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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11

12 Sacramento Municipal Utility District, *et al.*,

13 Plaintiffs,

14 v.

15 Federal Energy Regulatory Commission, *et al.*,

16 Defendants.  
17

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

**RESPONSE TO MOTION FOR  
PRELIMINARY INJUNCTION**

Hearing on Motion:

Date: January 25, 2018

Time: 2:00 p.m.

Location: Courtroom 2, 15th Floor

United States Courthouse

501 I Street, Suite 4-200

Sacramento, CA 95814  
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24 **DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

25 Plaintiffs Sacramento Municipal Utility District, *et al.* ask this Court to grant the  
26 extraordinary remedy of a preliminary injunction to restrain Defendants, the Federal Energy  
27 Regulatory Commission and several of its commissioners in their official capacities (collectively,  
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1 Commission or FERC), from providing interim rate authority to Bonneville Power  
2 Administration (Bonneville) under the Pacific Northwest Electric Power Planning and  
3 Conservation Act (Northwest Power Act), 16 U.S.C. §§ 839-839h.

4 As the Commission explains in its concurrently-filed Motion to Dismiss (ECF-13), the  
5 Court lacks subject matter jurisdiction to intervene in an ongoing Commission proceeding. The  
6 Northwest Power Act vests exclusive jurisdiction in the United States Courts of Appeals to  
7 review final agency actions under the Northwest Power Act. Because of this threshold  
8 jurisdictional bar, Plaintiffs cannot establish any likelihood of success on the merits in support of  
9 the issuance of a preliminary injunction. And in any event, as discussed below, the remaining  
10 preliminary injunction factors likewise dictate that Plaintiffs' motion should be denied.

11 Plaintiffs have scheduled a hearing on this motion for Thursday, January 25, 2018.  
12 Defendants do not believe that a hearing is necessary. If a hearing is held, however, Defendants  
13 do not intend to present witnesses or evidence, but will present oral argument in proportionate  
14 response to Plaintiffs.

### 15 **I. Preliminary Injunction Standard**

16 A preliminary injunction is “an extraordinary remedy never awarded as of right.” *Winter*  
17 *v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). To obtain relief, a  
18 movant must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable  
19 harm in the absence of preliminary relief, that the balance of the equities tips in the movants’  
20 favor, and that an injunction is in the public interest. *See, e.g., Disney Enters., Inc. v. VidAngel,*  
21 *Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (quoting *Winter*, 555 U.S. at 20). A federal court may  
22 only issue an injunction if it has subject-matter jurisdiction over the claim. *See Zepada v. United*  
23 *States Immigration & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983); *Pub. Util. Dist.*  
24 *No. 1 v. FERC*, 270 F. Supp. 2d 1, 5 (D.D.C. 2003) (denying preliminary injunction request  
25 against FERC because “this [c]ourt concludes that it is without jurisdictional authority to afford  
26 the plaintiff the remedy it is principally seeking . . .”).

1           **II. There Is No Likelihood of Success on the Merits Because the Court Lacks**  
2           **Subject-Matter Jurisdiction**

3           “Likelihood of success on the merits ‘is the most important’ *Winter* factor; if a movant  
4 fails to meet this ‘threshold inquiry,’ the court need not consider the other factors.” *Disney*, 869  
5 F.3d at 856. In this case, Plaintiffs cannot succeed on the merits because, as explained in the  
6 Commission’s motion to dismiss, the Court does not have subject matter jurisdiction to hear the  
7 merits of the claims set forth in Plaintiffs’ complaint. A question of jurisdiction makes success on  
8 the merits “more *unlikely* due to potential impediments to even reaching the merits.” *Munaf v.*  
9 *Geran*, 553 U.S. 674, 690 (2008) (emphasis in original).

