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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

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

**Plaintiffs,**

**v.**

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

**Defendants.**

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

**DEFENDANT  
NORTHWESTERN  
CORPORATION'S RESPONSE  
TO PLAINTIFFS' MOTION TO  
CONSOLIDATE**

Defendant NorthWestern Corporation ("NorthWestern"), an investor-owned

Montana public utility serving customers in Montana, South Dakota, Nebraska, and Yellowstone National Park, and subject to the regulations and oversight of the Montana Public Service Commission, commenced an arbitration against the other five owners of the Colstrip Units 3 and 4 Steam Electric Generating Project and related facilities, located in Colstrip, Montana (the “Project”).<sup>1</sup> The ownership and management of the Project is governed by the Colstrip Units 3 and 4 Ownership and Operation Agreement, dated May 6, 1981 (along with each of its four Amendments, the “O&O Agreement”), and NorthWestern commenced the arbitration pursuant to section 18 (Arbitration) of the O&O Agreement.<sup>2</sup>

NorthWestern’s dispute centers on the ongoing operation of the Project beyond the year 2025. Plaintiffs have insisted on and threatened to take actions that would cause the closure of the Project by 2025 in violation of the O&O Agreement, claiming a majority of the Owners can decide to close the Project. NorthWestern, on the other hand, contends a unanimous vote of the Owners is required to close the Project. Meanwhile, Talen has not declared its position on the level of vote required to close the Project.

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<sup>1</sup> The Project’s six owners are the Plaintiffs (Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc.), defendant Talen Montana, LLC, and NorthWestern (together, the “Owners.”).

<sup>2</sup> NorthWestern commenced arbitration, as required under Section 18, by providing 30-day notice to all Owners on February 9, 2021, and serving its demand for arbitration on March 12, 2021, which it amended and served on April 2, 2021.

On April 13, 2021, after NorthWestern served its amended demand for arbitration, the Montana Legislature passed Senate Bills 265 and 266. Montana Governor Gianforte signed Senate Bills 265 and 266 into law on May 3, 2021.

Senate Bill 265 amends section 27-5-323 of the Montana Code by adding these provisions:

Section (2)(a) An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act unless all the 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.

. . . .

Section 4. [This act] applies retroactively, within the meaning of 1-2-109, to applications made on or after January 1, 2021.

S.B. 265, 67th Leg., Reg. Sess. § 1 (Mont. 2021).

Senate Bill 266 amends the Montana Unfair Trade Practices and Consumer Protection Act to create two new unfair or deceptive acts or practices. The first is a “failure or refusal of an owner of a jointly owned electrical generation facility in the state to fund its share of operating costs.” Senate Bill 266 § 2(1)(a). The second is “[c]onduct by one or more owners of a jointly owned electrical generation facility in the state to bring about permanent closure of a generating unit of a facility without seeking and obtaining the consent of all co-owners of a generating

unit.” *Id.* § 2(1)(b). Senate Bill 266 authorizes the Montana Department of Justice to pursue injunctive relief and request a civil fine of up to “\$100,000 for each violation,” with “[e]ach day of a continuing violation” counting as “a separate offense.” *Id.* § 2(2)(a)–(b).

Owners, other than NorthWestern, have filed two other lawsuits besides this matter. On April 12, 2021, Plaintiffs commenced a lawsuit in the Superior Court for the State of Washington for Spokane County, bearing file no. 21201000-32. On April 27, 2021, Plaintiffs moved the Spokane Superior Court to compel the arbitration commenced by NorthWestern to proceed according to O&O Agreement § 18 (the arbitration clause). Plaintiffs argued, among others things, that Senate Bill 265 violates the contracts clauses of the U.S. Constitution and the Montana Constitution, and that the Federal Arbitration Act (“FAA”), 9 U.S.C. § 2, preempts the effort of the Montana Legislature to invalidate the arbitration clause in the O&O Agreement. Defendant Talen Montana, LLC (“Talen”) removed that lawsuit to the United States District Court for the Eastern District of Washington, Case No. 2:21-cv-00163 (the “Washington Lawsuit”), and it has moved to transfer the Washington Lawsuit to this Court, because the Washington Lawsuit and this lawsuit involve the same parties and common questions of law and fact.

