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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10  
11 Sacramento Municipal Utility District, *et al.*,  
12 Plaintiffs,  
13 v.  
14 Federal Energy Regulatory Commission, *et al.*,  
15 Defendants.

No. 2:17-cv-02461-TLN-AC

**NOTICE OF MOTION AND MOTION  
TO DISMISS COMPLAINT**

Hearing on Motion:

Date: February 8, 2018

Time: 2:00 p.m.

Location: Courtroom 2, 15th Floor

United States Courthouse

501 I Street, Suite 4-200

Sacramento, CA 95814

24 **MOTION TO DISMISS COMPLAINT**

25 Defendants Federal Energy Regulatory Commission, and its commissioners Cheryl A.  
26 LaFleur, Robert Powelson, and Neil Chatterjee, in their official capacities (Defendants),  
27 respectfully move this Court to dismiss the complaint in the above-captioned proceeding under  
28

1 Rule 12(b)(1) of the Federal Rules of Civil Procedure.

2 Please take notice that on February 8, 2018, at 2:00 p.m. or as soon thereafter as the matter  
3 may be heard, there will be a hearing on this motion in the above-captioned courtroom. If  
4 Plaintiffs agree, Defendants will stipulate under Local Rule 230(g) that no hearing is necessary  
5 and that the motion may be submitted on the parties' written submissions.

6 A memorandum in support of Defendants' arguments for dismissal is attached to this  
7 motion.

8 Respectfully submitted,

9 Robert H. Solomon  
10 Solicitor

11 /s/ Elizabeth E. Rylander  
12 Elizabeth E. Rylander  
13 Attorney

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**MEMORANDUM OF LAW**

16  
17 **MEMORANDUM OF POINTS AND AUTHORITIES**  
18 **IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT**  
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## INTRODUCTION

1  
2 The Complaint that Plaintiffs Sacramento Municipal Utility District, *et al.* (Plaintiffs) filed  
3 before this Court seeks preemptive resolution of issues pending in an ongoing proceeding before  
4 Defendant Federal Energy Regulatory Commission (FERC or Commission). In the agency  
5 proceeding, Bonneville Power Administration (Bonneville) seeks FERC's confirmation, under the  
6 Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16  
7 U.S.C. §§ 839-839h, of new rates for transmission of power along one transmission line in its  
8 system – the Southern Intertie. FERC has approved the rates on an interim basis and made them  
9 effective subject to refund and further consideration. *Bonneville Power Auth.*, 160 FERC  
10 ¶ 61,113 (2017) (Interim Order).

11 Plaintiffs contend that the Commission reviewed Bonneville's proposed rates under the  
12 wrong subsection of the Northwest Power Act. *See* Complaint at PP 1, *passim* (ECF-1) (favoring  
13 review under the stricter section 7(k), 16 U.S.C. § 839e(k), and not the Commission's choice of  
14 section 7(a), 16 U.S.C. § 839e(a)). Plaintiffs seek declaratory and injunctive relief that would  
15 prevent the Commission from continuing to provide Bonneville with interim authority to charge  
16 its revised rates. But their case suffers from several jurisdictional defects.

17 First, Plaintiffs cite the Administrative Procedure Act as a basis for jurisdiction. But a  
18 specific grant (or denial) of jurisdiction, as found in the Northwest Power Act, trumps the general  
19 authority provided to district courts to oversee questions of federal jurisdiction. 5 U.S.C. § 702.  
20 The Court should not find jurisdiction on a general basis when Congress has addressed, and other  
21 courts have confirmed, the specific matter of jurisdiction to review Bonneville's rates.

22 Second, Plaintiffs seek review at the wrong time. Under both the Administrative  
23 Procedure Act and the Northwest Power Act, a rate determination is not final for purposes of  
24 judicial review until FERC has confirmed it. 16 U.S.C. § 839f(e)(4)(D); *City of Seattle v.*  
25 *Johnson*, 813 F.2d 1364, 1367 (9th Cir. 1987). The Commission provided only preliminary  
26 approval of Bonneville's proposed rates, and must issue a further ruling before the rates become  
27 final. Thus, any challenge to the non-final Interim Order is premature and not ripe for judicial  
28 review.



