricity prices in the following decades.[46]

94. At the same time, Ecology anticipates that other covered entities, including independent power plants, will spend hundreds of millions of dollars each year to purchase allowances, generating significant revenue for Washington.[47] In 2023, covered entities will spend between $22.20 and $81.47 to purchase each allowance at auction.[48]

The CCA Maintains No Meaningful Distinction Between Electric Utilities and Their Power Plants for the Purpose of Allocating and Using Allowances

95. On its face, the CCA appears to provide the same treatment for power plants regardless of whether a local

[46] Kasia Patora, Wash. State Dep't of Ecology, No. 22-02-047, Final Regulatory Analyses: Chapter 173-446 WAC, Climate Commitment Act Program 177 tbls. 41 & 42 (2022), https://apps.ecology.wa.gov/publications/documents/2202047.pdf.

[47] David Kroman, *Carbon Auctions Will Bring WA More Money than Predicted. Transportation Could Benefit*, Seattle Times (Oct. 18, 2022, 6:38 AM), https://www.seattletimes.com/seattlenews/transportation/carbon-auctions-will-bring-wa-more-money-than-predicted-transportationcould-benefit/.

[48] Wash. State Dep't Ecology, Washington Cap-and-Invest Program 2023 Annual Auction Floor Price Notice (Dec. 1, 2022), https://apps.ecology.wa.gov/publications/documents/2202060.pdf; Wash. Dep't Ecology, Washington Cap-and-Invest Program 2023 Annual Allowance Price Containment Reserve and Price Ceiling Notice (Dec. 1, 2022), https://apps.ecology.wa.gov/publications/documents/2202059.pdf.

utility or an independent power company owns them.

96. As a matter of statutory text, the CCA distinguishes between electric utilities and power plants: It offers no-cost allowances to the former and requires the latter to purchase allowances unless they qualify for no-cost allowances under a different provision. *See* Wash. Rev. Code § 70A.65.120.

97. This distinction proves illusory for three reasons.

98. First, the CCA's text collapses the distinction between power plants and the utilities that own them. The CCA provides that a "first jurisdictional deliverer" that "generates electricity" associated with emissions that meet the coverage threshold qualifies as a covered entity. *Id.* § 70A.65.080(1)(b). Because a "first jurisdictional deliverer" is "the owner or operator of an electric generating facility in Washington," *id.* § 70A.65.010(38), any electric utility is responsible for the emissions of its power plants.

99. Second, as implemented by the Final Rule, the CCA does not necessarily require electric utilities and their power plants to seek distinct allowances. To satisfy their compliance obligations, every entity must hold sufficient allowances in registered accounts to cover their emissions for a given compliance period. *See* Wash. Admin. Code. §§ 173-446-150, -600. When a single entity owns several covered entities this group of entities may maintain a single, joint account. *Id.* § 173-446-100(2). Critically, the Final Rule provides that "[a]n electric utility that is the operator of an electricity generating facility in Washington has a direct corporate association with the operator of another electricity generating facility in Washington if the same party operates both generating

facilities," which means a utility and its fleet of power plants may maintain such a joint account. *Id.* § 173-446-105(5). As a result, Ecology will, in effect, allocate no-cost allowances to utilities and their power plants even though the CCA, in name, allocates these allowances to utilities alone.

100. Third, the CCA, as implemented by the Final Rule, permits utilities to transfer their no-cost allowances to their own power plants without any limitations. *Id.* § 173-446-425(2). By contrast, an in-state independent power plant may not receive a no-cost allowance from an electric utility unless it and the utility have concluded a power purchase agreement. *Id.*

The CCA's Allocation of Allowances Singles Out Grays Harbor, Favoring Facilities Owned by Local Utilities

101. Grays Harbor, Washington's sole independent power plant covered by the CCA during its first compliance period, will be subject to the CCA as implemented by the Final Rule beginning on January 1, 2023. Wash. Admin. Code. § 173-446-030(1).

102. As a result, in the coming year, Grays Harbor must purchase allowances to cover at least some of its 2023 emissions. *Id.* § 173-446-600(3). Its first opportunity to do so will be Ecology's first auction in February 2023, followed by three other auctions later that year.[49]

103. Invenergy already anticipates that these costs

[49] *Climate Commitment Act (CCA) Auctions and Trading*, Wash. State Dep't of Ecology, https://ecology.wa.gov/Air-Climate/Climate-Commitment-Act/Cap-and-invest/Auctions-andtrading (last visited Dec. 12, 2022).

will be significant for Grays Harbor. It expects to spend tens of millions of dollars to obtain allowances for Grays Harbor in 2023.

