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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. 1:21-cv-00047-SPW-KLD Defendant Talen Montana, LLC's Brief in Opposition to Plaintiffs' Partial Motion for Summary Judgment Oral Argument Requested

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Basis for Opposition

This action by four co-owners of a Montana power plant arises from a premature demand by another co-owner, defendant NorthWestern Corporation ("NorthWestern"), for arbitration of a dispute that may never occur, over possible closure of the plant years in the future.[1] The four co-owner plaintiffs seek to restrict NorthWestern's premature arbitration demand to a single arbitrator in Spokane, Washington, under Washington law. Instead of accepting the invitation of the plant's Operator and sixth co-owner, Talen Montana, LLC ("Talen Montana"), to get on with the premature arbitration, the co-owner plaintiffs ask the Court to invalidate an amendment to a 1985 Montana statute, Montana Code § 27-5-323, as contrary to the Federal Arbitration Act ("FAA") and the Contract Clauses in the federal and Montana Constitutions. But the FAA permits a state statute that, like the amendment to section 27-5-323, *requires* arbitration of certain disputes and *extends* a state's long-standing rule regarding venue-choice provisions to contracts involving an electrical generation facility in Montana. The FAA also allows a state statute that, like the amendment, actually *promotes* arbitration. Constitutional attacks on the

[1] Counsel for Talen Montana stressed at the hearing on August 6, 2021, that the parties do not have a ripe or justiciable dispute over the questions that the PNOs and NorthWestern claim underlie their demands for action by the Court. Tr. at 38:3-40:5. Talen Montana therefore submits this response subject to and while reserving all objections and defenses relating to ripeness, justiciability, and Article III jurisdiction.

amendment likewise miss the mark because the statute's *strengthening* of the arbitration provisions in the parties' 40-year-old Ownership and Operation Agreement (the "O&O Agreement") does not "substantially impair" the O&O Agreement but does advance Montana's significant and legitimate interest in maximizing the economic value of a key producer of jobs, tax revenues, and electric power. Because the co-owner plaintiffs have failed to show, as a matter of law, that the FAA preempts the amendment or that the amendment violates the Contract Clause of the Federal Constitution or the Montana Constitution, the Court should deny their motion for partial summary judgment, ECF No. 88.

Statement of the Case

Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. (the "Pacific Northwest Owners" or "PNOs") brought this case on May 4, 2021, against NorthWestern and Talen Montana. The PNOs soon amended their complaint to add claims against Austin Knudsen, in his official capacity as the Montana Attorney General (the "AG"). The PNOs allege that they face mandates from their home states of Oregon and Washington to cease selling electricity generated by coal-fueled facilities like the Colstrip Units and that they therefore "must act now to plan for and transition from Colstrip." First Amended Complaint ("FAC") ¶ 43, ECF No. 32. NorthWestern and Talen Montana filed separate answers. ECF Nos. 40 & 58. Stressing its status as Operator of the Colstrip

Units as well as a co-owner, Talen Montana included in its answer defenses asserting lack of justiciability, standing, and ripeness due to the absence of a present dispute regarding whether the Colstrip Units should close before 2026. *See* ECF No. 58 at 21-22. The PNOs' motion for a preliminary injunction regarding a different Montana statute, SB 266, remains pending after briefing and argument. The PNOs moved for partial summary judgment on August 17, 2021, and Talen Montana now timely responds with this brief in opposition.

Facts Relevant to the PNOs' Motion

The people of Montana rely on the Colstrip Units for jobs, power, and prosperity. Statement of Facts ¶ 10; ECF No. 58 (Talen Montana's Answer) at 21. The PNOs want to close the Colstrip Units no later than the end of 2025 to satisfy regulators in Washington and Oregon (their home markets). Statement of Facts ¶ 4; FAC ¶¶ 3, 40-43; Talen Montana's Answer at 21. NorthWestern, another co-owner, has sent the parties a demand for arbitration to "obtain a definitive answer to the questions of what vote is required to close Units 3 and 4 and what is the obligation of each co-owner to fund operations of the plant." Statement of Facts ¶ 5.

