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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; AUSTIN KNUDSEN, in his official capacity as Attorney General for the State of Montana,** Defendants.	Case No. 1:21-cv-00047-SPW-KLD **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED**

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I. INTRODUCTION

Defendant Knudsen takes no position on the PNW Owners' motion to preliminarily enjoin him from enforcing SB 266. Talen relegates its defense of SB 266 to a single footnote—leaving the crux of the claims unchallenged. Talen rushed to the Montana legislature seeking passage of a bill overriding the parties' contract on the very issues that were the subject of a dispute headed to arbitration, but now insists that the PNW Owners' motion is not ripe. That argument—also rejected by NorthWestern—is meritless. The Court should grant the preliminary injunction.

II. ARGUMENT

A. The PNW Owners' Claims Are Ripe

Talen fails to cite any precedents addressing when Contracts Clause claims are ripe. And the precedents Talen relies on do not involve laws like SB 266. The relevant, binding precedent makes clear that the PNW Owners' claims are ripe.

1. Talen's Proposed Test Does Not Apply Because an Injury Has Already Occurred

Talen argues that the PNW Owners' claims are not ripe because they fail to meet the three-part test from *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000). *See* Talen Br. 10. That test does not apply here.

First, the test applies only when a plaintiff claims to be injured by the *risk of prosecution itself*. *See Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 855 (9th Cir.

2002). If the plaintiff has *already* suffered "actual, ongoing … harm" that is "fairly traceable" to the challenged law, then *Thomas*'s three-part test is irrelevant, and the plaintiff has standing and a constitutionally ripe claim.[1] *See id.*

Precedent confirms "[t]he mere passage of th[e] law" warrants an injunction pursuant to the Contracts Clause, because "*passage* of a law impairs" a plaintiff's contract. *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150-52 (E.D.N.Y. 2012). For example, *HRPT Properties Trust v. Lingle* held that a lessor had a ripe Contracts Clause claim against a law regulating rent appraisal, even though "appraisers ha[d] not yet set rent under" the law, because the law itself frustrated "the intent of the parties that formed the lease." 715 F. Supp. 2d 1115, 1129 (D. Haw. 2010). Here, SB 266 injured the PNW Owners the moment the statute was passed by modifying the Agreement to: (1) effectively add a liquidated damages clause in the form of a $100,000 per-day civil fine; (2) require unanimity to close a Colstrip unit; (3) and interfere with an owner's right to disapprove of proposed budgets. By modifying the Agreement, SB 266 "extinguish[ed] [the PNW Owners'] valid expectancy interest[s]"—"an injury which is actual, concrete, and particularized." *Lazar v. Kronkce*, 862 F.3d 1186, 1198-99 (9th Cir. 2017).

[1] "[R]ipeness coincides squarely with standing's injury in fact prong." *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017) (cleaned up).

Second, the Supreme Court has held that there is "Article III jurisdiction" if "[t]he plaintiff's own … inaction … in failing to violate the law eliminates the imminent threat of prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Such "threat-eliminating behavior" is "effectively coerced," and a plaintiff need not "expose himself to liability before bringing suit to challenge the basis for the threat." *Id.* That is the case here, as the threat of SB 266 has effectively coerced the PNW Owners to refrain from their plan to submit a proposal for a May 19, 2021, vote to close Unit 3. PNW Br. 27; Roberts Decl. ¶ 42; Thackston Decl. ¶ 21; Greene Decl. ¶ 19. They also refrained from proposing and approving budgets that reflect early closure of one or both units, and from exercising their contractual rights for proposed budgets. *See* PNW Br. 12-13. That is enough for ripeness.

2. The Claims Are Constitutionally Ripe Under Talen's Test

Even if Talen's three-part test applied, the test is met here. Talen's argument distorts the PNW Owners' stated plans and relies on inapposite cases.