104. On January 1, 2023 and every day thereafter, Grays Harbor must factor the estimated cost of these allowances into its decisions on whether to generate electricity for sale within and outside of Washington. As of that date, it will generate electricity only if the prevailing price for electricity is greater than its costs for generating electricity and the estimated costs of the allowances required to cover the emissions created by that generation.

105. In fact, Grays Harbor will not know its true operating costs—its generation costs and the cost of the allowances it must obtain—when it decides whether to run on January 1, 2023. Because Ecology will not hold the first auction until February 2023, Grays Harbor will not know the price of an allowance until then. As a result, it will be unable to accurately and optimally generate and dispatch electricity in the coming weeks.

106. Even after the February Auction, Grays Harbor will face this same uncertainty on a recurring basis because the costs for allowances will likely change with each new auction.

107. No other power plant imminently regulated by the CCA must weigh the cost of allowances when deciding to generate electricity and therefore grapple with this same uncertainty. Local utilities own Grays Harbor's competitors. And these utilities need not consider the cost of allowances when choosing when to run their generating facilities in 2023, because Washington has covered their power plants' costs for complying with the CCA and has

not required utilities to consider such costs when dispatching these plants.

108. Under the CCA, electric utilities will likely use their no-cost allowances to cover their power plants' compliance obligations. Indeed, the CCA provides almost no reason for them not to do so.

109. Grays Harbor, by contrast, will not similarly benefit from utilities' no-cost allowances. Because Grays Harbor operates independently of Washington's utilities, under the Final Rule, Grays Harbor cannot receive a local utility's no-cost allowance unless that utility chooses to enter a power purchase agreement with Grays Harbor. Wash. Admin. Code § 173-446-425(2). Even if Grays Harbor entered such an agreement with a local utility, the Final Rule does not require that utility to transfer any allowances to Grays Harbor. *See id.* Moreover, the Final Rule does not prohibit the utility from charging Grays Harbor for the allowance or negotiating a reduced contract price for electricity to account for any allowances. *See id.*

110. Washington's utility-owned power plants, by contrast, will benefit from the CCA's no-cost allowances. They will need to expend very little money, if any at all to fulfill their obligations under the CCA because they have ready access to their owners' no-cost allowances.

111. These power plants, then, will choose to generate electricity without considering the cost of their greenhouse-gas emissions. As long as the prevailing price for electricity exceeds the cost of their inputs, such as natural gas, these power plants will generate electricity regardless of the carbon costs of such generation.

112. Moreover, the CCA's allocation of no-cost allowances erases the competitive advantages that Grays Harbor has developed. Even though Grays Harbor can generate electricity more efficiently and with fewer emissions than utility-owned power plants, it cannot benefit from this advantage because the CCA's compliance costs make any electricity it generates more expensive. Utility-owned power plants, on the other hand, will be able to sell electricity at comparatively larger margins because they benefit from the no-cost allowances given to their local owners, not because they compete more effectively than Grays Harbor.

113. Rather than regulate the generation of electricity evenhandedly, the CCA distorts Washington's electricity markets. During the CCA's first compliance period, only Grays Harbor, not its competitors, will need to purchase the allowances it needs at auction. This means that after January 1, 2023, Grays Harbor will face costs that its competitors will not, and, due to these increased costs, Grays Harbor will generate less electricity than it would have absent the CCA. Its competitors in turn, will generate more. In short, the CCA will cause one of Washington's cleanest and most efficient natural gas power plants to supply less electricity in the state and encourage its less-efficient and dirtier competitors to supply more electricity. Thus, the CCA's allocation of no-cost allowances will produce an outcome at odds with the CCA's fundamental goals of reducing greenhouse-gas emissions and preventing increases in electricity rates.

The CCA Discriminates Against Power Plants with Out-of-State Owners by Imposing Costs Upon Them that Utility-Owned Power Plants May Avoid

114. The CCA singles out Grays Harbor for unfavorable treatment because an out-of-state independent power producer, Invenergy, owns and operates it rather than a local utility.