The dispute in this case centers around a pair of Montana statutes, SB 265 and SB 266. SB 265 amends the statute that has governed arbitrations in Montana since its enactment in 1985, Montana Code § 27-5-323, and that the Montana Supreme Court upheld against a preemption claim in *Keystone, Inc. v. Triad Systems*, 971

P.2d 1240 (Mont. 1998). The original version of the statute provided, in relevant part, that "[a]n agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana." Mont. Code § 27-5-323(1). SB 265 added the following provision: "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 parties agree in writing to a single arbitrator." *Id.* § 27-5-323(2).

The O&O Agreement contains two dispute resolution provisions. The first, in Section 18, provides that the parties will arbitrate certain disputes in Spokane under the Washington Arbitration Act before a single arbitrator and that, if the parties cannot agree on an arbitrator, they may petition the Superior Court of Spokane County to appoint one. ECF No. 39-2 at 42. The other dispute resolution language, in Section 21(h), stipulates as follows:

> In addition to the rights granted in this Section 21, any nondefaulting Project User may take any action, at law or in equity, including an action for specific performance, to enforce this Agreement and to recover for any loss, damage or payment advances, including attorneys' fees in all trial and appellate courts and collection costs incurred by reason of such default.

Id. at 46. Section 34(c) of the O&O Agreement provides that the "Agreement shall be construed in accordance with the laws of the State of Montana, except that Section

18 shall be construed in accordance with the laws of the State of Washington." *Id.* at 52.

The parties do not have a dispute over naming an arbitrator. The PNOs have never proposed any arbitrator candidates. Statement of Facts ¶ 6. Nor have they petitioned the Spokane Superior Court (or any other court) to name an arbitrator. *See Avista Corporation et al. v. NorthWestern Corporation et al.* Dkt. 2:21-cv-00163-RMP, No. 43 at 13 (Aug. 18, 2021). Talen Montana months ago proposed appointment of a single arbitrator (and a Denver venue) in the context of a broader agreement for arbitration, but the PNOs never responded to the proposal. Statement of Facts ¶ 6.

Summary Judgment Standard

Rule 56 requires the movant to show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The Court, in deciding whether summary judgment is warranted, 'must view the evidence in the light most favorable to the nonmoving party,' and must deny summary judgment 'if a rational trier of fact might resolve the issue in favor of the nonmoving party.'" *United States Fid. & Guar. Co. v. Soco W., Inc.*, No. CV-04-29-BLG-SRT, 2006 WL 8441392, at *1 (D. Mont. Feb. 3, 2006) (quoting *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-

31 (9th Cir. 1987)). The PNOs have the burden to "show that there is no factual dispute, and that [they are] entitled to judgment as a matter of law." *Id.*

Argument

The PNOs' motion should be denied in its entirety. The FAA does not preempt the amendment to Montana Code § 27-5-323, nor does the amendment violate the Contracts Clause of either the United States Constitution or the Montana Constitution.

A. The FAA Does Not Preempt Montana Code Section 27-5-323

Neither of the PNOs' two arguments for FAA preemption has merit. The amendment applies a long-standing Montana public policy requiring arbitration of Montana-centric disputes in Montana and accords with the pro-arbitration objectives of the FAA.

1. The venue provisions of Section 27-5-323 apply to all contracts

The FAA "'permits agreements to arbitrate to be invalidated by generally applicable contract defenses'" *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 825 (9th Cir. 2019) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Indeed, the Montana Supreme Court squarely rejected a preemption challenge to the same statute in *Keystone, Inc. v. Triad Systems*, 971 P.2d 1240, 1243 (Mont. 1998). The court held that the FAA does not preempt Montana Code § 27-5-323 in part because "Montana law . . . does not distinguish between forum selection clauses

which are part of contracts generally and forum selection clauses found in agreements to arbitrate." *Id.* at 1245. "Such a distinction, if one existed, would certainly manifest the kind of unequal treatment that [the FAA] prohibits." *Id.* But another statute, Montana Code § 28–2–708, likewise "invalidates choice of forum provisions in contracts generally," and "27–5–323 does the same to arbitration agreements." *Id.*[2] Montana law therefore invalidated "the portion of the agreement which require[d] [the parties] to arbitrate the dispute outside of Montana." *Id.* at 1245-46. Specifying, as § 27-5-323 now does, that a particular kind of contract is subject to the same venue restrictions does not make arbitration agreements the target of the statute.

