No. 23-3857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVENERGY THERMAL LLC AND GRAYS HARBOR ENERGY LLC,

Plaintiffs-Appellants,

v.

LAURA WATSON, IN HER OFFICIAL CAPACITY AS DIRECTOR
OF THE WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Defendant-Appellee.

On Appeal from the District Court for the Western District of Washington,
Honorable Benjamin H. Settle Presiding, Case No. 3:22-cv-05967-BHS

APPELLANTS' OPENING BRIEF

Vanessa Soriano Power
Jason T. Morgan
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
vanessa.power@stoel.com

Stephen D. Andrews
Nicholas G. Gamse
Michael J. Mestitz
Samuel M. Lazerwitz
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
Telephone: (202) 434-5000
mmestitz@wc.com

Attorneys for Appellants Invenergy Thermal LLC and Grays Harbor Energy LLC

FRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants state that Invenergy Investment Company LLC is the ultimate parent corporation of Invenergy Thermal LLC and Grays Harbor Energy LLC. No publicly held corporation owns 10% or more of the stock of either Invenergy Thermal LLC or Grays Harbor Energy LLC.

Date: February 8, 2024

<u>/s/ Michael J. Mestitz</u>
Stephen D. Andrews
Nicholas G. Gamse
Michael J. Mestitz
Samuel M. Lazerwitz
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
Telephone: (202) 434-5000
mmestitz@wc.com

Vanessa Soriano Power
Jason T. Morgan
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
vanessa.power@stoel.com

Attorneys for Appellants Invenergy Thermal LLC and Grays Harbor Energy LLC

STATEMENT REGARDING ORAL ARGUMENT

Appellants Invenergy Thermal LLC and Grays Harbor Energy LLC respectfully request oral argument in this matter, given the district court's errors and the constitutional issues involved in their claims**.**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Cases—continued:

Page(s)

Cases—continued:

STATUTES

OTHER AUTHORITY

INTRODUCTION

Plaintiff-Appellant Invenergy Thermal LLC ("Invenergy") is an independent power producer headquartered in Chicago and incorporated in Delaware. ER-38. It competes with several of Washington's local utilities because, through Plaintiff-Appellant Grays Harbor Energy LLC ("Grays Harbor Energy"), it owns and operates Grays Harbor, a natural-gas power plant in Washington. ER-39, 43–45. Thanks to Invenergy's investments in state-of-the art clean energy technology, Grays Harbor is one of the cleanest and most efficient natural-gas power plants in the state. ER-42.

Nevertheless, Washington's Climate Commitment Act, RCW §§ 70A.65.005–.901 (the "Act"), provides no-cost allowances—free credits permitting the holder to emit greenhouse gases—worth millions of dollars to in-state utilities that own power plants, but not to out-of-state owners like Invenergy. ER-49–50, 58–61. In so doing, the Act violates the dormant Commerce Clause and the Equal Protection Clause, distorting Washington's electricity market to favor local generators and making it impossible for foreign market entrants to compete against the local utilities that own these other plants. ER-60, 63. Despite these well-pleaded allegations, and on the eve of the close of discovery, the district court granted defendant's motion for judgment on the pleadings in a decision that defied controlling precedent. ER-4. That order should be reversed for several alternative reasons.

First, the district court dismissed the case sua sponte and with prejudice on jurisdictional grounds that were neither briefed nor argued, based on reasoning foreclosed by controlling precedent it apparently did not consider. *See* ER-16–20. The district court ignored this Court's instruction that "the preferred practice for district courts is to afford parties an opportunity to be heard . . . on any basis the court invokes *sua sponte*," "particularly" where, as here, "the *sua sponte* ruling results in a dispositive order." *Wood v. City of San Diego*, 239 F. App'x 310, 311 (9th Cir. 2007) (reversing sua sponte dismissal for lack of standing).

Had the district court sought briefing or argument on standing, Appellants could have identified the controlling authority that likely would have avoided the court's error. For example, the court ruled that Invenergy lacked standing to challenge the discriminatory law regulating Grays Harbor Energy because Invenergy was its indirect sole shareholder. But that ruling contravenes Supreme Court precedent that an "indirect sole shareholder" has Article III standing to challenge regulations affecting its subsidiaries. *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 334, 336 (1990). The court neither considered this precedent nor cited any contrary caselaw.

The court also held that Grays Harbor Energy itself, as an "in-state entity," had no standing under the dormant Commerce Clause. This, too, was wrong: both the Supreme Court and this Court have held that in-state entities can bring dormant Commerce Clause claims. *See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932–33 (9th Cir. 2011).

The district court also disregarded that "[d]ismissals for lack of subject-matter jurisdiction . . . *must be without prejudice*, because a lack of jurisdiction deprives the dismissing court of any power to adjudicate the merits of the case." *Hampton v. Pac. Inv. Mgmt. Co.*, 869 F.3d 844, 846 (9th Cir. 2017) (emphasis added). Even if the district court had been right about standing (and it was not), it should have dismissed the case without prejudice, and without reaching the merits.

Second, the district court's rulings on the merits were perfunctory, premature (given its holding on standing), and wrong. The district court rejected with no substantive analysis Appellants' claims under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which alleged that the Act's burden on interstate commerce exceeds its local benefits. The court dismissed the *Pike* claim with prejudice because it said *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023), which the Supreme Court decided after Appellants filed this case, purportedly "rejected a similar argument." ER-20–21. Not so: in *Pork Producers*, the

Supreme Court confirmed that *Pike* "serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose" and "left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens.'" 598 U.S. at 377, 379 (citation omitted). Indeed, "six Justices of th[e] Court affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *Id.* at 403 (Kavanaugh J., concurring in part and dissenting in part). Appellants' allegations here mirror those that a majority of the Court found sufficient to state a claim. Nevertheless, the district court dismissed Appellants' *Pike* claims with no explanation beyond its reference to *Pork Producers*.

Third, the district court dismissed Appellants' other dormant Commerce Clause and Equal Protection Clause claims because the court concluded that Appellants were not "similarly situated" to in-state utilities. *See* ER-21–33. But this improperly resolved disputed issues of fact, ignoring Appellants' well-pleaded allegations that Grays Harbor competes directly with the utility-owned power plants to sell electricity to utilities. Appellants are therefore similarly situated to the in-state utilities because they own a power plant—just as the utilities do—and their power plants compete directly with one another.

For each of these reasons, this Court should reverse the dismissal with prejudice of Appellants' claims, vacate the district court's judgment, and remand for further proceedings.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On November 28, 2023, Appellants timely filed their notice of appeal from the district court's November 3, 2023 order dismissing the case. ER-79.

ISSUES PRESENTED

I. Whether the district court erred in dismissing Appellants' claims, sua sponte and with prejudice, because it believed Grays Harbor Energy and Invenergy lacked standing.

II. Whether the district court erred in dismissing with prejudice, and without substantive analysis, Appellants' dormant Commerce Clause claim under *Pike*.

III. Whether the district court erred in dismissing Appellants' other dormant Commerce Clause claim because it believed that Appellants were not similarly situated to other power-plant owners, or because it believed that the Act did not discriminate against out-of-state entities.

IV. Whether the district court erred in dismissing Appellants' Equal Protection Clause claim because it believed that Appellants were not similarly situated to other power-plant owners, or because it believed that the Act did not discriminate against out-of-state entities.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this Brief.

STATEMENT OF THE CASE

A. Factual Background

Invenergy is an independent power producer headquartered in Chicago, Illinois and incorporated in Delaware. ER-35. Through two intermediate wholly owned subsidiaries, it owns Grays Harbor Energy, a Delaware Corporation headquartered in Washington. ER-39 & n.2. Together, Invenergy and Grays Harbor Energy operate and own Grays Harbor. ER-35, 39.

Since January 1, 2023, Washington's Climate Commitment 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. ER-35–37, 49. Covered entities must obtain enough "allowances" to cover their annual emissions. ER-49–50. Each year, the number of available allowances goes down, encouraging covered entities to reduce emissions over time. ER-49–50. Thirteen natural-gas power plants in Washington, including Grays Harbor, qualified as covered entities during the Act's first compliance period. ER-39, 43.

In Washington's market for electricity, the generation and sale of electricity has two phases—generation and distribution—each involving different actors. *See* ER-40–41. In the generation phase, power plants can generate electricity and sell it on the wholesale market. ER-41. The electricity that one plant produces is indistinguishable within the market from the power produced by another. ER-41. Thus, electricity on the wholesale market is wholly fungible, regardless of which plant generated each individual kilowatt of electricity. ER-41. Power plants therefore sell electricity on the wholesale market to buyers, including utilities, by agreeing to supply specific amounts of electricity on specified transmission lines at a specified time, which entitles the buyer to use that amount of electricity at that time. ER-41.

In the other market phase, the distribution phase, utilities supply electricity to retail customers. ER-41. They distribute that electricity to the homes and businesses of the ratepaying public. ER-36.

Thus, in the market for power *generation*, Grays Harbor competes with other power plants to generate electricity to be dispatched by utilities or sold on the wholesale market. ER-36, 40–41, 43. Grays Harbor's twelve peer plants, however, are owned by Washington utilities: Avista Corp., PacifiCorp, Puget Sound Energy, and Clark Public Utilities (collectively, the "Local Utilities"). ER-37, 43–44.

Although utilities may face other regulations in their capacity as utilities—that is, with respect to the supply of electricity to ratepayers—the Act is concerned with the *generation* of power, not its distribution. ER-65, 67. And the Act's requirement that covered entities purchase allowances focuses on the market for power generation, not distribution. Covered entities are those that produce greenhouse gas emissions—largely, the power plants generating electricity. *See* ER-49–50, 65. The Act does not cover the utilities themselves, which do not produce substantial greenhouse-gas emissions in their capacity as utilities when they distribute power. ER-65. As a result, utilities generally do not have their own compliance obligations under the Act. ER-65.

The Act's regulatory scheme was revised and hurriedly finalized in the waning days of Washington's 2021 legislative session, as time ran short to pass the bill into law. ER-48. Unlike previous, failed efforts to implement a cap-and-trade program, the Act was passed after receiving support from Washington's electric utilities. ER-49. And no wonder: it provides these utilities with preferential treatment, awarding them no-cost allowances and permitting them to transfer the allowances to the power plants they own. *See* ER-50; RCW § 70A.65.120(3)(a). Indeed, the Act makes transfers to utility-owned plants seamless, and utilities have every incentive to transfer their allowances to their own plants, because it saves their plants millions in compliance costs. ER-58, ER-59–60. But the Act simultaneously imposes barriers to transferring no-cost allowances to independent, non-utility-owned plants like Grays Harbor. Rather than being permitted to freely transfer allowances to non-utility-owned power plants, utilities may only do so if they enter a power purchase agreement with that plant. ER-55, 58. Discovery revealed no such agreements in Washington—and because Local Utilities naturally benefit from using allowances to defray the expenses of their own plants, Local Utilities have no incentive to enter any. *See* ER-56, 59–60.

It is no surprise that the Local Utilities obtained favorable treatment under the law. Unlike Invenergy, they are powerful participants in Washington's in-state energy market. ER-36, 44, 68. Three are headquartered in Washington; the fourth, PacifiCorp is headquartered in neighboring Oregon. ER-44 & n.8. All conduct significant commercial and political activities in Washington. ER-44–45. Indeed, Avista Corp., PacifiCorp, and Puget Sound Energy—Washington's three investor-owned electric utilities—each own several facilities within Washington, employ hundreds of individuals, and, on average, expend hundreds of thousands of dollars in political contributions and lobbying efforts within the state. ER-45.

Invenergy and Grays Harbor Energy, by contrast, lack such extensive connections to Washington. ER-45. They own and operate only Grays Harbor in Washington, and employ fewer than 25 individuals in the state. ER-45. They also spend significantly less on political contributions and registered lobbyists than the three investor-owned Local Utilities. ER-45.

By allocating free allowances to the Local Utilities, but not other natural-gas power-plant owners, the Act forces Invenergy and Grays Harbor Energy to compete on an uneven playing field against Washington's in-state interests. ER-60–61, 69. And the disparate treatment—imposing compliance obligations on all plants but enabling the utility-owned plants to fulfill their obligations for free—distorts the state's electricity market. ER-60. Without free allowances, Invenergy and Grays Harbor Energy have already spent over $75 million on allowances for Grays Harbor and will be forced to spend millions more while their local competitors are exempted. *See* ER-58. On top of the costs for allowances, Invenergy and Grays Harbor Energy stand to lose substantial amounts in revenue because Grays Harbor's generation will factor in compliance costs that utility-owned plants need not. ER-62. And because the Act effectively imposes costs on Grays Harbor that all of its peer plants may avoid, it encourages utility-owned power plants to generate electricity in a manner that minimizes neither costs nor greenhouse-gas emissions. ER-59–60, 62, 66. In plainer terms, the Act's allocation of free allowances means that Grays Harbor will generate less electricity, and its utility-owned competitors will generate more, even though

Grays Harbor is cleaner and more efficient than its utility-owned competitors. ER-60.

The Act further distorts Washington's electricity market by obstructing the flow of energy investment into the state, and therefore by artificially depressing the free competition that would otherwise keep electrical prices low. ER-63. Any out-of-state power company that develops or buys a power plant would step on to the same uneven playing field on which Invenergy and Grays Harbor Energy compete against the Local Utilities. ER-63. For that reason, these companies have no incentive to undertake such business ventures in Washington, and any new market entrant will find itself at a disadvantage—unless the plant owner affiliates itself with one of the incumbent Local Utilities. ER-63. The Act's allocation of no-cost allowances, therefore, will likely shut out millions of dollars in interstate energy investment. ER-63.

Ultimately, the costs of the Act's distortion of Washington's electricity market will be significant for both Appellants and ratepaying Washingtonians, who will face greater greenhouse-gas emissions and electricity costs. ER-62. 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 overall emissions. ER-62, 66. 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 factor in the carbon costs of generation. ER-62, 66. Washington would avoid these costs if all natural-gas power-plant owners received no-cost allowances, because no power plant would have an artificial cost advantage over others. ER-63, 66.