115. The CCA provides favorable treatment to the twelve utility-owned power plants in Washington regulated during the CCA's first compliance period because it benefits a group composed of in-state interests. All four utilities that own these power plants operate across Washington. Three of them, in fact, call Washington home.[50] Moreover, unlike Invenergy, these utilities conduct substantial commercial and political activities in the state.

116. Invenergy simply lacks a comparable presence in Washington.

117. Put differently, the CCA's allocation of no-cost allowances benefits a class in which 100% of its members are owned by businesses with substantial presences in Washington and 92% of its members are owned by businesses headquartered in the state. At the same time, the CCA denies this same beneficial treatment to Grays Harbor, the only imminently regulated power plant owned by an entity that lacks a significant presence in and connection to Washington.

118. Under the CCA, Invenergy cannot compete on equal terms with these in-state competitors because the

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[50] PacifiCorp is the outlier, as it is based in neighboring Oregon. It owns only one power plant, the Chehalis Generation Facility.

CCA raises its costs to generate electricity alone.

119. Invenergy, unlike its competitors, lacks no-cost allowances to share with Grays Harbor, so Invenergy must bear the CCA's compliance costs to continue to sell electricity generated in Washington.

120. The CCA imposes no such additional costs on local electric utilities' efforts to sell the electricity they generate in the state.

121. Washington, therefore, has tailored the CCA to benefit Washington economic interests at the expense of their only out-of-state competitor.

The CCA's Local Favoritism Imposes Significant Costs on Invenergy and Also Increases Emissions and Electricity Costs for Washingtonians

122. Invenergy will face significant costs because of the CCA's local favoritism.

123. Because Invenergy must factor the cost of allowances into its decisions to sell electricity generated in Washington, the CCA will decrease the amount of electricity that Grays Harbor will sell and the profits it generates from those sales. Thus, Invenergy stands to lose substantial amounts in revenue in the coming years as a result of the CCA's discriminatory allocation of no-cost allowances.

124. Washington and its citizens will suffer as well.

125. The CCA's allocation of no-cost allowances will increase greenhouse-gas emissions because of the incentives this allocation creates. With the ability to freely transfer no-cost allowances to their power plants, utilities can avoid factoring the cost of greenhouse-gas emissions

into their dispatch decisions. Put differently, the utilities face no additional cost when dispatching their own power plants, regardless of the emissions those plants produce. Dirtier utility-owned power plants will generate more electricity than they would have absent the CCA. As a result, as a whole, Washington's power plants will produce more greenhouse-gas emissions than they would have absent the CCA.

126. Ratepayers will be similarly harmed by the incentives that the CCA's allocation of no-cost allowances produces. Because the no-cost allowances incentivize utilities to dispatch their own power plants regardless of their efficiency in terms of cost, the cost of generating electricity to fulfill Washington's retail demand for electricity will increase. When compared to the pre-CCA regime, modeling shows that the CCA as implemented is expected to increase these costs by billions of dollars between 2023 and 2041.

127. Utilities will have little difficulty passing those increased costs to consumers through rate increases. In fact, Washington's utilities have already requested multimillion-dollar rate increases over the next few years despite their favorable treatment under the CCA.[51]

128. Washington could avoid significant costs by providing Invenergy with no-cost allowances. This simple solution would prevent the CCA from distorting the market, which, in turn, would allow power plants to compete for business based on their efficiency and carbon

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[51] Press Release, Wash. State. Off. of Att'y Gen., Attorney General Opposes Rate Increase Requests by Puget Sound Energy, Avista (Aug. 1, 2022), https://www.atg.wa.gov/news/newsreleases/attorney-general-opposes-rate-increase-requests-puget-sound-energy-avista.

footprint.

129. Thus, placing Invenergy and its competitors on an even footing as the Constitution demands would also better serve the ends of the CCA.

The CCA's Allocation of No-Cost Allowances Will Obstruct the Flow of Investment in Energy Development to Washington

130. In addition to discriminating against out-of-state economic interests, the CCA will, in effect, shut off Washington from interstate investment in independent natural gas power plants like Grays Harbor.

131. Any out-of-state power company that develops or buys an existing power plant in Washington will find that it must compete against utility power plant owners on an unequal playing field. Just like Invenergy, any independent newcomer must bear the costs of complying with the CCA, and, for that reason, it will have to account for costs that its competitors, local utilities, do not.

