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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFICORP, an Oregon business corporation, *Plaintiff - Appellant*, v. CASEY SIXKILLER, Director of the Washington State Department of Ecology, *Defendant - Appellee*.	No. 24-4803 D.C. No. 3:23-cv-06155-TMC OPINION

Appeal from the United States District Court
for the Western District of Washington
Tiffany M. Cartwright, District Judge, Presiding

Argued and Submitted June 2, 2025
Seattle, Washington

Filed August 7, 2026

Before: Johnnie B. Rawlinson, Daniel A. Bress, and
Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Rawlinson;
Dissent by Judge Bress

OPINION

RAWLINSON, Circuit Judge:

PacifiCorp is a utility that supplies electricity to customers in Washington, Utah, Wyoming, Idaho, Oregon, and California. PacifiCorp appeals the district court's dismissal with prejudice of its complaint alleging that the Washington State Department of Ecology (Ecology) violates the Dormant Commerce Clause through enforcement of decarbonization requirements under Washington's Climate Commitment Act (CCA). *See* Wash. Rev. Code § 70A.65. PacifiCorp contends that this enforcement unconstitutionally increases electricity costs for PacifiCorp's non-Washington customers. PacifiCorp also challenges the district court's dismissal of its motion for preliminary injunction as moot. We affirm.

I. BACKGROUND

PacifiCorp is "a multi-state utility that serves approximately two million customers in six states, with approximately 140,000 customers in Washington." In its amended complaint, PacifiCorp alleged that it "owns and operates the Chehalis Generation Facility (Chehalis), . . . a gas-fired combined cycle electric generation facility located south of Chehalis, Washington." In 2021, Washington enacted the CCA which "require[s] certain emitting entities located in Washington to obtain and retire allowances for their respective annual greenhouse-gas emissions." "Some entities covered by the CCA will purchase allowances for their respective emissions at auction, while others are provided free (no-cost) allowances for emitting generation that serves Washington utility customers." PacifiCorp alleged that "[t]hese no-cost allowances mitigate the costs for Washington utility customers who would otherwise be required to pay for CCA allowances at market prices." In contrast, emitting resources like

Chehalis, which are located in Washington but serve utility customers in other states in addition to Washington, do not receive no-cost allowances for the portion of emissions for service for out-of-state residents." Under the CCA, "[t]hese no-cost allowances are assigned directly to electric utilities in an attempt to mitigate the cost burden of the program on electricity customers."

PacifiCorp further alleged that "[u]nder the CCA and its implementing regulations, electric utilities can transfer their no-cost allowances to the power plants that they own. Because these power plants are responsible for generating the electricity these utilities sell, and the emissions associated with that electricity, these no-cost allowances eliminate some or all of a utility-owned power plants' compliance costs caused by the CCA." PacifiCorp alleged that "for emitting resources like Chehalis that are located in Washington but that serve customers both within Washington and in other states, PacifiCorp will not receive no-cost allowances for the portion of emissions for service for out-of-state residents." "As a result, PacifiCorp's non-Washington customers bear higher power costs to ensure Chehalis has sufficient allowances to cover its emissions for the energy that serves those customers." "Alternatively, if utility regulators in those other states deny recovery of the cost of allowances because of this disparate treatment, PacifiCorp shareholders will bear the CCA compliance costs simply because it serves customers in other states." PacifiCorp asserted that "Washington customers do not pay for CCA allowance costs for electricity generated at Chehalis, but PacifiCorp and PacifiCorp's out-of-state customers do. The CCA's allocation of no-cost allowances harms PacifiCorp's non-Washington customers and PacifiCorp in direct proportion to the amount of Chehalis generation that crosses Washington's border."

PacifiCorp alleged that "[t]his harm to PacifiCorp and its non-Washington customers will continue to increase because Chehalis incurs a new CCA compliance obligation for each metric ton of carbon dioxide equivalent that the plant emits," and "approximately 77 percent of Chehalis' emissions do not receive no-cost allowances, and it falls to PacifiCorp (an out-of-state entity) or its out-of-state customers to pay for Washington's CCA compliance costs." PacifiCorp further alleged that "[a]s applied to PacifiCorp and its out-of-state customers, [Ecology's] implementation of the CCA's allocation of no-cost allowances violates the Commerce Clause of the United States Constitution because it impermissibly discriminates against out-of-state businesses and customers."

According to PacifiCorp, "Washington utilities that serve only or predominantly Washington customers do not have the same CCA compliance cost burden as PacifiCorp, which serves out-of-state customers with electricity from Chehalis," and "[t]hese protectionist effects and the explicit legislative text that the CCA shall be implemented to mitigate the cost burden for customers in Washington, and only in Washington, confirm that the CCA's allocation of no-cost allowances imposes Constitutionally impermissible burdens on interstate commerce."

PacifiCorp sought a motion for preliminary injunction to enjoin Ecology "from enforcing the no-cost allowance provisions of the CCA in a manner that discriminates between in-state and out-of-state customers."

The district court concluded that dismissal of PacifiCorp's Dormant Commerce Clause claims was warranted because "[t]he electricity PacifiCorp generates to send out of state is not substantially similar to the electricity it sells in Washington because the exported energy is not covered by" Washington's Clean Energy Transformation Act (CETA). *See* Wash. Rev. Code § 19.405. The district court opined that "[a]ccepting PacifiCorp's [Dormant Commerce Clause] argument would elevate the energy it produces in Washington but then sends out of state above Washington's entire regulatory framework for reducing carbon emissions: it would be exempt from both the decarbonization mandate of CETA *and* the purchase of allowances under the CCA." The district court observed that:

> Throughout PacifiCorp's complaint and description of how no-cost allowances under the CCA are allocated, there is not one mention of CETA's existence, despite the CCA and its implementing regulations making clear that an electric utility is only eligible for no-cost allowances to the extent that it is subject to CETA's requirements. But the existence of CETA, and its role in the allocation of no-cost allowances, is not an inconvenient fact that PacifiCorp can avoid by artful pleading.

The district court concluded that the CCA and CETA operate in tandem to reduce carbon emissions because:

> The CCA requires covered entities to buy allowances for carbon emissions, subject to a cap on allowances that decreases each year, so that market pressure will encourage those entities to decarbonize. But electric utilities serving Washington customers [do not] need that market pressure because CETA already requires them to decarbonize, and on a faster schedule. In contrast, the emissions that PacifiCorp generates within Washington's borders at its Chehalis plant, but uses to export electricity to

> customers in other states, are not covered by CETA at all. This fundamental difference in preexisting regulation means that the two categories of emissions are not substantially similar for purposes of the Dormant Commerce Clause.

The district court also rejected PacifiCorp's reliance on Dormant Commerce Clause precedent involving the compensatory tax doctrine because "the CCA's allocation of no-cost allowances to utilities already subject to CETA's requirements is not the equivalent of a facially discriminatory tax." The district court clarified that the compensatory tax doctrine is "a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through discriminatory means." *See Oregon Waste Sys. v. Dep't of Envt'l Qual. Of State of Or.*, 511 U.S. 93, 102 (1994). Rather than applying a discriminatory tax analysis, the district court determined that the relevant inquiry for this case is whether "the competing entities were subject to different regulatory regimes."

Finally, the district court opined that "the retail electric market in the United States is already the type of Balkanized system that the Dormant Commerce Clause in competitive markets serves to guard against—a fact acknowledged by both the Federal Power Act and the Supreme Court's Commerce Clause cases." *See e.g., Arkansas Elec. Coop. Corp. v. Ark. Pub. Svc. Com'n*, 461 U.S. 375, 395 (1983) ("[T]he national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States."); *see also Electric Pwr. Supply Ass'n v. Star*, 904 F.3d 518, 525 (7th Cir. 2018) ("Illinois has not engaged in any discrimination beyond what is required by the rule that a state must regulate within its borders. All carbon-emitting plants in

Illinois need to buy credits."). The district court explained that "[u]nder this [balkanized] system, PacifiCorp's retail electricity customers in Washington and other states do not compete in the way that typically triggers dormant Commerce Clause scrutiny. If PacifiCorp succeeds in passing the compliance costs of the CCA on to its out-of-state customers, it will be because each state's utility commission has approved charging its own residents those rates." On the other hand, "if PacifiCorp fails, then its shareholders will incur those costs not because they serve out-of-state customers, but because they own and operate a power plant in Washington state that produces emissions not already covered by CETA's decarbonization schedule—just like any other comparable covered entity under the CCA."

PacifiCorp did not seek leave to amend its complaint, and the district court dismissed PacifiCorp's complaint with prejudice because its "ruling [was] based on the plain text of the CCA and CETA and the way the statutes interact, rather than on insufficient factual allegations." The district court also denied PacifiCorp's motion for preliminary injunction as moot.

PacifiCorp filed a timely notice of appeal.

II. <u>STANDARDS OF REVIEW</u>

"We review *de novo* a district court's dismissal under Fed. R. Civ. P. 12(b)(6), accepting as true all allegations of fact in a well-pleaded complaint and construing those facts in the light most favorable to the plaintiff." *DeFrancesco v. Robbins*, 136 F.4th 933, 938 (9th Cir. 2025) (citation and internal quotation marks omitted).

"Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment. . . ."

Webb v. Trader Joe's Co., 999 F.3d 1196, 1204 (9th Cir. 2021) (citation omitted).

"The denial of a motion for preliminary injunction will be reversed only if the district court abused its discretion or based its decision on an erroneous legal premise. . . ." *F.T.C. v. Microsoft Corp.*, 136 F.4th 954, 964 (9th Cir. 2025) (citation omitted).

III. DISCUSSION

A. Standing and Ripeness of PacifiCorp's Claims

Ecology does not challenge the district court's rulings that PacifiCorp had standing to assert its Dormant Commerce Clause claim, and that the claim was ripe for adjudication. Nevertheless, "[s]tanding is a threshold consideration that must be determined before considering the merits." *Day v. Henry*, 152 F.4th 961, 967 (9th Cir. 2025), *as amended*, (citation omitted). For Article III standing, "a plaintiff must have (1) suffered an injury-in-fact that is (2) traceable to the defendant's challenged conduct, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (citation omitted). "[A] plaintiff satisfies redressability when he shows that a favorable decision will relieve a discrete injury to himself, not that a favorable decision will relieve his *every* injury. . . ." *Id.* (citation and internal quotation marks omitted) (emphasis in the original).

The district court held that PacifiCorp had standing because "[t]he CCA requires PacifiCorp to obtain allowances for its Chehalis emissions, either through purchase at auction or the award of no-cost allowances," and "PacifiCorp . . . plausibly alleged that it will have to spend money to purchase allowances for the emissions generated for exported electricity." The district court emphasized that, "[e]ven if PacifiCorp might eventually be allowed to pass those costs on to its customers, PacifiCorp remains the regulated entity required to obtain the allowances in the first place," resulting in "a sufficiently concrete and particularized injury for PacifiCorp to challenge the CCA's method of deciding when an electric utility must buy allowances rather than receive them for free."

We agree with the district court that PacifiCorp's "alleged injury is caused by the requirements of the challenged statute and it could be redressed by an injunction requiring Ecology to distribute no-cost allowances for exported electricity or exempting PacifiCorp from the purchase of allowances altogether." PacifiCorp's challenge to the manner in which Washington provided no-cost allowances was a sufficient injury-in-fact, and "the district court was capable of granting at least some relief" by enjoining "enforcement of the statutory scheme." *Day*, 152 F.4th at 968. "This solution would negate the Commerce Clause issue by eliminating enforcement of the allegedly discriminatory laws altogether. . . ." *Id.* (footnote reference omitted).

PacifiCorp's claims are also ripe. "For a suit to be ripe within the meaning of Article III, it must present concrete legal issues, presented in actual cases, not abstractions." *Planned Parenthood Great Nw. v. Labrador*, 122 F.4th 825, 839 (9th Cir. 2024) (citation and internal quotation marks omitted). "In many cases, the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry. . . ." *Id.* (citation and internal quotation marks omitted). The district court correctly held that "PacifiCorp's obligation to at least front the cost of allowances is identifiable and imminent," and that "PacifiCorp's responsibility to bear the cost of CCA allowances—regardless of the results of its administrative appeals to pass on those costs to its customers—rebut[ted] Ecology's ripeness argument." *See id.*

B. The District Court's Dismissal of PacifiCorp's Complaint

PacifiCorp contends that the district court erred in dismissing its complaint on the basis that PacifiCorp's respective generation of electricity under the CCA for in-state use and its generation of electricity for exportation were not similarly situated uses under the Dormant Commerce Clause.

The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. "The negative reading of this clause—known as the dormant Commerce Clause—prevents states from adopting protectionist measures that unduly restrict interstate commerce. . . ." *Day*, 152 F.4th at 969 (citation and internal quotation marks omitted). "The first step in analyzing any law under the dormant Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." *Id.* at 970 (citation and internal quotation marks omitted). "Discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (citation and internal quotation marks omitted). "This differential treatment must be as between persons or entities who are similarly situated." *Id.* (citation and internal quotation marks omitted).

Consistent with "the Supreme Court's clear instruction . . . that extreme caution is warranted before a court deploys its implied authority to reject a state law under the dormant Commerce Clause," *Flynt v. Bonta*, 131 F.4th 918, 926 (9th Cir. 2025) (citation and internal quotation marks omitted), we conclude that the district court correctly dismissed PacifiCorp's Dormant Commerce

Clause claims. In this case, the focus of the Dormant Commerce Clause analysis is not primarily on whether PacifiCorp produces the same product, specifically electricity, for in-state and out-of-state consumers. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (explaining that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations"). Rather, it is the regulatory distinctions between the treatment of entities that produce in-state electricity and exported electricity under the CCA and CETA that undermine PacifiCorp's contention that carbon emissions from its production of electricity for in-state and out-of-state customers are similarly situated for purposes of the Dormant Commerce Clause.[1]

In 2019, the Washington legislature adopted CETA to "address the impacts of climate change by leading the transition to a clean energy economy," and "to eliminate coal-fired electricity, transition the state's electricity supply to one hundred percent carbon-neutral by 2030, and one hundred percent carbon-free by 2045." Wash. Rev. Code § 19.405.010(1)-(2). To advance the state's decarbonization efforts, each electric utility was required to file a clean energy implementation plan with the Washington Utilities and Transportation Commission (Commission) by October 1. 2021, and every four years thereafter. The clean energy implementation plan was to describe "the utility's plan for making progress toward meeting the clean energy transformation standards [as] informed by

[1] Further complicating the Dormant Commerce Clause analysis in this case is the fact that PacifiCorp also sells electricity to Washington customers. PacifiCorp acknowledges that "CETA applies to gas-powered facilities like Chehalis," thus entitling PacifiCorp to receive no-cost allowances under the CCA for electricity sold to Washington customers. *See* Wash. Rev. Code § 70A.65.120(1).

the utility's clean energy action plan." Wash. Admin. Code 480-100-640(1).[2]

In 2021, the Washington legislature adopted "a cap on greenhouse gas emissions from covered entities and a program to track, verify, and enforce compliance through the use of compliance instruments," and imposed "[a]nnual allowance budgets that limit emissions from covered entities." Wash. Rev. Code § 70A.65.060(1)-(2) (2021). Under the CCA, a covered entity is one that "owns or operates a facility and the facility's emissions equal or exceed 25,000 metric tons of carbon dioxide equivalent." Wash. Rev. Code § 70A.65.080(1)(a). The CCA provides for allowances, which authorize the emission of "up to one metric ton of carbon dioxide equivalent." Wash. Rev. Code § 70A.65.010(1). These allowances must be purchased at auction.

The CCA also contains a provision allowing electric utilities subject to CETA "to be eligible for allowance allocation . . . in order to mitigate the cost burden of the [CETA] program on electricity customers." Wash. Rev. Code § 70A.65.120(1). Most of the covered entities obtain the required allowances by purchasing them at auctions conducted by Ecology. However, under the CCA, all electric utilities subject to the requirements of the 2019 CETA

[2] In 2024, the Commission determined that PacifiCorp had not shown "meaningful progress towards meeting CETA standards," and ordered an investigation into PacifiCorp's CETA update. *Washington Utilities & Transp. Comm'n v. PacifiCorp*, No. UE-210829, 2024 WL 1364108, at *5 (Wash. U.T.C. Mar. 25, 2024). The enforcement action against PacifiCorp and CETA's regulatory mandates undermine PacifiCorp's assertion that there are not two categories of emissions because CETA does not require utilities to be "greenhouse gas neutral" until 2030. CETA does not apply to exported power, thus justifying denial of cost allowances for sale of electricity to out-of-state customers irrespective of the timing set by the Washington legislature for its decarbonization goals.

are eligible for no-cost allowances. *See* Wash. Rev. Code § 70A.65.120(i); *see also* Wash. Admin. Code § 173-446-530.

PacifiCorp is among the electric utilities eligible to receive no-cost allowances. Utilities such as PacifiCorp, which are subject to CETA, receive no-cost allowances for carbon emissions produced by electricity sold to Washington customers, but these utilities do not receive no-cost allowances for emissions from electricity that is not subjected to CETA's requirements, *i.e.*, electricity exported outside the State of Washington, and therefore not subject to CETA. *See id.* As the district court explained, "[t]he energy PacifiCorp produces for use in-state is subject to a preexisting, comprehensive regulatory regime—the Clean Energy Transformation Act—that its exported energy is not."

"[A]ny notion of discrimination [in violation of the Dormant Commerce Clause] assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (footnote reference omitted). The district court correctly concluded that, due to the separate emission mandates imposed by CETA and the CCA, PacifiCorp was unable to plausibly allege that its carbon emissions resulting from in-state production of electricity and its carbon emissions emanating from its exported electricity were similarly situated for purposes of the Dormant Commerce Clause. As the district court explained,

> When the Washington legislature enacted the CCA, it was not writing on a blank slate. Because CETA already existed, the legislature faced a situation where a certain class of emitters otherwise subject to the CCA—electric utilities serving Washington residents—were already regulated by a

> separate and more aggressive decarbonization mandate. Rather than subject those utilities—including PacifiCorp—to overlapping sets of requirements, and potentially subject Washington's electric customers to unnecessary increased costs beyond what they already face under CETA, the legislature chose to issue no-cost CCA allowances to electric utilities to the extent that their emissions were already covered by CETA's decarbonization schedule.
>
> Although one would not learn it from reading PacifiCorp's complaint—which does not mention CETA at all, and instead frames the no-cost allowances as simply a giveaway to Washington customers—the connection between no-cost allowances for electric utilities and CETA's preexisting regulatory regime is in the plain text of the CCA and its regulations. The CCA's purpose of working in tandem with CETA's requirements, rather than just benefiting in-state customers, is reinforced by the statute phasing out the no-cost allowances by 2045, the same year that CETA's decarbonization mandate will be in full effect.