10           As detailed in the Commission’s motion to dismiss, the agency order from which  
11 Plaintiffs seek relief is non-final and subject to further consideration, and Bonneville’s interim  
12 rates are subject to refund. *Bonneville Power Admin.*, 160 FERC ¶ 61,113 at paragraphs (PP) 1,  
13 13-14 (2017). Both the Administrative Procedure Act and the Northwest Power Act require final  
14 agency action before judicial review. *See* 5 U.S.C. § 704 (no review of “preliminary, procedural,  
15 or intermediate agency action”); 16 U.S.C. § 839f(e)(1)(G) (providing for judicial review of final  
16 rate determinations). And in any event, judicial review of Northwest Power Act cases lies  
17 exclusively with the courts of appeals. *See* 16 U.S.C. § 839f(e)(5). Courts have uniformly held  
18 that district courts lack jurisdiction over cases that arise under the Northwest Power Act,  
19 regardless of the legal theory animating those cases. *See, e.g., Transmission Agency of N. Cal. v.*  
20 *Sierra Pac. Power Co.*, 295 F.3d 918, 922-23 (9th Cir. 2002) (affirming decision of judge in  
21 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 (D. Or. 1984), *aff’d*, 795 F.2d 810 (9th Cir. 1986); *Pub. Power Council v. Johnson*, 589  
24 F. Supp. 198, 202-03 (D. Or. 1984); *Pub. Util. Comm’r of Or. v. Bonneville Power Admin.*, 583  
25 F. Supp. 752, 754 (D. Or. 1984). Because there is no basis for jurisdiction, there is also no basis  
26 for granting Plaintiffs’ motion for preliminary injunction.

1           **III. The Remaining Preliminary Injunction Factors Do Not Support Plaintiffs’**  
2           **Request for Injunctive Relief**

3           A. Plaintiffs Have Not Shown They Will Suffer Irreparable Harm If Their  
4           Request for Preliminary Injunction Is Not Granted

5           To show irreparable harm for purposes of a preliminary injunction, Plaintiffs must  
6           demonstrate that such harm is “likely” in the absence of an injunction. *Winter*, 555 U.S. at 22  
7           (“Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent  
8           with our characterization of injunctive relief as an extraordinary remedy that may only be  
9           awarded upon a clear showing that the plaintiff is entitled to such relief.”) (citation omitted);  
10          *Disney*, 869 F.3d at 865. In the alternative, a plaintiff may show that there are serious questions  
11          going to the merits of a case, and a balance of hardships that tips sharply toward the plaintiffs.  
12          *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (citing *Alliance for the Wild Rockies v.*  
13          *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

14          Economic damage generally is not considered irreparable harm, because an injured party  
15          may seek corrective relief through litigation. *Cal. Hosp. Ass’n v. Maxwell-Jolly*, 776 F. Supp. 2d  
16          1129, 1140 (E.D. Cal. 2011); *Timba Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1189-90  
17          (E.D. Cal. 2010). There is an exception to this rule in instances when plaintiffs are legally  
18          precluded from pursuing damages. *Cal. Hosp. Ass’n*, 776 F. Supp. 2d at 1140. But the  
19          statements in Plaintiffs’ motion and the supporting exhibits do not demonstrate either that  
20          irreparable harm is imminent, or that they cannot pursue damages elsewhere. “To establish a  
21          likelihood of irreparable harm, conclusory and speculative allegations are not enough.” *Titaness*  
22          *Light Shop, LLC v. Sunlight Supply, Inc.*, 585 F. App’x 390, 391 (9th Cir. 2014).

23          Plaintiffs assert – both in their motion and in a supporting affidavit – that, as a result of the  
24          increase in transmission rates on the Southern Intertie, their suppliers’ costs are likely to rise; that  
25          their suppliers are likely to pass costs along to Plaintiffs; and that, because Plaintiffs are not direct  
26          customers of Bonneville, they are not entitled to share in any later refunds the Commission might  
27          order. Motion for Preliminary Injunction at 3-4 (ECF-6). But Plaintiffs do not claim that they are  
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1 legally prohibited from recouping their costs – only that refunds will not automatically flow to  
2 them as a result of any later Commission decision to order refunds. *Id.* (“None of these adverse  
3 impacts on Plaintiffs would be compensable for the obvious reason that Plaintiffs will not have  
4 been purchasing hourly contract service from” Bonneville).

