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signature page)

**UNITED STATES DISTRICT COURT  
DISTRICT OF MONTANA  
BILLINGS DIVISION**

PORTLAND GENERAL ELECTRIC  
COMPANY; AVISTA  
CORPORATION; PACIFICORP; and  
PUGET SOUND ENERGY, INC.,

Plaintiffs,

v.

NORTHWESTERN CORPORATION;  
TALEN MONTANA, LLC; AUSTIN  
KNUDSEN, in his official capacity as  
Attorney General for the State of  
Montana,

Defendants.

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TALEN MONTANA, LLC,

Plaintiff,

Case No. 1:21-cv-00047-SPW-KLD

MEMORANDUM IN SUPPORT  
OF MOTION TO CONSOLIDATE

Case No. 1:21-cv-00058-SPW-TJC

v.

AVISTA CORPORATION;  
NORTHWESTERN CORPORATION;  
PACIFICORP; PORTLAND  
GENERAL ELECTRIC COMPANY;  
and PUGET SOUND ENERGY, INC.,

Defendants.

(removed from Montana Thirteenth  
Judicial District Court, Yellowstone  
County, Cause No. DV-21-0511)

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE

Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, Plaintiffs Avista Corporation, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. (collectively the “Pacific Northwest Owners”) move this Court to consolidate *Talen Montana, LLC v. Avista Corporation, et al.*, Case No. 1:21-cv-00058-SPW-TJC (“*Talen*”)<sup>1</sup> with *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, Case No. 1:21-cv-00047-SPW-KLD (“*Portland General Electric*”).<sup>2</sup> As discussed herein, *Talen* and *Portland General Electric* involve common questions of law or fact and consolidation will serve the interests of efficiency and judicial economy. There is no good reason for these cases to

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<sup>1</sup> *Talen* was originally filed by the Plaintiff, Talen Montana, LLC, in Montana Thirteenth Judicial Court Yellowstone County on May 4, 2021. The Plaintiff filed its first amended complaint on May 5, 2021. This case was removed to the United States District Court for the District of Montana, Billings Division, on May 17, 2021.

<sup>2</sup> *Portland General Electric* was originally filed in the United States District Court for the District of Montana, Billings Division, on May 4, 2021. The Pacific Northwest Owners filed an amended complaint on May 19, 2021.

proceed separately and, therefore, the Pacific Northwest Owners respectfully request that these cases be consolidated.

**I. The Court May Consolidate Actions that Involve Common Questions of Law or Fact.**

Under Rule 42(a) of the Federal Rules of Civil Procedure, a federal district court may consolidate separate actions when they “involve a common question of law or fact.” Fed. R. Civ. P. 42(a); *Wilhite v. Littlelight*, No. CV-19-102-BLG-SPW-TJC, 2020 WL 6562109, at \*1 (D. Mont. Nov. 9, 2020). “Consolidation of actions provides ‘a valuable and important tool of judicial administration . . . [that] helps relieve[ ] the parties and the [c]ourt of the burden of duplicative pleadings and [c]ourt orders.’” *Id.* (quoting *Blasko v. Washington Metro. Area Transit Authority*, 243 F.R.D. 13, 15 (D. D.C. 2007)) (alterations in original). The purpose of consolidation under Rule 42(a) “is to enhance trial court efficiency by avoiding unnecessary duplication of proceedings and effort” and to “guard against the risk of inconsistent adjudications.” *AMTRAK v. Camargo Trucking*, No. 1:12-cv-775 AWI-BAM, 2013 U.S. Dist. LEXIS 3143, at \*6-7 (E.D. Cal. Jan. 7, 2013). Consolidation is appropriate “to avoid unnecessary cost or delay.” Fed. R. Civ. P. 42(a)(3); *Perez-Funez v. Dist. Dir., I.N.S.*, 611 F. Supp. 990, 994 (C.D. Cal. 1984). “Under the [Federal Rules of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of*

*Am. v. Gibbs*, 383 U.S. 715, 724 (1966) (citing, *inter alia*, Fed. R. Civ. P. 42).

“The district court has broad discretion under this rule to consolidate cases pending in the same district.” *Investors Research Co. v. United States Dist. Court for Cent. Dist. of Cal.* 877 F.2d 777, 777 (9th Cir. 1989); *In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987) (“consolidation is within the broad discretion of the district court”).

To determine whether consolidation is appropriate, a court should “weigh considerations of convenience and economy against considerations of confusion and prejudice.” *Blasko*, 243 F.R.D. at 15; *see also Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985). Consolidation is not precluded if there are some questions that are not common. *Batazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49, 50 (5th Cir. 1981). “Courts should invoke Rule 42 to ‘expedite trial and eliminate unnecessary repetition and confusion.’” *Upper Mo. Waterkeeper v. U.S. Env’tl. Protection Agency, et al.*, No. CV-20-27-GF-BMM, 2020 WL 6381950, at \*7 (D. Mont. Oct. 30, 2020) (quoting *Devlin Transp. Commc’ns Int’l Union*, 175 F.3d 121, 130 (2d Cir 1999)).

## **II. *Portland General Electric* and *Talen* Involve Common Issues of Law or Fact.**

*Portland General Electric* and *Talen* involve common questions of law and fact. Specifically, both cases raise questions regarding whether Montana Senate

Bill 265 of 2021 (“SB 265”) can lawfully be applied to disputes between the owners of Colstrip Units 3 and 4 (“Colstrip”).