1 Third, Plaintiffs seek review in the wrong forum. The Courts of Appeals have specific  
2 and exclusive jurisdiction to hear challenges to “final rate determinations” made under section 7  
3 of the Act, 16 U.S.C. § 839e. 16 U.S.C. § 839f(e)(1)(G). *Accord, e.g., Pac. Power & Light Co.*  
4 *v. Bonneville Power Admin.*, 589 F. Supp 539, 544-46 (D. Or. 1984). It appears that no district  
5 court has ever entertained a complaint concerning approval (interim or final) of Bonneville’s  
6 rates; as detailed below, courts have uniformly found that Congress consciously vested  
7 jurisdiction elsewhere.

8 Because this Court lacks jurisdiction to intervene in the ongoing agency proceedings,  
9 FERC respectfully requests that the Court dismiss the Complaint and deny Plaintiffs’ motion for  
10 preliminary injunction.

## 11 BACKGROUND

### 12 I. Statutory and Regulatory Background

13 FERC is an independent regulatory commission comprising up to five members appointed  
14 by the President, with the advice and consent of the Senate. *See* Department of Energy  
15 Organization Act, 42 U.S.C. § 7171(a)-(b) (establishing the Commission and transferring  
16 authority to it). Commissioners serve for up to five-year terms, and no more than three members  
17 of the Commission may be from the same political party. *Id.* § 7171(e). Under various statutes,  
18 the Commission regulates the interstate transmission and wholesale sale of electricity and natural  
19 gas, and licenses the construction and operation of hydropower projects and natural gas pipelines  
20 and infrastructure.

21 The Northwest Power Act confers on the Commission the authority to confirm and  
22 approve – and thereby to make effective – rates that the Bonneville Administrator establishes for  
23 “the sale and disposition of electric energy and capacity and for the transmission of non-Federal  
24 power,” as well as the sale of non-firm electric power outside the Pacific Northwest. 16  
25 U.S.C. §§ 839e(a)(2), 839e(k). Bonneville must establish its rates in accordance with its  
26 governing laws, following procedures described in the Northwest Power Act. *Id.*; *see also* 16  
27 U.S.C. § 839e(i) (describing procedures). The Commission’s review of new rates is appellate in  
28 nature, and requires that FERC approve or disapprove the rate proposal based on the record

1 before it. *Aluminum Co. of Am. v. Bonneville Power Admin.*, 903 F.2d 585, 592-93 (9th Cir.  
2 1989) (quoting *United States v. City of Fulton*, 475 U.S. 657, 663 (1986)).

3 The Northwest Power Act provides for judicial review of “final actions,” including “final  
4 rate determinations” under 16 U.S.C. § 839e. 16 U.S.C. § 839f(e)(1)(G). The Court of Appeals  
5 has exclusive jurisdiction over challenges to any action under the Northwest Power Act. *Id.*  
6 § 839f(e)(5).

7 The Administrative Procedure Act also provides a right to judicial review to any person  
8 “suffering legal wrong because of agency action, or adversely affected or aggrieved within the  
9 meaning of a relevant statute.” 5 U.S.C. § 702. This right does not affect other limitations on  
10 judicial review, or confer authority for courts to grant relief if other statutes impliedly or  
11 expressly forbid the relief sought. *Id.* The Administrative Procedure Act does not apply at all if  
12 statutes preclude judicial review, 5 U.S.C. § 701(a)(1), and does not permit review of  
13 “preliminary, procedural, or intermediate agency action.” *Id.* § 704.

## 14 **II. Procedural Background**

15 On July 31, 2017, Bonneville asked the Commission to provide interim and final approval  
16 of new rates in accordance with section 7 of the Northwest Power Act, 16 U.S.C. §839e, and Part  
17 300 of the Commission’s regulations, 18 C.F.R. § 300. Interim Order P 2. Bonneville’s rate case  
18 provided – among other proposals not at issue – for an increase in transmission rates over its  
19 Southern Intertie of about 170 percent. *Id.*

20 Plaintiffs raised general objections to the rate increase for southbound service on the  
21 Southern Intertie. *Id.* at 5. They argued that Bonneville’s filing was governed by section 7(k) of  
22 the Northwest Power Act; that Bonneville’s filing did not comply with the Commission’s  
23 regulations governing filings under that section; and that Bonneville had neither adhered to cost-  
24 based ratemaking nor explained its failure to do so. *Id.* Petitioners further contended that  
25 because they do not purchase transmission service directly from Bonneville, but buy services  
26 from resellers that use or base prices on the Southern Intertie, they will be harmed by the increase  
27 in rates over that transmission line. *Id.* They claimed that any refund condition that the  
28 Commission attaches to acceptance of the rates would not protect them due to this lack of

1 contractual proximity. *Id.* P 5 & n.13.