See Wash. Rev. Code § 70A.65.120(2)(d) ("Under no circumstances may utilities receive any free allowance after 2045.").

In sum, CETA requires electric utilities like PacifiCorp, that provide electricity to Washington customers to decarbonize their power generation, while emissions resulting from electricity produced for export to out-of-state customers are not covered by CETA. These categories of emissions regulated in Washington are not substantially similar under the Dormant Commerce Clause, particularly as "[g]ranting PacifiCorp its requested relief would mean that the emissions it generates in Chehalis, but uses to export electricity, would be exempt from both CETA's decarbonization mandate and the CCA's requirement of purchasing emissions allowances." Moreover, elimination of cost allowances for Washington customers and the allowances that PacifiCorp must purchase for its exported electricity "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." *General Motors*, 519 U.S. at 299. Indeed, PacifiCorp's exported power is not similarly situated to utilities providing in-state power under CETA "for the simple reason that . . . the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Id.* Thus, Washington's "categorical distinction between" its regulatory treatment of emissions from entities providing instate power under CETA and the lack of no-cost allowances in the CCA for emissions resulting from exported power produced by entities not providing in-state power under CETA is not "wholly illusory." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 586 (1997).

Although PacifiCorp purports that it would face higher costs for its exported power, particularly as other states impose their own set of carbon emissions requirements, we have "rejected arguments that state laws treating out-of-state and in-state entities similarly, but which prevent them from structuring or operating their business as they prefer, reflect improper discrimination in favor of in-state interests." *Flynt*, 131 F.4th at 927 (citations omitted). The Dormant Commerce Clause does not "protect the particular structure or methods of operation in a retail market." *Id.* at 928 (citation and alteration omitted). Moreover, "the dormant Commerce Clause does not impose a least burdensome requirement for state laws." *Association des Éleveurs de Canards et d'Oies du Québec v. Bonta*, 33 F.4th 1107, 1119 (9th Cir. 2022) (citation and internal quotation marks omitted).

Washington imposes different regulatory mandates for carbon emissions from electricity that is produced by PacifiCorp for use within the state, and carbon emissions from electricity produced for export. PacifiCorp's reliance on cases involving taxes imposed on out-of-state entities or the denial of tax exemptions for out-of-state entities is misplaced. In *Camps Newfound/Owatonna*, the Supreme Court considered "whether an otherwise generally applicable state property tax violate[d] the Commerce Clause . . . because its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of nonresidents." 520 U.S. at 567. The petitioner in that case "operate[d] a summer camp for the benefit of children of the Christian Science faith," and "[ab]out 95 percent of the campers [were] not residents of Maine." *Id.* Maine "provide[d] a general exemption from real estate and personal property taxes for benevolent and charitable institutions incorporated in the State." *Id.* at 568 (internal quotation marks omitted). "With respect to institutions that [were] in fact conducted or operated principally for the benefit of persons who [were] not residents of Maine, however, a charity [was able to] qualify for a more limited tax benefit, and then only if the weekly charge for services provided d[id] not exceed $30 per person." *Id.* (citation, footnote reference, and internal quotation marks omitted).

The Supreme Court framed the issue as "the disparate real estate tax treatment of a nonprofit service provider based on the residence of the consumers that it serves." *Id.* at 572. No issue was raised regarding whether the in-state and out-of-state entities were similarly situated under the Dormant Commerce Clause. *See id.* at 587. It is not surprising that there was no question of substantial similarity raised. The only difference between the entities being considered for differing taxation treatment was whether the entity serviced in-state campers or out-of-state campers. *See id.* at 575. In contrast, the entities here are not similarly situated because they are subject to entirely different statutory schemes. Thus, the Supreme Court's decision in *Campus Newfound/Owatonna* does not control the outcome of this case.[3]

Neither does the Supreme Court's decision in *Oregon Waste Sys.*, support PacifiCorp's contentions that emissions from in-state entities regulated by CETA and emissions from exported power that is not regulated by CETA are similarly situated under the Dormant Commerce

[3] In its letter filed under Federal Rule of Appellate Procedure 28(j), PacifiCorp raised a potential issue under the Tax Injunction Act (TIA), 28 U.S.C. §1341. "The TIA precludes suits in federal court where the requested relief would to some degree stop the assessment or collection of a state tax. . . ." *Online Merchants Guild v. Maduros*, 52 F.4th 1048, 1051-52 (9th Cir. 2022) (citation and internal quotation marks omitted). PacifiCorp has pursued contradictory positions as to whether the costs imposed under the CCA and CETA qualify as taxes. For the first time in its reply brief, PacifiCorp asserts that it could amend its complaint to allege that the CCA's no-cost allowances are taxes on electricity that discriminate against out-of-state customers in violation of 15 U.S.C. §391. However, in its 28(j) letter, PacifiCorp maintains that the TIA should not apply "because the purpose of [the] allowances is to modify behavior (reduce emissions), not to raise revenue." Based on PacifiCorp's concession that the CCA imposes regulatory fees and costs to promote decarbonization efforts, as opposed to a state tax for revenue collection, the TIA does not apply, and any amendment premised on violation of 15 U.S.C. § 391 would be futile.

Clause. In that case, the Supreme Court considered "whether Oregon's purportedly cost-based surcharge on the in-state disposal of solid waste generated in other States violate[d] the Commerce Clause." 511 U.S. at 95. The Supreme Court held that "[b]ecause [Oregon] offered no legitimate reason to subject waste generated in other States to a discriminatory surcharge approximately three times as high as that imposed on waste generated in Oregon, the surcharge [was] facially invalid under the negative Commerce Clause." *Id.* at 108.

Washington's decarbonization regime does not tax or impose a surcharge on electricity generated in other states and sold to Washington customers. Instead, Washington imposes different regulatory requirements for carbon emissions produced from electricity generated for in-state consumption and emissions produced from electricity generated for export. Thus, Washington's provision of no-cost allowances for carbon emissions produced by in-state entities covered under CETA, and its denial of no-cost allowances for entities that export power and are not subject to regulation under CETA do not involve "substantially similar entities." *General Motors*, 519 U.S. at 298.

We are persuaded by the Seventh Circuit's reasoning in *Electric Power Supply Association*, 904 F.3d 518. In that case, the Seventh Circuit considered a Dormant Commerce Clause challenge to legislation enacted in the State of Illinois to subsidize some of the state's nuclear generation facilities in the form of "zero emission credits." *Id.* at 521, 524. In affirming the district court's entry of summary judgment in favor of the State, the Seventh Circuit recounted the purpose of the Commerce Clause and its application to regulation of electricity by the several States. *See id.* at 524-25. In doing so the Seventh Circuit observed: "The commerce power belongs to Congress; the

Supreme Court treats silence by Congress as preventing discriminatory state legislation." *Id.* at 525. The Seventh Circuit then clarified that Congress has not remained silent when it comes to regulation of electricity by the States. Rather, Congress specifically provided in the Federal Power Act, 16 U.S.C. § 824(b)(1) that States "may regulate local generation" of electric power. *Id.* Based on that rationale, the Seventh Circuit concluded that zero emission credits were not discriminatory under the Commerce Clause. *See id.* Rather, they were a reflection of "the rule that a state must regulate within its borders." *Id.*

The same is true in this case. Legislators in the State of Washington promulgated a comprehensive statutory scheme to achieve its goal of reducing carbon emissions in the state. *See* Wash. Rev. Code §19.405.010. Washington's no-cost allowances are analogous to the zero emission credits considered by the Seventh Circuit in *Electric Power Supply Association*. Similarly to the rationale of the Seventh Circuit, limiting the no-cost allowances to providers that are subject to the requirements of the 2019 CETA requirements did not result in a violation of the Dormant Commerce Clause. *See id.*[4]

[4] Reduced to its essence, the dissent is predicated on the notion that PacifiCorp, which exports power, is similarly situated to Washington utilities which do not export power. However, as discussed at length, these entities are subject to different regulatory schemes linked to the State of Washington's commitment to the reduction of greenhouse-gas emissions within the state. Non-exporting utilities are subject to the provisions of the CCA, which requires entities emitting greenhouse-gas within the state to obtain allowances to offset those emissions. Utilities like PacifiCorp that export power are subject to a different regulatory provision because the CCA does not apply to greenhouse-gas emissions outside the State of Washington. We are not persuaded that discovery is required to establish this obvious dissimilarity.

Finally, PacifiCorp's contention that the district court erred in dismissing its complaint without leave to amend is unpersuasive. PacifiCorp maintains that, even though it did not seek leave to amend in the district court, it could amend its complaint to allege that "(1) CETA's portfolio requirements, of which the Washington-allocated portion of Chehalis is a part, do not go into effect until 2030, and (2) other states have laws similar to CETA that apply to electricity from Chehalis for PacifiCorp customers in those states." PacifiCorp "did not request leave to amend from the district court, so we need not consider that argument on appeal." *Osheske v. Silver Cinemas Acquisition Co.*, 132 F.4th 1110, 1114 (9th Cir. 2025). In any event, "[t]he district court's dismissal without leave to amend was proper because it is clear, on *de novo* review, that the complaint could not be saved by any amendment." *Id.* (citation and internal quotation marks omitted). Because PacifiCorp failed to plead a plausible and legally tenable Dormant Commerce Clause claim, any amendment would be futile irrespective of PacifiCorp's newly-minted allegations. *See id.*

C. The District Court's Denial of PacifiCorp's Motion For A Preliminary Injunction

PacifiCorp asserts that the district court abused its discretion in denying its motion for a preliminary injunction because it was likely to succeed on the merits of its Dormant Commerce Clause claim.

Because dismissal of PacifiCorp's Dormant Commerce Clause claim as a matter of law was warranted, the district court properly denied PacifiCorp's motion for a preliminary injunction as moot. *See Simon v. City & Cnty. of San Francisco*, 135 F.4th 784, 797 (9th Cir. 2025) (explaining that "[l]ikelihood of success on the merits is a threshold inquiry and is the most important factor" in determining whether a plaintiff is entitled to a preliminary injunction) (citation omitted); *see also Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 862 (9th Cir. 2017) (noting that a case is moot when a court is unable "to grant any effectual relief").

IV. CONCLUSION

We have acknowledged that "[o]ur federal system recognizes each State's freedom to serve as a laboratory; and try novel social and economic experiments." *American Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citation and internal quotation marks omitted). "This freedom would be meaningless if officials could not promote the economic benefits of these experiments to their states without running afoul of the Commerce Clause." *Id.* "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *Id.* (citation omitted). "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." *Id.* (citation omitted). Consistent with these precepts, we hold that the district court's dismissal of PacifiCorp's complaint with prejudice was warranted because PacifiCorp failed to plausibly allege that Washington's decarbonization regulations and its use of no-cost allowances were applied to similarly situated entities as required for violations of the Dormant Commerce Clause. Because PacifiCorp is unable to plausibly allege a cognizable claim under the Dormant Commerce Clause, the district court did not err in dismissing PacifiCorp's complaint without leave to amend, and PacifiCorp's motion for preliminary injunction was correctly denied as moot.

AFFIRMED.

BRESS, Circuit Judge, dissenting:

Washington's Climate Commitment Act (CCA) requires all operators of facilities in Washington State that emit more than a certain amount of greenhouse gas to purchase allowances for their emissions. Wash. Rev. Code §§ 70A.65.010(1), 70A.65.060(1)–(2), 70A.65.080(1)(a). To ease the burden of CCA compliance on electricity customers, retail electric utilities are eligible for "no-cost allowances," *i.e.*, free credits. *Id.* § 70A.65.120(1). But utilities can only receive no-cost allowances in proportion to the electricity they sell to Washington electricity customers. *Id.* § 70A.65.010(21); Wash. Admin. Code § 173-446-230(2)(f). In other words, if a utility in Washington sells 90% of its electricity to out-of-state customers, only 10% of its emissions will be eligible for no-cost allowances under the CCA. On its face, the CCA thus facially discriminates against interstate commerce by imposing greater costs on interstate electricity sales through the disallowance of associated no-cost allowances. This is a significant problem for plaintiff PacifiCorp, which must buy expensive CCA allowances—estimated at approximately $48 million in 2024—for all out-of-state electricity sales from its Chehalis, Washington plant.

Absent anything further, the CCA's facial discrimination against interstate sales of electricity would violate the core antidiscrimination principle of the dormant Commerce Clause. But Washington has a response: it says the CCA provides electric utilities with no-cost allowances to compensate for the costs that another Washington law, the Clean Energy Transformation Act (CETA), Wash. Rev. Code § 19.405.010 *et seq.*, imposes on producers selling electricity into Washington. Because CETA does not apply to electricity sold to out-of-state customers, Washington argues, the CCA's no-cost allowances for in-state electricity sales merely balance out CETA's burdens and place in-state and out-of-state electricity sales on equal footing.

That sounds sensible in theory, but under Supreme Court precedent, the key question is whether it is true in fact. And here, we do not have enough before us to say one way or the other. This case is only at the pleading stage, and we lack any record that would allow us to evaluate whether Washington is correct that the costs of the CCA and CETA merely offset each other, thereby justifying the CCA's facial discrimination against interstate commerce. And there are serious reasons to question Washington's argument, given the high immediate costs that the CCA imposes on PacifiCorp and the fact that CETA creates no immediate decarbonization obligations on gas-fired power plant operators until 2030. *See* Wash. Rev. Code § 19.405.040(1)(a). So the proper course here was to remand this case for factual development as to whether CETA's compliance costs and the CCA allowances are "roughly equivalent" in a way that would justify Washington's otherwise discriminatory treatment of interstate electricity sales. *See Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 103 (1994).

Like the district court, the majority opinion takes a very different path. It instead holds that the CCA's limitation of no-cost allowances to intrastate sales is entirely exempt from dormant Commerce Clause scrutiny because Washington's regulatory scheme renders electricity consumed in-state not "substantially similar" to electricity consumed out-of-state. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). That conclusion is mistaken as a matter of law. *Tracy* involved unique facts, and the case has rarely been applied since it was decided nearly thirty years ago. Nor did it apply here. Unlike *Tracy*, which involved different product markets and dissimilar sellers, the business entities subject to the CCA and CETA are the same—retail electric utilities, *i.e.*, utilities that sell electricity to residential customers. Those entities all compete within the same product market—the retail electricity market. And the underlying commodity sold within that market is the same—electricity.

By treating this case as outside dormant Commerce Clause scrutiny, the majority opinion improperly expands *Tracy*'s limited exception, which is only meant to permit differential treatment of entities that do not compete against each other (and in limited cases, those that do compete against each other but employ different business structures). *Tracy* has never been invoked—as the majority does here—to allow state regulation that increases the costs of intrastate commerce to justify facial discrimination against interstate commerce, without requiring any assessment of the degree to which interstate commerce is burdened. Because the majority's expansion of *Tracy* would swallow the dormant Commerce Clause altogether, I respectfully dissent.

I

In 2019, Washington enacted CETA to ensure that "all retail sales of electricity to Washington retail electric customers be greenhouse gas neutral by January 1, 2030." Wash. Rev. Code § 19.405.040(1). However, the statute does not require utilities to demonstrate compliance with this neutrality standard until after 2030. *Id.* § 19.405.040(1)(A). Instead, in the interim, utilities only need to submit implementation plans with "specific targets for energy efficiency, demand response, and renewable energy," among other things. *Id.* § 19.405.060(1); Wash. Admin. Code § 480-100-640(1). CETA further mandates that by 2045, only electricity from renewable and non-greenhouse gas-generating sources may be used to supply retail electricity sold in-state. Wash. Rev. Code §§ 19.405.020(27), (33);

19.405.050(1). Because CETA's decarbonization requirements are tied to in-state retail electricity consumption (as opposed to in-state production), the statute does not impose any decarbonization mandates on electricity produced in-state but consumed out-of-state.

In 2021, two years after enacting CETA, Washington passed the CCA. The CCA requires that by 2030, 2040, and 2050, respectively, in-state greenhouse gas emissions should fall below 55%, 30%, and 5%, relative to in-state greenhouse gas emission levels from 1990. *Id.* § 70A.45.020(1)(a). To accomplish this goal, the CCA establishes a "cap and invest program" (also known as a cap-and-trade program) that requires the Washington State Department of Ecology (Ecology) to "implement a cap on greenhouse gas emissions from covered entities." *Id.* § 70A.65.060(1). Covered entities include any owner or operator of a power plant that emits at least 25,000 metric tons of carbon dioxide equivalent. *Id.* § 70A.65.080(1)(a).

The CCA's emissions cap is accomplished through the sale of "allowances"—*i.e.*, "authorization[s] to emit up to one metric ton of carbon dioxide equivalent." *Id.* § 70A.65.010(1). Specifically, the CCA's cap-and-invest program establishes quarterly "auctions" through which Ecology "distribute[s] allowances" for covered entities to purchase. *Id.* § 70A.65.100(1). If a covered entity emits greenhouse gases beyond the allowances that it has obtained, it must purchase and submit four penalty allowances for every one allowance exceeded. *Id.* § 70A.65.200(2). If the entity fails to submit penalty allowances, Ecology can issue fines of "up to $10,000 per day per violation." *Id.* § 70A.65.200(3). Ecology is required to reduce the amount of allowances available for purchase every year, consistent with the CCA's emission reduction mandates. *Id.* § 70A.65.070(2).