B. Procedural History

Appellants sued Laura Watson, the Director of Washington State's Department of Ecology ("Ecology"), alleging that the Act's allocation of no-cost allowances violated the dormant Commerce Clause and the Equal Protection Clause. First, they alleged that, by providing allowances to Local Utilities but not Appellants, the Act unconstitutionally discriminated in effect against out-of-state natural-gas power-plant owners to the benefit of in-state ones. ER-68–70. Second, they alleged that the Act's allocation of no-cost allowances unconstitutionally burdened interstate commerce by obstructing the flow of interstate energy investment into Washington without producing local benefits that could justify this burden. ER-70–72. Third, they alleged that the Act's disparate treatment of natural-gas power plant owners violated the Equal Protection Clause because this disparate treatment increased electricity costs and greenhouse-gas emissions despite the Act's stated goals of reducing both. ER-72–73.

Ecology answered the Complaint. ER-88 (Dkt. No. 20). A few weeks later, with discovery underway, it moved for judgment on the pleadings for failure to state a claim. ER-88 (Dkt. No. 21). Appellants opposed, ER-88 (Dkt. No. 27), and Ecology replied, ER-88 (Dkt. No. 30).

After briefing on the motion closed, the Supreme Court decided *Pork Producers*, 598 U.S. 356, in which the Court considered a dormant-Commerce-Clause challenge to a California regulation under *Pike*. The Supreme Court rejected the claim as inadequately pleaded, but no reasoning carried the support of the majority of the Court. Nevertheless, the Court confirmed that *Pike* claims remain viable, even to challenge nondiscriminatory state laws that burden interstate commerce. *See Pork Producers*, 598 U.S. at 383–87 (plurality opinion); *id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part).

Several months later, the district court granted Ecology's motion for judgment on the pleadings and dismissed the Complaint with prejudice. ER-3.

First, without briefing or oral argument, the district court dismissed sua sponte and with prejudice Invenergy's and Grays Harbor Energy's dormant-Commerce-Clause claims for lack of Article III standing. ER-16–20. The district court held that, because Invenergy owned the Grays Harbor plant through subsidiary entities, Invenergy failed to allege an injury-in-fact. ER-17–18. It also concluded that Grays Harbor Energy failed to "plead a plausible 'invasion' of a 'legally cognizable interest' under the dormant Commerce Clause" because it is headquartered in Washington. ER-18–19 (citation omitted).

Despite concluding it lacked subject-matter jurisdiction, the district court proceeded to the merits. It held that the Complaint failed to state a claim under *Pike* based on its reading of the Supreme Court's opinion in *Pork Producers*. ER-20–21. The district court correctly acknowledged that the Supreme Court stated that *Pike* claims could still be brought to challenge laws even that were "genuinely nondiscriminatory." ER-14–15 (quoting *Pork Producers*, 598 U.S. at 371). And the district court also acknowledged that Appellants based their *Pike* claim on an allegation that the Act excessively burdened interstate commerce without advancing any legitimate local interest. ER-20. However, the district court's analysis dismissing Appellants' claim was confined to a single sentence asserting that "the Supreme Court recently rejected a similar argument, explaining that it 'overstate[s] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of [its] dormant Commerce Clause jurisprudence." ER-20–21 (quoting *Pork Producers*, 598 U.S. at 377).

Third, the district court held that Appellants' claim the Act discriminated against out-of-state entities was "not plausible." ER-21. It held that the Act does not discriminate on its face because "electric utilities and electricity generating facilities are not substantially similar entities." ER-21. The district court acknowledged Appellants' allegations that they competed against the Local Utilities in their capacity as power-plant owners, and acknowledged that power-plant owners could transfer their no-cost allowances to the electric generating facilities they operate. ER-22. But it concluded that the Act's "allocation of no-cost allowances applie[d] primarily to grant electric utilities a benefit in the captive market." ER-23. It therefore held that "the [Act] does 'not discriminate on the basis of a company's business contacts with the state, but rather on the basis of its status' as either an electric utility or electricity generating facility." ER-24 (citation omitted).

The district court also held that the Act did not discriminate against out-of-state entities in effect. It reiterated its views that Grays Harbor Energy was "an in-state entity" and that power plants and utilities were not "similarly situated." ER-25. It concluded the Complaint failed to plausibly allege that the Act allocated no-cost allowances only to in-state entities and denied them only to out-of-state entities. ER-30. The court held that PacifiCorp could not be an in-state entity under the dormant Commerce Clause. ER-25–28. Similarly, it noted that the University of Washington and Washington State University operated power plants but did not receive no-cost allowances. ER-28–30.

Finally, the district court dismissed Appellants' equal-protection claims with prejudice. ER-31–33. It dismissed Invenergy's claims for lack of standing because it does not directly own Grays Harbor, i.e., "the same reason it lacks standing to advance a claim under the dormant Commerce Clause[.]" ER-32. Based on largely the same analysis it applied to discrimination under the dormant Commerce Clause, the court concluded that electric utilities and electricity generating facilities were not similarly situated, and that the Complaint did not plausibly allege that the Act's allocation did not rationally relate to a legitimate government interest. ER-32–33.

Appellants timely appealed. ER-79.

SUMMARY OF THE ARGUMENT

I. Without briefing or argument, the district court held that Invenergy lacked standing to assert claims based on injuries to Grays Harbor or to itself because Invenergy wholly owns Grays Harbor Energy Center through two wholly-owned subsidiaries. ER-17–18. This contravenes clear Supreme Court precedent that an "indirect sole shareholder" of a company has Article III standing to challenge regulations affecting its subsidiaries. *Franchise Tax Bd.*, 493 U.S. at 336. The court also held that Grays Harbor Energy itself—as an "*in-state* entity"—had no standing to bring a dormant Commerce Clause claim. ER-18–19. But this, too, is incorrect: this Court and the Supreme Court have consistently held that in-state entities have standing to bring claims under the dormant Commerce Clause. *See, e.g.*, *Tracy*, 519 U.S. at 287.

At the very least, dismissal should have been without prejudice—both because the district court reached this ground without providing any opportunity for briefing or argument, and because a dismissal for lack of subject-matter jurisdiction must be without prejudice. Dismissal without prejudice would also allow Appellants to cure any pleading deficiencies—for example, by adding and/or replacing corporate affiliates as Plaintiffs. Otherwise, under the district court's reasoning, neither Invenergy, Grays Harbor Energy, nor any other affiliate could challenge an allegedly unconstitutional law that has cost Grays Harbor and Invenergy more than $75 million dollars already.

II. In *Pork Producers*, the Supreme Court recently reaffirmed that *Pike* "serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose," and expressly "left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens.'" 598 U.S. at 377, 379 (citation omitted). Indeed, "six Justices of th[e] Court affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *Id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part). The district court nevertheless held, with effectively no analysis, that Appellants' *Pike* claim should be dismissed with prejudice because *Pork Producers* "recently rejected a similar argument." ER-20–21. On the contrary, *Pork Producers* has no effect on the ongoing validity of *Pike* claims, and the allegations here are exactly those a majority of the Court stated would suffice to plead a *Pike* claim.

Even if dismissal were warranted, the court should not have dismissed with prejudice. Appellants should have been given leave to amend to add whatever allegations the district court believed were lacking (and which the district court did not even attempt to identify).

III. Appellants also adequately alleged that the Act discriminates under the dormant Commerce Clause by treating entities who own power plants differently depending on whether or not they are incumbent, in-state Local Utilities or out-of-state independent owners like Appellants.

Appellants and the Local Utilities are similarly situated because the Act regulates entities in their capacity *as power-plant owners*. The district court relied instead on other immaterial differences between electricity generators and utilities to conclude they are not similarly situated. *See* ER-21–24. But for the purpose of the Act, they are: utilities themselves do not produce substantial greenhouse-gas emissions in their capacity as utilities—the *power plants* they own produce covered emissions, and the Act gives the utilities no-cost allowances to cover those emissions. ER-36–37, 65. Appellants, who own a power plant but are not affiliated with a Local Utility, get no such allowances to cover their plant's emissions. ER-37. Although utilities face other regulations in their capacity as utilities—with respect to the power they supply to ratepayers—the Act is concerned with the generation of power, not its distribution. ER-67.

If dismissal were warranted, it should have been without prejudice, to allow Appellants to add any additional necessary allegations explaining the direct competition between Invenergy and the Local Utilities as owners of power plants. Appellants could, for example, allege additional facts further demonstrating the Local Utilities' participation in both power-generation and wholesale-electricity markets, and illustrating how the Act's allocation no cost-allowances provides the Local Utilities competitive advantages in those markets.

IV. For much the same reason, the district court erred in dismissing with prejudice Appellants' Equal Protection Clause claims. Appellants adequately alleged that they were treated differently from similarly situated power-plant owners, and that the differential treatment furthered only local protectionism, rather than any legitimate state interest. To the extent the district court believed Appellants' pleading was inadequate, it should have dismissed without prejudice and with leaved to amend.

STANDARD OF REVIEW

When considering a dismissal for lack of standing, this Court reviews the dismissal *de novo*. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 815 (9th Cir. 2017). Where, as here, "'standing is challenged on the basis of the pleadings,'" it "'accept[s] as true all material allegations of the complaint' and 'construe[s] the complaint in favor of the complaining party.'" *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1100 (9th Cir. 2024) (citation omitted). "At this stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the Court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). "Given the due process and fairness concerns presented, a district court generally must provide the parties with adequate notice that it is contemplating invoking a particular procedural device *sua sponte*." *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1060 (9th Cir. 2023). Thus, "the preferred practice for district courts is to afford parties an opportunity to be heard (through an Order to Show Cause or otherwise) on any basis the court invokes *sua sponte*," "particularly . . . where the *sua sponte* ruling results in a dispositive order." *Wood*, 239 F. App'x at 311.

This Court also reviews de novo "[a] judgment dismissing a case on the pleadings." *Brown v. Transworld Sys., Inc.*, 73 F.4th 1030, 1037 (9th Cir. 2023) (citation omitted). Dismissal is appropriate "only if 'no relief could be granted under any set of facts that could be proved consistent with the [complaint's] allegations.'" *Id.* (citation omitted). When considering a motion for judgment on the pleadings, the Court must "accept the factual allegations in the complaint as true, and view them in a light most favorable to the plaintiff." *LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015). "Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6)," *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015) (citation omitted), so a 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) (citation omitted).

In addition, "[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Jewel v. N.S.A.*, 673 F.3d 902, 907 n.3 (9th Cir. 2011) (citation omitted). And when the district court dismisses a claim for lack of standing, it must dismiss the claim without prejudice, "because a court that lacks jurisdiction 'is powerless to reach the merits.'" *Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (per curiam) (citation omitted).

ARGUMENT

I. INVENERGY AND GRAYS HAROR ENERGY HAVE STANDING, AND THE DISTRICT COURT ERRED BY DISMISSING SUA SPONTE AND WITH PREJUDICE.

A plaintiff has standing when it "show[s] (1) an 'injury in fact,' (2) a 'causal connection between his injury and the conduct complained of,' and (3) that his injury will 'likely . . . be redressed by a favorable decision.'" *Iten v. County of Los*

Angeles, 81 F.4th 979, 984 (9th Cir. 2023) (second alteration in original) (citation omitted). At the pleading stage, "'general factual allegations of injury' suffice to meet the plaintiff's burden." *Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022) (citation omitted).

Economic injuries sit at Article III's core, and a "pocketbook injury is a prototypical form of injury in fact." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Thus, an economic loss, "even one as small as a fraction of a cent, is sufficient to support standing." *Van v. LLR, Inc.*, 61 F.4th 1053, 1064 (9th Cir. 2023). Here, Appellants have suffered (and continue to suffer) millions of dollars in injuries, which confers standing to sue.

A. Invenergy and Grays Harbor Energy are injured by the CCA's allocation of no-cost allowances.

Both Invenergy and Grays Harbor Energy plausibly alleged that they would suffer monetary losses as a result of the Act's allocation of no-cost allowances. The Act requires Grays Harbor to have sufficient allowances to cover the emissions that it produces when generating electricity. ER-58. As a result, Grays Harbor Energy must purchase those allowances at auction, while the Local Utilities receive allowances they may use for the benefit of their power plants for free. ER-36–37, 58–61. Appellants anticipated spending tens of millions of dollars on allowances in 2023 alone, ER-58—and, indeed, have ultimately spent more than $75 million to date. These costs confer standing under Article III.

Moreover, the Act's disparate allocation of no-cost allowances distorts Washington's electricity market by subsidizing utility-owned power plants' cost of generation and making Grays Harbor's more expensive. Appellants therefore face competitive harm and lost revenue from the Act. ER-62. Such allegations of lost business and decreased revenue "easily satis[fy] the injury in fact standing requirement." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767 (9th Cir. 2018) (citations omitted).

Finally, Invenergy also has "a direct, personal interest" to bring suit for its own unique injuries, because the value of its investment in Grays Harbor and Grays Harbor Energy is diminished by Washington's unconstitutional regulation. *See Franchise Tax Bd.*, 493 U.S. at 336 (parent corporations had Article III standing to challenge laws affecting their indirect, wholly-owned subsidiaries).[1]

[1] Whether an owner has Article III standing over injury to its subsidiary is separate from whether it has "prudential standing." *See id.* Here, because Invenergy suffers injuries in its own right, it has both Article III and prudential standing to raise a claim. But, in any event, prudential standing is not a jurisdictional issue, Defendant never raised the issue, and any challenge to Invenergy's prudential standing has been waived. *See, e.g.*, *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000) ("[A] party waives objections to nonconstitutional standing not properly raised before the district court."). It also remains an open question whether prudential-standing rules are

Moreover, to the extent the district court erroneously believed that Gray Harbor was an "in-state entity" under the dormant Commerce Clause, ER18, Invenergy is plainly not, and so can undoubtedly press a dormant Commerce Clause claim in its own right, ER-35.

B. The district court's holdings that Appellants suffered no cognizable injuries violated binding precedent.

The district court, sua sponte and without briefing, disregarded Appellants' allegations of financial injury and instead articulated a view of standing that violates binding precedent. First, it held that Invenergy, as Grays Harbor Energy's indirect owner, suffered no Article III injury. *See* ER16–18, 32. Second, it reasoned that, with some narrow exceptions, only out-of-state plaintiffs suffer cognizable injuries under the dormant Commerce Clause, and, therefore, Grays Harbor Energy could not establish an injury under the Commerce Clause notwithstanding the financial harms it suffered. *See* ER-18–19. These holdings are both reversible error.