The PNOs' principal case, *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681 (1996) (Mot. at 9-10) concerned a different issue. It addressed a Montana law that "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.* at 687. *Keystone* distinguished the statute in *Doctor's Associates* from Montana Code § 27-

[2] Montana Code § 28-2-708 provides: "Every stipulation or condition in a contract by which any party to the contract is restricted from enforcing the party's rights under the contract by the usual proceedings in the ordinary tribunals or that limits the time within which the party may enforce the party's rights is void."

Montana Code § 27-5-323, when *Keystone* was decided (and still today), provided: "An agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana."

5-323 (SB 265) because the latter does not place venue clauses in arbitration agreements "on an unequal footing from general contract[s]," much less "nullif[y] either party's obligation to arbitrate their dispute." *Keystone*, 971 P.2d at 1245 (citations omitted). "Rather [the amendment] preserve[s] the obligation to arbitrate." *Id.*

The remaining (non-Montana) cases that the PNOs cite are distinguishable for the same reason. Mot. at 8-9. *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1425 (2017), addressed a Kentucky rule that "single[d] out arbitration agreements for disfavored treatment." And *Perry v. Thomas*, 482 U.S. 483, 484 (1987), concerned a California statute that foreclosed arbitration of wage disputes.

Keystone's holding remains undisturbed. In a footnote, the PNOs strain to avoid *Keystone*'s import, but their efforts fail. Mot. at 10 n.2. Although they identify two Montana Supreme Court cases, they never explain how they could have "undermined" *Keystone*. *Id.* (citing *Polzin v. Appleway Equipment Leasing, Inc.*, 191 P.3d 476 (Mont. 2008) and *Milanovich v. Schnibben*, 160 P.3d 562 (Mont. 2007). Neither case cited Montana Code § 27-5-323 or § 28-2-708, and neither questioned *Keystone*'s holding that preemption is assessed based on the "combined effect" of Montana Code § 27-5-323 and Montana Code § 28-2-708. These two cases, therefore, could not have "undermined" *Keystone*'s interpretation of those statutes.

Moreover, these cases had nothing to do with arbitration at all, much less FAA preemption, and *Polzin* applied Washington law. 191 P.3d at 481.

Subsequent Montana cases confirm *Keystone*'s continuing vitality. *See, e.g.*, *Wolf's Interstate Leasing & Sales, L.L.C. v. Banks*, 219 P.3d 1260, 1263 (Mont. 2009) ("We thus reach the same result here as we did in *Keystone*, and conclude there was not a waiver of the statutory right of Banks and Croft to arbitrate the dispute in Montana."); *Mills v. Scottrade, Inc.*, No. CV 08-127-BLG-CSO, 2009 WL 10701740, at *7 (D. Mont. Apr. 30, 2009) (relying on *Keystone* for the proposition that "Montana has strong public policy against choice of forum provisions, and to the extent application of law from a different jurisdiction will evade that public policy, Montana law applies"). The PNOs address none of them.

Furthermore, *Milanovich*, 160 P.3d at 565, which the PNOs cite, Mot. at 10 n.2, is consistent with *Keystone*. *Milanovich* upheld a forum-selection clause selecting *Montana* as the venue, 160 P.3d at 565, which is consistent with *Keystone*'s observation that "Section 28–2–708, MCA, has historically been applied . . . to protect Montana residents from having to litigate outside of Montana," *Keystone*, 292 Mont. at 234.

Other courts before and after *Keystone* have taken a similar view of Montana Code § 28-2-708. *State ex rel. Polaris Industries, Inc. v. District Court of Thirteenth Judicial District In & For Yellowstone County*, 695 P.2d 471, 472 (Mont. 1985), for

example, held: "the forum-selection clause of the Agreement is void under [§ 28-2-708] as an improper restraint upon the plaintiff's exercise of its rights." Similarly, *Rindal v. Seckler Co. Inc.*, 786 F. Supp. 890, 894 (D. Mont. 1992), held: "Enforcement of the parties' forum selection clause would clearly contravene a strong public policy of the State of Montana, as articulated by Mont. Code Ann. § 28–2–708 . . . ." *See also Swank Enters., Inc. v. NGM Ins. Co.*, No. CV 19-200-M-DLC, 2020 WL 1139607, at *4 (D. Mont. Mar. 9, 2020) ("[W]hat is clear enough from [Montana Code § 28-2-708] itself [is] that Montana public policy strongly disfavors forum-selection clauses that would transfer venue outside of the state."). The amendment to Montana Code § 27-5-323 merely includes arbitration agreements concerning Montana's electrical generating facilities within this longstanding Montana public policy.