132. No rational power company will enter such a market where, no matter how much it strives to improve efficiency and reduce costs, it will have a competitive disadvantage in the form of millions of dollars of increased costs each year due to the CCA's local favoritism.

133. As a result of the CCA's protectionist allocation of no-cost allowances, Washington will likely shut out millions of dollars in interstate energy investment over the coming decades.

<u>Obstructing the Flow of Investment in Energy Development Yields No Benefits Other Than Economic Protectionism</u>

134. The CCA substantially burdens interstate commerce by obstructing the flow of interstate investment to Washington without producing any legitimate benefits for the state.

135. Although the CCA may justify its allocation of no-cost allowances by claiming it helps to reduce greenhouse-gas emissions and keep electricity rates from rising rapidly, these benefits are illusory. As explained above, the CCA's allocation of no-cost allowances will result in more greenhouse-gas emissions and higher electricity rates over the next several decades than Washington would have experienced absent the CCA.

136. Rather than benefiting the public, the CCA benefits local economic interests. It provides local utilities with significant advantages over Invenergy and any other would-be independent power plant owners.

137. Local utilities can both generate more electricity and sell their electricity with higher margins than Invenergy because their plants in Washington will bear no additional costs due to the CCA. This advantage insulates local utilities from future competition from independent power plant owners as well.

138. These protectionist effects confirm that the CCA's allocation of no-cost allowances imposes burdens on interstate commerce that exceed its local benefits.

<u>The CCA's Disparate Treatment of Independent and Utility Power Plant Owners Is Not Tethered to Legitimate State Interests</u>

139. The CCA provides no-cost allowances to local utilities that own power plants in Washington but does not extend this same benefit to independent power plant owners. Distinguishing between these two similarly-situated classes of power plant owners is not rationally related to any legitimate state interest.

140. For the purposes of the CCA, independent power companies like Invenergy and local utilities are similarly situated as power plant owners in Washington even though local utilities engage in commercial activities besides operating power plants.

141. The CCA regulates all power plant owners in the same manner except with respect to the allocation of no-cost allowances.

142. The CCA regulates independent and utility power plant owners largely indirectly, as they do not produce substantial greenhouse-gas emissions on their own.[52] Their power plants produce emissions in their operations, and the CCA requires that power plants obtain a sufficient number of allowances to cover these emissions.

143. All power plants covered under the CCA are

[52] Utilities would have compliance obligations that were not associated with their plants' generation in two instances. First, the utility would be responsible for emissions associated with operating a fleet of service vehicles. Second, it would be responsible for the emission generated with any electricity that it imports from out-of-state generators. *See* Wash. Rev. Code. § 70A.65.080.

materially the same. The thirteen power plants regulated by the CCA during its first compliance period produce indistinguishable electricity in essentially the same manner, namely by operating natural-gas-fired generators. The specific amount of greenhouse-gas emissions and therefore the particular number of allowances any plant requires varies from plant to plant. But every power plant faces the same treatment under the CCA for their substantially identical operations except that utility-owned power plants will likely benefit from the no-cost allowances allocated to their owners.

144. The CCA does not regulate utilities independently from the indirect regulation of the power plants they own except that utilities receive no-cost allowances. As utilities generally do not produce substantial emissions in their commercial activities outside of electricity generation, these no-cost allowances benefit them as the owners of power plants directly regulated under the CCA.

145. Under the CCA, then, all power plant owners are similarly situated except that utility power plant owners receive benefits that independent power plant owners do not.

146. This differential treatment does not advance any legitimate state interest.

147. Washington may have legitimate interests in reducing greenhouse-gas emissions and preventing electricity rates from rising rapidly. But the CCA's disparate treatment of local utilities and independent power plant owners does not serve either of those interests.

148. The CCA's allocation of no-cost allowances bears no rational relationship to reducing greenhouse-gas emissions because it allows utilities to dispatch electricity without considering the cost of greenhouse-gas emissions. With no-cost allowances, a utility can elect to obtain electricity from a particular plant and cover that plant's emissions even though that plant produces more emissions and generates less efficiently than its competitors. Without no-cost allowances, utilities would need to consider the added costs of emissions whenever making dispatch decisions, and, as a result, they would have incentives to obtain electricity from cleaner and more efficient power plants. Similarly, if all power plant owners had no-cost allowances and could transfer them to their power plants, all power plants would compete on an even playing field. If these plants were to compete fairly, utilities would dispatch the more carbon-efficient power plants more often and the less carbon-efficient plants less often. Either scenario would likely reduce greenhouse-gas emissions in the electricity sector.