2 The Commission approved Bonneville’s new transmission rates on an interim basis,  
3 pending further review. *Id.* P 1. It explained that under section 7(a) of the Northwest Power Act,  
4 it did not have authority to modify Bonneville’s proposed rates, which are developed in the first  
5 instance by Bonneville’s Administrator. *Id.* P 11. “The rates are then submitted to the  
6 Commission for approval or disapproval. In this regard, the Commission’s role can be viewed as  
7 an appellate one: to affirm or remand the rates submitted to it for review.” *Id.*

8 The Commission specified that interim review, at this stage, was further limited. Given  
9 “the volume and complexity of a Bonneville rate application . . . and the limited period in  
10 advance of the requested effective date in which to review the application, the Commission  
11 generally defers resolution of issues on the merits of Bonneville’s application until the order on  
12 final confirmation.” *Id.* P 12. The Commission explained that it generally approves the rates on  
13 an interim basis, unless a filing is patently deficient, and provides the parties with an additional  
14 opportunity to raise issues with regard to Bonneville’s filing. *Id.* Finding that section 7(a), not  
15 section 7(k), of the Northwest Power Act should govern its review, and that Bonneville’s filing  
16 was not patently deficient, the Commission granted preliminary approval to Bonneville’s rate  
17 filing and made the new rates effective on October 1, 2017, subject to refund, pending further  
18 review. *Id.* P 13. The Commission has not yet issued a further order concerning Bonneville’s  
19 rate proposal.

20 Plaintiffs filed the instant complaint on November 21, 2017. Simultaneously, they  
21 appealed the Interim Order to the Court of Appeals for the Ninth Circuit. *Sacramento Mun. Util.*  
22 *Dist. v. FERC*, No. 17-73165 (9th Cir., filed Nov. 21, 2017). Plaintiffs/petitioners immediately  
23 moved for the Ninth Circuit to hold the appeal in abeyance pending this Court’s finding of  
24 jurisdiction, and the Commission did not object. The Ninth Circuit has not yet ruled on Plaintiffs’  
25 motion to hold the appeal in abeyance.

1 **ARGUMENT**

2 **I. The Interim Order Is Non-Final and Not Ripe for Review**

3 “A federal court is presumed to lack jurisdiction in a particular case unless the contrary  
4 affirmatively appears.” *A-Z Int’l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 1970) (citation  
5 omitted); *San Louis & Delta-Mendota Water Auth. v. Dep’t of Interior*, 905 F. Supp. 2d 1158,  
6 1166-67 (E.D. Cal. 2012). The burden of establishing proper subject matter jurisdiction falls to  
7 the plaintiff. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). In “resolving a  
8 factual attack on jurisdiction, the court may review evidence beyond the complaint,” and “need  
9 not presume the truthfulness of the plaintiff’s allegations.” *E.g., Safe Air for Everyone v. Meyer*,  
10 905 1035, 1039 (9th Cir. 2004).

11 Plaintiffs ask the Court to grant declaratory and injunctive relief relating to the Interim  
12 Order, before that order has become final and reviewable under the Administrative Procedure Act  
13 (which they cite as the basis for their complaint) or the Northwest Power Act (the authority under  
14 which the Commission took the action with which they disagree). Plaintiffs have not shown that  
15 either statute grants a district court jurisdiction over a non-final agency action – and in fact, both  
16 statutes prohibit it.

17 **A. Non-Finality Under the Administrative Procedure Act**

18 Plaintiffs point to section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, as a  
19 basis for jurisdiction. Complaint P 2 (ECF-1 at 2). The Act provides for judicial review of final  
20 agency actions. 5 U.S.C. § 704. Finality requires that the agency action provide a definitive  
21 statement of the agency’s views, and that it have a “direct and immediate” effect on the  
22 complaining parties’ day-to-day business. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40  
23 (1980).

