UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

INVENERGY THERMAL LLC, and GRAYS HARBOR ENERGY LLC, Plaintiffs, v. LAURA WATSON, in her official capacity as Director of the Washington State Department of Ecology, Defendant.	No. 3:22-cv-05967-BHS PLAINTIFFS' OPPOSITION TO DEFENDANT'S FRCP 12(C) MOTION TO DISMISS NOTE ON MOTION CALENDAR: APRIL 28, 2023 ORAL ARGUMENT REQUESTED

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STATUTES AND REGULATIONS

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PRELIMINARY STATEMENT

Washington's Climate Commitment Act, RCW 70A.65.005–901 (the "Act") aims to reduce greenhouse-gas emissions over the coming decades. While that is a noble purpose, the Act has been sabotaged by unconstitutional local favoritism. Under the Act, local electric utilities receive free, no-cost allowances, which enables them to run their plants without regard to the greenhouse-gas emissions they produce. Invenergy Thermal LLC ("Invenergy")[1], an out-of-state owner, on the other hand, must pay for its carbon. Thus, unlike the local utilities, Invenergy must bear the full compliance cost of the Act, even though it operates one of the most efficient natural-gas power plants in Washington, the Grays Harbor Energy Center ("Grays Harbor"). This is unlawful discrimination under both the dormant Commerce Clause and the Equal Protection Clause.

Although the Washington State Department of Ecology ("Ecology") answered the Complaint, Dkt. 20, it now moves for judgment on the pleadings. But Invenergy's well-pleaded allegations compel the denial of Ecology's motion. Invenergy alleges that, by allocating free allowances to electric utilities but not independent power-plant owners like Invenergy, the Act discriminates in practical effect among the owners of natural-gas power plants currently regulated under the Act based on their connections to Washington. Invenergy also alleges that the Act distorts Washington's electricity market, incentivizing electric utilities to rely on their own facilities over more carbon- and cost-efficient alternatives by forcing Grays Harbor and Invenergy, but not local electric utilities, to bear the Act's compliance costs. In the weeks since it filed the Complaint, Invenergy has observed signs that utility-owned power plants' share of generation has increased relative to Grays Harbor's. Rather than promoting the Act's goals of reducing greenhouse-gas emissions and preventing electricity-rate hikes, the allocation of no-cost

[1] Invenergy wholly owns Grays Harbor Energy LLC, and both Plaintiffs are collectively referred to as "Invenergy" for purposes of this brief.

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allowances frustrates these aims. With these allegations, Invenergy has stated both dormant-Commerce-Clause and equal-protection claims.

Ecology nevertheless urges this Court to dismiss the claims. With respect to the dormant-Commerce-Clause cause of action, the Supreme Court has emphasized that such claims require "a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (striking down state pricing law). This analysis is "fact dependent" and requires "factual development" that renders judgment on the pleadings inappropriate. *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 327 (5th Cir. 2022) (reversing dismissal of dormant Commerce Clause claims), *cert. pet. docketed*, No. 22-601 (U.S. Dec. 30, 2022). Thus, many courts have recognized that a developed factual record is necessary to determine the validity of such plausible claims. *See*, *e.g.*, *id.* (determining claim "warrants the factual development that effects claims typically receive"); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (reversing dismissal because claim "present[ed] issues of fact that cannot be properly resolved on a motion to dismiss"); *Cachia v. Islamorada*, 542 F.3d 839, 844 (11th Cir. 2008) (reversing dismissal of claim because "further proceedings are necessary to develop a record"); *Rhode v. Becerra*, 342 F. Supp. 3d 1010, 1016 (S.D. Cal. 2018) (noting the assessment of a law's benefits and burdens raises "predominantly fact questions that are not ripe for a motion to dismiss"). Unsurprisingly, nearly all the Commerce-Clause cases Ecology cites arose on motions for summary judgment, not motions to dismiss.[2]

Still, Ecology fundamentally contends (at 8) that the Court should dismiss the claim because "establishing discriminatory effect requires the production of substantial evidence showing both that the law discriminates in practice and that it does so for reasons of in-state

[2] *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Cir. 2012) (appeal from motion for summary judgment); *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010) (same); *S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (same); *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (same); *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154 (9th Cir. 2011) (same); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (same).

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economic protectionism." (citing *Black Star Farms*, 600 F.3d at 1230). That argument is premature, because Invenergy "is not required to 'demonstrate' anything" at the pleading stage. *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011). Before discovery, this Court asks only whether Invenergy "is entitled to offer evidence to support [its] claim." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

It is. Not only has Invenergy stated its claim thoroughly and at length, but Ecology repeatedly brushes aside disputes of fact that are vital to the resolution of Invenergy's causes of action. For example, Ecology contends (at 9) that the "undisputed facts fail to establish [in-state economic] protectionism." But the facts it identifies (at 10–11)—the extent of Invenergy's and utilities' presences in Washington and the relevance of two university-owned power plants—are in dispute. Ecology further argues (at 14) details of Grays Harbor's energy exports to California (without knowing what its competitors' similar exports are, which will be the subject of discovery); speculates (at 15) that if Grays Harbor received no-cost allowances, Invenergy may have an advantage over electric utilities (another proposition that will be the subject of discovery); and hypothesizes (at 18) that local utilities may have incentives to transfer no-cost allowances to facilities like Grays Harbor "as a means of contracting for lowered wholesale costs" (yet another issue subject to discovery). Ecology's own Request for Judicial Notice demonstrates still other disputed factual issues necessary to resolve the claim.[3]

With respect to Invenergy's equal-protection claim, Ecology leans on the government-friendly standard of review rather than grappling with the Complaint's allegations. Under rational-

[3] Ecology (at 11) suggests two university-owned power plants are covered entities, but the data it provides do not identify whether these power plants produced the recorded emissions, Dkt. 22-4. The Court, therefore, should decline Ecology's request to take judicial notice of these data except to the extent they establish that the University of Washington and Washington State University produced the recorded emissions. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999–1000 (9th Cir. 2018) (concluding court erred in taking notice of facts subject to different interpretations). Moreover, Ecology has offered no evidence that these power plants compete against Grays Harbor and the twelve other power plants identified in Invenergy's Complaint. *See* Compl. ¶¶ 44–48.