1. The district court erred in reaching standing sua sponte, with no briefing or argument.

As an initial matter, the district court improperly raised and decided the supposed standing issues sua sponte, without any notice to the parties. Although a

---

consistent with Article III. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *United States v. JP Morgan Chase Bank Acct. No. Ending 8215*, 835 F.3d 1159, 1167 (9th Cir. 2016).

district court may raise jurisdiction sua sponte, this Court has "emphasize[d] that the preferred practice for district courts is to afford parties an opportunity to be heard." *Wood*, 239 F. App'x at 311. Indeed, "district courts should always make every effort to afford the parties such an opportunity." *Id.*

Here, the district court afforded Appellants no such opportunity. Nor did it allow any amendment to cure the standing issues it (wrongly) perceived. But it is reversible error for a district court to "sua sponte dismiss[] the complaint on standing grounds" without providing the plaintiff with "'an opportunity to remedy any perceived defects in the complaint[.]'" *Jewel*, 673 F.3d at 907 n.3 (citation omitted); *see also Wood*, 239 F. App'x at 310; *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (dismissal without leave to amend was error when court "never allowed [plaintiffs] a chance to explain how they could amend the complaint if allowed to do so").

2. The district court erred in holding that Invenergy suffered no injury because Grays Harbor Energy is a wholly owned subsidiary.

Despite the clear allegations of monetary harm to Invenergy, the district court further erred by holding that Invenergy suffered no injury-in-fact because it is the sole owner of Grays Harbor Energy through two intermediate, wholly owned corporations—Invenergy Grays Harbor LLC and Invenergy Grays Harbor Holdings LLC. ER17–18; *see* ER-39 n.2.

The Supreme Court, however, held the opposite in *Franchise Tax Board*, 493 U.S. at 336. There, the Court considered whether two corporations had standing to challenge regulations on their wholly owned, indirect subsidiaries. *Id.* at 334–35. Both parents, it concluded, had "Article III standing to challenge the taxes that their wholly owned subsidiaries [were] required to pay." *Id.* at 336. It reasoned that, "[i]f those taxes are higher than the law of the land allows," the state's tax regulations "threaten[] to cause actual financial injury" to the parents "by illegally reducing the return on their investments" in the subsidiaries "and by lowering the value of their stockholdings." *Id.* Those harms provided the parents with Article III standing even though the regulations at issue governed only their indirectly owned subsidiaries. *Id.*

Invenergy, like the indirect corporate owners in *Franchise Tax Board*, alleged financial injuries resulting directly from Washington's allegedly unconstitutional regulation of its wholly and indirectly owned subsidiary. ER58, 61–62; *see supra* pp. 22–24. As *Franchise Tax Board* makes clear, Invenergy's allegations that the Act's regulation of Grays Harbor will harm it financially are "all that is required for Article III standing." 493 U.S. at 336.

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), upon which the district court relied, is not to the contrary. *See* ER-17–18. In *Dole*, the Court observed that "[a] corporate parent" does not "have legal title to the assets of" its subsidiaries. 538 U.S. at 475. The question there was not one of standing: it pertained only to the Court's analysis of the Foreign Sovereign Immunities Act's definition of an "instrumentality," which depends on whether a foreign state holds an "ownership interest" in a particular company. *See id.* at 473–78.

The injury in fact requirement, by contrast, does not focus on ownership—it focuses on whether the putative plaintiff has suffered some de minimis, concrete harm, even one as small as a fraction of a cent, *see Van*, 61 F.4th at 1063–64, and serves "to assure that the plaintiff is not an intermeddler, generally unhappy with the law, but without any particular stake in the outcome," *Iten*, 81 F.4th at 985. Invenergy has plausibly alleged why the Act's failure to allocate Grays Harbor or Invenergy no-cost allowances reduces its returns. That gives Invenergy a sufficient injury and "stake in the outcome" if the litigation, even though its ownership is indirect. *See Franchise Tax Bd.*, 493 U.S. at 336 (citation omitted).

Indeed, several other courts of appeals agree that the regulation of a business imposes an Article III injury on its owner, notwithstanding the separations of the corporate form. *See, e.g.*, *Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 638 (1st Cir. 2013) (finding Article III standing where, "the defendants' actions, although taken against [the plaintiff's] business rather than against Gianfrancesco himself, caused him 'actual financial injury'" (citation omitted)); *Advanced Nano Coatings, Inc. v. Hanafin*, 478 F. App'x 838, 842–43 (5th Cir. 2012) (per curiam) (holding that parent corporation had Article III standing to assert contract claim on behalf of its wholly owned subsidiary). District courts in this Circuit, too, have concluded that "[w]hen a wholly-owned subsidiary's expenses are increased due to a third party's allegedly unlawful act, the parent company's return on investment is reduced, thus lowering the value of its stockholdings," which, in turn, provides an injury sufficient for Article III standing. *Instrumentation Lab'y Co. v. Binder*, 2012 WL 12868361, at *3 (S.D. Cal. Aug. 28, 2012), *aff'd*, 603 F. App'x 618 (9th Cir. 2015); *see Johnson v. Myers*, 2011 WL 4533198, at *4 (N.D. Cal. Sept. 30, 2011) (shareholders had Article III standing).

The district court also cited this Court's non-precedential opinion in *Ashley Creek Properties, L.L.C. v. Larson*, 403 F. App'x 273, 274 (9th Cir. 2010), which held that a corporate owner lacked standing to challenge an Environmental Impact Statement prepared for a planned expansion of a mine. But *Ashley Creek* is both non-binding and distinguishable on its facts; there, the plaintiff had not alleged it had any legal interest in the mining leases alleged to be affected by the expansion, and, in any event, the "lack of plans . . . to develop the leases render[ed] the claimed injury too speculative[.]" *Id.* Here, by contrast, Appellants clearly alleged Invenergy's and Grays Harbor Energy's interest in Grays Harbor, and their plans to continue to operate it to generate electricity, as well as the concrete economic harm they both suffered. ER-38–39, 58–59, 62. The injury here is substantial, not speculative; there is no dispute that Appellants have spent tens of millions of dollars in compliance costs (and the district court did not hold otherwise). *See* ER-58.

Moreover, in *Ashley Creek*, the situation was reversed. In that case, this Court reasoned that a subsidiary that "does not contend that the rights [at issue] belong to it, but to its parent company" cannot have standing. *Ashley Creek*, 403 F. App'x at 274. The district court here assumed that "the inverse must also be true," ER-18, but that does not follow: parent corporations accrue benefits from and exercise operational control over their subsidiaries, and are injured when unlawful regulations diminish the value of their holdings. *See Franchise Tax Bd.*, 493 U.S. at 336. Even if a cognizable injury cannot not flow from a parent company to a subsidiary, it does not follow that a cognizable injury cannot flow from a subsidiary to a parent. On the contrary, ample law holds that it can. *See supra* pp. 26–28.

3. The district court erred in holding that Grays Harbor Energy was not injured under the dormant Commerce Clause.

The district court also concluded that Grays Harbor Energy lacked standing to assert its own claim under the dormant Commerce Clause because it is headquartered in Washington, and purportedly had no "out-of-state economic interests of its own against which the [Act] *could* discriminate." ER-18–19. The court acknowledged customers of discriminated-against, out-of-state entities could bring claims under the dormant Commerce Clause, but held that Grays Harbor was not "burdened in any similar way." ER-19.

Even in-state entities, however, have standing to bring claims under the dormant Commerce Clause. In *Yakima Valley*, for example, a Washington hospital challenged state licensing regulations under the dormant Commerce Clause. 654 F.3d at 923–24. There, the agency argued that the hospital "lack[ed] standing because it operates only an in-state hospital," but this Court rejected that argument. *Id.* at 933.[2] For a party to have standing to raise claims under the dormant Commerce Clause, this Court reasoned, those claims need only "bear more than a marginal relationship to claims addressing a state or county's effort to erect barriers to interstate commerce." *Yakima Valley*, 654 F.3d at 932 (citation omitted). The hospital's status as an in-state entity did not change the analysis because "[t]he Commerce Clause . . . protects the vitality of the national market for goods and services, not the location of a particular participant[.]" *Id.* at 933. At bottom, "a state burdens the rights of its own residents as well as those of other

---

[2] In *Yakima Valley*, the Court considered this a question of prudential rather than Article III standing, *id.* at 932, and the district court appears to have erroneously conflated the two, *see* ER-18–20. Prudential standing issues are waived unless there are raised by a party in the district court; here, they were not. *See supra* note 1.

states when it burdens interstate commerce." *Id.*; *see also Fla. Transp. Servs., Inc. v. Miami-Dade County*, 703 F.3d 1230, 1256 (11th Cir. 2012) (observing that "courts have reached the merits of numerous dormant Commerce Clause cases involving in-state parties").

Yakima Valley's reasoning applies with equal force here. Appellants allege that Washington denied them no-cost allowances that the Local Utilities enjoy because Washington has, in effect, sought to favor a group of in-state entities with substantial political and commercial connections to the state. ER-60–61, 68–69. Grays Harbor Energy, because it is not an in-state utility, received no allowances. *See* ER-68–69. Thus, even if Grays Harbor Energy is considered a Washington entity,[3] its claim stems directly from Washington's alleged discrimination against out-of-state power-plant owners to the benefit of in-state power-plant owners. It therefore has standing to assert its dormant-Commerce-Clause claims. *Yakima Valley*, 654 F.3d at 933.

[3] The district court mistakenly stated that "[t]he complaint concedes that Grays Harbor Energy LLC is an *in-state entity*, not an out-of-state entity." ER18. The Complaint contains no such concession. It alleges that Grays Harbor Energy and Invenergy are out-of-state entities for dormant-Commerce-Clause purposes because they lack substantial commercial and political presences in the state. ER61, 69; *see NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 322–24 (5th Cir. 2022) (classifying in-state interests based on their "local presence" rather than their places of incorporation), *cert. denied* No. 22-601, 2023 WL 8531876 (U.S. Dec. 11, 2023); *accord Fla. Transp. Servs.*, 703 F.3d at 1259.

Indeed, as the district court acknowledged, ER-19, the Supreme Court has repeatedly held that in-state entities have standing to bring dormant Commerce Clause challenges because "[c]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates," *Tracy*, 519 U.S. at 286. The district court appeared to believe this applied only to "customer[s] of [a] discriminated out-of-state entity[.]" ER-19. But *Tracy* makes clear that in-state plaintiffs can sue under the dormant Commerce Clause when they suffer any economic injury as a result of the challenged law: for example, either when they are "directly liable" under the challenged law or where the law "raise[s] the price of their . . . goods relative to the exempted" in-state alternatives. 519 U.S. at 287.

Here, Grays Harbor Energy is directly liable if Grays Harbor fails to cover its emissions with the allowances that it must purchase at auction. *See* ER-49–50, 58. And, because the competing utility-owned power plants received no-cost allowances, they do not have to factor compliance costs into their decision to generate power, making Grays' Harbor's electricity more expensive relative to the exempted utility-owned plants. ER-59–60. Grays Harbor Energy therefore "plainly ha[s] standing to challenge the [Act] in this Court," even if it is considered an in-state entity. *Tracy*, 519 U.S. at 287 (first alteration in original) (citation omitted).

C. The district court erred in dismissing the claims with prejudice.

Even if the district court did not err in holding that Appellants failed to plausibly allege Article III standing (and it did) the dismissal should have been without prejudice. As explained above, *supra* pp. 24–25, dismissals on grounds not raised by the parties should be without prejudice.

Moreover, even had the court been correct that Appellants lacked standing, is was required to dismiss without prejudice and stop there. "Dismissals for lack of subject-matter jurisdiction," such as dismissals for lack of Article III standing, "*must be without prejudice*, because a lack of jurisdiction deprives the dismissing court of any power to adjudicate the merits of the case." *Hampton*, 869 F.3d at 846 (emphasis added); *accord Barke*, 25 F.4th at 721. "[N]o matter how important the issue, a court lacking jurisdiction is powerless to reach the merits under Article III of the Constitution." *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1106 n.4 (9th Cir. 2006).

Thus, even if this Court concludes that the district court correctly dismissed the case for lack of standing, the ruling must be reversed and remanded with an order that the dismissal should have been without prejudice, vacating the remainder of the opinion. *See, e.g.*, *id.* at 1106–07 (vacating dismissal with prejudice and remanding with instructions to dismiss without prejudice);

DeCarlo v. Costco Wholesale Corp., 733 F. App'x 398, 399 (9th Cir. 2018) (same); *O'Campo v. Ghoman*, 622 F. App'x 609, 610 (9th Cir. 2015) (same).

Instead, the district court dismissed the case with prejudice, concluding that the standing issues "cannot be cured through the allegation of other facts[.]" ER-20.[4] But had the district court alerted Appellants to the issue, they could have advised the court of the controlling precedent it overlooked. And they certainly could have cured any issues by amending. For example, they could have added as plaintiffs Invenergy Grays Harbor LLC and Invenergy Grays Harbor Holdings LLC, the additional companies in Grays Harbor's ownership chain, addressing any problem with Invenergy's standing as an indirect whole owner. ER-39 n.2. And Appellants could have amended to further emphasize the injuries Grays Harbor Energy faces under *Yakima Valley* and *Tracy*, even if it is considered an in-state entity.

The result of the district court's logic—if applied—is that *no* Invenergy entity has standing to challenge a Washington law that has imposed tens of

[4] The only Ninth Circuit authority on which the district court relied was a case permitting a dismissal with prejudice for lack of standing because the plaintiff, a lawyer challenging this Court's rule against citing unpublished opinions, "could not have possibly" alleged an injury, and indeed *conceded at argument he had never been sanctioned for citing an unpublished opinion*. *Schmier v. U.S. Ct. of Appeals for Ninth Cir.*, 279 F.3d 817, 820, 821–24 (9th Cir. 2002). That implausible claim is a far cry from the claim here, in which Appellants have indisputably spent tens of millions of dollars complying with the Act.

millions of dollars on costs on Grays Harbor. Grays Harbor Energy is "in-state," so, by the district court's logic, cannot sue. And neither Invenergy nor any other whole owners of Grays Harbor Energy can sue either despite the fact that the Act has manifestly injured their investments in the Grays Harbor plant. This result unfairly confers immunity on an unconstitutional law.

