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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

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Sacramento Municipal Utility District, *et al.*,  
Plaintiffs,  
v.  
Federal Energy Regulatory Commission, *et al.*,  
Defendants.

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

**REPLY IN SUPPORT OF MOTION TO DISMISS**

Hearing (if necessary) 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

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

The Federal Energy Regulatory Commission (Commission or FERC) granted preliminary approval to new rates that Bonneville Power Administration (Bonneville) proposed for transmission service over one line in its eight-state system. *Bonneville Power Admin.*, 160 FERC

1 ¶ 61,113 (2017) (Interim Order). In an effort to obtain immediate judicial review of that non-final  
2 ruling – and perhaps undo the effectiveness of Bonneville’s new transmission rates – Plaintiffs  
3 suggest that the Commission’s final approval of the rates is “inevitable.” Opp. at Exh. A, p. 11  
4 (ECF-25). They urge the Court to review the Interim Order based on an incomplete view of case  
5 law concerning the judicial review provisions of the Pacific Northwest Electric Power Planning  
6 and Conservation Act (Northwest Power Act), 16 U.S.C. §§ 839-839h.

7 No district court or court of appeals has ever previously accepted contentions like  
8 Plaintiffs’, and this Court should, similarly, reject their arguments in favor of jurisdiction.

9 **I. Finality of Agency Action**

10 The Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, and the Northwest Power Act  
11 both provide that judicial review of Bonneville Power Administration’s (Bonneville) electric  
12 power and transmission rates may not occur until agency action to approve those rates has  
13 become final. The Administrative Procedure Act bars review of “preliminary, procedural, or  
14 intermediate agency action.” *Id.* § 704. And under the Northwest Power Act, reviewable “final  
15 actions” include final rate determinations under 16 U.S.C. § 839e. 16 U.S.C. §§ 839f(e)(1)(G),  
16 839f(e)(5); *e.g.*, *Cent. Lincoln People’s Util. Dist. v. FERC*, 735 F.2d 1101, 1107 (9th Cir. 1984).  
17 Rate determinations are deemed final upon confirmation and approval by the Commission. 16  
18 U.S.C. § 839f(e)(4)(D); *City of Seattle v. Johnson*, 813 F.2d 1364, 1367 (9th Cir. 1987).

19 No one disputes that the Interim Order is not final. *See* Opp. at Exh. A, pp.6-7 (ECF-25).  
20 Plaintiffs contend, however, that the order is nonetheless reviewable because, within it, the  
21 Commission made a final decision to review Bonneville’s rates for transmission over the  
22 Southern Intertie under section 7(a) of the Northwest Power Act. *Id.* at 2. They claim that  
23 because the Commission “evidences no intent to revisit [its] determination” that Northwest Power  
24 Act section 7(a), and not section 7(k), governs the Commission’s review of Bonneville’s rates,  
25 that issue must be final and ripe for immediate review. *Id.* at 7; *see also id.* at 2, 6-10 (citing  
26 various Federal Power Act cases in which the courts of appeals have reviewed a discrete legal  
27 issue within an ongoing FERC proceeding, *e.g.*, *California v. FERC*, 809 F.3d 491, 497 (9th Cir.  
28 2015); *Cal. Dep’t of Water Res. v. FERC*, 361 F.3d 517 (9th Cir. 2004) (denying reh’g of 341

1 F.3d 906 (9th Cir. 2003)); *City of Fremont v. FERC*, 336 F.3d 910 (9th Cir. 2003)).

2 But the very paragraph with which Plaintiffs disagree indicates that the Commission's  
3 review of Bonneville's rates remains unfinished: "Our *preliminary* review indicates that  
4 Bonneville's . . . filing *appears* to meet the statutory standards and the minimum threshold filing  
5 requirements. . . . The proposed rates therefore will be approved on an interim basis *pending our*  
6 *further review.*" Interim Order P 13 (emphasis added). The Commission invited further  
7 comment on "issues related to final confirmation and approval" of the rates, *id.* P 14 & Ordering  
8 P (B), and expressly noted the possibility that it would not ultimately approve the rates, *id.* P 13  
9 & Ordering P (A).