24 The Interim Order is expressly preliminary and non-definitive, and it explains that “the  
25 Commission generally defers resolution of issues on the merits of Bonneville’s application until  
26 the order on final confirmation.” Interim Order P 12. In the Interim Order, the Commission  
27 established a time period in which parties could file comments on any issues related to further  
28 confirmation and final approval of the proposed rates, to “ensure that the record in this

1 proceeding is complete and fully developed.” *Id.* P 14 & Ordering P (A). By statute, the  
2 Commission must issue at least one more order before the interim rates are finally confirmed. 16  
3 U.S.C. § 839e(i)(6). To this end, the Interim Order specifically provides for the possibility of  
4 unwinding the preliminary approval, noting that “the Commission may order refunds with interest  
5 if the Commission later determines in its final decision not to approve the rates.” *Id.* P 13.

6 Nothing in the pleadings indicates that the interim rate approval has had a direct effect on  
7 Plaintiffs’ day-to-day operations. Plaintiffs do not aver that their actual costs have increased, or  
8 that they could never obtain refunds if the rates are not finally confirmed later in the Commission  
9 process. They indicate only their expectation that the Commission will approve those rates in a  
10 final order, and concern that because they do not take service directly from Bonneville, they may  
11 not receive the benefit of later refunds. Complaint P 13 (ECF-1 at 5-6). These allegations do not  
12 establish either that Plaintiffs’ costs have increased as a result of the Interim Order, or that  
13 Plaintiffs could never recover higher costs at a later time.

14 Plaintiffs therefore cannot rely on the Administrative Procedure Act to establish  
15 jurisdiction over the Commission’s non-final action.

#### 16 B. Non-Finality Under the Northwest Power Act

17 Like the Administrative Procedure Act, the Northwest Power Act affirmatively precludes  
18 judicial review of non-final actions. The statute provides that the courts of appeals may review  
19 final actions, including “final rate determinations under section 839e of this title.” *Id.*  
20 §§ 839f(e)(1)(G), 839f(e)(5); *e.g.*, *Cent. Lincoln People’s Util. Dist. v. FERC*, 735 F.2d 1101,  
21 1107 (9th Cir. 1984). Rate determinations become final “upon confirmation and approval by the  
22 Federal Energy Regulatory Commission.” 16 U.S.C. § 839f(e)(4)(D); *Cent. Lincoln*, 735 F.2d at  
23 1109. *See also, e.g., PacifiCorp v. FERC*, 795 F.2d 816, 820 (9th Cir. 1986) (rate methodology  
24 became final when FERC denied rehearing).

25 The Northwest Power Act and the Commission’s implementing regulations specifically  
26 provide for the Commission’s interim approval of Bonneville’s rates, and thereby distinguish  
27 interim approval of Bonneville’s rates from final confirmation and approval. 16 U.S.C.  
28 § 839e(i)(6) (Commission may approve rates on an interim basis pending final confirmation); 18

1 C.F.R. § 300.20 (specifying procedures that the Commission uses to grant interim rate approval).  
2 As noted above, the Interim Order does not finally confirm and approve Bonneville’s rates, but  
3 establishes further procedures that must precede final approval, and notes that the Commission  
4 may ultimately decide not to approve the rates. Interim Order PP 13-14. If the Commission has  
5 erred in its determination to grant Bonneville interim authorization to charge the new rates,  
6 judicial intervention now would deny the Commission a chance to apply its expertise and to  
7 correct that error itself. *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980).

8 Plaintiffs nonetheless urge the Court to read finality into the Commission’s decision to  
9 review Bonneville’s rate proposal under section 7(a) of the Northwest Power Act, not under  
10 section 7(k) as Plaintiffs prefer, and assert jurisdiction on that basis. *See* Complaint P 12 (ECF-1  
11 at 5). The language of the Northwest Power Act and prior court decisions prohibit this. *Pub.*  
12 *Utils. Comm’n of Cal. v. FERC*, 814 F.2d 560, 561-62 (9th Cir. 1987) (statute grants jurisdiction  
13 over final actions only); *PacifiCorp*, 795 F.2d at 824-25 (court has jurisdiction over final agency  
14 actions as defined in the statute, not final approval of the rates as the term is used in contracts);  
15 *Cent. Lincoln*, 735 F.2d at 1109 (“[c]ourts have no jurisdiction where statutory procedural  
16 prerequisites are not met,” and therefore cannot “entertain non-constitutional challenges to rates  
17 until the rates have become final.”).