5 Plaintiffs do not support the latter allegation with documentary evidence, and therefore  
6 fall short of meeting the standard for preliminary injunction. *See Timba Shoshone Tribe*, 697 F.  
7 Supp. 2d at 1187 (“a few unsupported assertions” are not enough to show likelihood of success on  
8 the merits); *Reece v. Island Treasures Art Gallery, Inc.*, 486 F. Supp. 2d 1197, 1209 (D. Haw.  
9 2006) (bare assertions do not establish possibility of irreparable harm). In addition to the  
10 allegations in their motion, they submit an affidavit from an employee of Plaintiff Sacramento  
11 Municipal Utility District – which is just one of the three Plaintiffs. Motion for Preliminary  
12 Injunction, Exhibit B. The employee explains that, because power is delivered to his employer  
13 via transmission services purchased from third parties, those third parties would receive any  
14 FERC-ordered refunds. *Id.* P 12. He adds that nothing in his employer’s agreements “with third  
15 parties would require the third parties to pass those refunds back” to the plaintiff. Motion for  
16 Preliminary Injunction, Exhibit B at P 12.

17 Neither the motion nor the affidavit indicates that third parties are prohibited from making  
18 refunds to the Plaintiffs as their customers, or that they would never do so for other reasons – for  
19 example, if a court ordered them to do so. Moreover, Plaintiffs make no representations at all  
20 about whether Plaintiffs Transmission Agency of Northern California or Turlock Irrigation  
21 District could pursue repayment of any overcharges that might result from the Interim Order.  
22 This requires the Court to speculate as to whether they are similarly situated to Plaintiff  
23 Sacramento Municipal Electric District. *See In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098  
24 (9th Cir. 2007) (“Speculative injury cannot be the basis for a finding of irreparable harm.”) (citing  
25 *Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)).

1                   B.       The Balance of Equities and Public Interest Factors Do Not Support  
2   Granting Preliminary Injunctive Relief In These Circumstances

3                   The last two factors of the preliminary injunction test similarly do not support Plaintiffs'  
4 motion. The balance of equities and the public interest favor enforcing a Congressionally-  
5 designed statutory scheme and Congressionally-designed jurisdictional lines. Bonneville's  
6 "complex ratemaking determinations should be reviewed first by the Federal Energy Regulatory  
7 Commission, and then by the Ninth Circuit. These are the two institutions charged by Congress  
8 to supervise [Bonneville's] rate decisions." *Pub. Power Council*, 589 F. Supp. at 204; *see also*  
9 *Cent. Lincoln People's Util. Dist. v. Johnson*, 735 F.2d 1101, 1107, 1108-10 (9th Cir. 1984)  
10 (same, and also noting that agency action must be final prior to judicial review).

11                   The Commission's fulfillment of its statutory responsibilities – by reviewing the  
12 Bonneville rate case for conformity with the governing provision of the Northwest Power Act –  
13 serves the public interest. The Commission must take adequate time to fully consider  
14 Bonneville's rate case, in all of its "volume and complexity," Initial Order P 13, to ensure that its  
15 analysis satisfies the public interest. Through legislation, Congress has emphasized prompt  
16 resolution of matters under the Northwest Power Act. *Forelaws on Bd. v. Johnson*, 709 F.2d  
17 1310, 1312 (9th Cir. 1983) (citing *Pub. Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir.  
18 1982)). The Court should not intervene in the Commission's consideration of these matters, and  
19 slow their ultimate resolution, by asserting jurisdiction and bifurcating the statutorily-prescribed  
20 judicial review process. *Forelaws on Bd.*, 709 F.2d at 1313 (in the absence of a clear statutory  
21 directive, courts should avoid results that subject "essentially identical agency action to initial  
22 review in different levels of the federal courts").

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**CONCLUSION**

For the foregoing reasons, the court should deny Plaintiffs' preliminary injunction motion.

Respectfully submitted,

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