10 Despite the Commission's invitation, Plaintiffs explain that they "filed no such comments,  
11 having conceded that final FERC approval [of Bonneville's new rates] is inevitable as long as the  
12 governing standard is section 7(a), not section 7(k)." Opp. at Exh. A, p. 11. Instead, they filed a  
13 complaint with this Court and a petition for review with the Court of Appeals (9th Cir. No. 17-  
14 73165, motions pending for abeyance and to suspend briefing schedule), claiming that the  
15 Commission's intermediate ruling is final and reviewable.

16 The Commission is unable to comment on the substance of a proceeding that remains  
17 pending before it, but it need not do so in order for the Court to resolve this case. No case law  
18 indicates that either district courts or the courts of appeals have jurisdiction over the  
19 Commission's interim approval of Bonneville rates under the Northwest Power Act – even over  
20 discrete issues underlying interim approval, as in the Federal Power Act cases on which Plaintiffs  
21 rely. Instead, courts routinely decline to interfere with non-final agency processes under the  
22 Northwest Power Act, whether the agency in question is Bonneville or the Commission. *See,*  
23 *e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 814 F.2d 560, 561-62 (9th Cir. 1987) (no jurisdiction  
24 over appeal of FERC's interim rate approval, even when grounded in concern that Bonneville  
25 should have held a hearing); *Cent. Lincoln*, 735 F.2d at 1109 (dismissing petitions for review of  
26 rates that the Commission had not yet approved); *Pub. Util. Comm'r of Or. v. Bonneville Power*  
27 *Admin.*, 583 F. Supp. 752, 755-57 (D. Or. 1984) (no jurisdiction over requests that independent  
28 hearing officer conduct rate proceeding, because Bonneville administrator had not taken final

1 action for purposes of review). And if judicial intervention is justified, “it makes sense for the  
2 court with jurisdiction to review the final action to intervene. . . . Such a result would avoid  
3 creating an ‘irrational bifurcated system.’” *Pub. Util. Comm’r*, 583 F. Supp. at 756 (citation  
4 omitted).

5 Moreover, the case is unripe because the Commission may disapprove the rates altogether.  
6 *See* Interim Order P 13 & Ordering P (A) (noting this possibility). For this reason, any exercise  
7 of jurisdiction “might be mooted by subsequent actions of [Bonneville] or FERC.” *Cent. Lincoln*,  
8 735 F.2d at 1110; *see also Pub. Utils. Comm’n*, 814 F.2d at 562 (“If FERC were to deny  
9 confirmation of the rate order, our review of [Bonneville’s] ratemaking procedures would be  
10 unnecessary.”); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 967 (D.C. Cir. 2011)  
11 (citing *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007)) (claims may be unripe because if the  
12 court does not decide them immediately, it may never need to do so).

13 Finally, even taking the approach to reviewability that the Ninth Circuit has used in  
14 Federal Power Act cases like *Steamboaters v. FERC*, 759 F.2d 1382, 1387-88 (9th Cir. 1985), this  
15 case is not ready for review. First, as previously discussed, the case is non-final within the  
16 meaning of the applicable statute – the Northwest Power Act. Second, as discussed in the various  
17 pleadings responding to Plaintiffs’ Motion for Preliminary Injunction, Plaintiffs have alleged, but  
18 not demonstrated, that they will suffer irreparable harm as a result of the Interim Order. *See*  
19 Defendants’ Opposition to Motion for Preliminary Injunction at 4-5 (ECF-14); Bonneville Power  
20 Administration’s [Proposed] Response to Motion for Preliminary Injunction at 15-19 (ECF-21-2).  
21 And third, judicial intervention at this point would invade the province reserved to the agency,  
22 which is to review and confirm or reject the proposed new rates. 16 U.S.C. § 839e(a)(2). “For us  
23 to judge whether FERC erred in accepting [a] rate filing would ‘undermine the Commission’s  
24 primary jurisdiction by bringing the court[] into the adjudication of the lawfulness of rates in  
25 advance of administrative consideration. . . .” *Papago Tribal Utils. Auth. v. FERC*, 628 F.3d 235,  
26 244 (D.C. Cir. 1980).