18 Even an interlocutory procedural challenge like Plaintiffs’ must await final confirmation  
19 and approval before it becomes ripe for review. *Pub. Utils. Comm’n*, 814 F.2d at 561-62  
20 (reviewing Bonneville’s failure to hold a hearing before FERC gives final confirmation to rates  
21 would amount to “piecemeal review”); *Pub. Util. Comm’r of Or. v. Bonneville Power Admin.*,  
22 583 F. Supp. 752, 755-57 (D. Or. 1984) (no jurisdiction over ratepayers’ and state regulator’s  
23 request that independent hearing officer conduct rate proceeding, because Bonneville  
24 administrator had not taken final action for purposes of review). Practical considerations also  
25 counsel against early judicial intervention. *See Standard Oil*, 449 U.S. at 242 (such intervention  
26 “leads to piecemeal review which at the least is inefficient and upon completion of the agency  
27 proceeding may prove to have been unnecessary.”).

28 Finally, as Plaintiffs acknowledge (Complaint P 3 (ECF-1 at 2)), the Ninth Circuit has

1 previously declined to review FERC’s procedural decisions altogether, holding that the “plain  
2 words of the Northwest Power Act, section 839f(e)(5), fail to authorize review of FERC’s  
3 actions[.]” *Wash. Utils. and Transp. Comm’n v. FERC*, 26 F.3d 935, 940 (9th Cir. 1994) (citing  
4 *CP Nat’l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 912-13 (9th Cir. 1991)). There is no  
5 basis for this Court to assert jurisdiction under the Northwest Power Act.

## 6 **II. The Court of Appeals Has Exclusive Jurisdiction**

7 Even if Plaintiffs’ challenge to the Interim order were ripe for review, Plaintiffs seek relief  
8 in the wrong forum. “Suits to challenge the constitutionality of this chapter, or any action  
9 thereunder, final actions and decisions taken pursuant to this chapter by the [Bonneville]  
10 Administrator . . . or the implementation of such final actions . . . shall be filed in the United  
11 States court of appeals for the region.” 16 U.S.C. § 839f(e)(5). The Ninth Circuit therefore has  
12 exclusive jurisdiction over cases arising under the Northwest Power Act. *Pac. Power and Light*  
13 *Co. v. Bonneville Power Auth.*, 795 F.2d 810, 812 (9th Cir. 1986); *Forelaws on Bd. v. Johnson*,  
14 709 F.2d 1310, 1311 (9th Cir. 1983); *Cent. Lincoln*, 735 F.2d at 1109 (where “a statute  
15 establishes a specific scheme for obtaining review, the courts may assume that the set of  
16 procedures is exclusive.”). Such a grant of exclusive jurisdiction to the courts of appeals divests  
17 district courts of their general jurisdiction under 28 U.S.C. § 1331. *Mims v. Arrow Fin. Servs.*,  
18 *LLC*, 565 U.S. 368, 378-79 (2012). Courts have uniformly held that district courts lack  
19 jurisdiction over cases that arise under the Northwest Power Act. *See, e.g., Transmission Agency*  
20 *of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 922-23 (9th Cir. 2002) (affirming decision of  
21 judge in Eastern District of California to dismiss claims against Bonneville as subject to exclusive  
22 jurisdiction of Ninth Circuit); *Pac. Power & Light Co. v. Bonneville Power Admin.*, 589 F. Supp.  
23 539, 543-45 (D. Or. 1984), *aff’d*, 795 F.2d 810; *Pub. Power Council v. Johnson*, 589 F. Supp.  
24 198, 202-03 (D. Or. 1984); *Pub. Util. Comm’r*, 583 F. Supp. at 753.