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basis review, courts defer to the legislature's sound judgments, but that deference has limits. Indeed, while the express and widely-publicized goal of the Act is to address the "existential crisis" of climate change by reducing "greenhouse gas emissions," RCW 70A.65.005, the Act in fact does the opposite, facilitating *less carbon-efficient* electricity generation to the benefit of in-state utilities. The Act similarly justifies its allocation of no-cost allowances as a measure to protect Washingtonians from electricity-rate hikes. *See* RCW 70A.65.120. But the Act will increase, not decrease, the costs of supplying electricity to Washington's ratepayers—as Ecology itself has already determined. Compl. ¶ 93. Invenergy has plausibly alleged that the Act's allocation of no-cost allowances disserves the Act's twin purposes of reducing greenhouse-gas emissions and preventing electricity price increases for Washington's rate payers. For that reason, Invenergy may pursue its discrimination claim beyond the pleadings stage.

Invenergy has pleaded plausible claims that the Act's disparate allocation of allowances violates the dormant Commerce Clause and the Equal Protection Clause, so Ecology's motion for judgment on the pleadings should be denied.

STATEMENT OF THE CASE

A. The Act and Washington's Electricity Markets.

Since January 1, 2023, the Act has put a price on the emissions of "covered entities": entities that produced a certain amount of greenhouse-gas emissions between 2015 and 2019. Compl. ¶¶ 10, 68. Covered entities must obtain enough allowances to cover their annual emissions. Compl. ¶¶ 69–70. Each year, the number of available allowances goes down, which encourages covered entities to reduce their emissions over time. Compl. ¶ 69.

But not all covered entities must pay for allowances. Comp. ¶ 71. As relevant here, electric utilities receive allowances each year for free. Compl. ¶¶ 71–72. Although these utilities transmit and distribute electricity, they also own and operate electricity generating facilities, including natural-gas power plants. Compl ¶¶ 7, 29, 45–46. Consequently, Washington's electricity market

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draws on electricity generated by both electric utilities and independent power producers, who compete against each other as power-plant owners. Compl. ¶¶ 7, 34–36.

B. Invenergy Competes Against Washington's Other Natural-Gas Power-Plant Owners, Electric Utilities.

Invenergy is an independent power producer headquartered in Chicago, Illinois and incorporated in Delaware. Compl. ¶ 1. It competes with several of Washington's local utilities because it is the owner and operator of a natural-gas power plant in Washington: Grays Harbor. Compl. ¶¶ 3,7, 21.

Grays Harbor is one of Washington's cleanest and most efficient natural-gas power plants, and it recently solidified this status by installing state-of-the-art emissions-reducing technology. Compl. ¶¶ 38–39. In addition to Grays Harbor, twelve other natural-gas power plants in Washington also qualify as covered entities under the Act during its first compliance period. Compl. ¶¶ 22, 44–45. Like Grays Harbor, these other plants generate electricity that can be used to serve retail customers or sold on wholesale energy markets. Compl. ¶¶ 7, 33. All twelve of these plants, however, are owned by four of the state's electric utilities: Avista Corp., Clark Public Utilities, PacifiCorp, and Puget Sound Energy (collectively, the "Local Utilities"). Compl. ¶¶ 11, 46–48.

C. The Act's Allocation of No-Cost Allowances Singles Out Invenergy, Distorting the Market and Disserving Washington.

Invenergy does not receive no-cost allowances under the Act, but the Local Utilities do. Compl. ¶¶ 6, 119. These natural-gas power-plant owners,[4] unlike Invenergy, are local to Washington. Compl. ¶¶ 8, 48, 158. All but one are headquartered in Washington. Compl. ¶ 48. PacifiCorp, the exception, is headquartered in neighboring Oregon. Compl. at 11 n.8. More importantly, the Local Utilities conduct significant commercial and political activities in

[4] Plaintiffs refer to "natural-gas power-plant owners" rather than the "owners of natural-gas power plants that qualify as covered entities during the Act's first compliance period."

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Washington. Compl. ¶ 48. Avista Corp., PacifiCorp, and Puget Sound Energy each own several facilities within Washington, employ hundreds of individuals, and, on average, expend thousands of dollars in political contributions and lobbying efforts within the state. Compl. ¶¶ 49–50.

Invenergy, by contrast, lacks these same connections to Washington. Compl. ¶ 51. Headquartered in Chicago, it operates one facility in Washington, has fewer than 25 employees in the state, and spends significantly less on political contributions and registered lobbyists. Compl. ¶¶ 49–50.[5]

The Act denies Invenergy access to the type of free allowances it provides to the Local Utilities. In so doing, it forces Invenergy to compete on an uneven playing field against Washington's in-state interests. Compl. ¶¶ 114–21, 160–61. While Invenergy must purchase allowances to cover Grays Harbor's emissions, the Local Utilities can use their no-cost allowances to satisfy their power plants' obligations under the Act. Compl. ¶¶ 86, 100, 110. Indeed, the Local Utilities largely lack compliance obligations of their own, so will in all likelihood transfer their no-cost allowances to their power plants. Compl. ¶ 100. Grays Harbor, unlike its utility-owned competitors, cannot benefit from the Local Utilities' allowances because the Local Utilities can transfer their allowances to Grays Harbor only if they enter a power purchase agreement with Grays Harbor—and, even if they do so, they still may elect not to transfer any allowances. Compl. ¶¶ 109, 119.

The Act's disparate treatment of Washington's natural-gas power plants—imposing compliance obligations on all plants but enabling the utility-owned plants to fulfill their obligations for free—distorts the state's electricity market. Compl. ¶ 113. Unlike its competitors, Grays Harbor must consider the costs of obtaining allowances—the costs of its greenhouse-gas emissions—when deciding whether to generate electricity. Compl. ¶ 107. Its competitors need not consider these costs, and will generate electricity regardless of the carbon costs of doing so.