149. The CCA's allocation of no-cost allowances purports to benefit ratepayers by reducing local utilities' compliance costs, which limits any additional costs they might pass on to ratepayers. The no-cost allowances, however, incentivize utilities to dispatch their own power plants regardless of whether doing so is the most cost-effective means of obtaining electricity. By effectively eliminating utility-owned power plants' carbon costs, the no-cost allowances allow these power plants to appear to be more cost-effective generators than they in fact are. Utilities, therefore, are likely to dispatch their less efficient plants, which benefit from no-cost allowances, rather than dispatch a more efficient plant that must

consider carbon costs when generating, such as Grays Harbor. The costs of fulfilling Washingtonians' demand for electricity will therefore increase. Rather than bear these additional costs, local utilities will likely pass these costs on to Washington's consumers through rate increases. If the CCA enabled all power plants to benefit from no-cost allowances, it would incentivize utilities to make more efficient dispatch decisions, which would minimize the costs that utilities would pass on to ratepayers.

150. Washington may also have a legitimate interest in ensuring utilities comply with their obligations under CETA. CETA, however, regulates utilities in terms of the electricity they supply to ratepayers, while the CCA regulates utilities insofar as they own power plants that produce emissions. These regulatory regimes exist independently from each other even though both ultimately aim to reduce greenhouse-gas emissions. There is no indication that the CCA's provision of no-cost allowances affects utilities' ability to comply with CETA's regulatory scheme.

151. The CCA contemplates that Washington may link its cap-and-invest program with other similar programs, such as California's. Wash. Rev. Code. § 70A.65.210. Washington may have a legitimate interest in facilitating these linking efforts, but the CCA's allocation of no-cost allowances has no logical connection to this interest. Failing to provide utilities with no-cost allowances or offering these no-cost allowances to independent power plant owners would not prevent Washington from linking its program with those of its peers. For example, under California's cap-and-trade program, investor-owned utilities receive an allocation of

allowances, but they must consign these allowances for sale at auction and purchase allowances for their own use.[53] Quebec's program generally requires electric utilities to purchase allowances to cover their emissions, and it provides no-cost allowances to cover emissions associated with only limited types of electricity sales.[54]

152. At bottom, the CCA's allocation of no-cost allowances logically serves none of these interests.

CLAIMS FOR RELIEF

COUNT I

Violation of the Commerce Clause: Discrimination Against Interstate Commerce

153. Plaintiffs re-allege and incorporate by reference all of the preceding paragraphs.

154. The Commerce Clause of the U.S. Constitution empowers Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

155. This grant of power, by implication, also prohibits states from unduly restricting and burdening interstate commerce.

156. Accordingly, the Commerce Clause proscribes

[53] Cal. Code Regs. tit. 17, §§ 95890(b), 95892. Publicly owned utilities may use a portion of their allowances to satisfy compliance obligations and offer the rest for sale at auction. *Id.* § 95892(b)(2), (c).

[54] *See* Regulation Respecting a Cap-and-Trade System for Green House Gas Emissions Allowances, Q-2, r.46.1 § 39; *see also* Québec Ministère de l'Environnement, de la Lutte Contre les Changements Climatiques, de la Faune et des Parcs, *A Brief Look at the Québec Cap-And-Trade-System for Emission Allowances*, https://www.environnement.gouv.qc.ca/changements/carbone/documents-spede/in-brief.pdf (last visited Dec. 12, 2022).

any state law that discriminates against out-of-state economic actors unless that law is "narrowly tailored to advanc[e] a legitimate local purpose." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019) (alteration in original) (internal quotation marks omitted).

157. The CCA's distribution of no-cost allowances violates the Commerce Clause by discriminating in effect against out-of-state economic interests to the benefit of in-state economic interests.

158. Under the CCA, local utilities receive allowances at no cost. These utilities constitute in-state economic interests. Not only are they overwhelmingly resident corporations, but they also operate throughout Washington and have significant commercial and political presences in the state.