25 Plaintiffs attempt to evade the Northwest Power Act’s limitation of jurisdiction by casting  
26 their complaint as a challenge to FERC’s actions, not those of Bonneville. But this “does not *ipso*  
27 *facto* create jurisdiction in the district court[.]” *Pacific*, 589 F. Supp. at 543. Courts have resisted  
28 past plaintiffs’ efforts to create new avenues to jurisdiction by invoking grounds not directly

1 addressed in the Northwest Power Act. *See City of Seattle*, 813 F.2d at 1367-68 (petitioner  
2 attempted to distinguish a charge from a rate for purposes of establishing jurisdiction over interim  
3 FERC order); *Forelaws on Bd.*, 709 F.2d at 1311 (National Environmental Policy Act claim);  
4 *Pacific*, 589 F. Supp. at 545 (“Although plaintiffs seek to characterize their remaining claim as a  
5 pure contract issue unentangled with the merits or procedure of [Bonneville’s] rate proceeding,  
6 my exercise of jurisdiction would necessarily impact the course of the 1985 rate case.”). The  
7 proper focus of a jurisdictional inquiry is not the legal theory animating a lawsuit, but rather “the  
8 agency being attacked and whether the factual basis for that attack is an agency action authorized  
9 by the Act.” *Pacific*, 795 F.2d at 816.

10 Plaintiffs’ efforts to create jurisdiction where there is none would also lead to unnecessary  
11 and inefficient bifurcation of authority over challenges to agency action. Courts must “center  
12 [their] analysis upon the agency action which is challenged, and, in the absence of a clear  
13 statutory directive . . . avoid a result which would subject essentially identical agency action to  
14 initial review in different levels of the federal courts.” *Forelaws on Bd.*, 709 F.2d at 1313 (citing  
15 *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980)). “Permitting district court jurisdiction  
16 over interlocutory decisions by [Bonneville], but requiring Ninth Circuit jurisdiction over final  
17 [Bonneville] actions would frustrate the legislative intent to expedite review of [Bonneville]  
18 decisions.” *Pacific*, 795 F.2d at 815 (citing *Forelaws on Bd.*, 709 F.2d at 1313). It is not efficient  
19 for this Court to exercise jurisdiction over the Commission’s interlocutory decision – an event  
20 that would no doubt prompt the losing party to appeal to the Ninth Circuit – when the Northwest  
21 Power Act already provides for the Ninth Circuit to provide initial review of Bonneville’s rate  
22 case after the Commission has provided final confirmation of the rates.

23 Plaintiffs’ litigation strategy also risks a different type of improper bifurcation of review.  
24 They appealed the Interim Order to the Ninth Circuit on the same day that they filed their  
25 complaint before this Court. *Sacramento Mun. Utils. Dist. v. FERC*, No. 17-73165 (9th Cir., filed  
26 Nov. 21, 2017). Plaintiffs apparently prefer that this Court conduct the initial review of the  
27 Interim Order, and they have sought abeyance of the appeal pending this Court’s finding of  
28 jurisdiction. *See Motion to Hold Petition for Review in Abeyance at 1 (ECF-2) (9th Cir. No. 17-*



1 73165, filed Nov. 22, 2017). The Ninth Circuit has not yet ruled on their motion, but to date has  
2 exercised jurisdiction over this case. *See* Time Schedule Order at 1 (ECF-1 at 2) (9th Cir. No. 17-  
3 73165) (setting briefing schedule); Order (ECF-10) (9th Cir. No. 17-73165) (asking parties to  
4 contact circuit mediation service and noting that briefing schedule remains in effect). A federal  
5 district court and a federal appeals court should not try to assert jurisdiction over a case  
6 simultaneously. *See generally Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58  
7 (1982) (discussing effects of timing of notice of appeal). Plaintiff’s appeal is of a Commission  
8 order, not of a district court decision as in *Griggs*, but it raises a problem discussed in that case:  
9 the simultaneously-pending complaint and appeal invite courts at different levels of the federal  
10 judiciary to review and modify the same decision – here, one that took place in a still-ongoing  
11 agency proceeding. *See id.* at 59-60.

## 12 CONCLUSION

13 For the foregoing reasons, the Court should dismiss the Complaint for lack of subject  
14 matter jurisdiction.

15 Respectfully submitted,

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