[5] An Invenergy affiliate owns a wind farm in Washington. Compl. at 6 n.3.

Compl. ¶ 111. The Act therefore encourages utility-owned power plants to generate electricity in a manner that minimizes neither costs nor greenhouse-gas emissions. Compl. ¶¶ 113, 125–26, 148–49. Put differently, Grays Harbor is expected to generate less electricity, and its utility-owned competitors to generate more, even though Grays Harbor is cleaner and more efficient than its utility-owned competitors. Compl. ¶¶ 112–13. In fact, early market data appear to substantiate these concerns; even in the Act's first three months, there are already signs that utility-owned power plants' share of generation has increased relative to Grays Harbor's.

Moreover, these same incentives also obstruct the flow of investment into Washington. Compl. ¶ 130. Any out-of-state independent power company that develops or buys an existing power plant would compete against the Local Utilities on the same unequal playing field as Invenergy does now. Compl. ¶ 131. For that reason, these companies have no incentive to undertake such business ventures in Washington. Compl. ¶ 132. The Act's allocation of no-cost allowances, therefore, will likely shut out millions of dollars in interstate energy investment in the coming decades. Compl. ¶ 133.

Both Invenergy and Washingtonians will bear the costs of the Act's market distortion. Invenergy will spend millions of dollars on allowances for Grays Harbor. Compl. ¶¶ 103, 105. Indeed, at Washington's recent auction, the price already cleared $48.50, double Ecology's minimum. Req. Judicial Notice, Ex. 1 (Auction #1 Feb. 2023 Summary Report); Compl. ¶ 94. On top of the costs for allowances, Invenergy also stands to lose substantial amounts in revenue because Grays Harbor must account for these costs that no other natural-gas power plant in Washington faces. Compl. ¶ 123.

Looking beyond Invenergy, the allocation of no-cost allowances will likely result in more greenhouse-gas emissions in the coming years. Compl. ¶ 125. Because the Local Utilities need not consider the cost of obtaining allowances under the Act, they will dispatch their power plants more often regardless of the emissions costs, thereby increasing emissions. Compl. ¶¶ 125, 148. These same incentives encourage the Local Utilities to dispatch their own power plants even if

another power plant would provide more cost-efficient electricity, as any other plant must take into account the carbon costs of generation. Compl. ¶¶ 126, 149. As a result, the cost of supplying Washington's electricity will increase, and the Local Utilities will pass these added costs on to consumers. Compl. ¶¶ 126–27. If all natural-gas power-plant owners had no-cost allowances, no power plant would have an artificial cost advantage over others, and Invenergy and Washingtonians could largely avoid these harms. Compl. ¶¶ 128, 148–49.

LEGAL STANDARD

"Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) . . . ." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation marks omitted). When considering a motion for judgment on the pleadings, the Court "must accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886–87 (9th Cir. 2018) (internal quotation marks omitted).

A "motion [to dismiss] is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." *Chavez v. Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 360 (9th Cir. 2009) (alteration in original) (citation omitted). Those "fact-specific inquir[ies]" are "reserved for a later stage of th[e] case." *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 956 (N.D. Cal. 2020) (declining to dismiss dormant-Commerce-Clause claim). At this stage, "[t]he issue is not whether the plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim." *Usher*, 828 F.2d at 561. Thus, a complaint "does not need detailed factual allegations." *Heimrich v. Dep't of the Army*, 947 F.3d 574, 577 (9th Cir. 2020) (citation omitted). Instead, "[t]o survive a motion to dismiss," the plaintiff need only allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

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ARGUMENT

I. INVENERGY HAS STATED A CLAIM THAT THE ACT'S ALLOCATION OF NO-COST ALLOWANCES VIOLATES THE DORMANT COMMERCE CLAUSE.

The dormant Commerce Clause prohibits states from "discriminat[ing] against interstate commerce and bars state regulations that unduly burden interstate commerce." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (citations omitted). Courts subject state laws to scrutiny under the dormant Commerce Clause in two tiers. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015).

First, courts consider whether a state law "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013). If so, "it is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means." *Id.* (internal quotation marks omitted). A plaintiff pleads a Commerce-Clause violation under this prong when it plausibly alleges the challenged statute "effectuates differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter." *Am. Fuel & Petrochem. Mfrs. v. O'Keefe*, 903 F.3d 903, 913 (9th Cir. 2018) (internal quotation marks omitted).

Second, even if a statute does not discriminate on its face or in practical effect, a plaintiff nevertheless states a dormant-Commerce Clause violation under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), when it "plausibly allege[es] the [challenged law] places a 'significant' burden on interstate commerce," and this burden "clearly outweighs [its] local benefits." *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019). Once the plaintiff's complaint clears this bar, the court must engage in the fact-sensitive inquiry of examining "the benefits of [a state] law[] and the . . . wisdom in adopting it" to resolve the plaintiff's claim. *Chinatown Neighborhood Ass'n*, 794 F.3d at 1146 (alternations in original) (internal quotation marks omitted).

Invenergy has plausibly alleged that the Act's allocation of no-cost allowances fails both prongs of the dormant-Commerce-Clause analysis. First, the Act's allocation discriminates in

practical effect against Invenergy, the sole out-of-state natural-gas-power-plant owner, by denying it no-cost allowances and, in doing so, providing its in-state competitors an artificial competitive advantage. Second, by distorting Washington's electricity markets, the Act's allocation also effectively shuts out interstate investment in natural-gas power plants in Washington. This burden on interstate commerce violates the dormant Commerce Clause because no-cost allowances' purported benefits prove illusory and therefore fail to counterbalance their burdens.

A. The Complaint States a Claim for Unconstitutional Discrimination Under the Dormant Commerce Clause.

Under the dormant Commerce Clause, a state law discriminates when it "treat[s] similarly situated in-state and out-of-state economic interests differently in a way that favors the in-state interests." *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1239 (9th Cir. 2021). A plaintiff states a claim for unconstitutional discrimination in effect when it plausibly alleges (1) the challenged law treats in-state entities differently from out-of-state entities; (2) the differential treatment disfavors out-of-state entities and favors in-state entities, *see Am. Fuel & Petrochem. Mfrs.*, 903 F.3d at 913, and (3) the affected in-state and out-of-state entities "compete against each other in a single market," *Rocky Mountain Farmers Union*, 730 F.3d at 1088.