It is worth noting that Montana law does not "automatically" invalidate forum-selection clauses. *Rattler Holdings, LLC v. United Parcel Service, Inc.*, 505 F. Supp. 3d 1076, 1079 (D. Mont. 2020). In *Rattler*, for example, the court enforced a forum-selection clause selecting China as the venue for disputes relating to a contract to ship goods from a Chinese warehouse to international customers. *Id.* at 1078. *Polzin*, applying Washington law, enforced a forum-selection clause selecting Washington as the venue for disputes relating to an equipment-lease agreement with no set place of performance. 191 P.3d at 481. By contrast, the O&O Agreement

governs the operation of a Montana power plant and is exclusively performed in Montana. Unlike in *Rattler* and *Polzin*, any dispute about Colstrip is a Montana-centric dispute. As the Eastern District of Washington recently explained in transferring a related case to this court: the "case belongs, if anywhere, in a Montana court" because "the 'crux of the case' is in Colstrip, Montana where Units 3 and 4 are located," and "[t]he negative economic impacts of closing Colstrip Units 3 and 4 would be felt throughout the State of Montana, not Washington State." *Avista Corporation et al. v. NorthWestern Corporation et al.* Dkt. 2:21-cv-00163-RMP, No. 43 at 16, 18 (Aug. 18, 2021).

Nor does *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), aid the PNOs. Mot. at 11-12. *Bradley*, which concerned a California law that applied only to franchise agreements, is no longer good law. As the Ninth Circuit explained in *Sakkab*, the "decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), cuts against [*Bradley*'s] construction of the saving clause." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432-33 (9th Cir. 2015). *Bradley* was wrong insofar as it "require[d] that a defense apply generally to *all types of contracts*, *in addition to* requiring that the defense apply equally to arbitration and non-arbitration agreements." *Id.* (emphasis added). The PNOs downplay *Sakkab*, suggesting (in a footnote) that *Sakkab* merely "questions" *Bradley*'s reasoning. Mot.

at 12 n.4. But *Sakkab* in fact "abrogated" *Bradley*. *Lim v. TForce Logistics, LLC*, No. 20-55564, 2021 WL 3557294, at *4 (9th Cir. Aug. 12, 2021).

Because Montana's venue laws "do not single out arbitration agreements for special treatment," the amendment to Montana Code § 27-5-323 is not preempted. *Sakkab*, 803 F.3d at 432; *see also Blair v. Rent-A-Ctr., Inc.*, 928 F.3d at 827 (relying on *Sakkab* to hold that a California rule was not preempted because it "applies equally to arbitration and non-arbitration agreements"). The amendment is "derived from long-established [Montana] public policy," and "[Montana] courts have repeatedly . . . invalidate[d] [forum-selection clauses] unrelated to arbitration." *Blair*, 928 F.3d at 827-28; *see also, e.g.*, *Polaris*, 695 P.2d at 472; *Swank*, 2020 WL 1139607, at *1; *Rindal*, 786 F. Supp. at 890.[3]

[3] *Bradley* would not control even if it were good law. *Bradley* concerned a California law that applied to "one type of agreement, franchise agreements." 275 F.3d at 890. The PNOs suggest that the amendment is analogous insofar as it is "limited to venue provisions in contracts 'involving an electrical generation facility in this state.'" Mot. at 11. But the analogy is based on a straw man. The PNOs act as though the amendment is the only Montana law that addresses forum-selection clauses, and ignore the rest of the statute that SB 265 amended (Montana Code § 27–5–323) and the combined effect of Sections 28–2–708 and 27–5–323, i.e., that Montana law invalidates forum-selection clauses in all types of contracts. *See, e.g.*, *Wolf's Interstate Leasing & Sales*, 219 P.3d at 1263 (asset purchase and management agreement for automobile dealership); *Keystone*, 971 P.2d at 1241 (computer system purchase contract); *Polaris*, 695 P.2d at 472 (snow mobile distribution contract); *Swank*, 2020 WL 1139607, at *1 (contract to provide stone panels for construction project); *Rindal*, 786 F. Supp. at 890 (cattle feeding arrangement contract).