II. INVENERGY AND GRAYS HARBOR ENERGY STATED CLAIMS UNDER *PIKE.*

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). Concerns about "economic protectionism—that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"—lie at the dormant Commerce Clause's core. *Pork Producers*, 598 U.S. at 369 (citation omitted). *Pork Producers* also confirmed that the Supreme Court's precedents "left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens.'" *Id.* at 379 (citation omitted).

Thus, even if a statute does not discriminate on its face or in practical effect, a plaintiff nevertheless states a claim under *Pike* 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). If the plaintiff alleges the law has discriminatory effects or "impedes the flow of commerce," its claim lies closer to "*Pike*'s heartland." *Pork Producers*, 598 U.S. at 379–80, 379 n.2; *id.* at 391–92 (Sotomayor, J., concurring in part). Still, even without alleging such burdens, a plaintiff may state a claim under *Pike*. *Id.* at 392. Once a plaintiff plausibly alleges a burden on interstate commerce, 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 v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) (alternations in original) (citations omitted).

A. Appellants properly alleged under *Pike* that the Act unduly burdened interstate commerce and that its burdens exceeded local benefits.

Appellants plausibly alleged that the Act significantly burdened interstate commerce. The market for electricity is itself a vital interstate market: the Complaint alleged in great detail the interstate market for electricity generation and consumption in the Pacific Northwest. ER-40–41. In addition to imposing burdens on Grays Harbor's generation and providing a competitive advantage to Local Utilities, the Act also obstructs the flow of interstate investment into Washington to the benefit of Local Utilities by reducing potential competition.

ER-70–71. Any company wanting to open a new natural-gas power plant in Washington would be discouraged from doing so, because entrants not already affiliated with the incumbent Local Utilities would have to shoulder ongoing cost burdens that utility-owned plants do not. ER-59–61, 63, 70–71.

Appellants also alleged, consistent with *Pike*, that the burdens of the law clearly outweigh its local benefits. The Complaint explained that the Act would increase greenhouse-gas emissions because of the it creates an incentive for Local Utilities to run their less-efficient plants, regardless of the emissions those plants create. ER-62, 71.

Similarly, the Complaint alleged that the Act would harm, not help, Washington's ratepaying public. "Because the no-cost allowances incentivize utilities to dispatch their own power plants regardless of their efficiency in terms of cost, the cost of generating electricity to fulfill Washington's retail demand for electricity will increase." ER-62. Appellants' market modeling showed that the Act was "expected to increase these costs by billions of dollars between 2023 and 2041," and even as of the date of the Complaint, the Local Utilities were already seeking to raise rates. ER-62. In fact, as the Complaint alleged, *Ecology itself expects the Act to raise electricity prices*, and has made announcements to that effect. ER-56. Indeed, as discovery proceeded below, Appellants retained an expert who had conducted an analysis showing that the Act would have indeed increased *both* emissions and costs, which defeats its stated purpose; the district court dismissed just before the expert deadline.

B. *Pork Producers* does not foreclose Appellants' *Pike* claim.

In a single sentence, the district court rejected Appellants' claims under *Pike*, asserting that "the Supreme Court recently rejected a similar argument" in *Pork Producers*. ER-20–21.

This is simply wrong. In *Pork Producers*, "six Justices of th[e] Court affirmatively retain[ed] the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." 598 U.S. at 403 (Kavanaugh J., concurring in part and dissenting in part). Moreover, even under the narrower vision of *Pike* articulated by the plurality in *Pork Producers*, Appellants plausibly pleaded that the Act's allocation of no-cost allowances is unconstitutional under *Pike.*

The district court's lack of reasoning makes it difficult to know why it dismissed the *Pike* claim. *Pork Producers* plainly does not foreclose *Pike* claims in general. The majority there reasoned that claims alleging discrimination against out-of-state economic interests formed "*Pike*'s heartland" but nevertheless observed that it "has left the 'courtroom door open' to challenges premised on 'even nondiscriminatory burdens[.]'" *Id.* at 379–80 (citation omitted). Plainly, the Court "d[id] not shut the door on all such *Pike* claims," *id.* at 392 (Sotomayor, J., concurring in part); *see id.* at 395–96 (Roberts, C.J., concurring in part and dissenting in part)—but the district court did, *see* ER-20–21, 21 n.9.

Other district courts have permitted *Pike* claims to go forward after *Pork Producers*. Just a month after the decision below, another federal court expressly rejected a state's argument that "a plaintiff must allege discrimination against interstate commerce to state a plausible *Pike* claim." *Ass'n for Accessible Meds. v. Ellison*, 2023 WL 8374586, at *8 (D. Minn. Dec. 4, 2023). As that court noted, had the Supreme Court intended that result or intended to limit *Pike* only to "alleged burdens on the instrumentalities of interstate commerce (such as trains and trucks)," "the Supreme Court could have issued a very brief opinion affirming the dismissal of the plaintiffs' complaint in *Pork Producers*," which failed to press either theory. *Id.* at *8. But it did not. On the contrary, *Pork Producers* left *Pike* untouched. *See Pork Producers*, 598 U.S. at 403 (Kavanaugh, J., concurring in part and dissenting in part); *see also Selvaggi v. Borough of Point Pleasant Beach*, 2024 WL 303677, at *19 (D.N.J. Jan. 26, 2024) (denying motion to dismiss *Pike* claim after *Pork Producers*).

Indeed, Invenergy's and Grays Harbor Energy's allegations in support of their *Pike* claim are substantially stronger than those at issue in *Pork Producers*. There, the petitioners failed to plausibly allege a burden on interstate commerce because they "merely allege[d] harm to some producers' favored 'methods of operation.'" 598 U.S. at 386–87 (plurality opinion) (citation omitted); *see id.* at 393 (Sotomayor, J., concurring in part); *see also Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1033 (9th Cir. 2021) (mere "cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce"). Here, Appellants alleged more, including why the disparate allocation of no-cost allowances would distort the interstate market for power and dispatch decisions, would discourage new market entry and competition, and would, undercut the very interests sought to be served by the law. *See supra* pp. 36–38. These allegations are exactly the type that the Supreme Court suggested would be adequate to state a *Pike* claim. *See Pork Producers*, 598 U.S. at 384–86 (plurality opinion); *id.* at 399–402 (Roberts, C.J., concurring in part and dissenting in part).

C. Any dismissal should have been without prejudice.

Even had Appellants failed to plead plausible claims under *Pike* in their initial complaint, the district court should have dismissed the claims without prejudice and with leave to amend. "A simple denial of leave to amend without any explanation by the district court is subject to reversal." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1124 (9th Cir. 2018) (citation omitted) (vacating in part dismissal with prejudice). Here, the district court did not explain why Appellants'

Pike claim was deficiently pleaded, let alone why any deficiencies could not be cured by further amendment. ER-20–21.

Indeed, because Appellants "initiated the present lawsuit without the benefit of the Court's latest pronouncements" on *Pike*, they "deserve a chance to supplement their complaint" with allegations that address any new pleading requirements set forth in *Pork Producers*. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (holding that plaintiffs should be granted leave to amend in light of intervening Supreme Court authority); *see also Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028–29 (9th Cir. 2014) (remanding to permit plaintiffs to amend following intervening Supreme Court decision).

Here, if the district court had provided a reasoned analysis of why the complaint was insufficient under *Pike*, Appellants could have alleged additional facts regarding the burden that the Act places on the interstate markets for power generation and electricity. When the case was dismissed, Appellants were preparing to submit an expert report from an industry expert confirming that the Act imposed considerable costs on Grays Harbor and makes it more expensive for both in-state and even out-of-state consumers to purchase power from Grays Harbor. This is no surprise: "the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

The district court provided no explanation for declining to provide an opportunity for Appellants to provide any allegations it believed were missing under *Pike*. At a minimum, the Court should allow Appellants that opportunity. *See Hicks*, 897 F.3d at 1124.

III. INVENERGY AND GRAYS HARBOR ENERGY STATED CLAIMS FOR DISCRIMINATION UNDER THE DORMANT COMMERCE CLAUSE.

Invenergy and Grays Harbor Energy also pleaded dormant Commerce Clause claims because they plausibly alleged that the disparate allocation of no-cost allowances treats similarly situated power-plant owners differently. *See* ER-68–70. In effect, allocating no-cost allowances only to Local Utilities who own power plants, but not to others owners like Appellants, means that the law's allocation of no-cost allowances turns on whether the plants are owned by in-state or out-of-state entities. ER-59–60. Indeed, Grays Harbor, because it is not owned by one of these in-state Local Utilities, cannot even benefit from the Local Utilities' allowances under the Act. ER-59.

If a law "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (citation 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'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citation omitted).

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 requires factual development because ascertaining whether a law "discriminates in either purpose of effect necessarily requires looking behind the statutory text to the operation of the [challenged] law." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 544 (4th Cir. 2013). Thus, courts have recognized that a developed factual record is necessary to evaluate the validity of such plausible claims. *See, e.g.*, *id.* at 544–45 (reversing dismissal of plaintiffs' discrimination claim where their plausible allegations "raise[d] practical questions of fact" that required "proper fact-finding" to resolve); *Cachia v. Islamorada*, 542 F.3d 839, 843–44 (11th Cir. 2008) (reversing dismissal of discrimination claim and noting "further proceedings [were] necessary to develop a record" to adjudicate the claim).

A. Invenergy and Grays Harbor Energy pleaded that the Act discriminates in effect against out-of-state power-plant owners.

Appellants plausibly alleged that the Act's allocation of no-cost allowances discriminated in effect against out-of-state natural-gas power-plant owners by denying them the same free allowances given to their in-state competitors, Local Utilities. ER-68–70.

For purposes of the dormant Commerce Clause, "entities are similarly situated" when they "compete against each other in a single market." *Rocky Mountain Farmers*, 730 F.3d at 1088. This, too, can be a fact-intensive inquiry. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters Inc. v. Brown*, 567 F.3d 521, 525–28 (9th Cir. 2009) (weighing evidence, including expert testimony, to determine whether entities were similarly situated).

Here, the Local Utilities compete directly with Invenergy and Grays Harbor Energy because they all own and operate natural-gas power-plants that generate and supply electricity in Washington. ER-36, 41, 43–44. These businesses own and operate natural-gas power plants that, like Grays Harbor, generate electricity for retail customers and wholesale energy markets. ER-36, 41, 43. Indeed, these plants produce indistinguishable electricity onto the grid, where entities consume it regardless of which plant generated each individual kilowatt of electrical energy. ER-41. As a result, the Local Utilities, like Invenergy and Grays Harbor Energy, are regulated under the Act in their capacity as owners of plants that generate this fungible, interchange electrical energy supplied to the grid. *See* ER-64–65. The Act, however, treats Appellants differently than the Local Utilities, despite the fact that they are similarly situated as power-plant owners. ER-65. The Local Utilities receive no-cost allowances, and, with these allowances, they can cover their power plants' obligations under the Act. ER-58–59.

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). Appellants allege three ways that the Act's utility-only allocation disadvantages them by denying them the "beneficial [regulatory] treatment" the Act provides to their local competitors. *Id.* (alteration in original) (citation omitted). First, the Act imposes costs on Appellants that the Local Utilities need not bear. *See* ER-58–59, 61. Second, it "strip[s] away from" Appellants "the competitive and economic advantages" they have earned by distorting the electricity market such that Grays Harbor cannot effectively compete against utility-owned natural-gas power-plants even though it generates electricity more efficiently and with fewer emissions than its Local Utility-owned peers. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 351 (1977); *see* ER-42, 59–60. Third, this same distortion of the electricity market will cause Appellants to supply less electricity in Washington, and Local Utilities to supply more. ER-

60; *see Fam. Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 10 (1st Cir. 2010) (recognizing a law discriminates "when 'the effect of [that law] 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.'" (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 n.16 (1978))). And the Complaint explained why this discrimination failed to advance any legitimate state interests. ER-63–67.

Importantly, the Act regulates entities in their capacity *as power-plant owners*, and that is the respect in which Appellants and the Local Utilities are similarly situated. ER-64–65. As the Complaint explained, "[f]or the purposes of the [Act], independent power companies like Invenergy and local utilities are similarly situated as power plant owners in Washington even though local utilities engage in commercial activities besides operating power plants." ER-64. This is because utilities themselves do not produce substantial greenhouse-gas emissions in their capacity as utilities—their *power plants* produce covered emissions, and the Act requires them to obtain allowances to cover those emissions. ER-65. Although utilities may face other regulations in their capacity as utilities that supply power to ratepayers, the Act is concerned with the *generation of power*, not its distribution. *See* ER-65, 67.

B. The district court erred in dismissing Appellants' discrimination claims.

Despite this settled law and the fact-intensive nature of the inquiry, the district court's concluded that the Act did not discriminate against out-of-state entities because it believed that "electric utilities and electricity generating facilities are not substantially similar entities." ER-21, 25. Improperly resolving disputed issues of fact at the pleading stage, the district court also concluded that the Act's allocation of no-cost allowances benefited both in-state and out-of-state entities, and burdened both in-state-owned and out-of-state-owned power plants, and therefore could not be considered discriminatory.

Both of the district court's conclusions are legal error.

1. Invenergy and Grays Harbor Energy are similarly situated to the Local Utilities.

Relying on *Tracy*, the district court determined that independent power producers such as Appellants are not similarly situated to the Local Utilities because utilities operate in a regulated, monopoly market, and therefore that the Act does not discriminate on its face or in effect. ER-21–25. This reasoning, however, rests on both a misreading of *Tracy* and a misapprehension of the Act's regulatory scheme.

As noted above, the Local Utilities conduct some activities in a captive market—selling and distributing electricity to retail customers—but the Act does not regulate *those* activities. *See supra* p. 46; *see also* ER-40–41. Rather, the Act regulates these utilities as power-plant owners, and, in that market, they compete against Appellants. *See supra* pp. 44–45. Therefore, Invenergy and Grays Harbor Energy are similarly situated to the Local Utilities.