Notably, however, the CCA also allows certain covered entities to obtain "no cost allowances" outside of the CCA's auction procedures. *See id.* §§ 70A.65.110–70A.65.130. Relevant here, the CCA awards no-cost allowances to retail electric utilities based on the amount of electricity sold subject to CETA. *Id.* § 70A.65.120(1). The stated purpose of these no-cost allowances is "to mitigate the cost burden of the [cap-and-invest] program on electricity customers." *Id.* Critically, however, the statute defines "cost burden" as "the impact on rates or charges to customers of electric utilities *in Washington state* . . . caused by the program." *Id.* § 70A.65.010(21), (59) (emphasis added). And Ecology's implementing regulations for the CCA establish a one-to-one ratio between the greenhouse gas emissions associated with retail electricity consumed in-state and the award of no-cost allowances to electric utilities. *See* Wash. Admin. Code § 173-446-230(2)(f). Therefore, the CCA only awards free allowances to electric utilities in direct proportion to how much electricity they provide to Washington residents. *Id.*; Wash. Rev. Code § 70A.65.010(21). As the district court explained, "[i]n practice, this means that the CCA provides electric utilities with no-cost allowances for the portion of their emissions that they forecast will be used to generate electricity sold to retail customers within Washington state."

The plaintiff in this case, PacifiCorp, is an Oregon corporation that provides retail electric utility service to approximately two million customers across six states in the West. Of PacifiCorp's two million customers, 140,000 are located in Washington. PacifiCorp is one of three investor-owned electric utilities that compete in Washington's retail electricity market. The other two utilities are Avista, which, like PacifiCorp, sells electricity to both in-state and out-of-state customers, and Puget Sound Energy, which only does business in Washington. PacifiCorp owns and operates a gas-fired power plant in Chehalis, Washington, known as the Chehalis Generation Facility, or "Chehalis." Chehalis is a covered entity under the CCA.

About 23% of the electricity generated at Chehalis goes to Washington retail customers. Therefore, under the CCA, PacifiCorp receives no-cost allowances for 23% of the greenhouse gas emissions that it generates at Chehalis. *See* Wash. Rev. Code § 70A.65.120(2). But for the remaining 77% of greenhouse gas emissions that Chehalis produces, PacifiCorp does not receive free allowances. As a result, PacifiCorp estimates that it has incurred CCA compliance costs of $47.9 million in 2024 alone. Due to the costs imposed by the CCA, PacifiCorp represents that the Chehalis facility will no longer serve the interstate market starting in 2026.

II

I begin with how I would resolve this appeal. I then turn to why the majority opinion errs in concluding that the CCA's facial discrimination against interstate commerce is not even subject to dormant Commerce Clause review.

A

The Supreme Court has instructed that "'extreme caution is warranted before a court deploys' its 'implied authority' to reject a state law under the dormant Commerce Clause." *Flynt v. Bonta*, 131 F.4th 918, 926 (9th Cir. 2025) (quoting *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023)). That is particularly true for facially nondiscriminatory laws that merely have some effect on interstate commerce, or dormant Commerce Clause challenges that otherwise seek to expand this court-created doctrine. *See, e.g.*, *Pork Producers*, 598 U.S. at 369; *Peridot Tree WA, Inc. v. Wash. State Liquor*

& Cannabis Control Bd., 162 F.4th 1179, 1185, 1888–89 (9th Cir. 2026). But here, we are dealing with a state law that directly discriminates against interstate commerce. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 515 (2019). This case therefore implicates the central antidiscrimination protections of the dormant Commerce Clause, which are "deeply rooted" in Supreme Court case law. *Id.* As a lower court, we are obligated to enforce these precedents.

The dormant Commerce Clause's foundational antidiscrimination principle protects against measures that benefit in-state economic interests over out-of-state competitors (which is not the specific concern here). *See Pork Producers*, 598 U.S. at 369. But this overarching principle also extends to discrimination against interstate commerce *itself*. For as the Supreme Court has long emphasized, "[s]tate laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 (1997) (quoting *Fulton Corp v. Faulkner*, 516 U.S. 325, 331 (1996)). Indeed, discrimination against the enterprise of interstate commerce lies "at the very core of activities forbidden by the dormant Commerce Clause." *Id.*; *see also Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542, 549 (2015) (explaining that "a State 'may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984))); *Camps Newfound*, 520 U.S. at 581 (citing *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)).

Here, Washington law plainly "discriminate[s] against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The CCA only awards no-cost allowances to retail electric utilities in direct proportion to how much electricity they sell to Washington residents. *See* Wash. Rev. Code § 70A.65.120(2); Wash. Admin. Code § 173-446-230(2)(f). The greater the proportion of out-of-state residents served by utilities like PacifiCorp, the higher the burdens of CCA compliance become. This is facial discrimination against interstate commerce. *See Camps Newfound*, 520 U.S. at 577–78 ("Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986))).

For instance, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Supreme Court held that a state could not "impos[e] a higher tax on a [business] that serves principally nonresidents than on one that limits its services primarily to residents." 520 U.S. at 575. The statute in question "expressly distinguishe[d] between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out [entities] that serve mostly in-staters for beneficial tax treatment, and penalizing those [entities] that do a principally interstate business." *Id.* at 576. As a result, "the statute encourage[d] affected entities to limit their out-of-state clientele, and penalize[d] the principally nonresident customers of businesses catering to a primarily interstate market." *Id.* Such a law violated the dormant Commerce Clause's core antidiscrimination principle. *Id.* at 575–81.

Similarly, in *Fulton Corp v. Faulkner*, the Supreme Court rejected as facially discriminatory a statute that "taxed stock held by in-state shareholders only to the degree that its issuing corporation participates in interstate commerce," as the statute imposed taxes in direct proportion to how much of the corporations' business took place out of state. *Camps Newfound*, 520 U.S. at 578 (quoting *Fulton Corp.*, 516 U.S. at 333) (brackets omitted). As the Court explained, the law "tend[ed], at least, to discourage domestic corporations from plying their trades in interstate commerce," and was therefore presumptively invalid. *Fulton Corp.*, 516 U.S. at 333.

In this case, the CCA "expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market." *Camps Newfound*, 520 U.S. at 576. The statute also rewards with no-cost allowances those electric utilities "that serve mostly in-staters," while "penalizing" those utilities "that do a principally interstate business" by foisting the costs of the CCA upon them. *Id.* By imposing costs in direct proportion to an in-state utility's out-of-state business, the CCA "discourage[s] [retail electric utilities] from plying their trades in interstate commerce." *Fulton Corp.*, 516 U.S. at 333. This type of discrimination against interstate commerce presumptively violates the dormant Commerce Clause.[1]

B

Because the CCA's award of no-cost allowances facially discriminates against retail electric utilities that serve out-of-state customers, it faces "a virtually *per se* rule of invalidity." *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617,

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[1] The majority cites *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018), for the proposition that states "may regulate local generation" of electric power. Maj. Op. at 22–23 (quoting *id.* at 525). But the Seventh Circuit emphasized that its decision did not extend to "express discrimination" against interstate commerce. *Star*, 904 F.3d at 525. *Star* therefore does not change the result: Washington's laws facially discriminate against utilities to the extent that their customers "come principally from other States." *Camps Newfound*, 520 U.S. at 572.

624 (1978)). In limited circumstances, however, laws that discriminate against interstate commerce can be justified "as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means." *Oregon Waste*, 511 U.S. at 102.

Washington, throughout its briefing, attempts to justify its discrimination against interstate commerce by asserting that the purpose of the CCA is to "cover[ ] emissions associated with power that CETA does not reach, including power produced in Washington but exported out-of-state." Answering Br. at 1. In other words, in Washington's view, the CCA's burdens serve as a compensatory offset for the costs of CETA. As Washington tells us, "[t]he CCA's no-cost allowances harmonize the statute with CETA in an evenhanded manner that does not favor in-state interests at the expense of out-of-state interests."[2] Answering Br. at 14.

The idea that a burden on interstate commerce is justified because it offsets intrastate costs is not a new one. And when a state defends a discriminatory law on those

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[2] This basic argument is repeated throughout Washington's answering brief. *See, e.g.*, Answering Br. at 26 (the purpose of the no-cost allowances is "to harmonize the burdens imposed under the CCA and CETA and to avoid a double-burden on in-state power that is already required to decarbonize"); Answering Br. at 27 (noting that "no-cost allowances harmonize two otherwise overlapping regulatory regimes"); Answering Br. at 29 (the "CCA recognizes that Washington retail power customers have a reduced relative ability to accommodate increased costs from decarbonization compared to out-of-state customers receiving power exempt from CETA's requirements" (quotation marks omitted)); Answering Br. at 34 ("But the CCA does not grant no-cost allowances to benefit in-state interests. It grants them to avoid doubly burdening in-state retail power."); Answering Br. at 44 ("CETA is the express reason for the CCA's no-cost allowance system, and the two acts work together to achieve emissions reductions throughout Washington's power sector.").

grounds, Supreme Court precedent directs us to the dormant Commerce Clause's "compensatory tax doctrine." *See Or. Waste Sys.*, 511 U.S. at 102–03; *see also Fulton*, 516 U.S. at 331–32; *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647–48 (1994); *Maryland v. Louisiana*, 451 U.S. 725, 728 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69–70 (1963). Under this line of authority, which PacifiCorp invokes, a facially discriminatory tax on interstate commerce can be justified if it is "the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce." *Or. Waste Sys.*, 511 U.S. at 102–03 (quoting *Maryland*, 451 U.S. at 758–59). For a discriminatory state law to be upheld under this doctrine, "the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce." *Id.* at 103. In addition, "the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Id.* (quotation marks and brackets omitted).

Washington's argument that the CCA's denial of no-cost allowances for out-of-state electricity sales merely balances out the burdens that CETA imposes on in-state consumers is conceivable. But the issue is not the potential plausibility of the theory, but its validity in fact. Given the current Rule 12(b)(6) posture, whether Washington can make the required showing under the compensatory tax doctrine is entirely unclear on the present record.

As an initial matter, for the compensatory tax doctrine to apply, "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent.'" *Or. Waste Sys.*, 511 U.S. at 103 (quoting *Armco*, 467 U.S. at 643). Here, CETA imposes costs over time on in-state electricity through greenhouse gas-emission compliance requirements, whereas the CCA imposes one-time costs on exported electricity through the failure to award no-cost allowances. There is therefore a threshold question as to whether these are "substantially similar events" that are "mutually exclusive proxies for each other"—especially considering the Supreme Court's warning that courts should not "'plunge into the morass of weighing comparative tax burdens' by comparing taxes on dissimilar events." *Id.* at 104–05 (quoting *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 289 (1987) (alterations omitted)); *see also Fulton Corp.*, 516 U.S. at 338 (noting that besides the sales and use tax context, "our more recent cases have shown extreme reluctance to recognize new compensatory categories"). Further factual development on this issue would be required in order to assess fully Washington's defense of the CCA.

But even if we assume that the two events are sufficiently similar, it would be premature to decide this question on a motion to dismiss, as we do not know if Washington's claimed CCA offset "approximate[s]" the costs of CETA compliance. *Or. Waste Sys.*, 511 U.S. at 103. The discriminatory tax system that the Supreme Court struck down in *Oregon Waste Systems* imposed a $2.25 per ton surcharge on out-of-state waste and a $0.85 per ton surcharge on in-state waste. *Id.* at 99. There is nothing in the record before us that quantifies and compares the respective costs that have already been imposed by CETA and the CCA and that will be imposed in the future. It is therefore unknown at this time whether the costs associated with CETA compliance and the denial of no-cost allowances under the CCA are roughly equivalent.

This is a complicated question that requires fact and expert discovery. For instance, utilities can satisfy CETA's "greenhouse gas neutrality" requirement through many means, such as switching to non-emitting generation, obtaining and using renewable energy credits, investing in energy transformation projects, or making compliance payments. *See* Wash. Rev. Code § 19.405.040. Each of these methods are likely associated with different costs, which are incurred over several decades and may vary each year as the deadline for compliance approaches. For instance, before 2030, utilities do not need to demonstrate compliance with CETA's greenhouse gas neutrality requirement—they only need to submit implementation plans outlining how they plan to achieve compliance post-2030. *Id.* § 19.405.060(1). And as PacifiCorp points out, the costs of complying with and implementing CETA post-2030 are capped at a 2% increase over the utility's revenue in the previous year. *Id.* § 19.405.060(3)(a).

Here, at this preliminary stage, Washington has presented nothing that would allow us to evaluate the comparative costs of complying with CETA and the CCA, other than the state's repeated representations that the CCA was meant to compensate for the costs of complying with CETA. But Supreme Court precedent does not permit us to decide the compensatory offset question on Washington's mere say-so. The majority opinion claims, without analysis, that because "CETA does not apply to exported power," this "justif[ies] denial of cost allowances for sale of electricity to out-of-state customers." Maj. Op. at 15 n.2. But there is no basis for this assertion. No factual inquiry has been made on this critical issue (and as explained next, the majority opinion's rule of decision avoids that inquiry by design).

Accordingly, Washington's motion to dismiss should have been denied.

III

A

Like the district court, the majority opinion chooses a very different path. It ignores the Supreme Court's well-trodden facial discrimination precedents to deploy a novel theory that allows Washington to avoid dormant Commerce Clause scrutiny entirely. In the majority's view, "PacifiCorp's exported power is not similarly situated to utilities providing in-state power under CETA 'for the simple reason that . . . the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.'" Maj. Op. at 18–19 (quoting *Tracy*, 519 U.S. at 299). From this premise, the majority opinion effectively blesses *any* differential treatment against interstate commerce by the CCA, regardless of the magnitude.

This flawed theory rests on an improper expansion of *Tracy*'s similarly-situated-entities test. The point of *Tracy*'s rarely invoked exception is to prevent application of the dormant Commerce Clause to market participants that do not compete with each other in the same product market—because in that situation, there is no national market for competition for the dormant Commerce Clause to protect. Contrary to the majority's view, *Tracy* has never exempted from dormant Commerce Clause scrutiny laws that facially discriminate against interstate commerce as to the same product sold in the same product market, in transactions between similarly situated buyers and sellers, based solely on the supposedly greater costs that state regulation imposes on in-state sales. Indeed, by treating in-state and out-of-state electricity sales as differently situated based on their export destination, the majority's novel extension of *Tracy* is contrary to the logic of the dormant Commerce Clause itself.

Examining *Tracy* in detail demonstrates the majority's error. In *Tracy*, the Supreme Court considered an Ohio law that exempted from the state's general sales and use taxes purchases of gas from in-state natural gas utilities—known as local distribution companies, or LDCs. *See Tracy*, 519 U.S. at 281–82. The LDCs were all located in Ohio. *Id.* at 288. But the state did not exempt "non-LDC gas sellers, such as producers and independent marketers," from the tax. *Id.* at 282–83. General Motors, which purchased "virtually all the natural gas for its Ohio plants from out-of-state marketers," was therefore required to pay Ohio's general use tax for non-LDC gas purchases. *Id.* at 285. General Motors sued, alleging that the dormant Commerce Clause invalidated the LDC tax exemption.

The Supreme Court rejected General Motors' argument and held that the dormant Commerce Clause did not apply. The Court reasoned that "any notion of discrimination assumes a comparison of substantially similar entities," and LDCs and non-LDC sellers were "different entities" that "provide different products" and "serve different markets." *Id.* at 298–99. In particular, following a detailed background discussion of the history of natural gas consumption and regulation, the Supreme Court found that there were two distinct classes of natural gas consumers in Ohio, served by two distinct sets of natural gas providers. The first class of consumers was "typified by residential consumers," who were "small, captive users" of natural gas who did not have "high volume requirements." *Id.* at 301–02. These consumers had a need for "bundled" natural gas services, which included transportation of the gas to their homes and other protections, such as the steady supply of gas at a stable rate during winter. *Id.* at 283, 297, 306; *see also id.* at 301 ("These are buyers who live on sufficiently tight budgets to make the stability of rate important, and who cannot readily bear the risk of losing a fuel supply in harsh natural or economic weather."). The second class of consumers was comprised of "bulk buyers" like General Motors, "large commercial and industrial users" who had high-volume needs and financial wherewithal to buy natural gas wholesale from private marketers on a less regulated interstate market. *Id.* at 302–03.

The Supreme Court explained how Ohio's regulatory decisions were built on—and further deepened—this existing divide in the market. As the Court noted, LDCs, as public utilities, were subject to extensive state regulation to ensure that the needs of the residential consumer market were satisfied. *See id.* at 296–97; *see also id.* at 310 (describing the state regulation as "Ohio's regulatory response to the needs of the local natural gas market"). For instance, LDCs could only charge "just and reasonable rates," comprised of "a single average cost of gas . . . together with a limited return on investment." *Id.* at 296. They "could not exact a greater or lesser compensation for any services rendered than exacted from any other customer" for similar services. *Id.* at 297 (citation and alterations omitted). And they were required "to serve all members of the public, without discrimination," "to provide a firm backup supply of gas," and to "administer specific protective schemes" to help low-income customers. *Id.* In contrast, natural gas from non-LDC sellers came with none of those services and protections. *See id.* at 284–85. In short, LDCs and non-LDC sellers served different types of customers with different needs by providing different services with different regulatory protections for end-users of natural gas.

In light of these differences, *Tracy* concluded that the market for natural gas in Ohio was actually comprised of two separate markets for two "different products": "a product consisting of gas bundled with . . . services and protections," provided by LDCs, and an "unbundled gas" product without such protections, provided by non-LDC independent marketers. *Id.* at 297–99. This "difference in products," in turn, "mean[t] that the different entities"—LDCs and non-LDC marketers—were not "similarly situated" because they "serve[d] different markets, and would continue to do so even if the supposedly discriminatory [tax] burden were removed." *Id.* at 299. Therefore, given the "absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market," the dormant Commerce Clause—which "serve[s] the . . . fundamental objective of preserving a national market for competition"—"ha[d] no job to do." *Id.* at 299–300, 303.

As *Tracy* underscores, the similarly-situated entities test only comes into play "when the allegedly competing entities provide different products," and asks whether "the difference in products may mean that the different entities serve different markets." *Tracy*, 519 U.S. at 298–99. Even though the LDCs and non-LDC sellers provided the same commodity (natural gas), based on the underlying consumer needs and supportive regulatory outgrowth, there were two distinct product markets in Ohio for bundled and unbundled natural gas distribution services.