Concrete-Plan Prong. Consistent with the Agreement, the PNW Owners have articulated a concrete plan that would violate SB 266's unanimous-consent requirement, which begins by voting to close Unit 3 and making budget decisions reflecting early closure. *See* Roberts Decl. ¶¶ 30-31, 34-35, 39-47; Thackston Decl. ¶¶ 18-26; Greene Decl. ¶¶ 16-24; Johanson Decl. ¶¶ 7-10.

Talen disputes that fact by adding misleading brackets when quoting the PNW Owners' brief: "Plaintiffs ... assert that there is no 'risk that [they] will [seek to] close Colstrip in the immediate future.'" Talen Br. 16 (alterations in original). The addition of "seek to" changes the statement and is contradicted by the balance of Plaintiffs' brief. *See* PNW Br. 26-28; Roberts Decl. ¶¶ 18-21, 39-47; Thackston Decl. ¶¶ 8-12, 18-21; Greene Decl. ¶¶ 9-19; Johanson Decl. ¶¶ 5-6.[2] Even NorthWestern agrees that "Plaintiffs have … threatened to take actions now and in the immediate future that would cause or may be significant contributing factors leading to the closure of the Colstrip [units] by 2025 (or sooner)." NorthWestern Br. 16.

Additionally, Talen cannot now question the concreteness of the PNW Owners' plan, Talen Br. 11, when it lobbied for SB 266 by arguing that the PNW Owners were going to close Colstrip, Hanson Decl. Ex. C (7:17-24).[3] Talen offers no evidence to support its remarkable about-face, and the Court should not credit the argument of Talen's counsel above the PNW Owners' sworn statements.

[2] In their discussion of the public interest factor, the PNW Owners said, "[n]or is there any risk that the PNW Owners will close Colstrip in the immediate future." PNW Br. 28. Clearly, the point was that Colstrip would continue operating while a preliminary injunction is in place.

[3] Talen incorrectly asserts that a proposal to close Unit 3 requires itemized cost estimates. Talen Br. 8; *see, e.g.*, Roberts Decl. Ex. A, §§ 17(f)(i), (xi).

Talen's argument that there is no ripe budget dispute because the 2022 budget will not be proposed for two months (by September 1) ignores the fact that there are ongoing budget disputes because (1) budgeting efforts begin well before the Operator proposes its initial budget, Roberts Decl. ¶¶ 27-29; (2) the PNW Owners' approval of the 2021 operations-and-maintenance budget on March 22, 2021, did not resolve their concerns, and in fact they asked Talen to "[i]mmediately begin the budgeting process for the 2022 operating year," Roberts Decl. ¶ 34 & Ex. B; and (3) the fundamental issue driving many of the budget disputes—the vote requirement to close a unit—remains unresolved, *see* Roberts Decl. ¶¶ 30, 36-37.[4] Again, arguments by Talen's counsel do not trump the PNW Owners' evidence.

Threat-of-Enforcement and History-of-Prosecution Prongs. The second and third prongs can be addressed together. Talen asks this Court to ignore the following undisputed facts: SB 266 was passed two months ago, targeted Colstrip, and responded to the PNW Owners' actions. *See* PNW Br. 6-8; Hanson Decl. Exs. A, C. The Governor issued "a specific warning" in signing SB 266, *Thomas*, 220 F.3d at 1139, declaring that he "signed SB 265 and 266" because "Montana stands with Colstrip." Hanson Decl. ¶ 8. These unique features render *Thomas*, Talen's

[4] For example, absent SB 266, the PNW Owners would have already renewed their request that Talen prepare alternative 2022 budgets reflecting early closure. *See* Roberts Decl. ¶¶ 30, 36-37, 46.

primary authority, inapposite. There, the plaintiffs challenged a law despite: no complaint having been filed against them, the law having been "on the books" for twenty-five years, and no prosecutions having been brought under the law. *Thomas*, 220 F.3d at 1138-40.