Properly construed, *Tracy* makes clear that Invenergy and the Local Utilities are similarly situated. As the Supreme Court explained, a law may distinguish between utilities and their competitors if the law primarily affects the highly regulated, monopoly market in which utilities do not face outside competition. *See Tracy*, 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. *See NextEra Energy*, 48 F.4th at 319–20. For that reason, the Fifth Circuit held in *NextEra Energy* that, under *Tracy*, a state restriction on who could build certain electricity-transmission lines was "not immune from Commerce Clause scrutiny" even though it regulated electric utilities 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.

Here, the Act's allocation of no-cost allowances is no different. The Act regulates the production of greenhouse-gas emissions, so it regulates the generation, not the distribution, of electricity. ER-49–50, 65. Power-plants incur compliance obligations as a result of the emissions they produce from their generating activities, not the sale and distribution of that electricity to customers. ER-65. Local Utilities, therefore, face the same indirect regulation from the Act as all other-power plant owners. ER-65. In other words, the Act does not regulate the Local Utilities for their activities in the captive, retail electricity market. That the Local Utilities are different from Appellants in a *separate market*—because they are also purchasers of energy in their role as distributors, ER-36, 40–41—is irrelevant in determining whether they compete with Appellants as owners of plants in the market for power generation.

The district court's suggestion that the Act allocates the Local Utilities no-cost allowances "to grant electric utilities a benefit in the captive market," ER-23, fares no better. To be sure, the Act allocates utilities a certain number of no-cost allowances based on the amount of electricity those utilities supply to retail customers in Washington. *See* RCW § 70A.65.120(2)(b); WAC § 173-446-230(2). But, contrary to the District Court's conclusion, this method of allocation does not establish that the effects of these allowances are felt *primarily* in the captive retail electricity market. Regardless of how Ecology allocates no-cost allowances, the Complaint alleges that the Local Utilities will use those allowances for one purpose: to offset their power plants' compliance obligations that stem from power generation activities. ER-59. When Invenergy and Grays Harbor Energy generate electricity for eventual supply to Washingtonians, they lack no-cost allowances to reduce or offset Grays Harbor's compliance obligation. ER-61. At bottom, the Act effectively erases the compliance costs that the Local Utilities face as power-plant owners, and but leaves Appellants to bear those costs in full. ER-59, 61.

2. The Act's allocation of no-cost allowances benefits in-state power-plant owners and burdens their out-of-state competitors.

The district court also concluded that the Act does not discriminate "in effect" because it improperly reached beyond the pleadings to conclude that, notwithstanding the Complaint's allegations, the Act afforded one "out-of-state entity" no-cost allowances, and denied no-cost allowances to two other in-state generators besides Grays Harbor. *See* ER-26–30.[5] This was error.

i. The district court ignored the Complaint's well-pleaded allegations to conclude PacificCorp was an "out-of-state entity."

First, the district court concluded that Appellants had not plausibly alleged that PacifiCorp, one of the Local Utilities, was an "in-state" entity because it is headquartered in Oregon, despite the allegations it was an in-state entity under the dormant Commerce Clause due to its substantial presence in Washington and

[5] The district court also reiterated its earlier holdings that Grays Harbor Energy could bring no dormant Commerce Clause Claim, and that Appellants and the Local Utilities were not similarly situated. ER-25. The district court erred in reaching those conclusions. *See supra* pp. 29–32, 47–50.

considerable resources spent lobbying in the state. ER-26–27. But the dormant Commerce Clause relies on these factors, not its corporate formalities, to determine whether an entity is in-state or out-of-state. *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.*, 703 F.3d at 1259.

In *NextEra Energy*, for example, the Fifth Circuit, when considering a dormant-Commerce-Clause challenge to a Texas law that permitted only owners of existing utilities to build transmission lines connected to utility facilities, held that the owners of existing utilities were considered in-state entities even though "most" were "incorporated or headquartered outside Texas." *NextEra Energy*, 48 F.4th at 314, 323–25. It reasoned that what matters under the dormant Commerce Clause is the "clout" a business within a state from its political and economic engagement with that state, not its place of incorporation. *Id.* at 323. Because the owners of existing utilities had established these political and economic connections, favoring these businesses could constitute discrimination under the dormant Commerce Clause, even if "most" were incorporated outside of Texas. *Id.* at 323–24.

PacifiCorp, like the owners of Texas utilities in *NextEra Energy*, maintains sufficient economic and political connections to Washington to qualify as an in-state entity for dormant-Commerce-Clause purposes. *See* ER-44–45. PacifiCorp operates in part in Washington's highly regulated retail-electricity market and is one of only three investor-owned utilities in Washington. ER-40, 45 & n.9. And it possesses considerable political power in the state, ER-45—a consideration to which the dormant Commerce Clause is particularly attuned, because it protects out-of-state entities in part based on their limited ability to resort to the state's political processes, *see United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007).

The district court nevertheless dismissed *NextEra* as "inapposite." ER-27–28. In *NextEra*, under the challenged law, "the only way a company without a Texas presence can build, operate, or own transmission lines is to buy a utility that already owns a power facility in the state." *NextEra*, 48 F.4th at 314. The district court asserted that the Act here "does nothing of the sort. Plaintiffs do not claim that the [Act], for example, limits the ownership of electric utilities or electric generating facilities to entities with an existing presence in Washington, or otherwise imposes a burden on entities without an existing presence in the State." ER-28.

But that is exactly what Appellants alleged: no-cost allowances are distributed only to incumbent Local Utilities, and "[a]ny out-of-state power company that develops or buys an existing power plant in Washington will find that it must compete against utility power plant owners on an unequal playing field." ER-63. This, in turn, will discourage any market entrants from challenging Local Utilities' dominance. ER-63. Put another way, the only way to receive no-cost allowances as a power-plant owner is to already be a Washington utility.

Moreover, under the Act, utility-owned power plants may receive no-cost allowances from their owners without issue. ER-58. But even if a utility *wanted* to transfer no-cost allowances to an independent plant like Grays Harbor, it could only do so if the parties enter into a power purchase agreement. ER-55–66, 59. This term is not defined in the law, ER-55, and discovery produced no evidence of any ever existing. As a result, the Act, just like the challenged law in *NextEra Energy*, bestows a competitive advantage to businesses with extensive connections to the state and denies that advantage to businesses without those connections. ER-61.

Even if PacifiCorp *were* considered an out-of-state entity, however, Appellants would have still plausibly alleged that the Act discriminates against out-of-state entities. This is because a challenged law's "favored group" need not "be *entirely* in-state for a law to have a discriminatory effect on commerce" when "the vast majority" of that favored group "are local concerns." *Walgreen Co. v. Rullan*, 405 F.3d 50, 58–59 (1st Cir. 2005) (statute discriminated in effect even though some businesses that benefitted "[we]re owned by out-of-Commonwealth interests"); *Fam. Winemakers of Cal.*, 592 F.3d at 13 (benefit to some out-of-state entities did not erase "the much greater disadvantages" on others). For this reason too, the district court erred in holding that PacifiCorp's receipt of no-cost allowances foreclosed Appellants' claims, when the remaining three Local Utilities are all headquartered in Washington. *See* ER-44, 61.

ii. The district court resolved an unpleaded factual dispute by considering two university-owned power plants as relevant "competitors."

The district court also mistakenly determined that the Act did not discriminate in effect because, in briefing, Ecology argued that the University of Washington and Washington State University owned power plants and were supposedly ineligible to receive no-cost allowances despite their in-state status. ER-28–29. This, too, was error, for three alternative reasons.

First, the district court erred by relying on external materials "to resolve factual disputes against [Appellants'] well-pled allegations in the complaint." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1014 (9th Cir. 2018). The district court faulted Appellants for failing to allege that they did *not* compete against the two universities, ER-30, but they had no obligation to do so. By construing the allegations in the Complaint against the Appellants, the district court impermissibly took judicial notice of disputed facts and violated the appropriate standard for judgment on the pleadings. *See Khoja*, 899 F.3d at 999–

1000 (district court abused its discretion to the extent it took judicial notice of a transcript to establish disputed facts).[6]

Second, at the pleading stage, the university-owned power plants have no bearing on the sufficiency of Appellants' dormant-Commerce-Clause claims. Ecology's invocation of these plants simply raised a dispute of fact not suitable for resolution on the pleadings. *See Polanco v. Diaz*, 76 F.4th 918, 932 (9th Cir. 2023) (accepting disputed facts through judicial notice "would transform Defendants' motion to dismiss into a motion for summary judgment without offering Plaintiffs an opportunity to . . . further develop the record"). And further factual development would have shown the two university plants to be totally irrelevant, because those power plants produce steam for heating, rather than generating electricity.[7]

Third, Invenergy and Grays Harbor Energy are not similarly situated to the University of Washington and Washington State University, even in their joint

[6] Appellants below properly acknowledged that the court could take notice of the *existence* of certain public records, but objected to it taking substantive notice of the facts therein, to the extent they were disputed. ER-88 (Dkt. No. 28).

[7] *See* John Ryan, *Students Chain Selves to Smokestack To Light Climate Fire Under UW*, KUOW (May 25, 2023, 5:27 PM), https://www.kuow.org/stories/students-chain-selves-to-smokestack-to-light-climate-fire-under-uw (explaining that University of Washington's natural-gas boilers are used to generate steam to heat buildings).

capacity as power-plant owners, because they are not economic competitors. *See Rocky Mountain Farmers*, 730 F.3d at 1088. Grays Harbor competes alongside twelve other natural-gas power-plants in Washington that generate electricity to be supplied to the region's grid. ER-41, 43. Appellants, therefore, compete against the owners of *those* plants, the Local Utilities. ER-36, 43, 61. Ecology did not argue, and the district court did not find, that the two university-owned plants sell power to be distributed to ratepayers, nor that they otherwise participate in the interstate market for electricity in any respect whatsoever. And the mere fact that some in-state entities are incidentally affected by a discriminatory law renders "[t]he ordinance no less discriminatory." *C & A Carbone, Inc. v. Clarkstown,* 511 U.S. 383, 391 (1994); *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd.*, 298 F.3d 201, 214 (3d Cir. 2002); *Rullan*, 405 F.3d at 58.

C. Any dismissal should have been without prejudice.

At the very least, the district court should have provided Appellants with leave to amend the Complaint to cure any deficiencies. *See Armstrong v. Reynolds*, 22 F.4th 1058,1071 (9th Cir. 2022) (plaintiff "must be granted leave to amend" based on information identified in briefing that could cure pleading deficiencies). After all, "[i]t is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

To the extent the district court held that Appellants had not plausibly pleaded that they were similarly situated to the Local Utilities, Appellants could allege additional facts that explain the Local Utilities' activity and participation in the power-generation and wholesale electricity markets in Washington. Additional facts about these activities could show how both Invenergy and Grays Harbor Energy compete against the Local Utilities in a competitive market and how the Act's allocation of no-cost allowances primarily affects this competitive market. With such additional allegations, Appellants could plausibly plead that they and the Local Utilities are similarly situated. *See Tracy*, 519 U.S. at 297–304; *NextEra Energy*, 48 F.4th at 319–20; *Rocky Mountain Farmers Union*, 730 F.3d at 1088.

Appellants could also allege additional facts curing any purported deficiency regarding the Act's discrimination against out-of-state economic interests, like additional facts further demonstrating PacifiCorp's connection to Washington and the extent of its in-state commercial activities. Similarly, they could allege facts explaining why Grays Harbor competes with neither of the university-owned power plants. Such an amendment, as the district court tacitly acknowledged, ER-30, could cure any pleading deficiency.

IV. INVENERGY AND GRAYS HARBOR ENERGY STATED AN EQUAL-PROTECTION CLAIM.

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). A plaintiff states an equal-protection claim where it plausibly alleges that the challenged law arbitrarily singles out particular entities for unfavorable treatment without advancing legitimate government interests. *See Fowler Packing Co. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (reversing dismissal).

The district court dismissed Grays Harbor Energy's equal-protection claim for failure to state a claim, determining that Grays Harbor Energy had failed to plausibly plead either that Act discriminated against independent power plant owners or that the allocation of no-cost allowances was not rationally related to a legitimate government end. ER-32–33.[8] Not so. Invenergy and Grays Harbor Energy are similarly situated to the Local Utilities as power-plant owners under the Act, so the Act's denial of no-cost allowances to them constitutes discrimination. ER-64–65. Moreover, Appellants plausibly alleged that Washington lacks a reasonable justification for this discrimination because the Act's allocation of no-

[8] The district court dismissed Invenergy's claim for lack of standing. ER-32. For the reasons explained in Section I above, it erred in doing so.

cost allowances undermines, rather than promotes, the Act's aims of reducing greenhouse-gas emissions and slowing the growth of electricity costs. ER-65–67. That is all that is required at the pleading stage to state a cognizable claim.

A. Invenergy and Grays Harbor Energy are similarly situated to the Local Utilities.

The Equal Protection Clause requires states to treat similarly situated individuals alike, so a plaintiff pleads an equal-protection claim only if the challenged law distinguishes between groups that "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). Groups are similarly situated when the challenged regulatory scheme treats them similarly except with respect to the challenged classification. *See Harrison v. Kernan*, 971 F.3d 1069, 1075–76 (9th Cir. 2020). 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).

As with the dormant-Commerce-Clause-discrimination claim, the district court found no discrimination under the Equal Protection Clause because "electric utilities and electricity generating facilities are not similarly situated." ER-32. But as explained above, *see supra* pp. 47–50, Appellants are similarly-situated to the Local Utilities "in all relevant respects" because they are similarly situated *as owners of power plants* that compete in the market for power generation, ER-64–65. That Appellants differ from utilities in other respects—like with respect to power distribution, *see* ER-36—is irrelevant. Because the Act regulates the Local Utilities as power-plant owners rather than utilities, Grays Harbor Energy and the Local Utilities are similarly situated "in all relevant respects" under the Act. *Ariz. Dream Act Coal.*, 855 F.3d at 966. All own and operate power plants that generate indistinguishable electricity in more-or-less the same manner. ER-41, 43, 65. By providing no-cost allowances to other power-plant owners but not Invenergy and Grays Harbor Energy, the Act's allocation of no-cost allowances discriminates against Invenergy and Grays Harbor Energy. ER-72.