2. The amendment is not an obstacle to the FAA's objectives

Nor can the PNOs show that SB 265 is preempted, even if generally applicable, because it "interferes with" the O&O Agreement's "agreed-upon arbitration procedure." Mot. at 12-13. In the first place, the right to sue a "defaulting Project User" for "specific performance", "damage", and other relief in Section 21(h) will often override the "arbitration procedure" in Section 18. When Section 18 applies, "Montana's statutes are consistent with the FAA because neither statute nullifies either party's obligation to arbitrate their dispute. Rather, they preserve the obligation to arbitrate." *Keystone*, 971 P.2d at 1245.

As the Ninth Circuit recently has confirmed, "Congress did not intend for the parties' expectations to trump any and all other interests." *Sakkab*, 803 F.3d at 437. "[A] rule requiring that the parties' expectations be enforced in all circumstances, regardless of whether doing so conflicts with generally applicable state law, would render the saving clause wholly ineffectual." *Id*. Instead, the question is whether "a

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The PNOs' reliance (Mot. at 11 n.3) on the cases *Bradley* cited is misplaced for the same reason that *Bradley* is distinguishable—Montana's venue laws are not limited to one type of contract. *See KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (addressing a Rhode Island law that invalidated forum-selection clauses in "only one type of contract, franchise agreements"); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 444 (5th Cir. 2001) (addressing Louisiana law that applied only to certain construction subcontracts); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (addressing a New Jersey Supreme Court rule that applied to "only one type of contract (a franchise agreement)").

doctrine normally thought to be generally applicable . . . 'stands as an obstacle to the accomplishment of the FAA's objectives.'" *Blair*, 928 F.3d at 828 (cleaned up) (quoting *Concepcion*, 563 U.S. at 341, 343). The test is whether the state law "will deprive parties of the benefits of arbitration." *Id.*

The amendment to Montana Code § 27-5-323 passes the test. It obviously does not "deprive parties of the benefits of arbitration" because regardless of whether the FAA preempts the amendment's invalidation of the contract's *venue* provision, the parties are still bound by the agreement's *arbitration* provision. The PNOs do not suggest that arbitrating in Montana before three arbitrators in any way deprives them of the benefits of arbitration. Nor could they. The PNOs' reliance on *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Mot. at 13), is misplaced because those cases addressed rules requiring class-wide proceedings, thereby "'sacrific[ing] the principal advantage of arbitration—its informality.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Concepcion*, 563 U.S. at 348). Montana Code Section 27-5-323(2) does nothing remotely similar. The FAA does not preempt it.

B. The Amendment Is Constitutional

The PNOs' motion should also be denied as to their claim that the amendment violates the Contracts Clauses of the United States and Montana Constitutions.

In Montana, "[s]tatutes enjoy a presumption of constitutionality." *City of Billings v. Albert*, 203 P.3d 828, 830 (Mont. 2009). Similarly, "both the Supreme Court and [the Ninth Circuit] have upheld as reasonable various laws that nonetheless may have affected private contracts." *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, No. 20-56251, 2021 WL 3745777, at *6 (9th Cir. Aug. 25, 2021). "The threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (citation omitted). If yes, "the Court . . . ask[s] whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Id.*; *see also City of Billings v. Cty. Water Dist. of Billings Heights*, 935 P.2d 246, 251 (Mont. 1997) (same standard).[4] The PNOs cannot meet either element.

1. <u>The amendment does not substantially impair the PNOs' contractual rights</u>

The Contracts Clause challenge fails at the first step, particularly because the PNOs ignore the "[s]ignificant . . . fact that the parties are operating in a heavily regulated industry." *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983). Parties in "heavily regulated industr[ies]" know their "contractual rights [are] subject to alteration by state [] regulation." *Id.* at 413, 416; *see also*

[4] Because the analyses are the same under the federal and Montana Constitutions, Talen Montana addresses both claims together.

Mussetter Distrib., Inc. v. DBI Beverage Inc., 685 F. Supp. 2d 1028, 1033 (N.D. Cal. 2010) ("[I]n determining the extent of the impairment, the court may consider the extent to which the industry has been regulated in the past.").