Defendant Knudsen's one-paragraph Notice of No Position should make no difference. His vague statement that "the State does not anticipate enforcing Senate Bill 266 in the immediate future," Notice 2, cannot be read to mean the PNW Owners face only a "conjectural or hypothetical" risk of prosecution, *Davis*, 307 F.3d at 848 (cleaned up). The short Notice does not engage with the PNW Owners' Brief at all. Instead, it relies on a false premise—that the PNW Owners have no concrete plans to violate SB 266 in the immediate future. Notice 2. As discussed above, the fact that Colstrip will not close in the immediate future (i.e., while a preliminary injunction is in place) does not mean the PNW Owners have no concrete plan to violate SB 266.

3. Prudential Ripeness Is Satisfied

Talen also tries to invoke prudential ripeness, but offers no authority deeming Contract Clause or Dormant Commerce Clause challenges unripe. Talen's arguments are misplaced.

First, the claims are fit for decision. "Legal questions that require little factual development are more likely to be ripe." *Freedom to Travel Campaign v.*

Newcomb, 82 F.3d 1431, 1434 (9th Cir. 1996). Each of the constitutional claims here is a pure "question of law." *Masayesva v. Hal*e, 118 F.3d 1371, 1377 (9th Cir. 1997) (Contracts Clause); *Cal. Pac. Bank v. FDIC*, 885 F.3d 560, 569 (9th Cir. 2018) (vagueness). The challenges turn primarily on the purpose of SB 266, which is a purely legal issue, and Talen does not explain why an enforcement action would make "the legal arguments" any clearer. *Davis*, 307 F.3d at 857 (holding Dormant Commerce Clause challenge was ripe). Nor could it, as the relevant legislative record is already before this Court. Hanson Decl. Exs. A, C.

Second, Talen's only hardship argument is that no enforcement action is pending. But a "constitutionally-recognized injury"—which the PNW Owners are suffering—is "a hardship." *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010). In any event, "[t]he uncertain state of the law is sufficient hardship to prompt judicial review" where, as here, it affects a business's ability to plan for the future. *Chang v. U.S.*, 327 F.3d 911, 922 (9th Cir. 2003).

B. The PNW Owners Are Likely to Prevail on the Merits

Talen contends that "[t]he Attorney General has strong counterarguments" on the merits. Talen Br. 4 n.2. But the Attorney General makes no arguments and takes no position on the motion directed against him. Talen's footnote of counterarguments lack merit.

1. SB 266 Violates the Contracts Clause

SB 266 operates as an impairment to the Agreement. Defendants do not dispute that SB 266 subjects the PNW Owners to previously unavailable injunction actions and "effectively write[s] a liquidated damages clause into the Agreement." PNW Br. 13. Such "changes in statutory remedies" violate the Contracts Clause because "the contemporaneous state law pertaining to … enforcement" is part of the contract. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977).

Talen begins by disputing the PNW Owners' interpretation of the Agreement. This Court need not resolve those arguments. SB 266 unquestionably alters the remedies and liabilities relating to the Agreement, which makes it unconstitutional. Even if Talen were correct that the operator must "vote in favor of any retirement proposal," Talen Br. 4 n.2, SB 266 requires *unanimity*, not Talen's interpretation of section 17(f) (Operator and 55% total vote share).

Talen also argues that the PNW Owners' reasonable expectations have not been impaired because "the parties are operating in a heavily regulated industry." Talen Br. 4 n.2. But "prior unrelated regulation" of the "industry" does not count. *Ross v. City of Berkeley*, 655 F. Supp. 820, 830 (N.D. Cal. 1987). The "particular" issue must be regulated, not the industry generally. *Id.* at 829 (quoting *Veix v. Sixth Ward Bldg. & Loan*, 310 U.S. 32, 38 (1940)). Here, there is no "history" of Montana intervening in budgetary or closure disputes to impose massive fines. *Id.*

Neither contract term Talen cites even *hints* at that possibility. Roberts Decl. Ex. A, §§ 1(r), 3(b). And the "jointly owned electrical generation facility" phrase in SB 266 has never before appeared in the Montana Code; it is a term fashioned to target the PNW Owners.