It is telling that although the dormant Commerce Clause is a heavily litigated area, very few cases have applied *Tracy*'s exception (and none in the way the majority does here). In fact, in the nearly thirty years since *Tracy* was decided, the Supreme Court has mostly cited the case for other basic propositions of dormant Commerce Clause doctrine or oil and gas law. The most significant application of *Tracy* may be found in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S.

330 (2007), a decision that only highlights the limits of *Tracy*'s exception.

In *United Haulers*, the Supreme Court examined a challenge to two New York counties' "flow control" ordinances, which required that "all solid waste generated within the Counties be delivered to . . . processing sites" run by the counties' public waste disposal authority. *Id.* at 336. The Court applied *Tracy*, holding that there was no impermissible discrimination against interstate commerce because "[t]he flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same." *Id.* at 342. As the Supreme Court explained, "[u]nlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens," and "[t]hese important responsibilities set state and local government apart from a typical private business." *Id.* at 342–43. *United Haulers* is simply a straightforward application of *Tracy*, because it is obvious that states and municipalities are not "substantially similar entities" to "private businesses." *Id.* at 342 (quoting *Tracy*, 519 U.S. at 298); *see also Nat'l Ass'n of Optometrists & Opticians v. Brown* (*LensCrafters*), 567 F.3d 521, 527 (9th Cir. 2009) (explaining that under *Tracy*, "competing in the same market is not sufficient to conclude that entities are similarly situated" because "states may legitimately distinguish between business structures in a retail market").

Tracy and its (limited) progeny therefore establish the following principle: when determining whether two comparator entities are "substantially similar" in dormant Commerce Clause cases, we must ask whether there is "actual or prospective competition between the supposedly favored and disfavored entities in a single market"—meaning a single product market. *Tracy*, 519 U.S. at 300; *see also id.* at 299 ("[T]he difference in products may mean that the different entities serve different markets."). If so, the entities are presumed to be similarly situated, although we must also consider the entity's "structure" or "method[ ] of operation" because it is permissible for a state to discriminate between market participants on those grounds, *LensCrafters*, 567 F.3d at 527, including, most obviously, when the state or local government itself has taken over the market, *see United Haulers*, 550 U.S. at 342–45.

B

Armed with the proper inquiry under *Tracy*, it becomes apparent why the majority's "substantial similarity" reasoning cannot stand.

It is undisputed that PacifiCorp competes with Avista, Puget Sound Energy, and out-of-state utilities in the same product market: retail electricity. All of the in-state utilities are investor-owned utilities—none are publicly-owned, *see United Haulers*, 550 U.S. at 342–44, or otherwise differently structured, *see Exxon*, 437 U.S. at 127; *LensCrafters*, 567 F.3d at 527. And unlike in *Tracy*, where different regulatory regimes meant that LDC and non-LDC sellers served different product markets, all in-state utilities serving retail electricity consumers are subject to the same regulatory frameworks.

The majority nevertheless maintains that "the regulatory distinctions between the treatment of entities that produce in-state electricity and exported electricity under the CCA and CETA . . . undermine PacifiCorp's contention that carbon emissions from its production of electricity for in-state and out-of-state customers are similarly situated." Maj. Op. at 14. That is not correct. Under CETA, if a utility serves instate consumers, "all retail sales of electricity to Washington retail electric customers [must] be greenhouse gas neutral by January 1, 2030."

Wash. Rev. Code § 19.405.040(1). And similarly, Washington represents that "the CCA treats instate and out-of-of state utilities identically for both the compliance obligation arising from their emissions at power plants in Washington and associated with imported power, as well as their eligibility for no-cost allowances." *See id.* §§ 70A.65.010(19), (21), (23), (27), (38), (42), 70A.65.060–70A.65.080; Wash. Admin. Code § 173-446- 230. In other words, all retail electric utilities located in Washington and serving Washington retail consumers are subject to both CETA and the CCA. The only difference is the allocation of no-cost CCA allowances based on the proportion of out-of-state customers served by each utility. Wash. Admin. Code § 173-446-230; Wash. Rev. Code § 70A.65.010(21). That is a difference in the application of the same regulatory framework depending on the amount of interstate commerce in which a retail utility engages. It is not a difference in the regulatory regime itself.

CETA did not eliminate actual, let alone prospective, competition between PacifiCorp and its competitors in either the Washington or out-of-state retail electricity markets. *See Tracy*, 519 U.S. at 300. Contra *Tracy*, there are not two distinct markets for electricity. Even after CETA went into effect, electricity from Chehalis competed in the Washington retail electricity market and out-of-state retail electricity markets with electricity from Puget Sound Energy, Avista, and importers. Unlike the LDC regulations in *Tracy*, which reinforced the separate retail and wholesale markets for natural gas, CETA did not fragment the retail electricity market (either in Washington or out of state) into two distinct product markets. *See Tracy*, 519 U.S. at 301. Therefore, even with CETA, PacifiCorp and its competitors are similarly situated because "their products compete against each other in a single market"—the retail electricity product market. *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1088

(9th Cir. 2013) (citing *Tracy*, 519 U.S. at 299). Washington is not engaging in the differential treatment of differently situated entities, but rather the differential treatment of a *product*—retail electricity—based on whether it enters interstate commerce. That takes this case far outside the scope of *Tracy*.

The majority's analysis muddles the *Tracy* test by treating the relevant comparator entities in an impossibly fluid way, shifting from "carbon emissions" to "exported power" to "utilities providing in-state power." Maj. Op. at 17–19. The majority opinion apparently compares "exported power" to "utilities providing in-state power," Maj. Op. at 18–19—a comparison that does not track *Tracy*'s focus on "substantially similar *entities*." 519 U.S. at 298 (emphasis added). What I take the majority to mean is that power exported out of state is differently situated from power dispatched to and consumed in Washington because Washington-bound power is regulated by CETA, while exported power is not. By this logic, the two "serve different markets, and would continue to do so even if the supposedly discriminatory burden"—the no-cost allowances—"were removed," Maj. Op. at 18–19 (quoting *Tracy*, 519 U.S. at 299), because Washington customers can only be served by CETA-compliant power.

But this analysis improperly collapses two different market concepts into one. Although PacifiCorp and its competitors serve different *geographic* markets (*i.e.*, the in-state and out-of-state markets), they compete in the same *product* market for retail electricity. In effect, then, the majority refashions the *Tracy* test to apply to the same product sold across multiple geographic markets, based on regulations (here, CETA) that increase the cost of in-state sales. Maj. Op. at 18–19.

But *Tracy* never concluded that products in the same product market could be differently situated based on either the geographic markets in which they are sold and consumed, the costs of in-state production, or whether the products are differently regulated in different states. *Cf. Tracy*, 519 U.S. at 300. And for good reason: such an expansion of *Tracy* would contradict the fundamental logic of the dormant Commerce Clause itself. The premise of the dormant Commerce Clause is that there should be "a national market free from local legislation that discriminates in favor of local interests." *C & A Carbone*, 511 U.S. at 393. Even though different states may constitute different geographic markets in the economic sense, the dormant Commerce Clause forbids discrimination because of those differences. It would be illogical for *Tracy*'s similarly-situated entities exception to immunize laws that regulate the same product differently based on where it is sold or purchased, when the point of the dormant Commerce Clause is to prevent discrimination based on those distinctions. *See id.* at 390 (underscoring that a state cannot "impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State").

Extending *Tracy* to products sold in different geographic markets—instead of using it to determine whether two entities compete in the same product market—creates untenable results. All a state must do to escape dormant Commerce Clause scrutiny is apply some sort of regulatory framework to in-state sales of a product, which would in turn make it substantially different from out-of-state sales, which could then be burdened without limitation under the logic of the majority opinion. That contradicts Supreme Court precedent, which has repeatedly found dormant Commerce Clause violations even in industries characterized by "a patchwork of regional and state systems that lack comprehensive federal regulations or national uniformity." *See, e.g.*, *C & A Carbone*, 511 U.S. at 394 (solid waste disposal); *New England*

Power Co. v. New Hampshire, 455 U.S. 331, 334 (1982) (hydroelectricity); *Maryland*, 451 U.S. at 728 (natural gas).

Indeed, under the majority's theory of the case, nothing would stop other states with decarbonization mandates from imposing their own discriminatory taxes on exported electricity without any dormant Commerce Clause review. As the Supreme Court has emphasized, "[a]voiding this sort of 'economic Balkanization,' and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence." *Camps Newfound*, 520 U.S. at 577 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)). *Tracy* has been on the books for nearly three decades, but it has never been understood in the far-reaching way the majority opinion deploys it today.

C

But even if we follow the majority opinion's flawed understanding of *Tracy* and conclude that the similarly-situated entities test can be directly applied to products based on whether they are sold in-state or out-of-state, CETA still does not render retail electricity consumed in-state substantially different from electricity consumed out-of-state. Here, the exact same electricity is dispatched to either Washington consumers or out-of-state consumers based on demand and the marginal cost of generation. *See Kootenai Elec. Co-op., Inc. v. FERC*, 192 F.3d 144, 148 (D.C. Cir. 1999) (noting that "[p]ower is fungible"). And unlike in *Tracy*, the utilities' customers, as retail electricity users, all have the same purchasing needs. *Cf. Tracy*, 519 U.S. at 301 (non-LDCs "did not serve the Ohio LDCs' core market of small, captive users"). There is a facial similarity to *Tracy* in that both cases involve an underlying commodity. But the Supreme Court's extensive discussion of the natural gas market in

Tracy shows that the similarities stop there, because *Tracy* involved two distinct product markets in a way this case does not.

While the majority opinion maintains that CETA is a "comprehensive statutory scheme" meant to enforce a "separate and more aggressive decarbonization mandate," Maj. Op. at 17, 23, that is immaterial here. The practical effect of CETA's mandate is to increase the marginal cost of generating electricity for Washington consumers by imposing additional compliance costs on utilities. In other words, the only difference between electricity dispatched instate and out-of-state is, functionally, the cost of generating it. As PacifiCorp points out, it is "not possible to track electrons for purposes of determining what customers are ultimately served by Chehalis-produced power."

No precedent suggests that cost-input differences driven by state regulation can turn one product into two differently-situated products for dormant Commerce Clause purposes. Nor does it matter here that the allegedly more costly CETA-compliant energy will be produced through cleaner "green energy" processes. As we have explained, under *Tracy*, "[e]ntities are similarly situated for constitutional purposes if their products compete against each other in a single market," and "[i]f they do, it is irrelevant whether they are made from different materials." *Rocky Mt. Farmers Union*, 730 F.3d at 1088. *Tracy* has never been thought to immunize from dormant Commerce Clause scrutiny laws that facially discriminate against interstate commerce based on the supposedly higher in-state costs of production or distribution of the same product sold in the same product market.

The majority's contention that exported electricity from Chehalis "would continue to [serve separate markets,] even if the supposedly discriminatory burden were removed," is therefore untrue. Maj. Op. at 18–19 (quoting *Tracy*, 519 U.S. at 299). Again, part of the reason that Chehalis-generated electricity can serve different markets is due to the marginal cost of distribution to each state, and CETA and the CCA simply increase those costs for electricity sent in-state and out-of-state, respectively. The "discriminatory burden" imposed by the CCA can and will impact the provision of electricity services to out-of-state markets. Indeed, we are told that the increased compliance costs imposed by the CCA are already poised to drive Chehalis out of the interstate market.

The majority also asserts that "granting PacifiCorp its requested relief would mean that the emissions it generates in Chehalis, but uses to export electricity, would be exempt from both CETA's decarbonization mandate and the CCA's requirement of purchasing emissions allowances." Maj. Op. at 18 (brackets omitted). That is not correct. PacifiCorp is not entitled to any exemption per se; it is entitled to nondiscriminatory treatment.

Of course, Washington strenuously argues that PacifiCorp *is* receiving that very treatment because the CCA's no-cost allowances merely balance out the costs of CETA for in-state electricity sales. But as I have explained, that is the critical unresolved question in this case—one the majority avoids by treating this case as falling within *Tracy*'s limited exception. In blessing Washington's scheme without further inquiry, the majority misapplies *Tracy* to create a never-before-seen exception to the dormant Commerce Clause that not only insulates Washington's facially discriminatory law from any constitutional scrutiny, but also circumvents the carefully tailored compensatory tax doctrine that is meant for this type of situation. Because the majority opinion departs from the Supreme Court's dormant Commerce Clause precedent, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PACIFICORP, an Oregon business corporation, Plaintiff, v. LAURA WATSON, in her official capacity as Director of the Washington State Department of Ecology, Defendant.	Case No. 3:23-cv-06155-TMC ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff PacifiCorp owns and operates a gas-fired electric power plant in Chehalis, Washington. The emissions generated by the Chehalis plant make PacifiCorp a "covered entity" under Washington's Climate Commitment Act (the "CCA"), which requires covered entities to buy allowances at auction for each metric ton of carbon dioxide emissions they generate. The CCA caps overall carbon emissions in the state, and the number of allowances available for purchase decreases over time, using market pressure to encourage investment in reducing emissions.

PacifiCorp is an electric utility that serves customers in six states, including Washington. The electricity that PacifiCorp sells to Washington customers is governed by an earlier Washington statute, the Clean Energy Transformation Act ("CETA"). Unlike the CCA's market-based approach to reducing emissions, CETA imposes a mandate: it requires all power sold to Washington consumers to be decarbonized by 2045. Because electric utilities in Washington are already subject to CETA's decarbonization mandate, the CCA provides them with "no-cost" allowances rather than requiring them to buy allowances at auction. The no-cost allowances phase out by 2045 once CETA's requirements are in full effect.

PacifiCorp receives these no-cost allowances for emissions generated by its Chehalis plant that serve its Washington utility customers. It must buy allowances, however, for emissions generated in Chehalis used to serve customers in other states—emissions that are not covered by CETA's decarbonization schedule. PacifiCorp contends that this difference in treatment of in-state and exported electricity violates the dormant Commerce Clause of the United States Constitution. It seeks a preliminary injunction ordering Defendant Laura Watson, who administers the CCA as the Director of the Washington Department of Ecology ("Ecology"), to either issue no-cost allowances to PacifiCorp for electricity generated for export or exempt PacifiCorp from purchasing allowances at all.

But the starting point for a successful dormant Commerce Clause challenge is "a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). The electricity PacifiCorp generates to send out of state is not substantially similar to the electricity it sells in Washington because the exported energy is not covered by CETA. Accepting PacifiCorp's argument would elevate the energy it produces in Washington but then sends out of state above Washington's entire regulatory framework for reducing carbon emissions: it would be exempt from both the decarbonization mandate of CETA *and* the purchase of allowances under the CCA. The dormant Commerce Clause does not require this result, and PacifiCorp's arguments fail as a matter of law.

For this reason, and as explained further below, the Court GRANTS Defendant Watson's motion to dismiss (Dkt. 23) and DISMISSES the case. PacifiCorp's motion for a preliminary injunction (Dkt. 17) is DENIED as moot.

II. BACKGROUND

A. Washington's 2019 Clean Energy Transformation Act

In 2019, the Washington Legislature enacted CETA to "address the impacts of climate change by leading the transition to a clean energy economy." RCW 19.405.010. CETA mandates that all retail electricity sold to Washington customers be greenhouse gas neutral by 2030. RCW 19.405.040(1). By 2045, utilities must sell electricity generated entirely by non-emitting and renewable sources. RCW 19.405.050(1). Utilities are expected to meet this timeline by investing in greater efficiency, renewable energy infrastructure, and other energy transformation projects. *See* RCW 19.405.040(1)(a), (b). Because CETA applies only to electricity sold to Washington customers, it does not cover electricity generated within Washington but sold out of state.

Even before the decarbonization deadlines occur, the burden of CETA compliance is not insignificant. For example, beginning in October 2021 and every four years thereafter, each electric utility must file with the Washington Utilities and Transportation Commission a "clean energy implementation plan" that "describes the utility's plan for making progress toward meeting the clean energy transformation standards." WAC 480-100-640(1). The plan must be updated biennially and include detailed information about how the utility will set targets and make progress toward meeting CETA's requirements. *See* WAC 480-100-640(2)–(7). PacifiCorp itself has been involved in several proceedings before the Utilities and

Transportation Commission related to its CETA compliance efforts and the sufficiency of its clean energy implementation plan. *See, e.g.*, *In the Matter of the Petition of PacifiCorp d/b/a Pac. Power & Light Co., Petitioner, Seeking Exemption from the Provisions of WAC 480-100-605, No. 1*, 2021 WL 5961519, at *3 (Wash. U.T.C. Dec. 13, 2021); *In the Matter of PacifiCorp, d/b/a Pac. Power & Light Company's Clean Energy Implementation Plan*, No. UE-210829, 2023 WL 7181840 (Wash. U.T.C. Sept. 22, 2023). While this case has been pending, the Commission entered an order finding that PacifiCorp's biennial update to its clean energy implementation plan "does not at this time show meaningful progress towards meeting CETA standards" and setting the matter for adjudication. *Washington Utilities & Transp. Comm'n, Complainant, v. PacifiCorp d/b/a Pac. Power & Light Co., Respondent*, 09, 2024 WL 1364108, at *5 (Wash. U.T.C. Mar. 25, 2024). The Court takes judicial notice of these administrative proceedings not for the substance of the decisions or their underlying facts, but merely as examples of how CETA compliance is enforced. Fed. R. Evid. 201; *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) ("Courts may take judicial notice of some public records, including the records and reports of administrative bodies." (internal quotation marks and citation omitted)).

B. Washington's 2021 Climate Commitment Act

Two years after CETA, in 2021, the Legislature enacted the CCA to further reduce greenhouse gas emissions in Washington by establishing a "cap and invest program." RCW 70A.65.005, .010(58), .060–.080. The CCA directs Ecology to set an annual cap on greenhouse gas emissions by Washington's largest emitters, known as "covered entities." RCW 70A.65.060. The cap applies to most entities that generated or engaged in certain activities associated with at least 25,000 metric tons of "carbon dioxide equivalent" emissions for any year between 2015 and 2019. RCW 70A.65.080(1). PacifiCorp is a covered entity because of the emissions generated by its Chehalis power plant. *See* Dkt. 11 ¶¶ 2–3, 5, 11.