1           **II. Exclusive Jurisdiction of Court of Appeals**

2           Plaintiffs next contend that the federal district courts have exclusive jurisdiction to review  
3 the Commission’s actions under the Northwest Power Act, because the statute does not expressly  
4 preclude such review. Complaint PP 2-4 (ECF-1 at 2-3); Opp., Exh. A, p. 4. To support their  
5 theory, they rely (for the first time) on *Pacific Power and Light v. Bonneville Power Admin.*, 795  
6 F.2d 810 (9th Cir. 1986). This case does not recognize district court jurisdiction over a challenge  
7 to FERC’s procedural decisions, as Plaintiffs would have it (Opp., Exh. A at p. 4), but cautions  
8 against reviewing cases that wrap challenges to Bonneville rate decisions in other legal theories in  
9 an effort to evade the statute’s jurisdictional prescriptions.

10           The district court decision underlying *Pacific Power and Light* considered a complaint,  
11 grounded in contract law, that Bonneville had prematurely initiated a new rate case. *Pacific*  
12 *Power & Light Co. v. Bonneville Power Admin.*, 589 F. Supp. 539, 542 (D. Or. 1984). Analyzing  
13 16 U.S.C. § 839f(e)(5), which lists final agency actions subject to appellate review, the district  
14 court noted that there was no final agency action at issue. *Id.* at 543. “Initially, then, it appears  
15 that this lawsuit is not one subject to the original jurisdiction of the Ninth Circuit[.]” *Id.* But  
16 district court jurisdiction is appropriate “only if (1) there is an affirmative basis for jurisdiction (2)  
17 not precluded by the” Northwest Power Act. *Id.*

18           Plaintiffs aver that there is an affirmative basis for jurisdiction because they challenge  
19 FERC’s interim procedural decision about how to review the Bonneville rates, which is not an  
20 action enumerated in the statute. Opp. at Exh. A, pp. 3-4. This theory would allow them to evade  
21 the requirement that rates have received final confirmation and approval prior to judicial review.  
22 But here, as in *Pacific Power & Light*, the Northwest Power Act precludes district court  
23 jurisdiction, because such an “exercise of jurisdiction would necessarily impact the course of” the  
24 rate case at issue – and therefore cannot be disentangled from a matter over which the courts of  
25 appeals have exclusive jurisdiction. 589 F. Supp. at 545 (“The more important issue is not  
26 whether the [issue] is a ‘rate matter’ or ‘not a rate matter.’ Rather, the critical point is whether  
27 Congress has already specified a procedure for review of plaintiff’s claim. It has.”)

28           The Ninth Circuit’s decision is not to the contrary. It states only that district court

1 jurisdiction lies over actions not within the exclusive jurisdiction of the courts of appeals. *Pacific*  
2 *Power and Light Co.*, 795 F.2d at 814. This is far from a statement that district courts have  
3 exclusive jurisdiction over FERC actions under the Northwest Power Act, *see* Opp. at Exh. A,  
4 p. 4 – especially because *Pacific Power and Light* did not involve FERC at all.

5 Moreover, the Ninth Circuit agreed with the district court that district courts lack  
6 jurisdiction “where the effect of an action is to challenge a [Bonneville] proceeding, the substance  
7 of which will eventually be subject to direct review by this court.” 795 F.2d at 815. The legal  
8 theory on which the case is founded is not the basis for jurisdiction; rather, “jurisdiction under the  
9 Act should be a function of the agency whose actions are being challenged rather than a function  
10 of the cause of action which petitioner asserts.” *Id.* at 816. Even if this Court finds that the target  
11 agency is FERC, and not actually Bonneville, judicial intervention will affect the course of the  
12 rate case, and that rate case will ultimately be subject to judicial review in the courts of appeals.  
13 16 U.S.C. § 839f(e)(1)(G). The Court should resist Plaintiffs’ efforts to create jurisdiction by  
14 attacking Bonneville’s rates by way of a challenge to the Commission’s decision-making process.

### 15 CONCLUSION

16 For the foregoing reasons, the court should dismiss the Complaint for lack of subject  
17 matter jurisdiction.

18 Respectfully submitted,

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