Invenergy's Complaint satisfies each of these requirements.

1. The Act treats in-state and out-of-state entities differently.

First, Invenergy alleges that the Act treats in-state entities differently from out-of-state entities in practical effect.

Under the Act, electric utilities—but not other entities in the electricity sector—receive no-cost allowances. RCW 70A.65.120. Besides Invenergy, Washington's natural-gas power-plant owners are electric utilities with significant connections to Washington. Compl. ¶¶ 48 & 11 n.8, 115–16. They own several power plants within Washington, collectively employ thousands of individuals, and participate actively in the state's local politics. Compl.¶¶ 49–50.

Such extensive practical connections, not corporate formalities, inform whether an entity is an in-state economic interest. *See NextEra Energy*, 48 F.4th at 322–24 (classifying in-state interests based on their "local presence" rather than places of incorporation); *accord Fla. Transp. Servs., Inc. v. Miami-Dade County*, 703 F.3d 1230, 1259 (11th Cir. 2012). Consider, for example, the Fifth Circuit's decision in *NextEra Energy*. There, electricity-transmission companies challenged a statute that permitted only owners of existing utilities to build transmission lines that connected to utility facilities. *NextEra Energy*, 48 F.4th. at 314. The plaintiffs alleged that this statute unlawfully discriminated against out-of-state electricity companies by shutting them out of Texas's electricity-transmission market. *See id.* at 315. The Fifth Circuit held that the plaintiffs had stated a dormant-Commerce-Clause claim even though "most of" the entities benefitting from the Texas law were "incorporated or headquartered outside Texas." *Id.* at 324, 326. Because a business derives its "clout" within a state from political and economic engagement with that state, these connections drive the dormant-Commerce-Clause inquiry. *Id.* at 323 (observing that an out-of-state corporation "that employs hundreds of thousands of workers in a state" would likely "have the clout to enact protectionist measures"). Accordingly, *NextEra* recognized that the statute's preference for incumbents, regardless of their state of incorporation, could constitute discrimination under the dormant Commerce Clause. *Id.* at 324.

Here, the Local Utilities' extensive connections to Washington are substantially greater than those in *NextEra*, and confirm that those Local Utilities are in-state economic interests. Compl. ¶¶ 48–50. By the same token, Invenergy's lack of similar connections to Washington confirms that it constitutes an out-of-state economic interest. Compl. ¶¶ 48–50. Again, focusing on the depth of Invenergy's and the Local Utilities' presences in Washington makes sense. After all, the dormant Commerce Clause protects out-of-state entities in part based on their limited ability to exercise influence in the state's political process. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007).

Ecology's two contrary arguments are not persuasive. Ecology first insists (at 9–10) that because PacifiCorp is headquartered in Oregon, Invenergy cannot sustain a discrimination claim. But an in-state interest is defined by an entity's connection to the state, not its formal 'home.' *See supra* p. 11. Moreover, although PacifiCorp is based in Oregon, Ecology ignores that PacifiCorp, one of the state's three investor-owned utilities, maintains a substantial presence in Washington—one substantially larger than Invenergy's. Compl. ¶¶ 8, 49–50. In any event, even if PacifiCorp were deemed foreign to Washington, Invenergy's claim would still survive a motion to dismiss because the challenged law's "favored group" need not "be *entirely* in-state for a law to have a discriminatory effect on commerce." *Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005) (concluding a statute discriminated in effect against interstate commerce when the law favored local pharmacies even though some of these pharmacies "[we]re owned by out-of-Commonwealth interests"). The Act favors the group that is composed almost entirely of in-state entities and disfavors only an out-of-state competitor. That is enough to state a claim for unconstitutional discrimination under the dormant Commerce Clause.

Second, Ecology (at 11) argues that "Plaintiffs cannot show economic protectionism because the [Act] burdens even *state-owned* generation facilities," pointing to two university-owned power plants without demonstrating whether these plants produce sufficient emissions to fall under the Act or whether they are competitors who supply electricity to anyone other than their respective universities, *see supra* p. 3 n.3. Further, Ecology cites no law whatsoever for this legal proposition. The Act does not cease to be discriminatory because some state-owned interests also face unfavorable treatment. On the contrary, discrimination under the dormant Commerce Clause does not require that the challenged law "favor all in-state businesses as a group—a statute may be invalid if it favors only a single or finite set of businesses." *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 214 (3d Cir. 2002) (citation omitted) (finding an issue of material fact whether a state law violated the dormant Commerce Clause).

2. The Act's disparate allocation of free allowances disadvantages Invenergy and advantages the Local Utilities.

A law discriminates under the dormant Commerce Clause when it "benefit[s] in-staters and burden[s] outsiders." *Foresight Coal Sales, LLC. v. Chandler*, 60 F.4th 288, 298 (6th Cir. 2023). Invenergy's Complaint alleges three ways that the Act's utility-only allocation disadvantages Invenergy by denying Invenergy the "beneficial [regulatory] treatment" the Act provides to Invenergy's local competitors. *Id.* (alteration in original) (citation omitted). Ecology does not dispute—and therefore concedes—that Invenergy has plausibly pleaded this element.

First, under the Act, Invenergy must bear costs its local competitors do not. A state engages in "obvious" discrimination when a statutory scheme "rais[es] the costs of doing business in [that state's] market for [out-of-state businesses], while leaving those of their [in-state] counterparts unaffected." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350–51 (1977). The Act does just that. While Invenergy must spend millions of dollars on allowances for Grays Harbor—and has already been forced to do so, because Ecology held the first auction in February, Req. for Judicial Notice, Ex. 1—local utilities avoid these costs because they will receive significant numbers of allowances and will use them to cover their plants' compliance obligations. Compl. ¶¶ 101–03, 108, 110, 119–20. As a result, the Act, much like the scheme the Supreme Court struck down in *West Lynn Creamery*, functions as a tariff on the electricity generated by Invenergy's power plant, but not the electricity generated by the Local Utilities' plants. *See* 512 U.S. at 194–96 (striking down law taxing all dairy producers and paying a subsidy only to in-state dairy producers).