The CCA requires covered entities such as PacifiCorp to have "allowances" for each metric ton of greenhouse gases they emit. RCW 70A.65.010(1) (defining "allowance" as "an authorization to emit up to one metric ton of carbon dioxide equivalent"). A covered entity may only emit as much greenhouse gas as it has allowances for and if it exceeds that amount, it must either submit four allowances for every one allowance missing or face penalties of up to $10,000 per day for each violation. RCW 70A.65.200. Each year, Ecology will reduce the total number of allowances available, thereby "capping" the amount of greenhouse gases that covered entities may collectively emit. RCW 70A.65.070(2).

Most covered entities obtain allowances by purchasing them at auctions conducted by Ecology. RCW 70A.65.100. The proceeds from the auctions are used to invest in climate change mitigation and environmental justice projects (the "invest" portion of "cap and invest"). RCW 70A.65.100(7), .230.

Some covered entities receive certain allowances for free, which the CCA calls "no-cost allowances." *See* RCW 70A.65.110–130. This includes electric utilities such as PacifiCorp.[1] *See* Dkt. 11 ¶¶ 5, 8, 11. In relevant part, the CCA reads:

> The legislature intends by this section to allow all consumer-owned electric utilities and investor-owned electric utilities *subject*

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[1] Electric utilities in Washington may be either consumer-owned (such as a municipal electric utility or a public utility district) or investor-owned (such as PacifiCorp). *See* RCW 19.405.020(10), (24).

> *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). The act defines "cost burden" as "the impact on rates or charges to customers of electric utilities in Washington state for the incremental cost of electricity service to serve load due to the compliance cost for greenhouse gas emissions caused by the program." RCW 70A.65.010(21). Electric utilities may transfer their no-cost allowances to power plants that they own. WAC 173-446-425.

Ecology's regulations implementing the CCA also explain that "[a]llowances 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. *Only electric utilities subject to chapter 19.405 RCW, the Washington Clean Energy Transformation Act*, qualify for no cost allowances." WAC 173-446-230(1) (emphasis added). Ecology calculates the allocation of no-cost allowances to electric utilities using supply and demand forecasts provided by the utilities that "best predict the manner in which each electric utility will comply with the Clean Energy Transformation Act." WAC 173-446-230(2)(a)–(c). No-cost allowances to electric utilities phase out over time and must end by 2045—the same year that CETA requires all electric utilities to use "nonemitting electric generation and electricity from renewable resources" to "supply one hundred percent of all sales of electricity to Washington retail electric customers." RCW 19.405.050; *see* RCW 70A.65.120(2)(d) ("Under no circumstances may utilities receive any free allowances after 2045."); RCW 19.405.010(2) ("It is the policy of the state to . . . transition the state's electricity supply to . . . one hundred percent carbon-free by 2045.").

In practice, this means that the CCA provides electric utilities with no-cost allowances for the portion of their emissions that they forecast will be used to generate electricity sold to retail customers within Washington state. *See* Dkt. 11 ¶ 33; WAC 173-446-230. Electric utilities do not receive no-cost allowances for emissions associated with exported electricity because that electricity is not subject to CETA. *See Invenergy Thermal LLC v. Watson*, No. 3:22-cv-05967-BHS, 2023 WL 8404048, at *3 (W.D. Wash. Nov. 3, 2023) (describing how the CCA and CETA "work in tandem" by providing no-cost allowances under the CCA to electric utilities subject to CETA's decarbonization requirements).

C. PacifiCorp's Chehalis Facility

PacifiCorp is an Oregon corporation with its principal place of business in Oregon. Dkt. 11 ¶ 14. It does business as Rocky Mountain Power in Wyoming, Utah, and Idaho, and as Pacific Power in Oregon, California, and Washington. *Id.* In all six states, it is a "regulated public utility." *Id.* In Washington, where it has about 140,000 customers, PacifiCorp is regulated by Ecology and the Washington Utilities and Transportation Commission. Dkt. 11 ¶ 2. As an electric utility in Washington, PacifiCorp is subject to CETA for the electricity it sells "to Washington retail electric customers." RCW 19.405.040(1), .050(1).

PacifiCorp owns and operates the Chehalis Generation Facility ("Chehalis"), a "gas-fired combined cycle electric generation facility" in Lewis County, Washington that "has a nominal generating capacity of 520 megawatts." Dkt. 11 ¶¶ 2–3. The amount of emissions generated by Chehalis means that PacifiCorp must obtain allowances for those emissions under the CCA. *See* Dkt. 11 ¶¶ 5, 8, 11, 35, 39.

PacifiCorp alleges that about 77 percent of its Chehalis emissions are used to generate power for non-Washington customers, and that therefore it "will be required to spend tens of millions of dollars on CCA allowances to account for greenhouse gas emissions from Chehalis." Dkt. 11 ¶¶ 11, 39. PacifiCorp specifically alleges that it estimates 2024 CCA compliance costs of $47.9 million, although this does not account for the no-cost allowances PacifiCorp will receive for its Washington customers, which will reduce the cost. *Id.* ¶ 35.

PacifiCorp acknowledges in its complaint that while it intends to pass those costs along to its non-Washington customers, because PacifiCorp is a regulated public utility in each state, including those costs within its electric rates must be approved by each state's utility commissions. *See* Dkt. 11 ¶¶ 8, 10, 14, 40–41. PacifiCorp alleges that so far, Wyoming and Oregon's utility commissions have denied its requests to pass along those costs, meaning they will "be borne by PacifiCorp and its shareholders." *Id.* ¶¶ 10, 40–41.

D. Procedural History

On December 15, 2023, PacifiCorp filed its complaint for declaratory and injunctive relief, claiming that Ecology's allocation of no-cost allowances only for Washington customers unconstitutionally discriminates against PacifiCorp and its non-Washington customers. Dkt. 1. PacifiCorp amended its complaint on January 4, 2024. Dkt. 11. PacifiCorp alleges that Ecology's implementation of the CCA violates the dormant Commerce Clause "by increasing the cost of electricity for PacifiCorp's out-of-state customers, compared to PacifiCorp's Washington customers, for electricity produced by the same generation facility" at Chehalis. *Id.* ¶ 12.

PacifiCorp moved for a preliminary injunction on January 11, and the parties agreed to a combined briefing schedule on PacifiCorp's motion and Ecology's motion to dismiss. Dkt. 17, 20. On March 8, Ecology opposed PacifiCorp's motion and moved to dismiss the case. Dkt. 23. Both parties have since completed their briefing and the Court heard oral argument. Dkt. 26, 30, 32. The motions are ripe for consideration.

III. DISCUSSION

A. Legal Standard for Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), the Court may dismiss a complaint for lack of a cognizable legal theory or the "absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citation omitted). On a Rule 12(b)(6) motion, the Court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party," *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014), but will test the legal sufficiency of the claims made in the complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). When granting a motion to dismiss, a district court should generally provide leave to amend unless it is clear the complaint could not be saved by any amendment. *See* Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

In this case, PacifiCorp alleges that the CCA violates the dormant Commerce Clause by discriminating between emissions generated to serve Washington and out-of-state utility customers. Although both parties submitted evidence on PacifiCorp's preliminary injunction motion, in ruling on Ecology's motion to dismiss the Court has considered only the law, the non-conclusory factual allegations in PacifiCorp's complaint, and administrative proceedings before the Washington Utilities and Transportation Commission subject to judicial notice. *Ritchie*, 342 F.3d at 908 (describing what materials may be considered on a motion to dismiss).

As explained further below, PacifiCorp's complaint must be dismissed because PacifiCorp cannot make out a cognizable dormant Commerce Clause theory. Even taking all of PacifiCorp's alleged facts as true, the CCA's different treatment of PacifiCorp's in-state and exported energy does not violate the Commerce Clause because the two categories are not "substantially similar." *Tracy*, 519 U.S. at 298. The energy PacifiCorp produces for use in-state is subject to a preexisting, comprehensive regulatory regime—the Clean Energy Transformation Act—that its exported energy is not. Throughout PacifiCorp's complaint and description of how no-cost allowances under the CCA are allocated, there is not one mention of CETA's existence, despite the CCA and its implementing regulations making clear that an electric utility is only eligible for no-cost allowances to the extent that it is subject to CETA's requirements. But the existence of CETA, and its role in the allocation of no-cost allowances, is not an inconvenient fact that PacifiCorp can avoid by artful pleading. It is part of the statutory framework that this Court must analyze when considering PacifiCorp's theory of the case. And when that framework is examined as a whole, PacifiCorp's theory fails as a matter of law, requiring dismissal with prejudice.

B. PacifiCorp has Article III standing.

The Court has original jurisdiction over PacifiCorp's dormant Commerce Clause claim under 28 U.S.C. § 1331. But Ecology challenges this Court's jurisdiction by arguing that PacifiCorp lacks Article III standing. Dkt. 23 at 18–23. This argument is unpersuasive and overcomplicates the standing inquiry.

Article III of the U.S. Constitution limits the Court's jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2. For a case or controversy to exist, the party bringing the case must have standing. *Perry v. Newsom*, 18 F.4th 622, 630 (9th Cir. 2021). The "irreducible constitutional minimum" of Article III standing requires the plaintiff to show the following three elements: "(1) [The plaintiff] suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016). As the party invoking the Court's jurisdiction, the plaintiff "bears the burden of establishing these elements." *Id.*

Injury in fact is the "[f]irst and foremost" of the three elements. *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A concrete injury is one that is "real, and not abstract." *Spokeo*, 578 U.S. at 340 (internal quotation marks omitted). "An injury in fact can be a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights, to take just a few common examples." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). "A 'particularized injury' is one that 'affect[s] the plaintiff in a personal and individual way.'" *Safer Chems., Healthy Fams. v. U.S. Env't Prot. Agency*, 943 F.3d 397, 411 (9th Cir. 2019) (quoting *Spokeo*, 578 U.S. at 339).

Second, to be fairly traceable to the challenged conduct, "there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The connection "must not be too speculative or attenuated." *All. for Hippocratic Med.*, 602 U.S. at 383. And third, to be redressable, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted).

1. *The CCA's requirement that PacifiCorp buy emissions allowances establishes standing for PacifiCorp's claims.*

Ecology asserts that PacifiCorp lacks standing to bring its dormant Commerce Clause claim because it has not presented an injury sufficiently connected to its constitutional claim. Dkt. 23 at 19. Ecology argues that PacifiCorp only asserts its non-Washington customers are injured to the benefit of Washington customers. *Id.* at 20. Ecology asserts that this injury is not plausibly alleged because PacifiCorp has not been allowed to increase its rates in other states to account for increased CCA compliance costs (*id.*; *see also* Dkt. 18-4 at 1; Dkt. 18-5 ¶ 211) and its non-Washington customers have therefore not suffered any injury.

Ecology argues that PacifiCorp cannot raise constitutional claims on behalf of "an unharmed group of third parties" and lacks the close relationship required to assert third-party standing. Dkt. 23 at 20–21 (citing *Coal. of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002)). Ecology also argues that because PacifiCorp's regulatory applications to incorporate the cost of allowances into non-Washington utility rates remain under appeal, it is unclear "who will ultimately bear the cost of PacifiCorp's compliance with the CCA," and there is not yet a "realistic danger of sustaining a direct injury." Dkt. 23 at 22–23 (citing *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1149 (9th Cir. 2000)).

Ecology's position misstates the nature of PacifiCorp's injury and overcomplicates the standing inquiry. "Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish." *All. for Hippocratic Med.*, 602 U.S. at 382. The CCA requires PacifiCorp to obtain allowances for its Chehalis emissions, either through purchase at auction or the award of no-cost allowances. RCW 70A.65.060, .100–.130. PacifiCorp has plausibly alleged that it will have to spend money to purchase allowances for the emissions generated for exported electricity. Dkt. 11 ¶¶ 11, 35, 39.

Even if PacifiCorp might eventually be allowed to pass those costs on to its customers, PacifiCorp remains the regulated entity required to obtain the allowances in the first place. This is a sufficiently concrete and particularized injury for PacifiCorp to challenge the CCA's method of deciding when an electric utility must buy allowances rather than receive them for free. PacifiCorp's standing is based on its own injury, not a potential future injury of its customers. The alleged injury is caused by the requirements of the challenged statute and it could be redressed by an injunction requiring Ecology to distribute no-cost allowances for exported electricity or exempting PacifiCorp from the purchase of allowances altogether. *Kirola v. City & County of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) (a claim is redressable if a federal court is capable of granting relief).

The Supreme Court reached a similar conclusion when faced with a standing challenge to a dormant Commerce Clause case in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, the plaintiffs challenged an exemption from Hawaii's liquor tax granted to certain locally produced liquors to "encourage development of the

Hawaiian liquor industry." *Id.* at 265. The state's tax agency argued that the plaintiffs, who were liquor wholesalers, lacked standing because they passed the tax along to their retailer customers and thus showed no economic injury from the tax. *Id.* at 266–67. The Court rejected this argument, holding that the wholesalers "plainly have standing" because they are "liable for the tax," and "although they may pass it on to their customers . . . they must return the tax to the State whether or not their customers pay their bills." *Id.* at 267. In PacifiCorp's case, it must obtain the emissions allowances to comply with the CCA, whether it successfully passes the costs along or not, and it therefore has standing to challenge Ecology's method for allocating those allowances.

2. PacifiCorp's claim of injury is sufficiently ripe.

Ecology also argues that PacifiCorp's claims are unripe "because the question of who will ultimately be required to pay for its CCA compliance costs is the subject of ongoing and future proceedings." Dkt. 23 at 21. For the same reasons PacifiCorp has standing, PacifiCorp's responsibility to bear the cost of CCA allowances—regardless of the results of its administrative appeals to pass on those costs to its customers—rebuts Ecology's ripeness argument. Dkt. 23 at 22–23. Ripeness is synonymous with the "injury-in-fact prong of the standing inquiry," *Smith v. Health Care Serv. Corp.*, No. 23-35508, 2024 WL 1927610, at *1 (9th Cir. May 2, 2024), for which there must be a "realistic danger of sustaining a direct injury," *Thomas*, 220 F.3d at 1149. PacifiCorp's obligation to at least front the cost of allowances is identifiable and imminent. Its claims are ripe.

C. PacifiCorp does not make a cognizable dormant Commerce Clause claim.

While PacifiCorp has standing to pursue its dormant Commerce Clause claims, the claims fail on their merits.

1. *Federal courts must exercise caution before using the dormant Commerce Clause to strike down state laws regulating health and welfare.*

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "Reading between the Constitution's lines," the Supreme Court has long held that "the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also contains a further, negative command" that forbids 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) (cleaned up). Courts refer to "[t]his 'negative' aspect of the Commerce Clause" as the "dormant Commerce Clause." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 515 (2019) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

Because the dormant Commerce Clause is a judicially created doctrine implied from the intent of the Commerce Clause rather than found in its text, the Supreme Court has focused on the purpose of the doctrine to interpret its limits. The "fundamental objective" of the dormant Commerce Clause is to "preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Tracy*, 519 U.S. at 287. Accordingly, the dormant Commerce Clause prohibits statutes and regulatory measures driven by protectionism, "designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers*, 598 U.S. at 369.

At the same time, dormant Commerce Clause jurisprudence "has had to respect a cross-purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). "The essence of our federal system is that within the realm of the authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal." *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)). And "[i]n our interconnected national marketplace, many (maybe most) state laws have the practical effect of controlling extraterritorial behavior." *Nat'l Pork Producers*, 598 U.S. at 374 (internal quotation marks omitted). "State income tax laws lead some individuals and companies to relocate to other jurisdictions. Environmental laws often prove decisive when businesses choose where to manufacture their goods." *Id.* (internal citations omitted).

This respect for federalism and the traditional authority of the States to regulate health and welfare within their borders means that "'extreme caution' is warranted before a court deploys" the "implied authority" of the dormant Commerce Clause. *Id.* at 390 (quoting *Tracy*, 519 U.S. at 310). "Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" *Id.* (quoting *Conway v. Taylor's Ex'r*, 1 Black 603, 634 (1862)). Courts must not use "the dormant Commerce Clause as 'a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.'" *Id.* at 380 (quoting *United*

Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007)).

2. *The CCA's differing treatment of in-state and exported electricity does not violate the dormant Commerce Clause because the two categories are not similarly situated.*

A "threshold" question in considering a dormant Commerce Clause challenge is that "any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298–99; *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010) ("Differential treatment must be as between persons or entities who are similarly situated."). Ecology argues that "because of CETA, Washington retail power is differently situated than wholesale and out-of-state retail power." Dkt. 23 at 27. This argument disposes of PacifiCorp's claims.

As described above, *see supra* Sections II.A–B, when the Washington legislature enacted the CCA, it was not writing on a blank slate. Because CETA already existed, the legislature faced a situation where a certain class of emitters otherwise subject to the CCA—electric utilities serving Washington residents—were already regulated by a separate and more aggressive decarbonization mandate. *Compare* RCW 19.405.030(1)(a) (eliminate coal power by 2025); .040(1) (eliminate natural gas power by 2030); .050(1) (total decarbonization by 2045) *with* RCW 70A.65.070; RCW 70A.45.020(1)(a) (reduce emissions to 45% of 1990 levels by 2030, 70% by 2040, and 95% by 2050). Rather than subject those utilities—including PacifiCorp—to overlapping sets of requirements, and potentially subject Washington's electric customers to unnecessary increased costs beyond what they already face under CETA, the legislature chose to issue no-cost CCA allowances to electric utilities to the extent that their emissions were already covered by CETA's decarbonization schedule.

Although one would not learn it from reading PacifiCorp's complaint—which does not mention CETA at all, and instead frames the no-cost allowances as simply a giveaway to Washington customers—the connection between no-cost allowances for electric utilities and CETA's preexisting regulatory regime is in the plain text of the CCA and its regulations. *See, e.g.*, RCW 70A.65.120(1) (granting no-cost allowances to electric utilities "subject to the requirements of . . . the Washington clean energy transformation act"); WAC 173-446-230(1) ("Only electric utilities subject to chapter 19.405 RCW, the Washington Clean Energy Transformation Act, qualify for no cost allowances."). The CCA's purpose of working in tandem with CETA's requirements, rather than just benefiting instate customers, is reinforced by the statute phasing out the no-cost allowances by 2045, the same year that CETA's decarbonization mandate will be in full effect. RCW 70A.65.120(2)(d) ("Under no circumstances may utilities receive any free allowances after 2045.").