159. The CCA's allocation of no-cost allowances benefits local utilities as local entities that own and operate power plants in Washington. Although utilities receive the allowances, the CCA regulates emissions of the power plants they own. Because local utilities largely lack emissions of their own, the CCA's allocation of no-cost allowances has the practical effect of enabling power plants owned by local utilities to satisfy most if not all of their CCA obligations for free. Simply put, the CCA provides a significant benefit to these local power plant owners and operators.

160. At the same time, the CCA denies this benefit to Invenergy, Washington's only non-utility owner of a power plant that is regulated during the CCA's first compliance period. Unlike local utilities, Invenergy conducts limited business and political activities in

Washington. The CCA does not provide any no-cost allowances to Invenergy, so its power plant, Grays Harbor must purchase allowances at auction to satisfy its CCA obligations.

161. The CCA's discrimination against Invenergy as an out-of-state independent power plant owner engaged in interstate commerce produces a competitive advantage for its in-state competitors, Washington's local utilities. Invenergy owns and operates the only power plant in Washington that must consider the cost of carbon in its decisions to generate and sell electricity during the CCA's first compliance period. With these added costs, it will, in all likelihood, choose to generate and sell less electricity than it would have without the CCA.

162. Washington's local utilities, by contrast, will likely generate and sell more electricity because the CCA reduces their power plants' generating costs relative to those of their independently owned competitor, Grays Harbor.

163. By distorting the market in this way, the CCA's allocation of no-cost allowances has forced Washington's only out-of-state owner of a power plant regulated during the CCA's first compliance period to compete on an uneven playing field against in-state power plant owners even though it has recently invested millions of dollars to solidify Grays Harbor's position as one of Washington's cleanest and most efficient natural gas power plants.

164. The dormant Commerce Clause prohibits such economic protectionism achieved through the discrimination against interstate commerce unless a legitimate state interest apart from economic protection justifies that discrimination.

165. No such interest justifies the CCA's protectionist allocation of no-cost allowances.

166. The CCA's allocation of no-cost allowances purports to advance two interests: (1) protecting ratepayers from undue increase in electricity rates and (2) reducing greenhouse-gas emissions.

167. The CCA's allocation of no-cost serves neither of these ends. Instead, it will increase electricity costs and greenhouse-gas emissions from power plants in the coming decades.

168. Because the CCA's allocation of no-cost allowances discriminates against interstate commerce and advances no legitimate state interest in doing so, this provision violates the dormant Commerce Clause.

169. Defendant purports to act within the scope of her authority under Washington law in enforcing and implementing the CCA.

170. Defendant is liable to Plaintiffs for proper redress under 42 U.S.C. § 1983 because the CCA's distribution of no-cost allowances deprives Plaintiffs of the rights, privileges, and immunities secured by the Commerce Clause.

171. Plaintiffs have no adequate remedy at law and will be irreparably harmed by the continued enforcement of the CCA.

COUNT II

Violation of the Commerce Clause: Excessive Burden on Interstate Commerce in Relation to Putative Local Benefits

172. Plaintiffs re-allege and incorporate by reference

all of the preceding paragraphs.

173. The Commerce Clause also prohibits any state law that burdens interstate commerce when the law's burdens clearly outweigh any putative local benefits it confers.

174. The CCA's distribution of no-cost allowances to locally owned electricity generators excessively burdens interstate commerce without advancing any legitimate local interest.

175. The CCA's allocation of no-cost allowances substantially burdens interstate commerce by obstructing the flow of interstate investment in natural gas power plants to Washington. Because the CCA provides no-cost allowances to local utilities but not independent power plant owners, any independent power company would find itself in the same position as Invenergy if it sought to invest in or develop a natural gas power plant in Washington. Like Grays Harbor, any power plant that they were to purchase would bear the costs of complying with the CCA, while the competing plants owned by local utilities would not. In other words, new investors would enter the same distorted market that benefits local utilities and burdens their independent competitors.

176. Because it distorts the market in this way, the CCA's allocation of no-cost allowances, in effect, blocks further interstate investment in natural gas power plants. As a result of the CCA, Washington will likely lose many millions of dollars in investment in natural gas power plants in the coming decades.

177. The CCA's distribution of no-cost allowances is not justified by any consumer protection interest, any

environmental interest, any pro-competitive interest, nor any public welfare interest.