Second, the Act "strip[s] away from" Invenergy "the competitive and economic advantages it has earned for itself[.]" *Hunt*, 432 U.S. at 351. Over the past two decades, Invenergy has developed Grays Harbor into one of Washington's most efficient and cleanest power plants. Compl. ¶¶ 38–39. In the last few years, Invenergy spent millions of dollars to upgrade the plant with advanced-gas-path technology to ensure it generates electricity more efficiently and with

fewer emissions than its competitors. Compl. ¶ 39. Nevertheless, under the Act, Invenergy cannot reap the rewards of its investments. Regardless of how much Grays Harbor improves its efficiency or reduces its emissions, utility-owned natural-gas power plants can undercut it because they need not factor in the cost of allowances into their generating costs. Compl. ¶¶ 107, 112.

Third, "the effect of [the Act] is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 10 (1st Cir. 2010) (citation omitted). By distorting the market to the advantage of utility-owned power plants, the Act's allocation of no-cost allowances will cause Invenergy to supply less electricity in Washington, and local utilities to supply more. Compl. ¶ 113. Even in the Act's infancy, Invenergy has already seen market data indicating that utility-owned power plants' share of electricity generation has grown relative to Grays Harbor's, which further illustrates the need for discovery here.

Whether Washington intended to help local electric utilities or hobble out-of-state power companies does not matter; "it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced [goods] rather than to harm out-of-state producers." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984). What matters is that Invenergy has plausibly alleged that the Act produces three discriminatory effects, each sufficient to support its dormant-Commerce-Clause claim. This is especially true given that "[c]laims that turn on intent and effects typically require factual development" and are therefore inappropriate to dismiss at the pleadings stage. *NextEra Energy*, 48 F.4th at 327.

3. Invenergy and the Local Utilities are "similarly situated."

Invenergy has also plausibly alleged the third element of its discrimination claim: that the Act discriminates between similarly situated in-state and out-of-state entities. "[E]ntities are similarly situated" when they "compete against each other in a single market." *Rocky Mountain Farmers Union*, 730 F.3d at 1088. Although the Local Utilities operate in markets that Invenergy does not, such as electricity distribution, Grays Harbor competes alongside twelve utility-owned

natural-gas power plants to generate and supply wholesale electricity in Washington. Compl. ¶¶ 7, 33, 44–48. The owners of these power plants—Invenergy and the Local Utilities—compete against each other in this market as the owners of the generation facilities. Compl ¶¶ 118–19.

In some cases, on its own, "competing in the same market is not sufficient to conclude that entities are similarly situated." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009). But that competition is sufficient when the entities compete against each other in the market the challenged law primarily governs. *See NextEra Energy*, 48 F.4th at 319–20 (concluding that electric utilities and transmission companies were similarly situated because the challenged law regulated the market for electricity transmission, in which they competed). Here, the Act, by capping emissions, regulates the generation, not the supply, of electricity. Because the Act's allocation of no-cost allowances thus affects utilities *as power-plant owners*, not as *utilities qua utilities*, Invenergy has plausibly alleged that it and the Local Utilities are similarly situated for the purposes of the Act's allocation. Compl. ¶¶ 139–45. Moreover, the Court's evaluation of whether entities are similarly situated is fact sensitive and depends on evidence showing competition, or lack thereof. Resolution of this question, too, is premature at the pleading stage. *See Nat'l Ass'n of Optometrists*, 567 F.3d at 525–28 (weighing evidence, including expert testimony, to determine whether entities were similarly situated).

Ecology disputes that Invenergy is "similarly situated to utilities," but it is wrong. Primarily, it contends (at 12, 15–17) that the Supreme Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), gives utilities special status under the dormant Commerce Clause. Ecology, however, misinterprets *Tracy*, suggesting it exempted public utilities from dormant-Commerce-Clause scrutiny entirely. The Court actually declined to adopt that position in *Tracy*, *see* 519 U.S. at 291 n.8, and other courts have subsequently rejected this maximalist reading, *e.g.*, *NextEra Energy*, 48 F.4th at 318 ("Utilities, despite their history as monopolies and the vestiges of that tradition even in deregulated markets, are not 'immune from [ ] ordinary Commerce Clause jurisprudence.'" (alteration in original) (quoting *Tracy*, 519 U.S. at 291 n.8)).

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Properly construed, *Tracy* actually makes clear that Invenergy and the Local Utilities are similarly situated. Under *Tracy*, a state law may distinguish between utilities and their competitors if it primarily affects the highly regulated, monopoly market in which utilities do not face outside competition. *See* 519 U.S. at 297–304. But when the law concerns *only* the competitive market in which the utility participates, the utility's activities in the non-competitive market do not matter. *NextEra Energy*, 48 F.4th at 319–20. The Fifth Circuit in *NextEra Energy* therefore recognized *Tracy*'s limited scope, holding that Texas's restriction on who could operate electricity-transmission lines was "not immune from Commerce Clause scrutiny," because that statute "govern[ed] only a competitive market" in which "vertically integrated utilities and transmission-only companies compete and offer the same services." *Id.* at 319–20. Thus, it concluded that, in the transmission market, "a vertically integrated utility and a transmission-only company are similarly situated." *Id.* at 320.

So, too here, where Invenergy has alleged sufficient facts to establish that the Act's allocation of no-cost allowances primarily affects electricity generation rather than transmission or distribution. The Local Utilities generally do not produce substantial emissions regulated under the Act in their operations.[6] Compl. ¶ 142. Instead, the Act regulates them indirectly in their capacity as the owners of power plants producing covered emissions. Compl. ¶ 142. Because the Act "governs only a competitive market," Invenergy's claim, like those at issue in *NextEra Energy*, presents no *Tracy* "dilemma." 48 F.4th at 319.