All of this aligns with a common-sense understanding of how the statutes work together. The CCA requires covered entities to buy allowances for carbon emissions, subject to a cap on allowances that decreases each year, so that market pressure will encourage those entities to decarbonize. But electric utilities serving Washington customers don't need that market pressure because CETA already requires them to decarbonize, and on a faster schedule. In contrast, the emissions that PacifiCorp generates within Washington's borders at its Chehalis plant, but uses to export electricity to customers in other states, are not covered by CETA at all. This fundamental difference in preexisting regulation means that the two categories of emissions are not "substantially similar" for purposes of the dormant Commerce Clause. *Tracy*, 519 U.S. at 298.

Chief Judge G. Murray Snow of the U.S. District Court for the District of Arizona recently reached a similar result in *Day v. Henry*, 686 F. Supp. 3d 887 (D. Ariz. 2023). In *Day*, a group of wine collectors sued state regulators over Arizona's three-tiered alcohol regulation system. *Id.* at 890. Under that system, licensed liquor retailers could ship wine directly to consumers who made online orders, but unlicensed retailers could not. *See id.* Because obtaining a retail license required a physical presence in Arizona, the plaintiffs argued that the regulatory scheme discriminated against out-of-state liquor retailers in violation of the dormant Commerce Clause. *Id.* at 891.

In holding that the retailers were not similarly situated, Chief Judge Snow observed that "[r]etailers with physical premises in Arizona are subject to Arizona's specific three-tier system and regulations," including "on-site liquor inspections, investigation of complaints, covert underage buyer programs, audits and other financial inspections, and investigation of records to determine compliance with Arizona liquor laws." *Id.* at 895. They were also required, unlike the unlicensed out-of-state retailers, "to obtain alcohol from Arizona wholesalers or wholesalers under Arizona's oversight and regulation." *Id.* The court concluded that "[i]t is doubtful that retailers subject to all of Arizona's liquor regulations and retailers subject to none of them can be seen as similarly situated." *Id.* at 895–96.

Chief Judge Snow also noted, as several other courts have also recognized, that "when granting plaintiffs' requested relief would allow the out-of-state entity 'dramatically greater rights' than the in-state entity, they are likely not similarly situated." *Id.* at 896 (quoting *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th

Cir. 2010)); *cf. Lebmoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 873 (6th Cir. 2020) ("[Licensed] retailers all live with the bitter and sweet of Michigan's three-tier system . . . [Plaintiff] seizes the sweet and wants to take a pass on the bitter.") PacifiCorp's argument faces the same problem. Granting PacifiCorp its requested relief would mean that the emissions it generates in Chehalis, but uses to export electricity, would be exempt from both CETA's decarbonization mandate and the CCA's requirement of purchasing emissions allowances. This would elevate the energy used to serve the out-of-state interest above Washington's entire program of reducing carbon emissions, reinforcing that the two categories are not similarly situated.

That PacifiCorp's energy produced at Chehalis for in-state versus exported electricity is subject to a different regulatory scheme also distinguishes this case from the two Supreme Court cases that PacifiCorp primarily relies on: *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997), and *Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 100 (1994). In *Camps Newfound*, in which the Court struck down a statute that limited property tax exemptions for charities to those serving mostly in-state residents, the Supreme Court explained that "there is no question that the statute at issue here is facially discriminatory because it disparately treats *identically situated* Maine nonprofit camps depending upon whether they favor in-state, as opposed to out-of-state, campers." 520 U.S. at 583 (emphasis added). PacifiCorp cannot plausibly allege that the energy it produces in Washington subject to CETA is "identically situated" to the energy that is not. In *Oregon Waste Systems*, the Supreme Court struck down a statute that imposed different fees on the disposal of solid waste generated in- and out-of-state. 511 U.S. at 95. But the Supreme Court expressly recognized in that case that "[n]o claim has been made that the disposal of waste from other States imposes higher costs on Oregon and its political subdivisions than the disposal of in-state waste." *Id.* at 101. In other words, the state of Oregon had not argued that the two streams of waste were not similarly situated, let alone subject to different regulatory regimes.

PacifiCorp also argues that if Ecology wants to rely on the application of CETA to distinguish in-state and exported electricity, it must do so under the "compensatory tax" doctrine considered in the *Oregon Waste Systems* case, not the threshold question of whether the two categories are substantially similar. *See* Dkt. 26 at 24–25. PacifiCorp's argument is not persuasive. The compensatory tax doctrine is "a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means." *Oregon Waste Sys.*, 511 U.S. at 102. "Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce does not offend the negative commerce clause." *Id.* at 102–03. "The tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce." *Id.* at 103. But the CCA's allocation of no-cost allowances to utilities already subject to CETA's requirements is not the equivalent of a "facially discriminatory tax." Instead, the threshold analysis used in *Day v. Henry* and other cases in which the competing entities were subject to different regulatory regimes is the relevant inquiry.

Finally, the conclusion that the CCA's differing treatment of energy used for in-state versus exported electricity does not violate the dormant Commerce Clause is reinforced by the reality that the provision of electricity to retail customers is not the type of competitive national market that the dormant Commerce Clause traditionally endeavors to protect. As PacifiCorp acknowledges in its complaint, it "is a regulated public utility" in all six of the states that it serves, and the costs that it recovers from retail customers are determined by each state's utility commission. Dkt. 11 ¶¶ 14, 40–42; *see also F.E.R.C. v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265 (2016) (explaining that while the Federal Power Act authorizes FERC to regulate the competitive interstate market for wholesale electricity, it "leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity" (quoting 16 U.S.C. § 824(b))). In Washington, for example, the Utilities and Transportation Commission must "[r]egulate in the public interest . . . the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service." RCW 80.01.040(3). In doing so, the Commission must set "just, fair, reasonable and sufficient" rates, RCW 80.28.010, and "assure that regulated utilities earn enough to stay in business." *PacifiCorp v. Wash. Util. & Transp. Comm'n*, 194 Wn. App. 571, 588, 376 P.3d 389 (2016) (quotation marks and citations omitted).

What this means in practice is that the CCA's regulation of the cost of emitting carbon from Chehalis does not have the type of direct impact on out-of-state customers that, for example, the Maine statute in *Camps Newfound* had on increasing summer camp prices for out-of-state campers, or the surcharge in *Oregon Waste Systems* had on out-of-state waste disposers, because each state's utility commission regulates the rates charged to its own residents.[2] In this sense, the retail electric market in the

[2] For the same reason, Ecology's argument is also stronger than Arizona's in *Day v. Henry*, where the in-state and out-of-state liquor retailers could genuinely compete for online customers.

United States is already the type of "Balkanized" system that the dormant Commerce Clause in competitive markets serves to guard against—a fact acknowledged by both the Federal Power Act and the Supreme Court's Commerce Clause cases. *See, e.g.*, *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 395 (1983) ("[T]he national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States."); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 525 (7th Cir. 2018) ("The commerce power belongs to Congress; the Supreme Court treats silence by Congress as preventing discriminatory state legislation. Yet Congress has not been silent about electricity: it provided in [the Federal Power Act] that states may regulate local generation." (citing 16 U.S.C. § 824(b)).

Under this system, PacifiCorp's retail electricity customers in Washington and other states do not compete in the way that typically triggers dormant Commerce Clause scrutiny. If PacifiCorp succeeds in passing the compliance costs of the CCA on to its out-of-state customers, it will be because each state's utility commission has approved charging its own residents those rates. And if PacifiCorp fails, then its shareholders will incur those costs not because they serve out-of-state customers, but because they own and operate a power plant in Washington state that produces emissions not already covered by CETA's decarbonization schedule—just like any other comparable covered entity under the CCA. *Cf. Elec. Power Supply Ass'n*, 904 F.3d at 525 ("Illinois has not engaged in any discrimination beyond what is required by the rule that a state must regulate within its borders. All carbon-emitting plants in Illinois need to buy credits.").

"The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *Tracy*, 519 U.S. at 300. The nature of the state-controlled market for retail electricity, and "the absence of actual or prospective competition between" in- and out-of-state retail electric customers, *see id.*, reinforces the conclusion that the CCA's differing treatment of energy produced at Chehalis for in-state versus exported electricity does not offend the Commerce Clause.

3. The CCA does not violate the dormant Commerce Clause under the Pike test.

PacifiCorp's complaint also alleges that even if the CCA's allocation of no-cost allowances is considered nondiscriminatory, it "nonetheless contravenes the Commerce Clause" under the analysis derived from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Dkt. 11 ¶ 60. This claim also fails as a matter of law.

In *National Pork Producers*, the Supreme Court clarified the application of *Pike*, rejecting an argument that courts 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." 598 U.S. at 377 (internal quotation marks omitted). The Court explained that this reading "overstate[s] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence." *Id.* Instead, *Pike* generally stands for the principle that "a law's practical effects may also disclose the presence of a discriminatory purpose." *Id.*; *see also id.* at 391 (Sotomayor, J., concurring) ("*Pike*'s balancing and tailoring principles are most frequently deployed to detect the presence or absence of latent economic protectionism."). While the Court "left the courtroom door open to challenges premised on even nondiscriminatory burdens," *id.* at 379 (internal quotation marks and citation omitted), it observed that such cases often "have addressed state laws that impose burdens on the arteries of commerce, on trucks, trains, and the like." *Id.* at 392 (Sotomayor, J., concurring) (internal quotation marks omitted). Anything else falls outside of "*Pike*'s core." *Id.*

PacifiCorp's argument cannot succeed under any application of *Pike* because it both falls outside of *Pike*'s core and, like the failed challenge in *National Pork Producers*, PacifiCorp has failed to plausibly "allege a substantial burden on interstate commerce." *See id.* at 393 (Sotomayor, J., concurring). The application of *Pike* does not reveal latent economic protectionism because, as discussed extensively above, emissions generated in Washington for in-state retail electricity (which are already subject to CETA's decarbonization mandate) are not similarly situated to those generated for exported electricity (which are not). *Tracy*, 519 U.S. at 298 ("[A]ny notion of discrimination assumes a comparison of substantially similar entities.").

PacifiCorp has not alleged a substantial burden on interstate commerce because retail electric customers do not compete in a national marketplace, and any increased costs to PacifiCorp's out-of-state customers must be approved by their own state's regulatory commissions. *See id.* at 300 ("[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply."). If CCA compliance costs are ultimately borne by PacifiCorp's shareholders and make the use of the Chehalis plant less profitable, that is how carbon pricing works, and is not sufficient on its own to show a substantial burden on interstate commerce. *See Elec. Power Supply Ass'n*, 904 F.3d at 524 ("On this view, whenever Illinois, or any other state, takes some step that will increase or reduce the state's aggregate generation capacity, or affect the price of energy, then the state policy is invalid. That can't be right; it would be the end of federalism.").[3] The *Pike* balancing test cannot save PacifiCorp's claims.

4. The CCA does not discriminate between electric utilities.

Although PacifiCorp agreed at oral argument that its "primary claim is that [Ecology] is treating in-state and out-of-state customers differently," Dkt. 33 at 8:1–2, it has also suggested that the CCA discriminates against "out-of-state companies like PacifiCorp." *See* Dkt. 17 at 13, 28–29. There are no factual allegations in PacifiCorp's complaint that support this argument, and the plain text of the CCA treats all utilities equally. The provisions of the CCA challenged by PacifiCorp apply equally to all utilities operating in Washington, regardless of their state of incorporation or headquarters. *See* RCW 70A.65.010(38), .080(1)(b)–(c), .200. And the allocation of no-cost allowances applies to "all consumer-owned and investor-owned electric utilities subject to" CETA. RCW 70A.65.120(1). Indeed, this District has previously determined that the CCA treats all electric utilities the same when allocating no-cost allowances. *Invenergy Thermal LLC v. Watson*, No. 3:22-cv-05967-BHS, 2023 WL 8404048, at *12 (W.D. Wash. Nov. 3, 2023) ("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.").

[3] Although unnecessary for resolving this case, the Court notes that the Seventh Circuit in *Electric Power Supply Association* suggested that because Congress has expressly provided in the Federal Power Act that "states may regulate local generation," the *Pike* balancing test "does not apply to a state's regulation of electric capacity or a cross-subsidy between carbon-emitting generation and carbon-free generation." 904 F.3d at 525.

5. PacifiCorp's statutory interpretation argument fails.

"In the alternative" to its claim under 42 U.S.C. § 1983 that the CCA violates the dormant Commerce Clause, Count Two of PacifiCorp's complaint alleges that Ecology's regulations allocating the CCA's no-cost allowances based only on Washington retail electricity load have misinterpreted the statute. Dkt. 11 ¶¶ 67–74. Although PacifiCorp appeared to abandon this claim at oral argument, *see* Dkt. 33 at 4:7–6:12, Ecology correctly points out that if PacifiCorp wanted to bring a freestanding challenge to whether Ecology's implementing rules are consistent with the CCA, it needed to do so under Washington's Administrative Procedure Act. *Hillis v. Wash. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997) (with limited exceptions "the Administrative Procedure Act (APA) provides the exclusive means of judicial review of agency action"); RCW 34.05.510 ("This chapter establishes the exclusive means of judicial review of agency action"); RCW 34.05.570(2) (setting out procedure for challenging agency rules under APA). Even if this may be considered under the doctrine of constitutional avoidance (as PacifiCorp asserted at oral argument, *see* Dkt. 33 at 5:22–6:4), the plain text of the CCA ties no-cost allowances for electric utilities to the requirements of CETA, which apply only to Washington customers. RCW 70A.65.120(1). However PacifiCorp intended it, this argument fails as a matter of law.

IV. CONCLUSION

As the Supreme Court cautioned just last year, "[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" *Nat'l Pork Producers*, 598 U.S. at 390. PacifiCorp's claims fall far short of that mark. Defendant Watson's motion to dismiss is GRANTED and PacifiCorp's complaint is DISMISSED.

PacifiCorp has not requested leave to amend its complaint. But even if it had, because this Court's ruling is based on the plain text of the CCA and CETA and the way the statutes interact, rather than on insufficient factual allegations, the deficiencies in PacifiCorp's complaint cannot possibly be cured by the allegation of other facts and leave to amend would be futile. *See* Fed. R. Civ. P. 15(a); *Manzarek*, 519 F.3d at 1031. The case is therefore DISMISSED WITH PREJUDICE. PacifiCorp's Motion for Preliminary Injunction (Dkt. 17) is denied as moot. The Clerk is directed to enter judgment in favor of Defendant and close the case.

Dated this 15th day of July, 2024.

Tiffany M. Cartwright
United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

PACIFICORP, an Oregon business corporation, Plaintiff, v. LAURA WATSON, in her official capacity as Director of the Washington State Department of Ecology, Defendant.	Case No. 3:23-cv-06155-DWC AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. Plaintiff PacifiCorp ("PacifiCorp"), an Oregon corporation, brings this action for declaratory and injunctive relief against defendant Laura Watson ("Defendant"), in her official capacity as Director of the Washington State Department of Ecology ("Ecology").

2. PacifiCorp is a multi-state utility that serves approximately two million customers in six states, with approximately 140,000 customers in Washington. PacifiCorp is regulated by Ecology and the Washington Utilities and Transportation Commission, and, most relevant here, PacifiCorp owns and operates the Chehalis Generation Facility ("Chehalis").

3. Chehalis is a gas-fired combined cycle electric generation facility located south of Chehalis, Washington, east of Interstate 5 in Lewis County, Washington. It

began commercial operation in June 2003 and has a nominal generating capacity of 520 megawatts.

4. In 2021, Washington enacted the Climate Commitment Act ("CCA"). RCW 70A.65.005 to .901. The CCA and its implementing regulations require certain emitting entities located in Washington to obtain and retire allowances for their respective annual greenhouse-gas emissions. Ecology will then reduce the number of allowances available each year over seven separate four-year time periods starting in 2023 and running through 2050. Ecology describes the CCA as "a market-based program—as allowances become more scarce, they become more valuable due to the powers of supply and demand. Businesses that do not sufficiently reduce their emissions will be faced with increasing compliance costs,"[1] thus, in the hope of Ecology, motivating emitters to reduce emissions through market-based incentives.

5. Some entities covered by the CCA will purchase allowances for their respective emissions at auction, while others are provided free ("no-cost") allowances for emitting generation that serves Washington utility customers. These no-cost allowances mitigate the costs for Washington utility customers who would otherwise be required to pay for CCA allowances at market prices. Yet emitting resources like Chehalis, which are located in Washington but serve utility customers in other states in addition to Washington, do not receive no-cost allowances for the portion of emissions for service for out-of-state residents.

6. For example, in each year during the first period of the CCA program (from 2023 through 2026), utilities receive no-cost allowances to cover emissions associated

[1] Wash. State Dep't of Ecology, "Washington's cap-and-invest program," available at https://ecology.wa.gov/Air-Climate/Climate-Commitment-Act/Cap-and-invest.

with emitting generation that serves their Washington customers. Wash. Admin. Code § 173-466-230. These no-cost allowances are assigned directly to electric utilities in an attempt to "mitigate the cost burden of the program on electricity customers." RCW 70A.65.120(1). The CCA defines "cost burden" to mean the "impact on rates or charges to *customers of electric utilities in Washington state* for the incremental cost of electricity service to serve load due to the compliance cost for greenhouse gas emissions caused by the [CCA] program." RCW 70A.65.010(21) (emphasis added); Wash. Admin. Code § 173-446-020 (same).

7. 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, these no-cost allowances eliminate some or all of a utility-owned power plants' compliance costs caused by the CCA.

8. But for emitting resources like Chehalis that are located in Washington but that serve customers both within Washington and in other states, PacifiCorp will not receive no-cost allowances for the portion of emissions for service for out-of-state residents. Defendant's decision to deny no-cost allowances for the portion of emissions for service for out-of-state residents is, apparently, based on her interpretation of RCW 70A.65.010(21) (defining "Cost burden" to "mean[] the impact on rates or charges to customers of electric utilities in Washington state for the incremental cost of electricity service to serve load due to the compliance cost for greenhouse gas emissions caused by the program."). As a result, PacifiCorp's non-Washington customers bear higher power costs to ensure Chehalis has sufficient allowances to cover its emissions for

the energy that serves those customers. Alternatively, if utility regulators in those other states deny recovery of the cost of allowances because of this disparate treatment, PacifiCorp shareholders will bear the CCA compliance costs simply because it serves customers in other states.