SB 266 also does not advance a significant and legitimate public purpose. Talen's assertion that SB 266 ensures "employee safety and the reliable supply of electricity" is not tenable. Talen Br. 8 n.2. First, Supreme Court precedent—previously cited and undisputed by Talen—holds that laws which "appl[y] only to" parties that have "entered into [certain] agreements" do not serve a public purpose. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983). Given SB 266's targeting of joint-ownership agreements, its formulaic recitations of public purposes cannot change the fact that its substance is "providing a benefit to special interests." *Ross*, 655 F. Supp. at 832 (cleaned up). Second, there were no findings to support SB 266's purported public purposes. There was no testimony or evidence that worker safety or environmental remediation were not being funded or had historically not been funded. *See* Hanson Decl. Exs. A, C. Nor was there any evidence identifying past, nonunanimous closures affecting the electricity supply in Montana. *See id.* The fact that "the State has produced no evidence of the harm to be avoided by passage of the Act" undercuts any claim of serving a broad public purpose. *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 860 (8th Cir. 2002).

2. SB 266 Violates the Dormant Commerce Clause

No defendant disputes that SB 266 has a discriminatory purpose. That point is decisive. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of … discriminatory purpose" alone. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

Talen makes two arguments on the Dormant Commerce Clause claim. Neither has merit.

First, Talen contends that SB 266 treats in-state and out-of-state entities the same. Talen Br. 8 n.2. But that point goes to "discriminatory effect," not discriminatory purpose. *LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). What's more, Talen's argument fails to identify "a similarly situated in-state entity" to which SB 266 would likely be applied. *Id.* Failure to identify an in-state comparator should confirm SB 266's discriminatory nature, not defeat it. *Cf. Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945-48 (9th Cir. 2004) (holding that the lack of a comparator was not fatal to a class-of-one equal-protection claim, given the evidence of animus).

Second, Talen asserts that the PNW Owners have not identified "any 'burden' here." Talen Br. 8 n.2. But finding a protectionist "purpose" precludes "inquiry into … the burden on interstate commerce." *Bacchus*, 468 U.S. at 270. Also, the burden is obvious. SB 266 targets the Agreement to dilute the PNW

Owners' voting rights, provide Talen and Northwestern much greater leverage, and ultimately give Montanans "greater control over the Colstrip facility" to force the PNW Owners—out-of-state economic interests—to remain involved in Colstrip. Hanson Decl. Ex. A (2:20-22). A law that "benefits" "in-state … economic interests" to the detriment of "out-of-state economic interests" is a burden. *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

3. SB 266's Closure Provision Is Unconstitutionally Vague

Defendant Knudsen does not disclaim the PNW Owners' reading of SB 266, which covers a broad range of conduct, including constitutionally protected conduct. *Compare* Br. 31-32, *with* Knudsen Notice 2. Nor does he clarify that, in a future action, he will *not* seek civil fines for the PNW Owners' current or planned conduct. Talen claims that "the test" under SB 266 "is whether conduct 'bring[s] about permanent closure.'" Talen Br. 9 n.2. But SB 266 actually covers any "[c]onduct … *to* bring about permanent closure." SB 266 § 2(1)(b) (emphasis added). The fact that SB 266 "applies retroactively" undercuts the notion that liability is not triggered until actual closure occurs. SB 266 § 6.

C. The PNW Owners Have Suffered and Will Suffer Irreparable Harm

A preliminary injunction is warranted because the PNW Owners suffered irreparable harm the moment SB 266 impaired their contractual rights and will

continue to suffer irreparable harm as they are deterred from taking the necessary steps to plan for Colstrip's and their customers' future.