Ecology also argues (at 13–14) that the Local Utilities are differently situated from Invenergy because they must comply with the Clean Energy Transformation Act, RCW 19.405.010–901 ("CETA"). While true, this is beside the point, because CETA governs how utilities *supply* electricity to Washington ratepayers, not how they *generate* electricity. Compl. ¶¶ 60–61. For example, CETA's central requirement is that electric utilities must achieve

[6] The possible exceptions are (1) the emissions associated with service vehicles; and (2) emissions associated with electricity imports. Compl. at 32 n.52

carbon neutrality for all the electricity they sell "to Washington retail electric customers" by 2030. RCW 19.405.040(1). This requirement, however, says nothing about utilities' ability to generate emissions-intensive electricity in Washington and sell it outside the state. Those generating activities instead fall under the Act. Because the Act regulates the Local Utilities and Invenergy in their shared capacity as power-plant owners, CETA's additional regulation of electric utilities as power suppliers is irrelevant.

Ecology finally posits (at 14) that the Act's allocation of no-cost allowances is needed to prevent a "duplicate mandate on utilities" that could "further increas[e] costs to consumers." Even so, Washington's policy decision to limit CETA's reach provides no defense for discrimination against out-of-state independent-power producers. After all, "a policy that benefits out-of-state interests doesn't justify another that burdens them." *Foresight Coal Sales*, 60 F.4th at 301. What is more, rather than easing a duplicative mandate, the Act's allocation of no-cost allowances may encourage the Local Utilities to continue to generate emissions-intensive electricity. Because CETA concerns only Washingtonians' supply of electricity, electric utilities can continue to generate emissions-intensive electricity as long as they sell it to Californians, Idahoans, and Oregonians. Of course, the Act would discourage such behavior if the Local Utilities needed to purchase allowances to cover these emissions. The Local Utilities' no-cost allowances, however, likely erase any disincentive the Act would provide because they can use their no-cost allowances to cover any emissions associated with electricity sold within or without Washington. *See* WAC 173-446-230(6).

* * *

In sum, Invenergy has plausibly alleged that the Act's allocation of no-cost allowances disadvantages Invenergy, the sole out-of-state natural-gas power-plant owner, and benefits the Local Utilities, its in-state competitors.

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To the extent these claims raise factual issues, further proceedings, not judgment on the pleadings, is the appropriate next step. *See supra* pp. 2–3. Invenergy's dormant-Commerce-Clause-discrimination claim withstands Ecology's motion to dismiss.

B. The Complaint Also States a *Pike* Claim Because the Act's Allocation of No-Cost Allowances Excessively Burdens Interstate Commerce Without Producing Local Benefits.

As explained above, Invenergy has plausibly alleged that the Act discriminates against out-of-state interests. But even if it did not, the Act's allocation of no-cost allowances would still be subject to dormant-Commerce-Clause scrutiny. A statute that does not discriminate in effect still violates the dormant Commerce Clause if it imposes burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S at 142.

At this stage, Invenergy need only "plausibly allege the [Act] places a 'significant' burden on interstate commerce" and that this burden "clearly outweighs" its purported benefits. *Rosenblatt*, 940 F.3d at 452. Under *Pike*, a court must consider the purported benefits of a challenged regulation and weigh them against the regulation's burden on interstate commerce once the plaintiff alleges the law "imposes a substantial burden." *Pharm. Rsch. & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1044 (9th Cir. 2014) (citation omitted) (addressing *Pike* claim at summary judgment). This inquiry involves "predominantly fact questions that are not ripe for a motion to dismiss." *Rhode*, 342 F. Supp. 3d at 1016; *see Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) (*Pike* balancing "requires evidence"). Thus, courts allow *Pike* claims to survive a motion to dismiss when the plaintiff plausibly alleges that the challenged law substantially burdens interstate commerce and produces only illusory local benefits. *See, e.g.*, *Levin Richmond Terminal Corp.*, 482 F. Supp. 3d at 956–57 (declining to dismiss *Pike* claim); *Flynt v. Shimazu*, 2021 WL 134491, at *4 (E.D. Cal. Jan. 14, 2021) (same); *Magna Legal Servs. v. Arizona ex rel. Bd. of Certified Reporters*, 2013 WL 4478933, at *5–7 (D. Ariz. Aug. 21, 2013) (same).

Invenergy's *Pike* claim survives Ecology's motion for judgment on the pleadings because Invenergy has plausibly alleged both that the Act's allocation of no-cost allowances significantly

burdens interstate commerce, and that this allocation fails to produce significant benefits for Washington.

Under *Pike*, to allege a significant burden, the plaintiff must "allege plausibly that the challenged action imposes a burden not only on them or other specific market participants but on the relevant market as a whole." *Levin Richmond Terminal Corp.*, 482 F. Supp. 3d at 956. Accordingly, courts consider whether the challenged law disrupts "the interstate flow of goods" or "impair[s] the free flow of materials and products across state borders." *Nat'l Ass'n of Optometrists & Opticians*, 682 F.3d at 1154 n.14, 1155. Here, Invenergy alleges that the Act's allocation of no-cost allowances burdens interstate commerce by, in effect, walling off Washington from interstate investment in natural-gas power plants. Compl. ¶ 130. Any new entrant would find itself competing against the Local Utilities on the same uneven playing field that currently hampers Invenergy's ability to compete. Compl. ¶ 131. Given that no rational energy investor would invest in such a skewed landscape, the Act's allocation of no-cost allowances, will, in effect, shut out millions of dollars of interstate energy investment over the coming decades. Compl. ¶ 132. That this reduction in investment benefits the Local Utilities by limiting the prospect of future competition only increases the magnitude of the Act's burden. *See Fla. Transp. Servs.*, 703 F.3d at 1258–60 (concluding that the permitting process for stevedores imposed a substantial burden on interstate commerce when it prevented new entrants from entering the market and benefited in-state incumbents in doing so); Compl. ¶¶ 136–38, 179.