9. As a result, Washington customers do not pay for CCA allowance costs for electricity generated at Chehalis, but PacifiCorp and PacifiCorp's out-of-state customers do. The CCA's allocation of no-cost allowances harms PacifiCorp's non-Washington customers and PacifiCorp in direct proportion to the amount of Chehalis generation that crosses Washington's border.

10. Two other states have already rejected PacifiCorp's attempts to allocate these costs to comply with Washington's CCA to out-of-state customers. On October 27, 2023, the Public Utility Commission of Oregon ("OPUC") decided that these additional CCA costs cannot be borne by Oregon customers.[2] This amounts to almost $13 million of these CCA costs that the Commission has prevented PacifiCorp from recovering from customers in 2024. On January 2, 2024, the Wyoming Public Service Commission followed suit, and this will amount to an almost $9.9 million disallowance in 2024.[3]

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[2] *In the Matter of PacifiCorp, dba Pacific Power, 2024 Transition Adjustment Mechanism*, OPUC Docket No. UE 420, Order No. 23-404, *available at* https://apps.puc.state.or.us/orders/2023ords/23-404.pdf.

[3] *In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Service Rates by Approximately $140.2 Million Per Year or 21.6 Percent and to Revise the Energy Cost Adjustment Mechanism*, WPSC Docket No. 20000-633-ER-23, Record No. 17252, paragraph 211 ("The Commission concludes [PacifiCorp] shall not recover any costs associated with the [CCA] in any rates charged to Wyoming customers.").

11. This harm to PacifiCorp and its non-Washington customers will continue to increase because Chehalis incurs a new CCA compliance obligation for each metric ton of carbon dioxide equivalent that the plant emits. Wash. Admin. Code § 173-446-040 (generally discussing covered emissions). Yet approximately 77 percent of Chehalis' emissions do not receive no-cost allowances, and it falls to PacifiCorp (an out-of-state entity) or its out-of-state customers to pay for Washington's CCA compliance costs.

12. In short, Defendant's implementation of the CCA discriminates against PacifiCorp by increasing the cost of electricity for PacifiCorp's out-of-state customers, compared to PacifiCorp's Washington customers, for electricity produced by the same generation facility.

13. As applied to PacifiCorp and its out-of-state customers, Defendant's implementation of the CCA's allocation of no-cost allowances violates the Commerce Clause of the United States Constitution because it impermissibly discriminates against out-of-state businesses and customers.

PARTIES

14. PacifiCorp is an Oregon corporation with its principal place of business in Oregon. PacifiCorp, which does business as Rocky Mountain Power and Pacific Power, provides electric service to retail customers as Rocky Mountain Power in Wyoming, Utah, and Idaho, and as Pacific Power in Oregon, California, and Washington. PacifiCorp is a regulated public utility providing electric service to customers in all six of these states.

15. Defendant Laura Watson is the Director of Ecology, and performs all powers, duties and functions within the authority of the agency. Wash. Admin. Code § 173-06-130. Ecology regulates greenhouse gases at the state

level under the federal Clean Air Act and is tasked with implementing the CCA. *See* RCW 70A.15.1005.

JURISDICTION AND VENUE

16. Under 28 U.S.C. § 1391(b)(2), venue is proper in the Western District of Washington federal district court because Chehalis is located in Lewis County, Washington, where a substantial part of the events giving rise to this claim occurred.

17. The relief requested is authorized pursuant to 42 U.S.C. § 1983, the All Writs Act, 28 U.S.C. § 1651(a), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

18. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1367(a).

FACTUAL ALLEGATIONS

Electricity Dispatch

19. The United States lacks a single, unified market for electricity, but it also does not have fifty individual electricity markets. 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 with vertically integrated utilities, and markets overseen by regional transmission organizations and independent system operators.[4]

20. The Pacific Northwest lacks a centralized market authority, and because of this, individual utilities decide when and how to dispatch—or make use of—the

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[4] Fed. Energy Regulatory Comm'n, Energy Primer: A Handbook for Energy Market Basics 61 (2020), available at https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf.

electricity-generation resources available to them to serve electric demand (also known as “load”). This decision system is referred to as dispatch.

21. When making dispatch decisions on how to serve the electric demand (also known as ‘load’) of their customers, 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.

22. Dispatch decisions are made each day, and PacifiCorp must decide whether and how long to run its generators like Chehalis. Relevant here, the amount of electricity that Chehalis generates—and delivers to its customers—depends almost entirely on the marginal generating cost of that facility, relative to the costs from other generation sources and demand for electricity. Utilities will dispatch the lowest marginal cost electricity resources to customers first, and as they need more generation to serve load, will dispatch more expensive electricity.

23. The marginal cost of electricity for generation resources includes the cost from incremental variable taxes. For emitting resources located in Washington, this includes the cost of allowances required by the CCA. Hence, the CCA increases the marginal cost for electricity for Chehalis to reflect the expected cost of CCA allowances, and Chehalis will be less likely to be dispatched than it would without these compliance costs.

24. For example, if the marginal cost without the CCA per megawatt from Chehalis is $100, but with the CCA the marginal cost is $110, and if there is another generating source not subject to the CCA with a marginal cost of $106 per megawatt, then, because of the CCA, there will be

instances when the $106 source will be used instead of Chehalis.[5]

25. This means that, on any given day, depending on total demand and generation resources, Chehalis will operate less compared to other generation resources, when the CCA allowance cost increases the marginal cost of Chehalis generation above the marginal generation cost of those other generation resources. The CCA also increases costs for all customers compared to the alternative where PacifiCorp receives no-cost allowances from Ecology regardless of which state its customers are located in.

Mechanisms of the CCA

26. The CCA aims to achieve dramatic reductions in greenhouse-gas emissions from emissions sources located in Washington over the next several decades. *See* RCW 70A.65.070(2); RCW 70A.45.020. It contributes to these efforts by empowering Ecology to implement a cap on greenhouse-gas emissions for Washington's largest emitters. RCW 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, RCW 70A.65.080(1), although waste-to-energy facilities and railroad companies that have these levels of emissions need not join the program until the second and third four-year compliance periods (2027 to 2030 and 2031 to 2034, respectively). RCW 70A.65.080(2)-(3).

27. To implement the emissions cap, the CCA relies on "[a]llowance[s]," and each allowance is an "authorization to emit up to one metric ton of carbon dioxide equivalent."

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[5] These numbers are not the actual marginal costs for Chehalis or actual the increase due to the CCA; these round numbers were chosen solely for ease of demonstrating the concept.

RCW 70A.65.10(1). Under the CCA, a covered entity may emit only as many metric tons of greenhouse gases as it has allowances for, though during the first compliance period it may cover up to eight percent of its annual emissions with credits for greenhouse-gas-emissions offsets, eventually decreasing to six percent in subsequent compliance periods. RCW 70A.65.170, RCW 70A.65.310. If an entity does not submit sufficient allowances and offsets to cover its emissions, it must either submit four allowances for every one allowance missing or face penalties of up to $10,000 per day for each violation. RCW 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. RCW 70A.65.070(2).

28. 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. RCW 70A.65.100. To control the cost of obtaining allowances, the CCA directs Ecology to establish a minimum price, which increases annually, RCW 70A.65.150, and a maximum price, which also increases annually and is set to ensure covered entities invest in reducing emissions. RCW 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. RCW 70A.65.140. If the price rises too close to the maximum price, Ecology will hold additional auctions. Washington will then use the proceeds from the auctions to invest in a variety of projects, including climate-change mitigation and environmental justice initiatives. RCW 70A.65.100(7); *see* RCW 70A.65.230.

The CCA's No-Cost Allowances

29. 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, RCW 70A.65.110, electric utilities, RCW 70A.65.120, and natural gas utilities, *id*, receive some allowances for free, known as no-cost allowances.

30. Ecology began considering new rules to implement the CCA, including the proper allocation of no-cost allocations, on August 4, 2021. *See* Wash. Admin. Code §§ 173-446-010 to -700.[6] Over the following ten months, Ecology developed and drafted rules, and held several public meetings to receive public comment.

31. On May 16, 2022, Ecology proposed initial draft rules ("Draft Rules"), where the agency would allocate no-cost allowances to electric utilities, with the amount based largely on forecasted Washington retail electricity load (and forecasted emissions from the electricity to meet those loads).[7]

32. In response to the Draft Rules, PacifiCorp requested Ecology amend the proposed rules to provide additional no-cost allowances to multi-jurisdictional utilities like PacifiCorp for the emissions from resources like Chehalis that serves out-of-state residents. The agency rejected PacifiCorp's request, concluding that "the plain

[6] Wash. Dep't of Ecology, Preproposal Statement of Inquiry, WSR 21-16-111 (Aug. 4, 2021), *see* Rule Making Timeline *available at* https://ecology.wa.gov/regulations-permits/laws-rules-rulemaking/closed-rulemaking/wac-173-446.

[7] Proposed Language for Chapter 173-446 WAC: Climate Commitment Act Program Rule § 173-446-230(1) (May 16, 2022), https://ecology.wa.gov/getattachment/4ffb375b-2bec-4b66-afb3-9b613645896e/OTS-3614-4-For-Filing.pdf (Hereinafter "Draft Rule").

language of the law and legislative intent is clear that the concept of cost burden relates to how the costs associates with covered emissions are passed on to the *customers in the State of Washington*."[8]

33. The final CCA rules reflect this conclusion and confirm that electric utilities will receive no-cost allowances based on the forecast for each utility's *Washington* retail electricity load, and the forecasted emissions associated with supplying that load. Wash. Admin. Code § 173-446-230(1)-(2).

Discriminatory Effects of the CCA's No-Cost Allowance Provisions

34. Although Wash. Admin. Code § 173-446-230(1) provides that Ecology will distribute no-cost allowances to mitigate the "cost burden" on customer rates, Wash. Admin. Code § 173-446-020 defines "'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." (Emphasis added.) This is consistent with the CCA that identically defines "cost burden" using similar text. RCW 70A.65.010(21).

35. This text in RCW 70.65.010(21) is apparently the basis for Ecology's implementing rules, and those implementing rules and decisions by Defendant result in discrimination against the portion of Chehalis generation that serves out-of-state customers, but that does not receive no-cost allowances. Chehalis is covered by the CCA during its first compliance period and will need to

[8] Washington, Dep't. of Ecology, Publication 22-02-046, *Concise Explanatory Statement*, Chapter 173-446 WAC Climate Commitment Act Program, at 239 (Sept. 2022), available at: https://apps.ecology.wa.gov/publications/documents/2202046.pdf (emphasis added).

purchase allowances to cover at least some of its future emissions. *See* Wash. Admin. Code § 173-446-030(1). PacifiCorp anticipates these costs will be significant for Chehalis, and estimates compliance costs of $47.9 million for 2024 alone (without accounting for the value of no-cost allowances for Chehalis that serves Washington, which should partially reduce these CCA allowance costs).

36. PacifiCorp must factor these estimated CCA compliance costs into its dispatch decision to generate electricity from Chehalis for sale within and outside of Washington. And that decision is based on the marginal cost for Chehalis (which includes estimated CCA allowances costs), compared to the marginal cost for other generation sources available to PacifiCorp.

37. However, there will be significant ongoing uncertainty regarding the actual operating costs of Chehalis, because the price of allowances is likely to change at each quarterly auction (within administratively determined floor and ceiling prices).

38. Still, PacifiCorp must factor the cost of allowances into its Chehalis dispatch decision to generate power from Chehalis on any given day and for how long. The estimated costs for CCA allowances is included in the marginal cost for Chehalis, thus changing PacifiCorp's Dispatch decisions. The increased marginal cost for Chehalis due to CCA allowance costs will result in the use of generation sources with higher marginal costs than Chehalis's marginal cost without the CCA allowance cost. As a result, the increase to Chehalis' marginal cost from the CCA allowance costs will decrease the amount of electricity that Chehalis will generate to serve PacifiCorp's customers and sell into regional power markets.

39. Altogether, PacifiCorp will be required to spend tens of millions of dollars on CCA allowances to account

for greenhouse gas emissions from Chehalis in 2024, and likely similar amounts each year going forward. This is because the majority of Chehalis generation is allocated for non-Washington customers pursuant to multi-state regulatory agreements, for which PacifiCorp will have to purchase CCA allowances (instead of receiving no-cost allowances like it receives for the generation allocated to in-state customers).

40. Yet PacifiCorp cannot recover CCA allowance costs from Washington customers when the generation is allocated to out-of-state customers. These costs will either be passed along to non-Washington customers, or if denied for recovery by state utility commissions, will be borne by PacifiCorp and its shareholders. PacifiCorp has requested that non-Washington state utility commissions allow recovery of those expenses from customers; yet Oregon and Wyoming have already denied the Company's requests for recovery of these costs. PacifiCorp will have no way of recouping in its Oregon and Wyoming customer rates the millions of dollars in compliance costs imposed by the Washington CCA.

41. PacifiCorp has already purchased CCA allowances for Chehalis' 2023 emissions but filed to defer those costs from rate making in Oregon. PacifiCorp will request that non-Washington state utility commissions allow recovery of those expenses from customers; however, subsequent recovery is subject to review by the OPUC.

42. PacifiCorp therefore will likely have substantial unrecoverable costs in the coming years as a result of the CCA's discriminatory allocation of no-cost allowances. This discrimination is arbitrary and unreasonable, as there is no environmental difference between greenhouse gas emissions from generation of electricity from the same generation resource for customers that reside inside Washington, compared to generation for out-of-state

residents, when emissions are not contained within state borders. But the CCA nonetheless requires nonresidents to pay for CCA allowances while Ecology gives them to Washington customers for free.

There are two costs from the CCA

43. As noted above, PacifiCorp estimates $47.9 million in costs associated with compliance with the CCA for emissions from Chehalis in 2024. There are two different cost categories within that number.

44. First, there are the straightforward costs incurred from purchasing CCA allowances based on the amount of emissions generated by Chehalis in a given year. The second is the additional cost to dispatch generation sources with higher marginal costs than would have been dispatched without the CCA.

45. As described above, PacifiCorp each day dispatches generation sources from lowest to highest costs of generation. At the point at which demand (*i.e.* "load") is satisfied with lower cost generation sources, generation sources with higher costs are not used.

46. Under the CCA, because of the cost for CCA allowances, Chehalis' marginal cost per megawatt increases, which changes the decision as to when PacifiCorp will dispatch Chehalis.

47. Because the CCA will increase Chehalis' marginal cost above the marginal cost of other generation sources that are not required to purchase allowances under the CCA,[9] those other generation sources will be dispatched instead of or before Chehalis under the CCA; those same generation sources would have been dispatched after Chehalis (or not at all) without the CCA. As a result, the

[9] Generation facilities outside of Washington do not have to pay for CCA allowances.

cost of generation (and potentially the amount of greenhouse gas emissions) from these alternative resources to meet customer demand will increase, and that may result in increased rates for customers to cover the increased costs of generation.

48. For example, if the marginal cost without the CCA per megawatt from Chehalis is $100, but with the CCA the marginal cost is $110, and if there is another generating source not subject to the CCA with a marginal cost of $106 per megawatt, then, because of the CCA, there will be instances when the $106 source will be used instead of Chehalis. This increases costs for all customers compared to the alternative without the CCA (or compared to the alternative where PacifiCorp receives no-cost allowances from Ecology regardless of which state its customers are located in).[10]

49. PacifiCorp will suffer those system-wide cost increases, which are included in the $47.9 million estimate for 2024.

50. Additionally, PacifiCorp risks suffering a separate and additional discriminatory harm because of those added costs from the Dispatch decisions described above. The discriminatory CCA program and resulting commission decisions from Oregon and Wyoming have made it impossible to economically dispatch Chehalis. If PacifiCorp includes the cost of allowances in its dispatch price of Chehalis, non-Washington utility regulators may decide that PacifiCorp erred by dispatching the $106 resource instead of Chehalis because, according to those regulators, the residents in those other states should not bear the cost of Washington's discriminatory CCA

[10] These numbers are not the actual marginal costs for Chehalis or actual the increase due to the CCA; these round numbers were chosen solely for ease of demonstrating the concept.

program. Thus, the regulators in other states may rule that PacifiCorp should have disregarded the costs from the CCA program and dispatched Chehalis with an assumed marginal cost of $100 instead of dispatching the $106 resource. On that basis, those same regulators may disallow recovery of the difference in cost between Chehalis and the $106 resource ($106 minus $100). In other words, PacifiCorp will not be allowed to recover for the added costs created by changes in the dispatch decisions and will suffer that harm due to the CCA's discrimination between customers inside of Washington and customers in other states. That harm is in addition to not being allowed to recover the costs of purchasing CCA allowances (the difference between $100 and $110 for electricity from Chehalis). Alternatively, if PacifiCorp chooses to not include the cost of allowances in its dispatch price of Chehalis, it risks incurring the costs of additional allowances because of increased use of Chehalis generation.

51. These two discrete CCA costs, caused by the CCA's allocation of no-cost allowances, benefits local economic interests and obstructs interstate commerce. Washington utilities that serve only or predominantly Washington customers do not have the same CCA compliance cost burden as PacifiCorp, which serves out-of-state customers with electricity from Chehalis.

52. These protectionist effects and the explicit legislative text that the CCA shall be implemented to mitigate the cost burden for customers in Washington, and only in Washington, confirm that the CCA's allocation of no-cost allowances imposes Constitutionally impermissible burdens on interstate commerce.