B. The Act's allocation of no-cost allowances lacks a rational relationship to legitimate interests.

As Invenergy and Grays Harbor Energy are similarly situated to the Local Utilities, the Act's denial of no-cost allowances to them violates the Equal Protection Clause if this disparate treatment is not "rationally related to a legitimate state interest." *United States v. Padilla-Diaz*, 862 F.3d 856, 862 (9th Cir. 2017) (citations omitted). The court must "scrutinize the connection, if any, between the [Act's] goal . . . and the way in which [entities] 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). Although this standard is deferential, the court must nevertheless assure itself the state's classification rests on a reasonable, legitimate justification. If it did not, rationale-basis review "would have no meaning at all." *Id.* at 1089.

Here, the Complaint plausibly alleged the disparate allocation of no-cost allowances impedes rather than advances the Act's aims, as it will increase both greenhouse-gas emissions and electricity prices in Washington over the coming decades. ER-62, 66, 71–73. The district court ignored those allegations, reasoning that "[t]here is . . . no doubt that the allocation of no-cost allowances to electric utilities—which sell electricity directly to the public—bears a rational relation to" the Act's stated aim of "'mitigat[ing] the cost burden of'" the Act's regulation of emissions "on electricity customers." ER-33 (quoting RCW § 70A.65.120(1)). But the Complaint observes that *Ecology itself expects the Act to raise electricity* prices. ER-56. Indeed, it spent paragraphs explaining why the Act undermines the very legislative aims that it purports to serve. ER-65–67, 72–73.

At the pleadings stage, the district court cannot ignore these well-pleaded allegations; Appellants have alleged the elements of an equal-protection claim, and to the extent there are disputes of fact, those must be resolved after discovery. *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 v. City of Boston*, 180 F. Supp. 3d 108, 118–19 (D. Mass. 2016) (same).

C. Any dismissal should have been without prejudice.

Here, as on the other claims, the district court also abused its discretion in dismissing the Equal Protection Clause claim with prejudice and without leave to amend. To start, the district court's explanation was inadequate: it merely stated that "this claim cannot possibly be cured by the allegation of other facts[.]" ER-33; *see supra* pp. 40–41.

The district court was also wrong; Appellants could have alleged additional facts that could cure the deficiencies identified by the court. First, Appellants could have alleged additional facts about utilities' participation and activities in the power-generation market, which would strengthen its allegation that Appellants and the Local Utilities are similarly situated as power-plant owners under the Act. Second, it could have pleaded additional facts regarding the lack of a relationship between no-cost allowances and retail electricity prices. Allegations along these lines would further show that the allocation of no-cost allowances bears no rational relationship to its stated purpose. The court therefore erred in denying Appellants the opportunity to replead.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the dismissal with prejudice of Appellants' claims, vacate the District Court's judgment, and remand for further proceedings.

Date: February 8, 2024

<u>/s/ Michael J. Mestitz</u>
Stephen D. Andrews
Nicholas G. Gamse
Michael J. Mestitz
Samuel M. Lazerwitz
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
Telephone: (202) 434-5000
mmestitz@wc.com

Vanessa Soriano Power
Jason T. Morgan
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
vanessa.power@stoel.com

Attorneys for Appellants Invenergy Thermal LLC and Grays Harbor Energy LLC

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Circuit Rules 28-1 and 32-1(a) because this brief contains 13,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 and Times New Roman 14-point font.

/s/ *Michael J. Mestitz*
Michael J. Mestitz

Dated: February 8, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Michael J. Mestitz*
Michael J. Mestitz

Dated: February 8, 2024

STATUTORY ADDENDUM

TABLE OF CONTENTS

Chapter 70A.65 RCW

GREENHOUSE GAS EMISSIONS—CAP AND INVEST PROGRAM

*　　*　　*　　*　　*

RCW 70A.65.005 Findings—Intent. (1) The legislature finds that climate change is one of the greatest challenges facing our state and the world today, an existential crisis with major negative impacts on environmental and human health. Washington is experiencing environmental and community impacts due to climate change through increasingly devastating wildfires, flooding, droughts, rising temperatures and sea levels, and ocean acidification. Greenhouse gas emissions already in the atmosphere will increase impacts for some period of time. Actions to increase resilience of our communities, natural resource lands, and ecosystems can prevent and reduce impacts to communities and our environment and improve their ability to recover.

(2) In 2020, the legislature updated the state's greenhouse gas emissions limits that are to be achieved by 2030, 2040, and 2050, based on current science and emissions trends, to support local and global efforts to avoid the most significant impacts from climate change. Meeting these limits will require coordinated, comprehensive, and multisectoral implementation of policies, programs, and laws, as other enacted policies are insufficient to meet the limits.

(3) The legislature further finds that while climate change is a global problem, there are communities that have historically borne the disproportionate impacts of environmental burdens and that now bear the disproportionate negative impacts of climate change. Although the state has done significant work in the past to highlight these environmental health disparities, beginning with senator Rosa Franklin's environmental equity study, and continuing through the work of the governor's interagency council on health disparities, the creation of the Washington environmental health disparities map, and recommendations of the environmental justice task force, the state can do much more to ensure that state programs address environmental equity.

(4) The legislature further finds that while enacted carbon policies can be well-intended to reduce greenhouse gas emissions and provide environmental benefits to communities, the policies may not do enough to ensure environmental health disparities are reduced and environmental benefits are provided to those communities most impacted by environmental harms from greenhouse gas and air pollutant emissions.

(5) The legislature further finds that wildfires have become one of the largest sources of black carbon in the last five years. From 2014 through 2018, wildfires in Washington state generated 39,200,000 metric tons of carbon, the equivalent of more than 8,500,000 cars on the road a year. In 2015, when 1,130,000 acres burned in Washington, wildfires were the second largest source of greenhouse gas emissions releasing 17,975,112 metric tons of carbon dioxide into the atmosphere. Wildfire pollution affects all Washingtonians, but has disproportionate health effects on low-income communities, communities of color, and the most vulnerable of our population. Restoring the health of our forests and investing in wildfire prevention and preparedness will therefore contribute to improved air quality and improved public health outcomes.

(6) The legislature further finds that by exercising a leadership role in addressing climate change, Washington will position its economy, technology centers, financial institutions, and manufacturers to benefit from national and international efforts that must occur to reduce greenhouse gases. The legislature intends to create climate policy that recognizes the special nature of emissions-intensive, trade-exposed industries by minimizing leakage and increased life-cycle emissions associated with product imports. The legislature further finds that climate policies must be appropriately designed, in order to avoid leakage that results in net increases in global greenhouse gas emissions and increased negative impacts to those communities most impacted by environmental harms from climate change. The legislature further intends to encourage these industries to continue to innovate, find new ways to be more energy efficient, use lower carbon products, and be positioned to be global leaders in a low carbon economy.

* * * * *

RCW 70A.65.010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Allowance" means an authorization to emit up to one metric ton of carbon dioxide equivalent.

(2) "Allowance price containment reserve" means an account maintained by the department with allowances available for sale through separate reserve auctions at predefined prices to assist in containing compliance costs for covered and opt-in entities in the event of unanticipated high costs for compliance instruments.

(3) "Annual allowance budget" means the total number of greenhouse gas allowances allocated for auction and distribution for one calendar year by the department.

(4) "Asset controlling supplier" means any entity that owns or operates interconnected electricity generating facilities or serves as an exclusive marketer for these facilities even though it does not own them, and has been designated by the department and received a department-published emissions factor for the wholesale electricity procured from its system. The department shall use a methodology consistent with the methodology used by an external greenhouse gas emissions trading program that shares the regional electricity transmission system. Electricity from an asset controlling supplier is considered a specified source of electricity.

(5) "Auction" means the process of selling greenhouse gas allowances by offering them up for bid, taking bids, and then distributing the allowances to winning bidders.

(6) "Auction floor price" means a price for allowances below which bids at auction are not eligible to be accepted.

(7) "Auction purchase limit" means the limit on the number of allowances one registered entity or a group of affiliated registered entities may purchase from the share of allowances sold at an auction.

(8) "Balancing authority" means the responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a balancing authority area, and supports interconnection frequency in real time.

(9) "Balancing authority area" means the collection of generation, transmission, and load within the metered boundaries of a balancing authority. A balancing authority maintains load-resource balance within this area.

(10) "Best available technology" means a technology or technologies that will achieve the greatest reduction in greenhouse gas emissions, taking into account the fuels, processes, and equipment used by facilities to produce goods of comparable type, quantity, and quality. Best available technology must be technically feasible, commercially available, economically viable, not create excessive environmental impacts, and be compliant with all applicable laws while not changing the characteristics of the good being manufactured.

(11) "Biomass" means nonfossilized and biodegradable organic material originating from plants, animals, and microorganisms, including products, by-products, residues, and waste from agriculture, forestry, and related industries as well as the nonfossilized and biodegradable organic fractions of municipal wastewater and industrial waste, including gases and liquids recovered from the decomposition of nonfossilized and biodegradable organic material.

(12) "Biomass-derived fuels," "biomass fuels," or "biofuels" means fuels derived from biomass that have at least 40 percent lower greenhouse gas emissions based on a full life-cycle analysis when compared to petroleum fuels for which biofuels are capable as serving as a substitute.

(13) "Carbon dioxide equivalents" means a measure used to compare the emissions from various greenhouse gases based on their global warming potential.

(14) "Carbon dioxide removal" means deliberate human activities removing carbon dioxide from the atmosphere and durably storing it in geological, terrestrial, or ocean reservoirs, or in products. "Carbon dioxide removal" includes existing and potential anthropogenic enhancement of biological or geochemical sinks and including, but not limited to, carbon mineralization and direct air capture and storage.

(15) "Climate commitment" means the process and mechanisms to ensure a coordinated and strategic approach to advancing climate resilience and environmental justice and achieving an equitable and inclusive transition to a carbon neutral economy.

(16) "Climate resilience" is the ongoing process of anticipating, preparing for, and adapting to changes in climate and minimizing negative impacts to our natural systems, infrastructure, and communities. For natural systems, increasing climate resilience involves restoring and increasing the health, function, and integrity of our ecosystems and improving their ability to absorb and recover from climate-affected disturbances. For communities, increasing climate resilience means enhancing their ability to understand, prevent, adapt, and recover from climate impacts to people and infrastructure.

(17) "Closed facility" means a facility at which the current owner or operator has elected to permanently stop production and will no longer be an emissions source.

(18) "Compliance instrument" means an allowance or offset credit issued by the department or by an external greenhouse gas emissions trading program to which Washington has linked its greenhouse gas emissions cap and invest program. One compliance instrument is equal to one metric ton of carbon dioxide equivalent.

(19) "Compliance obligation" means the requirement to submit to the department the number of compliance instruments equivalent to a covered or opt-in entity's covered emissions during the compliance period.

(20) "Compliance period" means the four-year period for which the compliance obligation is calculated for covered entities.

(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.

(22) "Covered emissions" means the emissions for which a covered entity has a compliance obligation under RCW 70A.65.080.

(23) "Covered entity" means a person that is designated by the department as subject to RCW 70A.65.060 through 70A.65.210.

(24) "Cumulative environmental health impact" has the same meaning as provided in RCW 70A.02.010.

(25) "Curtailed facility" means a facility at which the owner or operator has temporarily suspended production but for which the owner or operator maintains operating permits and retains the option to resume production if conditions become amenable.

(26) "Department" means the department of ecology.

(27) "Electricity importer" means:

(a) For electricity that is scheduled with a NERC e-tag to a final point of delivery into a balancing authority area located entirely within the state of Washington, the electricity importer is identified on the NERC e-tag as the purchasing-selling entity on the last segment of the tag's physical path with the point of receipt located outside the state of Washington and the point of delivery located inside the state of Washington;

(b) For facilities physically located outside the state of Washington with the first point of interconnection to a balancing authority area located entirely within the state of Washington when the electricity is not scheduled on a NERC e-tag, the electricity importer is the facility operator or owner;

(c) For electricity imported through a centralized market, the electricity importer will be defined by rule consistent with the rules required under RCW 70A.65.080(1)(c);

(d) For electricity from facilities allocated to serve retail electricity customers of a multijurisdictional electric company, the electricity importer is the multijurisdictional electric company;

(e) If the importer identified under (a) of this subsection is a federal power marketing administration over which the state of Washington does not have jurisdiction, and the federal power marketing administration has not voluntarily elected to comply with the program, then the electricity importer is the next purchasing-selling entity in the physical path on the NERC e-tag, or if no additional purchasing-selling entity over which the state of Washington has jurisdiction, then the electricity importer is the electric utility that operates the Washington transmission or distribution system, or the generation balancing authority;

(f) For electricity that is imported into the state by a federal power marketing administration and sold to a public body or cooperative customer or direct service industrial customer located in Washington pursuant to section 5(b) or (d) of the Pacific Northwest electric power planning and conservation act of 1980, P.L. 96-501, the electricity importer is the federal marketing administration;

(g) If the importer identified under (f) of this subsection has not voluntarily elected to comply with the program, then the electricity importer is the public body or cooperative customer or direct service industrial customer; or

(h) For electricity from facilities allocated to a consumer-owned utility inside the state of Washington from a multijurisdictional consumer-owned utility, the electricity importer is the consumer-owned utility inside the state of Washington.

(28) "Emissions containment reserve allowance" means a conditional allowance that is withheld from sale at an auction by the department or its agent to secure additional emissions reductions in the event prices fall below the emissions containment reserve trigger price.

(29) "Emissions containment reserve trigger price" means the price below which allowances will be withheld from sale by the department or its agent at an auction, as determined by the department by rule.

(30) "Emissions threshold" means the greenhouse gas emission level at or above which a person has a compliance obligation.

(31) "Environmental benefits" has the same meaning as defined in RCW 70A.02.010.

(32) "Environmental harm" has the same meaning as defined in RCW 70A.02.010.

(33) "Environmental impacts" has the same meaning as defined in RCW 70A.02.010.

(34) "Environmental justice" has the same meaning as defined in RCW 70A.02.010.

(35) "Environmental justice assessment" has the same meaning as identified in RCW 70A.02.060.

(36) "External greenhouse gas emissions trading program" means a government program, other than Washington's program created in this chapter, that restricts greenhouse gas emissions from sources outside of Washington and that allows emissions trading.