On May 4, 2021, Plaintiffs commenced the present lawsuit (Case No. 21-cv-00047), and later that same day, Talen commenced a lawsuit in the Montana

Thirteenth Judicial District Court, Yellowstone County, Cause No, DV 21-0511,  
seeking:

1. A declaration that Sections 18 and 34(c) of the O&O Agreement are invalid 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 arbitration by one rather than three arbitrators; or (5) otherwise allow the laws or courts of Washington to influence where and how the arbitration proceeds.
2. An order enjoining [Plaintiffs and NorthWestern] to comply with, and conditionally compelling them to arbitrate in accordance with the O&O Agreement as modified by, Montana Code§ 27-5-323.

Plaintiffs removed Talen's Yellowstone County lawsuit to this Court, Case No. 21-cv-00058. Because the two lawsuits involve common questions of law and fact, Plaintiffs now move to consolidate Case No. 21-cv-00047 with Case No. 21-cv-00058.

NorthWestern depends upon the Project to meet the demand for electricity from its customers in Montana. Given the lengthy lead time for NorthWestern to plan for, locate, obtain regulatory approval for, address inevitable litigation, and construct new sources of electrical generation to replace the Project were it closed prematurely, any delay in obtaining a final decision regarding whether the O&O Agreement requires unanimity or a majority to close the Project would severely damage NorthWestern and create potential electricity shortfalls for NorthWestern's

customers in Montana.

Because time is of the essence, because the two Montana lawsuits involve common questions of law and fact, and because multiple lawsuits even in the same forum create inefficiencies and the real potential for conflicting results, NorthWestern favors consolidation.

While Plaintiffs' motion to consolidate is based on these same considerations, it is worthy of note that Plaintiffs have opposed Talen's motion to transfer the Washington Lawsuit to this Court. Plaintiffs also have moved to remand the Washington Lawsuit to the Spokane Superior Court.<sup>3</sup> Apparently, consolidation of the two Montana lawsuits is important to Plaintiffs, while transferring the Washington lawsuit to this court to improve coordination of all three lawsuits, which involve the same parties and common questions of law and fact, is not. Talen shares that same dichotomous view: it now has moved to remand Case No. 21-cv-00058 to the Yellowstone County District Court.

If Plaintiffs' opposition to Talen's motion to transfer succeeds, if Plaintiffs' motion to remand the Washington Lawsuit to the Spokane Superior Court succeeds, and if Talen's motion to remand Case No. 21-cv-00058 to the Yellowstone County District Court succeeds, what began as a straightforward

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<sup>3</sup> Both the motion to transfer and the motion to remand the Washington Lawsuit are scheduled to be heard on July 14, 2021.

arbitration involving the interpretation of the O&O Agreement about the Project's ongoing operation will persist as three lawsuits in three jurisdictions involving the same parties and addressing common questions of law and fact. NorthWestern and the other Owners will suffer from multiple proceedings involving essentially the same issues giving rise to significant inefficiencies and expense and the palpable risk of conflicting results. Without timely resolution of how this arbitration will be administered, NorthWestern's need for a prompt resolution of the issue of the vote needed to effect Project closure will linger, putting it and its customers in jeopardy of potential electricity shortfalls and the resulting damage. NorthWestern needs coordination and timely resolution of these lawsuits so the arbitration can proceed.

The *Manual for Complex Litigation 4th* addresses coordination of related cases pending in different federal courts (section 20.1) and pending in federal and state courts (section 20.3). NorthWestern urges this Court to engage in active coordination of the three lawsuits to ensure efficiency, cost savings, consistent results, and a timely resolution of the lawsuits so the parties may proceed to arbitration to avoid damages caused by delay.

### **CONCLUSION**

For the reasons stated above, NorthWestern agrees Case No. 21-cv-00047 should be consolidated with Case No. 21-cv-00058. It further urges the Court to coordinate the litigation pending in Washington with the litigation pending in

Montana.

DATED: June 17, 2021

Respectfully submitted,

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