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983 (Declaratory and Injunctive Relief):

Discrimination between Washington customers and out-of-state customers in Defendant's allocation of no-cost allowances to PacifiCorp violates the Dormant Commerce Clause As Applied to PacifiCorp and Its Customers

FIRST COUNT

The CCA and Wash. Admin. Code No-Cost Allowance Provisions Violate the Dormant Commerce Clause As Applied to PacifiCorp and Its Customers

53. PacifiCorp realleges and incorporates by reference the allegations set forth above.

54. The Commerce Clause grants Congress the exclusive power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3.

55. "One of the fundamental purposes of the [Commerce] Clause 'was to insure . . . against discriminating State legislation.'" *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (quoting *Welton v. Missouri*, 91 U.S. 275, 280 (1876)). For this reason, the Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

56. Under this "negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175 (1995), the Constitution "prohibit[s] state or municipal laws whose object is local economic protectionism," *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994). This analysis

does not require a balancing test; all that matters is whether the challenged law discriminates against out-of-state economic interests in favor of in-state interests.[11] And a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus*, 468 U.S. at 270 (citations omitted).

57. There is no need to "guess at the legislature's motivation" here, *id.* at 271, because the CCA's no-cost allowance program is discriminatory on its face. The relevant statutes and regulations are crystal clear on this point: the purpose of the no-cost allowances is "to mitigate the cost burden of the program on electricity customers," RCW 70A.65.120(1), and defines "cost burden" as the "impact on rates or charges to *customers of electric utilities in Washington state* for the incremental cost of electricity service to serve load due to the compliance cost for [the cap and invest] program." RCW 70A.65.010(21) (emphasis added); Wash. Admin. Code § 173-446-020 (same).

58. Ecology confirmed this fact when—in direct response to PacifiCorp's request for no-cost allowances for the portion of Chehalis generation that serves out-of-state residents—the agency concluded that the allowances that PacifiCorp receives for Chehalis must be distributed to Washington retail load alone, because "the plain language of the law and legislative intent is clear that the concept of cost burden relates to how the costs associates with

[11] *Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992) ("Oklahoma attempts to discount this evidence by emphasizing that the Act sets aside only a 'small portion' of the Oklahoma coal market, without placing an 'overall burden' on out-of-state coal producers doing business in Oklahoma. The volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce.").

covered emissions are passed on to the *customers in the State of Washington*."[12]

59. The purpose of CCA's no-cost allowance provisions is not to reduce emissions. Its purpose is to insulate Washington residents from CCA compliance costs. States cannot "hoard a local resource—be it meat, shrimp, or milk [or in this case no-cost allowances for emitting resources that serve Washington residents]—for the benefit of local businesses." *Carbone*, 511 U.S. at 392. Accordingly, the CCA's no-cost allowance program is unconstitutionally discriminatory on its face. *Wyoming v. Oklahoma,* 502 U.S. 437, 456 (1992); *Oklahoma Tax Comm'n,* 514 U.S. at 175; *Bacchus*, 468 U.S. at 270.

60. Yet, even if no-cost allowances could be considered "even-hande[d]," and only impose "incidental" burdens on interstate commerce, *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), it nonetheless contravenes the Commerce Clause.

61. Under *Pike*, state laws that apply "even-handedly" are unconstitutional where "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* Where some 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 Council v. Ross*, 143 S.Ct. 1142, 1157 (2023) (plurality opinion). On this latter analysis, the "presence or absence of discrimination in practice" is decisive under *Pike*, and courts use this test

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[12] State of Washington, Dep't. of Ecology, Publication 22-02-046, *Concise Explanatory Statement*, Chapter 173-446 WAC Climate Commitment Act Program, at 239 (Sept. 2022), available at: https://apps.ecology.wa.gov/publications/documents/2202046.pdf (emphasis added).

to "smoke out . . . hidden protectionism" in seemingly non-discriminatory laws, and if found, strike them down.[13] Significantly, the "local benefits" that can be considered under *Pike* do not include a state's narrow economic interests. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) ("protecting a major local industry" is not a legitimate interest).

62. The CCA seeks to protect Washington's narrow economic interests by shielding in-state utilities and in-state customers from the costs of implementing the law. While it is a laudable goal (at least in the abstract) for states to attempt to keep power costs low for its citizens, as applied here, these narrow interests cannot support the no-cost allowance provisions of the CCA when they burden out-of-state residents. And these discriminatory burdens on PacifiCorp and its non-Washington customers are significant—an estimated $47.9 million for compliance costs for 2024 emissions alone, without yet accounting for 2023 and future years. The no-cost allowance provisions are neither necessary or relevant to the CCA's overall goal of reducing carbon emissions.

63. Under *Pike*, this local benefit cannot sustain constitutional scrutiny when it comes at the price of discriminating against out-of-state residents. *Dean Milk Co.*, 340 U.S. at 354.

64. Accordingly, PacifiCorp has no adequate remedy at law, and it will be irreparably harmed by the continued enforcement of the CCA. There is an actual and substantial controversy between PacifiCorp and Defendant having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

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[13] *Id.* at 1158 (quoting R. Fallon, The Dynamic Constitution 311 (2d ed. 2013)).

PacifiCorp is entitled to attorneys' fees under 42 U.S.C. § 1988 as related to this cause of action.

65. As a result, PacifiCorp is entitled to the following: (a) a ruling that Defendant is liable to PacifiCorp under 42 U.S.C. § 1983, because the CCA's no-cost allowance provisions and their implementing regulations deprive PacifiCorp and its non-Washington customers of the rights, privileges, and immunities to which they are entitled under the Commerce Clause; (b) an injunction that orders the Defendant to avoid the constitutional defects in the CCA no-cost allowance provisions by expanding the availability of no-cost allowances to all customers who receive power from Chehalis regardless of the customer's state of residence; (c) an injunction prohibiting Defendant from enforcing, or seeking to enforce, the provisions of the CCA requiring PacifiCorp to acquire allowances for its out-of-Washington customers who receive power from Chehalis; and (d) a declaratory order, pursuant to 28 U.S.C. § 2201, declaring that the CCA's no-cost allowance provisions and their implementing regulations as applied to PacifiCorp and its non-Washington customers are an invalid and unenforceable exercise of state authority prohibited by the Commerce Clause.

66. Further, PacifiCorp asks that this Court enter an order for preliminary injunctive relief against Defendant pending a trial on the merits of PacifiCorp's claims. The Court should order as preliminary injunctive relief: (a) an injunction that orders the Defendant to correct the constitutional defects in the CCA no-cost allowance provisions by expanding the availability of no-cost allowances to all customers who receive power from Chehalis regardless of the customer's state of residence; and (b) an injunction prohibiting Defendant from enforcing, or seeking to enforce, the provisions of the CCA requiring PacifiCorp

to acquire allowances for its out-of-Washington customers of power from Chehalis.

SECOND COUNT

Defendant is misapplying the CCA to cause discrimination that violates the Dormant Commerce Clause

67. This is in the alternative to the First Count of the First Claim for relief. PacifiCorp realleges and incorporates by reference the allegations set forth above in paragraphs 1 through 52.

68. Defendant is misinterpreting the CCA in deciding to allocate no-cost provisions only to in-state customers (instead of all customers, as the CCA intends), thereby discriminating against out-of-state electricity customers.

69. Defendant has misinterpreted the CCA to mean that the CCA is intended to mitigate the cost burden only of Washington customers. Ecology implemented administrative rules stating that electric utilities will receive no-cost allowances based on the forecast for each utility's Washington retail electricity load, and the forecasted emissions associated with supplying that load. Wash. Admin. Code § 173-446-230(1)-(2).

70. Ecology confirmed the above interpretation when—in response to PacifiCorp's request for no-cost allowances for the portion of Chehalis generation that serves out-of-state residents—the agency concluded that the allowances that PacifiCorp receives for Chehalis must be distributed to Washington customers alone, because "the plain language of the law and legislative intent is clear that the concept of cost burden relates to how the

costs associates with covered emissions are passed on to the *customers in the State of Washington*."[14]

71. However, Ecology has misinterpreted the CCA and applied the no-cost provisions of the CCA in a discriminatory manner violating the Dormant Commerce Clause.

72. Under the CCA, no-cost allowances should be allocated to all of PacifiCorp's customers receiving electricity from Chehalis, regardless of whether the customer resides inside or outside of Washington's borders.

73. The original version of the bill specifically referenced providing no-cost allowances to Washington citizens only.[15] That was removed in a substitute bill. If the legislature had intended to limit the no-cost allowance benefit to only Washington citizens and customers, it would have kept the original text. The change indicates that the final version of the CCA does not allow Defendant to limit provision of no-cost allowances to PacifiCorp based on the state of residence of its customers receiving electric power from Chehalis.

74. As a result of Ecology's misinterpretation of the statute and its incorrect application of no-cost allowances, PacifiCorp and its non-Washington customers will be irreparably harmed. Defendant's discriminatory implementation of the CCA violates the Dormant Commerce Clause facially and in its purpose (as Ecology stated in its *Concise Explanatory Statement*), and in its effect. The

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[14] State of Washington, Dep't. of Ecology, Publication 22-02-046, *Concise Explanatory Statement*, Chapter 173-446 WAC Climate Commitment Act Program, at 239 (Sept. 2022), available at: https://apps.ecology.wa.gov/publications/documents/2202046.pdf (emphasis added).

[15] https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Bills/5126.pdf?q=20231228153948 at 11.

purpose of Defendant's discriminatory implementation of the CCA's no-cost allowance provisions is not to reduce emissions. Its purpose is to insulate Washington residents from CCA compliance costs. States cannot "hoard a local resource—be it meat, shrimp, or milk [or in this case no-cost allowances for emitting resources that serve Washington residents]—for the benefit of local businesses." *Carbone*, 511 U.S. at 392. Accordingly, Defendant's discriminatory implementation of the CCA's no-cost allowance program is unconstitutionally discriminatory on its face, in its purpose, in its effect, and under the *Pike* test. These discriminatory burdens on PacifiCorp and its non-Washington customers are significant—an estimated $47.9 million for compliance costs for 2024 emissions alone, without yet accounting for 2023 and future years.

75. PacifiCorp has no adequate remedy at law, and it will be irreparably harmed by Defendant's continued discriminatory enforcement of the CCA. There is an actual and substantial controversy between PacifiCorp and Defendant having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. PacifiCorp is entitled to attorneys' fees under 42 U.S.C. § 1988 as related to this cause of action.

76. PacifiCorp is entitled to the following: (a) an injunction that orders the Defendant to correct the constitutional defects in her interpretation of the CCA and implementation of the no-cost allowance provisions by expanding the availability of no-cost allowances to all customers who receive power from Chehalis regardless of the customer's state of residence; (b) an injunction prohibiting Defendant from enforcing, or seeking to enforce, the provisions of the CCA requiring PacifiCorp to acquire allowances for its out-of-Washington customers who receive power from Chehalis; and (c) a declaratory order, declaring that the CCA's no-cost allowance provisions require

no-cost allowances for all customers of utilities operating in Washington, contrary to Ecology's interpretation and its implementing administrative rules.

77. PacifiCorp asks that this Court enter an order for preliminary injunctive relief against Defendant pending a trial on the merits of PacifiCorp's claims. The Court should order as preliminary injunctive relief: (a) an injunction that orders the Defendant to correct the constitutional defects in her interpretation of the CCA and implementation of the no-cost allowance provisions by expanding the availability of no-cost allowances to all customers who receive power from Chehalis regardless of the customer's state of residence; and (b) an injunction prohibiting Defendant from enforcing, or seeking to enforce, the provisions of the CCA requiring PacifiCorp to acquire allowances for its out-of-Washington customers of power from Chehalis.

PRAYER FOR RELIEF

WHEREFORE, PacifiCorp prays that the Court:

a. Issues an injunction that orders the Defendant to correct the constitutional defects in the CCA no-cost allowance provisions by expanding the availability of no-cost allowances to all customers who receive power from Chehalis regardless of the customer's state of residence; or, in the alternative,

b. Issues an injunction prohibiting Defendant from enforcing, or seeking to enforce, the provisions of the CCA requiring PacifiCorp to acquire allowances for its out-of-Washington customers of Chehalis;

c. Declares that either

(1) the provisions of the CCA as applied to PacifiCorp that deny no-cost allowances for electricity allocated for PacifiCorp's out-of-state customers violates

the Commerce Clause of the United States Constitution; or

(2) the CCA's no-cost allowance provisions require no-cost allowances for all customers of utilities operating in Washington and that Defendant's discrimination in allocating no-cost allowances to PacifiCorp based on the residence of PacifiCorp's customer is contrary to the CCA and violates the Commerce Clause of the United States Constitution;

d. Awards attorneys' fees and costs and disbursements associated with this litigation under 28 U.S.C. § 2412 and 42 U.S.C. § 1988 and other applicable authority;

e. Awards such additional relief as justice may require.

DATED: January 4, 2024.

MARKOWITZ HERBOLD PC

s/ Dallas DeLuca
Dallas DeLuca, WSBA No. 45948

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. Art. I, § 8, cl. 3 provides:

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. Wash. Rev. Code § 70A.65.010 provides in pertinent part:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

* * * * *

(21) "Cost burden" means the impact on rates or charges to customers of electric utilities in Washington state for the incremental cost of electricity service to serve load due to the compliance cost for greenhouse gas emissions caused by the program. Cost burden includes administrative costs from the utility's participation in the program.

* * * * *

3. Wash. Rev. Code § 70A.65.120 provides:

(1) The 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.

(2)(a) By October 1, 2022, the department shall adopt rules, in consultation with the department of commerce and the utilities and transportation commission, establishing the methods and procedures for allocating allowances for consumer-owned and investor-owned electric utilities. The rules must take into account the cost burden of the program on electricity customers.

(b) By October 1, 2022, the department shall adopt an allocation schedule by rule, in consultation with the department of commerce and the utilities and transportation commission, for the first compliance period for the provision of allowances at no cost to consumer-owned and investor-owned electric utilities. This allocation must be consistent with a forecast, that is approved by the appropriate governing board or the utilities and transportation commission, of each utility's supply and demand, and the cost burden resulting from the inclusion of the covered entities in the first compliance period.

(c) By October 1, 2026, the department shall adopt an allocation schedule by rule, in consultation with the department of commerce and the utilities and transportation commission, for the provision of allowances for the second compliance period at no cost to consumer-owned and investor-owned electric utilities. This allocation must be consistent with a forecast, that is approved by the appropriate governing board or the utilities and transportation commission, of each utility's supply and demand, and the cost burden resulting from the inclusion of covered entities in the second compliance period. The allowances included in this schedule must reflect the increased scope of coverage in the electricity sector relative to the program budget of allowances established in 2022.

(d) By October 1, 2030, the department shall adopt an allocation schedule by rule, in consultation with the department of commerce and the utilities and transportation commission, for the provision of allowances at no cost to consumer-owned and investor-owned electric utilities for the compliance periods contained within calendar years 2031 through 2045. This allocation must be consistent with a forecast, that is approved by the appropriate governing board or the utilities and transportation commission, of each utility's supply and demand, and the cost burden resulting from the inclusion of the covered entities in the compliance periods. The rule developed under this subsection (2)(d) may prescribe an amount of allowances allocated at no cost that must be consigned to auction by consumer-owned and investor-owned electric utilities. However, utilities may use allowances for compliance equal to their covered emissions in any calendar year they were not subject to potential penalty under RCW 19.405.090. Under no circumstances may utilities receive any free allowances after 2045.

(3)(a) During the first compliance period, allowances allocated at no cost to consumer-owned and investor-owned electric utilities may be consigned to auction for the benefit of ratepayers, deposited for compliance, or a combination of both. The rules adopted by the department under subsection (2) of this section must include provisions for directing revenues generated under this subsection to the applicable utilities.

(b) By October 1, 2026, the department, in consultation with the department of commerce and the utilities and transportation commission, must adopt rules governing the amount of allowances allocated at no cost under subsection (2)(c) of this section that must be consigned to auction. For calendar year 2030, electric utilities may use allowances for compliance equal to their covered emissions if not subject to potential penalty under RCW 19.405.090.

(4) The benefits of all allowances consigned to auction under this section must be used by consumer-owned and investor-owned electric utilities for the benefit of ratepayers, with the first priority the mitigation of any rate impacts to low-income customers.

(5) If an entity is identified by the department as an emissions-intensive, trade-exposed industry under RCW 70A.65.110, unless allowances have been otherwise allocated for electricity-related emissions to the entity under RCW 70A.65.110 or to a consumer-owned utility under this section, the department shall allocate allowances at no cost to the electric utility or power marketing administration that is providing electricity to the entity in an amount equal to the forecasted emissions for electricity consumption for the entity for the compliance period.

(6) The department shall allow for allowances to be transferred between a power marketing administration and electric utilities and used for direct compliance.

(7) Rules establishing the allocation of allowances to consumer-owned utilities and investor-owned utilities must consider the impact of electrification of buildings, transportation, and industry on the electricity sector.

(8) Nothing in this section affects the requirements of chapter 19.405 RCW.

(9) A consumer-owned utility that is party to a contract that meets the following conditions must be issued allowances under this section for emissions associated with imported electricity, in order to prevent impairment of the value of the contract to either party:

(a) The contract does not address compliance costs imposed upon the consumer-owned utility by the program created in this chapter; and

(b) The contract was in effect as of July 25, 2021, and expires no later than the end of the first compliance period.

(10) The department may not allocate allowances to an electric utility under this section for greenhouse gas emissions associated with electricity produced by a waste to energy facility for which the facility has a compliance obligation under this chapter.

4. Wash. Admin. Code § 173-446-230 provides in pertinent part:

(1) **Total no cost allowances allocated to electric utilities.** 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. Only electric utilities subject to chapter 19.405 RCW, the Washington Clean Energy Transformation Act, qualify for no cost allowances.

(2) The cost burden effect recognizes that compliance with the program requires the submission of compliance instruments and in the absence of possessing the required compliance instruments procurement of those instruments has an associated cost that would be translated into consumer electricity prices without the mitigation of that cost burden as provided by this program. Those potential costs, along with the administrative costs of the program, comprise the cost burden of the program. Provision of some or all of the allowances necessary to address this deficit, through the means established in this section, is the method by which this cost burden is mitigated. Under this framework, ecology will use the following methods to determine the cost burden effect and the allocation of allowances to each qualifying electric utility.

* * * * *

(f) One allowance will be initially allocated for each metric ton of emissions associated with the cost burden effect for each qualifying electric utility for each emissions year as projected through this process. The final total of allocated allowances will be subject to further adjustments as detailed in this subsection.

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