(37) "Facility" means any physical property, plant, building, structure, source, or stationary equipment located on one or more contiguous or adjacent properties in actual physical contact or separated solely by a public roadway or other public right-of-way and under common ownership or common control, that emits or may emit any greenhouse gas.

(38) "First jurisdictional deliverer" means the owner or operator of an electric generating facility in Washington or an electricity importer.

(39) "General market participant" means a registered entity that is not identified as a covered entity or an opt-in entity that is registered in the program registry and intends to purchase, hold, sell, or voluntarily retire compliance instruments.

(40) "Greenhouse gas" has the same meaning as in RCW 70A.45.010.

(41) "Holding limit" means the maximum number of allowances that may be held for use or trade by a registered entity at any one time.

(42) "Imported electricity" means electricity generated outside the state of Washington with a final point of delivery within the state.

(a) "Imported electricity" includes electricity from an organized market, such as the energy imbalance market.

(b) "Imported electricity" includes imports from linked jurisdictions, but such imports shall be construed as having no emissions.

(c) Electricity from a system that is marketed by a federal power marketing administration shall be construed as "imported electricity," not electricity generated in the state of Washington.

(d) "Imported electricity" does not include electricity imports of unspecified electricity that are netted by exports of unspecified electricity to any jurisdiction not covered by a linked program by the same entity within the same hour.

(e) For a multijurisdictional electric company, "imported electricity" means electricity, other than from in-state facilities, that contributes to a common system power pool. Where a multijurisdictional electric company has a cost allocation methodology approved by the utilities and transportation commission, the allocation of specific facilities to Washington's retail load will be in accordance with that methodology.

(f) For a multijurisdictional consumer-owned utility, "imported electricity" includes electricity from facilities that contribute to a common system power pool that are allocated to a consumer-owned utility inside the state of Washington pursuant to a methodology approved by the governing board of the consumer-owned utility.

(43) "Leakage" means a reduction in emissions of greenhouse gases within the state that is offset by a directly attributable increase in greenhouse gas emissions outside the state and outside the geography of another jurisdiction with a linkage agreement with Washington.

(44) "Limits" means the greenhouse gas emissions reductions required by RCW 70A.45.020.

(45) "Linkage" means a bilateral or multilateral decision under a linkage agreement between greenhouse gas market programs to accept compliance instruments issued by a participating jurisdiction to meet the obligations of regulated entities in a partner jurisdiction and to otherwise coordinate activities to facilitate operation of a joint market.

(46) "Linkage agreement" means a nonbinding agreement that connects two or more greenhouse gas market programs and articulates a mutual understanding of how the participating jurisdictions will work together to facilitate a connected greenhouse gas market.

(47) "Linked jurisdiction" means a jurisdiction with which Washington has entered into a linkage agreement.

(48) "Multijurisdictional consumer-owned utility" means a consumer-owned utility that provides electricity to member owners in Washington and in one or more other states in a contiguous service territory or from a common power system.

(49) "Multijurisdictional electric company" means an investor-owned utility that provides electricity to customers in Washington and in one or more other states in a contiguous service territory or from a common power system.

(50) "NERC e-tag" means North American electric reliability corporation (NERC) energy tag representing transactions on the North American bulk electricity market scheduled to flow between or across balancing authority areas.

(51) "Offset credit" means a tradable compliance instrument that represents an emissions reduction or emissions removal of one metric ton of carbon dioxide equivalent.

(52) "Offset project" means a project that reduces or removes greenhouse gases that are not covered emissions under this chapter.

(53) "Offset protocols" means a set of procedures and standards to quantify greenhouse gas reductions or greenhouse gas removals achieved by an offset project.

(54) "Overburdened community" means a geographic area where vulnerable populations face combined, multiple environmental harms and health impacts or risks due to exposure to environmental pollutants or contaminants through multiple pathways, which may result in significant disparate adverse health outcomes or effects.

(a) "Overburdened community" includes, but is not limited to:

(i) Highly impacted communities as defined in RCW 19.405.020;

(ii) Communities located in census tracts that are fully or partially on "Indian country" as defined in 18 U.S.C. Sec. 1151; and

(iii) Populations, including Native Americans or immigrant populations, who may be exposed to environmental contaminants and pollutants outside of the geographic area in which they reside based on the populations' use of traditional or cultural foods and practices, such as the use of resources, access to which is protected under treaty rights in ceded areas, when those exposures in conjunction with other exposures may result in disproportionately greater risks, including risks of certain cancers or other adverse health effects and outcomes.

(b) Overburdened communities identified by the department may include the same communities as those identified by the department through its process for identifying overburdened communities under RCW 70A.02.010.

(55) "Person" has the same meaning as defined in RCW 70A.15.2200(5)(h)(iii).

(56) "Point of delivery" means a point on the electricity transmission or distribution system where a deliverer makes electricity available to a receiver, or available to serve load. This point may be an interconnection with another system or a substation where the transmission provider's transmission and distribution systems are connected to another system, or a distribution substation where electricity is imported into the state over a multijurisdictional retail provider's distribution system.

(57) "Price ceiling unit" means the units issued at a fixed price by the department for the purpose of limiting price increases and funding further investments in greenhouse gas reductions.

(58) "Program" means the greenhouse gas emissions cap and invest program created by and implemented pursuant to this chapter.

(59) "Program registry" means the data system in which covered entities, opt-in entities, and general market participants are registered and in which compliance instruments are recorded and tracked.

(60) "Registered entity" means a covered entity, opt-in entity, or general market participant that has completed the process for registration in the program registry.

(61) "Resilience" means the ability to prepare, mitigate and plan for, withstand, recover from, and more successfully adapt to adverse events and changing conditions, and reorganize in an equitable manner that results in a new and better condition.

(62) "Retire" means to permanently remove a compliance instrument such that the compliance instrument may never be sold, traded, or otherwise used again.

(63) "Specified source of electricity" or "specified source" means a facility, unit, or asset controlling supplier that is permitted to be claimed as the source of electricity delivered. The reporting entity must have either full or partial ownership in the facility or a written power contract to procure electricity generated by that facility or unit or from an asset controlling supplier at the time of entry into the transaction to procure electricity.

(64) "Supplier" means a supplier of fuel in Washington state as defined in RCW 70A.15.2200(5)(h)(ii).

(65) "Tribal lands" has the same meaning as defined in RCW 70A.02.010.

(66) "Unspecified source of electricity" or "unspecified source" means a source of electricity that is not a specified source at the time of entry into the transaction to procure electricity.

(67) "Voluntary renewable reserve account" means a holding account maintained by the department from which allowances may be retired for voluntary renewable electricity generation, which is directly delivered to the state and has not and will not be sold or used to meet any other mandatory requirements in the state or any other jurisdiction, on behalf of voluntary renewable energy purchasers or end users.

(68) "Vulnerable populations" has the same meaning as defined in RCW 70A.02.010. [2022 c 181 § 10; 2021 c 316 § 2.]

* * * * *

RCW 70A.65.080 Program coverage. (1) A person is a covered entity as of the beginning of the first compliance period and all subsequent compliance periods if the person reported emissions under RCW 70A.15.2200 for any calendar year from 2015 through 2019, or if additional data provided as required by this chapter indicates that emissions for any calendar year from 2015 through 2019 equaled or exceeded any of the following thresholds, or if the person is a first jurisdictional deliverer and imports electricity into the state during the compliance period:

(a) Where the person owns or operates a facility and the facility's emissions equal or exceed 25,000 metric tons of carbon dioxide equivalent;

(b) Where the person is a first jurisdictional deliverer and generates electricity in the state and emissions associated with this generation equals or exceeds 25,000 metric tons of carbon dioxide equivalent;

(c) Where the person is a first jurisdictional deliverer importing electricity into the state and the cumulative annual total of emissions associated with the imported electricity, whether from specified or unspecified sources, exceeds 25,000 metric tons of carbon dioxide equivalent. In consultation with any linked jurisdiction to the program created by this chapter, by October 1, 2026, the department, in consultation with the department of commerce and the utilities and transportation commission, shall adopt by rule a methodology for addressing imported electricity associated with a centralized electricity market;

(d) Where the person is a supplier of fossil fuel other than natural gas and from that fuel 25,000 metric tons or more of carbon dioxide equivalent emissions would result from the full combustion or oxidation, excluding the amounts for fuel products that are produced or imported with a documented final point of delivery outside of Washington and combusted outside of Washington; and

(e)(i) Where the person supplies natural gas in amounts that would result in exceeding 25,000 metric tons of carbon dioxide equivalent emissions if fully combusted or oxidized, excluding the amounts for fuel products that are produced or imported with a documented final point of delivery outside of Washington and combusted outside of Washington, and excluding the amounts: (A) Supplied to covered entities under (a) through (d) of this subsection; and (B) delivered to opt-in entities;

(ii) Where the person who is not a natural gas company and has a tariff with a natural gas company to deliver to an end-use customer in the state in amounts that would result in exceeding 25,000 metric tons of carbon dioxide equivalent emissions if fully combusted or oxidized, excluding the amounts: (A) Supplied to covered entities under (a) through (d) of this subsection; and (B) the amounts delivered to opt-in entities;

(iii) Where the person is an end-use customer in the state who directly purchases natural gas from a person that is not a natural gas company and has the natural gas delivered through an interstate pipeline to a distribution system owned by the purchaser in amounts that would result in exceeding 25,000 metric tons of carbon dioxide equivalent emissions if fully combusted or oxidized, excluding the amounts: (A) Supplied to covered entities under (a) through (d) of this subsection; and (B) delivered to opt-in entities.

(2) A person is a covered entity as of the beginning of the second compliance period and all subsequent compliance periods if the person reported emissions under RCW 70A.15.2200 or provided emissions data as required by this chapter for any calendar year from 2023 through 2025, where the person owns or operates a waste to energy facility utilized by a county and city solid waste management program and the facility's emissions equal or exceed 25,000 metric tons of carbon dioxide equivalent.

(3) A person is a covered entity beginning January 1, 2031, and all subsequent compliance periods if the person reported emissions under RCW 70A.15.2200 or provided emissions data as required by this chapter for any calendar year from 2027 through 2029, where the person owns or operates a railroad company, as that term is defined in RCW 81.04.010, and the railroad company's emissions equal or exceed 25,000 metric tons of carbon dioxide equivalent.

(4) When a covered entity reports, during a compliance period, emissions from a facility under RCW 70A.15.2200 that are below the thresholds specified in subsection (1) or (2) of this section, the covered entity continues to have a compliance obligation through the current compliance period. When a covered entity reports emissions below the threshold for each year during an entire compliance period, or has ceased all processes at the facility requiring reporting under RCW 70A.15.2200, the entity is no longer a covered entity as of the beginning of the subsequent compliance period unless the department provides notice at least 12 months before the end of the compliance period that the facility's emissions were within 10 percent of the threshold and that the person will continue to be designated as a covered entity in order to ensure equity among all covered

entities. Whenever a covered entity ceases to be a covered entity, the department shall notify the appropriate policy and fiscal committees of the legislature of the name of the entity and the reason the entity is no longer a covered entity.

(5) For types of emission sources described in subsection (1) of this section that begin or modify operation after January 1, 2023, and types of emission sources described in subsection (2) of this section that begin or modify operation after 2027, coverage under the program starts in the calendar year in which emissions from the source exceed the applicable thresholds in subsection (1) or (2) of this section, or upon formal notice from the department that the source is expected to exceed the applicable emissions threshold, whichever happens first. Sources meeting these conditions are required to transfer their first allowances on the first transfer deadline of the year following the year in which their emissions were equal to or exceeded the emissions threshold.

(6) For emission sources described in subsection (1) of this section that are in operation or otherwise active between 2015 and 2019 but were not required to report emissions for those years under RCW 70A.15.2200 for the reporting periods between 2015 and 2019, coverage under the program starts in the calendar year following the year in which emissions from the source exceed the applicable thresholds in subsection (1) of this section as reported pursuant to RCW 70A.15.2200 or provided as required by this chapter, or upon formal notice from the department that the source is expected to exceed the applicable emissions threshold for the first year that source is required to report emissions, whichever happens first. Sources meeting these criteria are required to transfer their first allowances on the first transfer deadline of the year following the year in which their emissions, as reported under RCW 70A.15.2200 or provided as required by this chapter, were equal to or exceeded the emissions threshold.

(7) The following emissions are exempt from coverage in the program, regardless of the emissions reported under RCW 70A.15.2200 or provided as required by this chapter:

(a) Emissions from the combustion of aviation fuels;

(b) Emissions from watercraft fuels supplied in Washington that are combusted outside of Washington;

(c) Emissions from a coal-fired electric generation facility exempted from additional greenhouse gas limitations, requirements, or performance standards under RCW 80.80.110;

(d) Carbon dioxide emissions from the combustion of biomass or biofuels;

(e)(i) Motor vehicle fuel or special fuel that is used exclusively for agricultural purposes by a farm fuel user. This exemption is available only if a buyer of motor vehicle fuel or special fuel provides the seller with an exemption certificate in a form and manner prescribed by the department. For the purposes of this subsection, agricultural purposes" and "farm fuel user" have the same meanings as provided in RCW 82.08.865.

(ii) The department must determine a method for expanding the exemption provided under (e)(i) of this subsection to include fuels used for the purpose of transporting agricultural products on public highways. The department must maintain this expanded exemption for a period of five years, in order to provide the agricultural sector with a feasible transition period;

(f) Emissions from facilities with North American industry classification system code 92811 (national security); and

(g) Emissions from municipal solid waste landfills that are subject to, and in compliance with, chapter 70A.540 RCW.

(8) The department shall not require multiple covered entities to have a compliance obligation for the same emissions. The department may by rule authorize refineries, fuel suppliers, facilities using natural gas, and natural gas utilities to provide by agreement for the assumption of the compliance obligation for fuel or natural gas supplied and combusted in the state. The department must be notified of such an agreement at least 12 months prior to the compliance obligation period for which the agreement is applicable.

(9)(a) The legislature intends to promote a growing and sustainable economy and to avoid leakage of emissions from manufacturing to other locations. The legislature further intends to see innovative new businesses locate and grow in Washington that contribute to Washington's prosperity and environmental objectives.