Despite Ecology's claims to the contrary (at 19), the burden Invenergy alleges is cognizable. Courts recognize that a law produces a significant burden on interstate commerce when it obstructs out-of-state investment. *See Gulch Gaming, Inc. v. South Dakota*, 781 F. Supp. 621, 625 (D.S.D. 1991) (concluding that a law which "restrict[ed]" out-of-state residents' investment in certain in-state businesses burdened interstate commerce); *see also Alliant Energy Corp. v. Bie*, 330 F.3d 904, 917 (7th Cir. 2003) (recognizing that effects "on interstate financial transactions" are a cognizable burden on interstate commerce). Ecology argues without authority

(at 19) that accepting Invenergy's allegations would threaten too many state laws on dormant-Commerce-Clause grounds. But courts already have the ability to weed out cases when they do not plausibly allege substantial burdens on interstate commerce. *See Rosenblatt*, 940 F.3d at 452 (dismissing the plaintiff's *Pike* claim for failure to allege a significant burden). Invenergy's claim should proceed because its allegations clear this threshold.

To state a *Pike* claim, a plaintiff must also allege that the burden on interstate commerce "clearly outweighs [the challenged law]'s local benefits." *Id.* at 452. Such an imbalance occurs when the claimed benefits of the law prove "illusory." *UFO Chuting of Haw., Inc. v. Smith*, 508 F.3d 1189, 1196 (9th Cir. 2007) (citation omitted). And, because this analysis "is a fact-specific inquiry reserved for a later stage of th[e] case," a plaintiff need only plausibly allege that any asserted benefits are illusory to survive a motion to dismiss. *Levin Richmond Terminal Corp.*, 482 F. Supp. 3d at 956–57. *NextEra Energy*, for example, reversed the dismissal of the plaintiff's *Pike* claim, reasoning that, because the plaintiff alleged a burden on interstate commerce and "plausibly alleged that the claimed local benefit of reliability is 'insignificant and illusory,' this claim warrant[ed] the factual development that effects claims typically receive." 48 F.4th at 327–28.

Here, Washington purports to advance two legitimate interests through its allocation of no-cost allowances: (1) ensuring Washingtonians have access to electricity at reasonable rates and (2) reducing greenhouse-gas emissions to prevent climate change. Compl. ¶ 135. Invenergy alleges that the Act, in fact, advances neither. Compl. ¶ 178. Across the Pacific Northwest, emissions from power plants and retail electricity rates will rise over the next several decades as a result of the Act's distortion of the electricity market. Compl. ¶¶ 124–27, 148–49, 178. Thus, the Act's allocation of no-cost allowances fails to realize local benefits that counterbalance the significant burden it imposes on interstate commerce. Compl. ¶ 180.

Ecology contends (at 19–20) that the Court should not "second-guess" Washington's policy decisions. (quoting *S.D. Myers*, 253 F.3d at 471). But "[w]hile the Court must give appropriate deference to the legislature's judgment" when reviewing a *Pike* claim, "it is not a

rubberstamp." *Levin Richmond Terminal Corp.*, 482 F. Supp. 3d at 956. In sum, the mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 849 (9th Cir. 2013) (citation omitted). Ecology may defend Washington's legislative judgment at a later stage when the Court has the evidence required to weigh the Act's benefits and burdens. But, here, Ecology's unadorned say-so cannot overcome Invenergy's plausible allegations.

II. THE ACT VIOLATES INVENERGY'S RIGHT TO EQUAL PROTECTION BY SINGLING IT OUT FOR UNFAVORABLE TREATMENT WITHOUT A LEGITIMATE GOVERNMENTAL PURPOSE.

Under the Equal Protection Clause, a state's differential treatment of similarly-situated businesses "must bear a rational relationship to a legitimate governmental purpose." *Romer v. Evans*, 517 U.S. 620, 635 (1996). If "there is no logical connection between the [challenged law's] purpose and classification and its regulatory impact," that law violates the Equal Protection Clause, notwithstanding rational basis review's deferential approach. *Mont. Med. Ass'n v. Knudsen*, — F. Supp. 3d —, 2022 WL 17551162, at *10 (D. Mont. 2022). Invenergy plausibly alleges that the Act's allocation of no-cost allowances—providing them to electric utilities but not independent natural-gas power-plant owners—is irrational in light of the Act's aims. While, under the Act, all other natural-gas power-plant owners receive no-cost allowances, Washington denies Invenergy these allowances. *See supra* Section I.A. And Washington lacks a legitimate justification for doing so, as Invenergy has plausibly alleged that this disparate treatment serves none of the legitimate state interests that the Act seeks to advance. Compl. ¶¶ 145–52.

A. The Act Discriminates Against Invenergy.

Because the Equal Protection Clause requires states to treat similarly situated individuals alike, a court must begin its equal-protection inquiry by (1) "identify[ing] the state's classification of groups" and then (2) determining whether those groups "are similarly situated . . . in respects that are relevant to the state's challenged policy." *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th

Cir. 2018) (citation omitted). Two groups are similarly situated when the challenged regulatory scheme treats them similarly except with respect to the challenged classification. *Harrison v. Kernan*, 971 F.3d 1069, 1075–76 (9th Cir. 2020) (concluding imprisoned men and women of the same security classification were similarly situated). The two groups need not be identical in every respect to be similarly situated; instead, what matters is whether they are similarly situated "in all relevant respects" under the law at issue. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) (determining DACA recipients and other noncitizens were similarly situated for the purposes of obtaining drivers' licenses).

Even though Invenergy differs from the Local Utilities in certain respects, *see* Compl. ¶ 7, Invenergy has plausibly alleged that they are similarly situated under the Act, because the Act regulates the Local Utilities as power-plant owners, not utilities. *See supra* Section I.A.3. As power-plant owners, Invenergy and the Local Utilities are materially the same—they own and operate power plants that generate indistinguishable electricity in more-or-less the same manner. Compl. ¶¶ 32–33, 44–46, 143. Thus, the Act's allocation of no-cost allowances discriminates against Invenergy. *See supra* Section I.A.1–2.