The ownership and operation of Colstrip is governed by an Ownership and Operation Agreement between the owners of Colstrip, dated May 6, 1981, which has been amended four times (“O&O Agreement”). Andrea Decl. ¶ 3. Section 18 of the O&O Agreement provides that “any controversies” arising from or relating to the O&O Agreement that cannot be resolved through negotiation “shall” be arbitrated in Spokane, Washington, before a single arbitrator in an arbitration held pursuant to Washington’s arbitration act.<sup>3</sup> *Id.*

SB 265 purports to invalidate parts or all of Sections 18 of the O&O Agreement. Specifically, SB 265 amends Section 27-5-323 of the Montana Code by adding the following:

(2)(a) An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration

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<sup>3</sup> In accordance with the terms of Section 18 of the O&O Agreement, on April 14, 2021, the Pacific Northwest Owners necessarily filed a Petition to Compel Arbitration Pursuant to RCW 7.04A, before the Superior Court for the State of Washington, Spokane County (Case No. 21-2-01000-32). On April 20, 2021, the Pacific Northwest Owners filed a Motion to Compel Arbitration Pursuant to Chapter 7.04A RCW and the Parties’ Arbitration Agreement. On May 14, 2021, Talen Montana, LLC filed a Notice of Removal, thereby initiating *Avista Corporation, et. al. v. NorthWestern Corporation and Talen Montana, LLC.*, Case No. 2:21-cv-00163-RMP, presently pending before the United States District Court for the Eastern District of Washington. On May 21, 2021, Talen Montana, LLC filed a Motion to Transfer or Dismiss, in which it states: “This case should be transferred to the District of Montana so it can be paired or consolidated with Plaintiffs’ other lawsuit about the same issues....”

occur within the state before a panel of three arbitrators selected under the [Montana] Uniform Arbitration Act unless all parties agree in writing to a single arbitrator. (b) For the purposes of this subsection, “electrical generation facility” has the meaning provided in 15-24-3001.”

.....

[This act] applies retroactively, within the meaning of 1-2-109, to applications made on or after January 1, 2021.

Andrea Decl. ¶ 5 and Ex. A.

In *Portland General Electric*, the Pacific Northwest Owners seek, among other things,<sup>4</sup> declaratory relief that SB 265 is unconstitutional as applied to the O&O Agreement (i) under the Contract Clause of the United States Constitution, and (ii) under the Contract Clause of the Montana State Constitution. Andrea Decl. ¶ 6 and Ex. B. The Pacific Northwest Owners also seek declaratory relief that SB 265 is, as applied to the O&O Agreement, preempted by the Federal Arbitration Act. *Id.*

The issues in *Talen* give rise to the same questions of law regarding the legality of SB 265 as applied to the O&O Agreement. In *Talen*, the Plaintiff, Talen Montana, LLC (“Talen Montana”), seeks an order declaring:

that Sections 18 and 34(c) of the O&O Agreement are invalid under Montana Code § 27-5-323 [as amended by SB 265] insofar as they (1) require that any arbitration be conducted in Washington; (2) permit a Washington court to appoint an arbitrator, (3) require that any arbitration be governed by the Washington Uniform Arbitration Act; (4) allow for

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<sup>4</sup> *Portland General Electric* includes additional issues regarding a related Montana Senate Bill, SB 266 of 2021.

arbitration by one rather than three arbitrators; or (5) otherwise allow the laws of the courts of Washington to influence where and how the arbitration proceeds.

Andrea Decl. ¶ 7 and Ex. C.

Talen Montana further seeks an order conditionally compelling arbitration in accordance with Montana Code § 27-5-323, as amended by SB 265, and the Uniform Arbitration Act. *Id.* In *Talen*, the Pacific Northwest Owners' counterclaims are identical to their claims concerning SB 265 in *Portland General Electric*, and their affirmative defenses in *Talen* raise the same issues of constitutionality and preemption.

*Portland General Electric* and *Talen* involve common questions of law or fact. In both *Portland General Electric* and *Talen*, with regard to SB 265, the issues are whether SB 265, as applied to the O&O Agreement, is unconstitutional under the United States Constitution and the Montana Constitution, and whether it is preempted by the Federal Arbitration Act. *See Wilhite*, 2020 WL 6562109 at \*1 (consolidation appropriate to avoid duplicative pleadings). Consolidation of *Portland General Electric* and *Talen* will help relieve the parties and the Court of the burden of duplicative pleadings and Court orders and, therefore, will serve the interests of efficiency and judicial economy. *See Wilhite*, 2020 WL 6562109, at \*1; *Blasko*, 243 F.R.D. at 15. Moreover, consolidation will not delay these proceedings and should save considerable time and expense through the

elimination of duplication. Accordingly, consolidation of *Talen* with *Portland General Electric* is appropriate.

### **III. Conclusion**

For the reasons stated herein, the Pacific Northwest Owners respectfully request that the Court consolidate *Talen* with *Portland General Electric* and continue the consolidated case under *Portland General Electric*.

Dated this 3<sup>rd</sup> day of June, 2021.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Charles E. Hansberry

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Jenny M. Jourdonnais

*Attorneys for Portland General Electric  
Company, Avista Corporation, PacifiCorp,  
and Puget Sound Energy, Inc.*



CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies this memorandum in support complies with L.R. 7.1(d)(2)(A). This Memorandum in Support of Motion to Consolidate contains 1,502 words, excluding the caption, the Certificate of Compliance and the Certificate of Service. The word count function of the word-processing system used to prepare this memorandum was relied up on in this calculation.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2021, a copy of the foregoing document was served on the following persons:

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