Talen's argument relies entirely on the lack of a pending enforcement action. *See* Talen Br. 15-18. But under the Contract Clause, a law impairs a party's contractual rights the moment it is passed, not when it is enforced. *See HRPT Props. Tr.*, 715 F. Supp. 2d at 1129, 1135; *Donohue*, 886 F. Supp. 2d at 150-52. Such impairments constitute irreparable harm and warrant preliminary injunctions. *See Donohue*, 886 F. Supp. 2d at 150-52; *West Indian Co. v. Virgin Islands*, 643 F. Supp. 869, 882 (D.V.I. 1986).

Even under Talen's framing, the PNW Owners' have demonstrated that SB 266 is impairing their contractual rights in at least two ways. First, SB 266 is interfering with the PNW Owners' right to freely negotiate the 2022 budget. *Supra* at 2-3. SB 266 "severely disrupts any balance at the bargaining table" and "is an irreparable harm that cannot be ignored." *Donahue*, 886 F. Supp. 2d at 153. Second, SB 266 interferes with the PNW Owners' ability to take steps to close one or more Colstrip units. NorthWestern admits this is a "complex and costly process that requires long-term planning." Northwestern Br. 22. The PNW Owners would have already begun that process absent SB 266. *Supra* at 2-3. But because SB 266 prohibits "conduct … *to bring about* permanent closure" of Colstrip, SB 266 § 2(1)(b), the PNW Owners must refrain from taking steps to take to bring about

Colstrip's closure—steps they are contractually entitled to and wish to take. *Supra* at 2-3.

Finally, Talen and Northwestern try to dismiss the PNW Owners' harm as "voluntary." Northwestern Br. 21-22. Northwestern asserts that the PNW Owners could instead choose to sell the electricity from Colstrip on the open market. *Id.* *See* NorthWestern Br. 21-22. And Talen similarly argues that SB 266 is not harming the PNW Owners because they could still transition away from Colstrip by selling their interests in the plant. Talen Br. 17-18. These arguments are irrelevant: the Constitution protects the PNW Owners' right to choose *if* and *how* they transition away from Colstrip, and that right should be protected while this lawsuit progresses. *See Donahue*, 886 F. Supp. 2d at 150; *West Indian Co.*, 643 F. Supp. at 882; *Gov't Suppliers Consolidating Servs. v. Bayh*, 734 F. Supp. 853, 864 (S.D. Ind. 1990) (finding "irreparable harm regardless of whether they have suffered economic loss"). Also, the notion that the PNW Owners can easily transfer their interests, with the $100,000-per-day potential liability that is attached, is not tenable.

D. The Balance of Harms Favors an Injunction

No defendant argues that it will be harmed if the Court enjoins enforcement of SB 266. Indeed, benefits from enforcing unconstitutional laws are not "legally cognizable." *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). NorthWestern

claims that it will be harmed by "[p]rotracted [c]ourt [l]itigation," but never explains how enjoining SB 266 enforcement will prolong litigation. NorthWestern Br. 12.

E. The Public Interest Supports Injunctive Relief

No defendant contests that an injunction is in the public interest if there is a "violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). NorthWestern argues that the public has an interest in a speedy resolution of the arbitration, but fails to explain how a preliminary injunction will delay the arbitration. *See* NorthWestern Br. 18-21.

F. Northwestern's Request for Separate Injunctive Relief Is Improper

Northwestern's brief seeks a separate injunction compelling a speedy arbitration. *See* NorthWestern Br. 18-19. That request should be denied as procedurally improper. *See Rose v. Swanson*, 2011 WL 4940754, at *2 (D. Mont. Oct. 17, 2011).

III. CONCLUSION

The PNW Owners respectfully request that their motion for a preliminary injunction be granted.

I certify that this memorandum contains 3,239 words, in compliance with the Local Civil Rules.

DATED this 1st day of July, 2021.

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