B. The Act's Allocation of No-Cost Allowances to Only Utility Power-Plant Owners Is Not Rationally Related to Any Legitimate Interest.

The Act's discrimination against Invenergy violates the Equal Protection Clause if it is not "rationally related to a legitimate state interest." *United States v. Padilla-Diaz*, 862 F.3d 856, 862 (9th Cir. 2017) (citations omitted). In this analysis, courts must "scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002) (concluding that a statutory exemption was arbitrary). In doing so, they consider two questions: (1) "[d]oes the challenged legislation have a legitimate purpose?"; and (2) "[w]as it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1249 (W.D. Wash. 2019) (alterations in original) (citations omitted),

aff'd, 978 F.3d 1092 (9th Cir. 2020), *and cert. denied*, 142 S. Ct. 387 (2021). At bottom, the court must assure itself that a reasonable justification for a statute's classification exists; otherwise "the standard of review would have no meaning at all." *Silveira*, 312 F.3d at 1089.

Invenergy has plausibly alleged that Washington has no reasonable justification for the Act's allocation of no-cost allowances to electric utilities but not other natural-gas power-plant owners. It has pleaded that, rather than advance Washington's interests, the Act's distinction between Invenergy and electric utilities runs counter to them by increasing both greenhouse-gas emissions and electricity costs. *See supra* Section I.B. At this stage, those allegations are sufficient for Invenergy's claim to proceed. *See Newell-Davis v. Phillips*, 551 F. Supp. 3d 648, 656–57 (E.D. La. 2021) (denying dismissal of equal-protection claim); *Bos. Taxi Owners Ass'n, Inc. v. City of Boston*, 180 F. Supp. 3d 108, 118–19 (D. Mass. 2016) (same). Still, Ecology contends (at 22) that utilities' CETA obligations justify the Act's utility-only allocation of no-cost allowances. But CETA obligations have nothing to do with the Act because CETA does not govern how utility-owned power plants generate electricity. *See supra* Section I.A.2. These two regulatory regimes operate independently, so this difference cannot justify the Act's discrimination against Invenergy. *See Mont. Med. Ass'n*, 2022 WL 17551162, at *11–12 (rejecting the state's justification of a distinction where it had no bearing on the statute's purpose).

Simply put, the Act's allocation of no-cost allowances purports to protect ratepayers, and, because Invenergy has plausibly alleged that this discriminatory provision is untethered from this aim, it has stated a claim under the Equal Protection Clause.

III. INVENERGY'S DISCRIMINATION CLAIM IS RIPE.

Despite Ecology's cursory suggestion to the contrary, Invenergy's claims are constitutionally and prudentially ripe. *See Ass'n of Irritated Residents v. U.S. EPA*, 10 F.4th 937, 944 (9th Cir. 2021). A constitutionally ripe dispute "present[s] issues that are definite and concrete, not hypothetical or abstract," so courts have recognized that this ripeness inquiry "coincides squarely with standing's injury in fact prong." *Safer Chems., Healthy Families v. U.S.*

EPA, 943 F.3d 397, 411 (9th Cir. 2019) (citations omitted). Whether a dispute is ripe in the prudential sense turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Irritated Residents*, 10 F.4th at 944 (citations omitted). Accordingly, "[w]here a plaintiff brings a pre-enforcement challenge, the ripeness inquiry turns on whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, or whether the alleged injury is too imaginary or speculative to support jurisdiction." *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1229 (9th Cir. 2022) (internal quotation marks omitted).

Invenergy's risk of injury from the Act's allocation of no-cost allowances is "definite and concrete, not hypothetical or abstract." *Id.* (citation omitted). Since January 1, 2023, Invenergy has had to plan to procure allowances to cover Grays Harbor's consistently growing compliance obligation. Compl. ¶¶ 101–02. Though Invenergy does not face its first deadline to submit allowances until November 2024, WAC 173-446-600(3), it must purchase these allowances now because Invenergy must some provide 2023 vintage allowances to satisfy this obligation, and it can buy only a limited number of allowances at each auction, *see* WAC 173-446-020 (defining "[v]intage year"); WAC 173-446-330 (setting purchase limits). If Invenergy fails to comply, Ecology will seek penalty allowances and, if those are not forthcoming, fines from Invenergy. WAC 173-446-610. Moreover, Washington has repeatedly told Invenergy that Invenergy will receive zero no-cost allowances to offset Grays Harbor's obligation—the very discrimination that forms the basis of Invenergy's claim. Compl. ¶¶ 80, 86. Without these no-cost allowances, since January, Invenergy has had to consider the Act when determining how it will run Grays Harbor each day, weighing added compliance costs against potential revenue. Grays Harbor has therefore generated less electricity than it would have without the Act. Compl. ¶¶ 104, 109. Invenergy's competitors have not faced this burden. Compl. ¶ 107. Invenergy's injury, the contours of its claim, and its dispute are all clear.

Rather than acknowledge the concrete ways that the Act's allocation of no-cost allowances has disadvantaged and continues to disadvantage Invenergy, Ecology merely speculates (at 17–18) that some electric utilities could provide Grays Harbor with no-cost allowances. Such an arrangement, of course, would not help Invenergy when it has decided not to run Grays Harbor. More importantly, whether a utility voluntarily transfers allowances to Grays Harbor is beside the point. Invenergy alleges that the Act discriminates by denying it the allocation of no-cost allowances it provides to other power-plant owners. Invenergy need not wait and see if this discrimination will occur; Washington has written it into the Act. *See* RCW 70A.65.120. Even if the Court were to consider whether Grays Harbor could receive benefits from no-cost allowances, Invenergy has alleged that the Rule makes this a remote possibility. Compl. ¶¶ 90–91, 109.

CONCLUSION

For the foregoing reasons, Ecology's motion for judgment on the pleadings should be denied. In the alternative, the Court should dismiss without prejudice so that Plaintiffs can amend their complaint to cure any pleading deficiencies.

I certify that this memorandum contains 8376 words, in compliance with the Local Civil Rules.

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