178. In fact, the CCA's purported local benefits prove illusory. As mentioned above, the CCA is projected to increase electricity rates and greenhouse-gas emissions from power plants. It therefore fails to produce the local benefits that Washington claims will flow from providing no-cost allowances to local utilities.

179. Rather than serve legitimate local interests, the CCA's allocation of no-cost allowances enables local protectionism. By disadvantaging independent power plant owners and thwarting any future investment, the CCA insulates local utilities and their power plants from competition. This protectionist effect only adds to the CCA's burden on interstate commerce.

180. As the CCA's allocation of no-cost allowances substantially burdens interstate commerce without producing local benefits, it violates the dormant Commerce Clause.

181. Defendant purports to act within the scope of her authority under Washington law in enforcing and implementing the CCA.

182. Defendant is liable to Plaintiffs for proper redress under 42 U.S.C. § 1983 because the CCA's distribution of no-cost allowances deprives Plaintiffs of the rights, privileges, and immunities secured by the Commerce Clause.

183. Plaintiffs have no adequate remedy at law and will be irreparably harmed by the continued enforcement of the CCA.

COUNT III

Violation of the Equal Protection Clause: Unlawful Discrimination

184. Plaintiffs re-allege and incorporate by reference all of the preceding paragraphs.

185. The Equal Protection Clause of the Fourteenth Amendment guarantees all persons "the equal protection of the laws." U.S. Const. amend. XIV, § 1.

186. Consistent with this guarantee, any classification which treats groups differently "must bear a rational relationship to a legitimate governmental purpose." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

187. The CCA treats independent power plant owners differently from other similarly situated power plant owners, namely local utilities. The CCA allocates no-cost allowances to utilities but not to Invenergy, Washington's sole independent owner of a power plant regulated under the CCA.

188. The CCA's distinction between independent power plant owners and utilities is not rationally related to any legitimate governmental purpose. There is no logical relationship between the CCA's allocation of no-cost allowances and reducing greenhouse gas emissions because these allowances incentivize utilities to dispatch their power plants rather than their cleaner competitors. Similarly, allocating no-cost allowances to utilities but not to other power plant owners does not logically serve the CCA's goal of limiting the statute's impact on ratepayers. The CCA's no-cost allowances incentivize utilities to dispatch their own power plants rather than their more efficient competitors, raising the electricity costs for

fulfilling Washington's retail demand for electricity. If all power plant owners, utilities and independent companies alike, received no-cost allowances, the CCA would more effectively incentivize utilities to dispatch power plants based on their efficiency and carbon footprint.

189. Moreover, the CCA's allocation of no-cost allowances is not logically related to Washington's interests in ensuring local utilities meet their independent obligations under CETA or facilitating linkages among Washington's cap-and-trade programs and other similar North American programs.

190. Because the CCA's disparate treatment of the owners of electricity generating facilities in Washington lacks a rational relationship to a legitimate state interest, the CCA's allocation of no-cost allowances to local utilities but not to independent power plant owners violates the Equal Protection Clause.

191. Defendant purports to act within the scope of her authority under Washington law in enforcing and implementing the CCA.

192. Defendant is liable to Plaintiffs for proper redress under 42 U.S.C. § 1983 because the CCA deprives Plaintiffs of the rights, privileges, and immunities secured by the Equal Protection Clause.

193. Plaintiffs have no adequate remedy at law and will be irreparably harmed by the continued enforcement of the CCA.

REQUEST FOR RELIEF

Plaintiffs request that this Court grant the following relief:

194. Pursuant to 28 U.S.C. § 2201, declare that the CCA as applied is invalid and unenforceable under the Commerce Clause of the United States Constitution; and declare that the CCA as applied is invalid and unenforceable under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

195. Require Defendant and her agents to provide no-cost allowances to Plaintiffs, or require Defendant and her agent to re-allocate no-cost allowances or require electric utilities to transfer no-cost allowances to Plaintiffs; or otherwise enjoin Defendant and her agents from enforcing the CCA to disadvantage Plaintiffs;

196. Award Plaintiffs their costs and disbursements associated with this litigation under 28 U.S.C. § 2412, 42 U.S.C. § 1988, and other applicable authority; and

197. Provide such other relief as the Court deems just and proper.

DATED: December 13, 2022

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