(b) Consistent with the intent of the legislature to avoid the leakage of emissions to other jurisdictions, in achieving the state's greenhouse gas limits in RCW 70A.45.020, the state, including lead agencies under chapter 43.21C RCW, shall pursue the limits in a manner that recognizes that the siting and placement of new or expanded best-in-class facilities with lower carbon emitting processes is in the economic and environmental interests of the state of Washington.

(c) In conducting a life-cycle analysis, if required, for new or expanded facilities that require review under chapter 43.21C RCW, a lead agency must evaluate and attribute any potential net cumulative greenhouse gas emissions resulting from the project as compared to other existing facilities or best available technology including best-in-class facilities and emerging lower carbon processes that supply the same product or end use. The department may adopt rules to determine the appropriate threshold for applying this analysis.

(d) Covered emissions from an entity that is or will be a covered entity under this chapter may not be the basis for denial of a permit for a new or expanded facility. Covered emissions must be included in the analysis undertaken pursuant to (c) of this subsection. Nothing in this subsection requires a lead agency or a permitting agency to approve or issue a permit to a permit applicant, including to a new or expanded fossil fuel project.

(e) A lead agency under chapter 43.21C RCW or a permitting agency shall allow a new or expanded facility that is a covered entity or opt-in entity to satisfy a mitigation requirement for its covered emissions under chapter 316, Laws of 2021 and under any greenhouse gas emission mitigation requirements for covered emissions under chapter 43.21C RCW by submitting to the department the number of compliance instruments equivalent to its covered emissions during a compliance period. [2022 c 179 § 14; 2021 c 316 § 10.]

* * * * *

RCW 70A.65.100 Auctions of allowances . (1) Except as provided in RCW 70A.65.110, 70A.65.120, and 70A.65.130, the department shall distribute allowances through auctions as provided in this section and in rules adopted by the department to implement these sections. An allowance is not a property right.

(2)(a) The department shall hold a maximum of four auctions annually, plus any necessary reserve auctions. An auction may include allowances from the annual allowance budget of the current year and allowances from the annual allowance budgets from prior years that remain to be distributed. The department must transmit to the environmental justice council an auction notice at least 60 days prior to each auction, as well as a summary results report and a postauction public proceeds report within 60 days after each auction. The department must communicate the results of the previous calendar year's auctions to the environmental justice council on an annual basis beginning in 2024.

(b) The department must make future vintage allowances available through parallel auctions at least twice annually in addition to the auctions through which current vintage allowances are exclusively offered under (a) of this subsection.

(3) The department shall engage a qualified, independent contractor to run the auctions. The department shall also engage a qualified financial services administrator to hold the bid guarantees, evaluate bid guarantees, and inform the department of the value of bid guarantees once the bids are accepted.

(4) Auctions are open to covered entities, opt-in entities, and general market participants that are registered entities in good standing. The department shall adopt by rule the requirements for a registered entity to register and participate in a given auction.

(a) Registered entities intending to participate in an auction must submit an application to participate at least 30 days prior to the auction. The application must include the documentation required for review and approval by the department. A registered entity is eligible to participate only after receiving a notice of approval by the department.

(b) Each registered entity that elects to participate in the auction must have a different representative. Only a representative with an approved auction account is authorized to access the auction platform to submit an application or confirm the intent to bid for the registered entity, submit bids on behalf of the registered entity during the bidding window, or to download reports specific to the auction.

(5) The department may require a bid guarantee, payable to the financial services administrator, in an amount greater than or equal to the sum of the maximum value of the bids to be submitted by the registered entity.

(6) To protect the integrity of the auctions, a registered entity or group of registered entities with a direct corporate association are subject to auction purchase and holding limits. The department may impose additional limits if it deems necessary to protect the integrity and functioning of the auctions:

(a) A covered entity or an opt-in entity may not buy more than 10 percent of the allowances offered during a single auction;

(b) A general market participant may not buy more than four percent of the allowances offered during a single auction and may not in aggregate own more than 10 percent of total allowances to be issued in a calendar year;

(c) No registered entity may buy more than the entity's bid guarantee; and

(d) No registered entity may buy allowances that would exceed the entity's holding limit at the time of the auction.

(7)(a) For fiscal year 2023, upon completion and verification of the auction results, the financial services administrator shall notify winning bidders and transfer the auction proceeds to the state treasurer for deposit as follows: (i) \$127,341,000 must first be deposited into the carbon emissions reduction account created in RCW 70A.65.240; and (ii) the remaining auction proceeds to the climate investment account created in RCW 70A.65.250 and the air quality and health disparities improvement account created in RCW 70A.65.280.

(b) For fiscal year 2024, upon completion and verification of the auction results, the financial services administrator shall notify winning bidders and transfer the auction proceeds to the state treasurer for deposit as follows: (i) $356,697,000 must first be deposited into the carbon emissions reduction account created in RCW 70A.65.240, except during fiscal year 2024, the deposit as provided in this subsection (7)(b)(i) may be prorated equally across each of the auctions occurring in fiscal year 2024; and (ii) the remaining auction proceeds to the climate investment account created in RCW 70A.65.250 and the air quality and health disparities improvement account created in RCW 70A.65.280, which may be prorated equally across each of the auctions occurring in fiscal year 2024.

(c) For fiscal year 2025, upon completion and verification of the auction results, the financial services administrator shall notify winning bidders and transfer the auction proceeds to the state treasurer for deposit as follows: (i) $366,558,000 must first be deposited into the carbon emissions reduction account created in RCW 70A.65.240, except that during fiscal year 2025, the deposit as provided in this subsection (7)(c)(i) may be prorated equally across each of the auctions occurring in fiscal year 2025; and (ii) the remaining auction proceeds to the climate investment account created in RCW 70A.65.250 and the air quality and health disparities improvement account created in RCW 70A.65.280, which may be prorated equally across each of the auctions occurring in fiscal year 2025.

(d) For fiscal years 2026 through 2037, upon completion and verification of the auction results, the financial services administrator shall notify winning bidders and transfer the auction proceeds to the state treasurer for deposit as follows: (i) $359,117,000 per year must first be deposited into the carbon emissions reduction account created in RCW 70A.65.240; and (ii) the remaining auction proceeds to the climate investment account created in RCW 70A.65.250 and the air quality and health disparities improvement account created in RCW 70A.65.280.

(e) The deposits into the carbon emissions reduction account pursuant to (a) through (d) of this subsection must not exceed $5,200,000,000 over the first 16 fiscal years and any remaining auction proceeds must be deposited into the climate investment account created in RCW 70A.65.250 and the air quality and health disparities improvement account created in RCW 70A.65.280.

(f) For fiscal year 2038 and each year thereafter, upon completion and verification of the auction results, the financial services administrator shall notify winning bidders and transfer the auction proceeds to the state treasurer for deposit as follows: (i) 50 percent of the auction proceeds to the carbon emissions reduction account created in RCW 70A.65.240; and (ii) the remaining auction proceeds to the climate investment account created in RCW 70A.65.250 and the air quality and health disparities improvement account created in RCW 70A.65.280.

(8) The department shall adopt by rule provisions to guard against bidder collusion and minimize the potential for market manipulation. A registered entity may not release or disclose any bidding information including: Intent to participate or refrain from participation; auction approval status; intent to bid; bidding strategy; bid price or bid quantity; or information on the bid guarantee provided to the financial services administrator. The department may cancel or restrict a previously approved auction participation application or reject a new application if the department determines that a registered entity has:

(a) Provided false or misleading facts;

(b) Withheld material information that could influence a decision by the department;

(c) Violated any part of the auction rules;

(d) Violated registration requirements; or

(e) Violated any of the rules regarding the conduct of the auction.

(9) Records containing the following information are confidential and are exempt from public disclosure in their entirety:

(a) Bidding information as identified in subsection (8) of this section;

(b) Information contained in the secure, online electronic tracking system established by the department pursuant to RCW 70A.65.090(6);

(c) Financial, proprietary, and other market sensitive information as determined by the department that is submitted to the department pursuant to this chapter;

(d) Financial, proprietary, and other market sensitive information as determined by the department that is submitted to the independent contractor or the financial services administrator engaged by the department pursuant to subsection (3) of this section; and

(e) Financial, proprietary, and other market sensitive information as determined by the department that is submitted to a jurisdiction with which the department has entered into a linkage agreement pursuant to RCW 70A.65.210, and which is shared with the department, the independent contractor, or the financial services administrator pursuant to a linkage agreement.

(10) Any cancellation or restriction approved by the department under subsection (8) of this section may be permanent or for a specified number of

auctions and the cancellation or restriction imposed is not exclusive and is in addition to the remedies that may be available pursuant to chapter 19.86 RCW or other state or federal laws, if applicable.

(11) The department shall design allowance auctions so as to allow, to the maximum extent practicable, linking with external greenhouse gas emissions trading programs in other jurisdictions and to facilitate the transfer of allowances when the state's program has entered into a linkage agreement with other external greenhouse gas emissions trading programs. The department may conduct auctions jointly with linked jurisdictions.

(12) In setting the number of allowances offered at each auction, the department shall consider the allowances in the marketplace due to the marketing of allowances issued as required under RCW 70A.65.110, 70A.65.120, and 70A.65.130 in the department's determination of the number of allowances to be offered at auction. The department shall offer only such number of allowances at each auction as will enhance the likelihood of achieving the goals of RCW 70A.45.020. [2023 c 475 § 937; 2022 c 181 § 3; 2021 c 316 § 12.]

* * * * *

RCW 70A.65.120 Allocation of allowances to electric utilities. (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, 2028, 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. [2021 c 316 § 14.]

*   *   *   *   *

RCW 70A.65.200 Enforcement—Penalty. (1) All covered and opt-in entities are required to submit compliance instruments in a timely manner to meet the entities' compliance obligations and shall comply with all requirements for monitoring, reporting, holding, and transferring emission allowances and other provisions of this chapter.

(2) If a covered or opt-in entity does not submit sufficient compliance instruments to meet its compliance obligation by the specified transfer dates, a penalty of four allowances for every one compliance instrument that is missing must be submitted to the department within six months. When a covered entity or opt-in entity reasonably believes that it will be unable to meet a compliance

obligation, the entity shall immediately notify the department. Upon receiving notification, the department shall issue an order requiring the entity to submit the penalty allowances.

(3) If a covered entity or opt-in entity fails to submit penalty allowances as required by subsection (2) of this section, the department must issue an order or issue a penalty of up to $10,000 per day per violation, or both, for failure to submit penalty allowances as required by subsection (2) of the section. The order may include a plan and schedule for coming into compliance.

(4) The department may issue a penalty of up to $50,000 per day per violation for violations of RCW 70A.65.100(8) (a) through (e).

(5) Except as provided in subsections (3) and (4) of this section, any person that violates the terms of this chapter or an order issued under this chapter incurs a penalty of up to $10,000 per day per violation for each day that the person does not comply. All penalties under subsections (3) and (4) of this section and this subsection must be deposited into the climate investment account created in RCW 70A.65.250.

(6) Orders and penalties issued under this chapter are appealable to the pollution control hearings board under chapter 43.21B RCW.

(7) For the first compliance period, the department may reduce the amount of the penalty by adjusting the monetary amount or the number of penalty allowances described in subsections (2) and (3) of this section.

(8) An electric utility or natural gas utility must notify its retail customers and the environmental justice council in published form within three months of paying a monetary penalty under this section.

(9)(a) No city, town, county, township, or other subdivision or municipal corporation of the state may implement a charge or tax based exclusively upon the quantity of greenhouse gas emissions.

(b) No state agency may adopt or enforce a greenhouse gas pricing or market-based emissions cap and reduce program for stationary sources, or adopt or enforce emission limitations on greenhouse gas emissions from stationary sources except as:

(i) Provided in this chapter;

(ii) Authorized or directed by a state statute in effect as of July 1, 2022; or

(iii) Required to implement a federal statute, rule, or program.

(c) This chapter preempts the provisions of chapter 173-442 WAC, and the department shall repeal chapter 173-442 WAC.

(10)(a) By December 1, 2023, the office of financial management must submit a report to the appropriate committees of the legislature that summarizes two categories of state laws other than this chapter:

(i) Laws that regulate greenhouse gas emissions from stationary sources, and the greenhouse gas emission reductions attributable to each chapter, relative to a baseline in which this chapter and all other state laws that regulate greenhouse gas emissions are presumed to remain in effect; and

(ii) Laws whose implementation may effectuate reductions in greenhouse gas emissions from stationary sources.

(b) The state laws that the office of financial management may address in completing the report required in this subsection include, but are not limited to:

(i) Chapter 19.27A RCW;

(ii) Chapter 19.280 RCW;

(iii) Chapter 19.405 RCW;

(iv) Chapter 36.165 RCW;

(v) Chapter 43.21F RCW;

(vi) Chapter 70.30 RCW;

(vii) Chapter 70A.15 RCW;

(viii) Chapter 70A.45 RCW;

(ix) Chapter 70A.60 RCW;

(x) Chapter 70A.535 RCW;

(xi) Chapter 80.04 RCW;

(xii) Chapter 80.28 RCW;

(xiii) Chapter 80.70 RCW;

(xiv) Chapter 80.80 RCW; and

(xv) Chapter 81.88 RCW.

(c) The office of financial management may contract for all or part of the work product required under this subsection. [2022 c 181 § 4; 2021 c 316 § 23.]

*   *   *   *   *

RCW 70A.65.310 Covered or opt-in entity compliance obligation. (1) A covered or opt-in entity has a compliance obligation for its emissions during each four-year compliance period, with the first compliance period commencing January 1, 2023. The department shall by rule require that covered or opt-in entities annually transfer a percentage of compliance instruments, but must fully satisfy their compliance obligation, for each compliance period.

(2) Compliance occurs through the transfer of the required compliance instruments or price ceiling units, on or before the transfer date, from the holding account to the compliance account of the covered or opt-in entity as described in RCW 70A.65.080.

(3)(a) A covered entity may substitute the submission of compliance instruments with price ceiling units.

(b) A covered or opt-in entity submitting insufficient compliance instruments to meet its compliance obligation is subject to a penalty as provided in RCW 70A.65.200.

(4) Older vintage allowances must be retired before newer vintage allowances.

(5) Upon receipt by the department of all compliance instruments transferred by a covered entity or opt-in entity to meet its compliance obligation, the department shall retire the allowances or offset credits. [2022 c 181 § 2.]

*   *   *   *   *