For example, in *Energy Reserves Group*, a Kansas statute imposing price controls on the intrastate gas market did not substantially impair any contractual rights because "[f]or more than 75 years now, Kansas has regulated the production, transportation, distribution, and sale of natural gas." 459 U.S. at 413-14 & n.18. Similarly, in *Mussetter*, a California statute providing an expedited method to determine the value of beer distribution rights did not substantially impair contractual rights because "California has regulated the beer industry in various ways dating back more than five decades." 685 F. Supp. 2d at 1033. *Mussetter* even cited a California law that "prohibit[s] provisions restricting the venue for any dispute to a forum outside the state" to explain why "[f]urther regulation in this field would not be unexpected." *Id.* (citing Cal. Bus. & Prof. Code § 25000.6).

The electrical generation industry is likewise heavily regulated, as the O&O Agreement contemplates. *See* ECF No. 39-2 at 26, § 3(b) ("The Operator . . . shall construct, operate and maintain the Project . . . all in accordance with . . . any applicable laws, regulations, orders, permits and licenses, now or hereafter in effect, of any governmental authority having authority."); *see also id.* §§ 1(j), 1(r), 5(a), 15(a), 15(c), 29. In addition, NorthWestern, one of the PNOs' co-owners, "is a public

electrical power utility, as defined by § 69-3-101, MCA, regulated by the [Montana Public Service Commission] pursuant to Title 69, chapter 3, MCA." *Barsanti v. Montana Pub. Serv. Comm'n*, 481 P.3d 232 (Mont. 2021). The Montana Public Service Commission has "full power of supervision, regulation, and control of such public utilities." Mont. Code Ann. § 69-3-102. Therefore, just like the parties in *Energy Reserves Group*, the PNOs knew when they signed it that this contract was "subject to alteration by state [] regulation." 459 U.S. at 416.

The PNOs also misrepresent what the amendment does. SB 265 does not "eliminate[]" the parties' right to '"choose who will resolve specific disputes."' Mot. at 16 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010)). Rather, the amendment permits "parties [to] agree in writing to a single arbitrator." The PNOs' refusal to accept Talen Montana's most recent proposal, which calls for just one arbitrator, undermines any suggestion that having one arbitrator is "important" to the PNOs. Mot. at 16; Statement of Facts ¶ 6.

The PNOs also distort the import of the parties' selection of Washington as the venue and governing law for the arbitration clause. *See* Mot. at 16-18. The PNOs speculate, without any factual support, that the parties had an "important reason for choosing Washington's laws rather than Montana's." Mot. at 18. The record undercuts their assertion, including the exhibit they submitted in support of their motion. One of the PNOs' lobbyists testified that the parties selected Washington

"[p]robably at that time it was done because you had West Coast, Puget and Avista, and in Montana Power, and they felt that maybe that was a central location. *I don't think there was any intent to favor one state or another*." ECF No. 88-2 (Ex. 1 to Plaintiffs' Motion) at 79:10-13 (emphasis added)). To the extent the parties chose Washington because Montana at the time "prohibited pre-dispute arbitration provisions" (Mot. at 18), there is no impairment because current Montana law, including the amendment, supports arbitration.

The PNOs also overlook the rule that forum-selection clauses should be disregarded when "enforcement would contravene a strong public policy of the forum in which suit is brought," *Gemini Techs., Inc. v. Smith & Wesson Corp.,* 931 F.3d 911, 915 (9th Cir. 2019), which applies here based on Montana public policy. And the PNOs ignore that Section 21(h) of the O&O Agreement contemplates litigation, without any venue limitation, for many disputes that Section 18 might cover. ECF No. 39-2 at 42. The PNOs' factual argument is also premature because no discovery has occurred.

Equally inapt is the PNOs' suggestion that the amendment changes the governing law for an arbitration. *See* Mot. at 17-18. Montana's Uniform Arbitration Act would apply notwithstanding Section 18's selection of the Washington Arbitration Act. "Montana applies the Restatement (Second) of Conflict of Laws § 187(2) 'when [it is] faced with the question of whether to give effect to a

contractual choice of law by the parties.'" *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937-38 (9th Cir. 2001) (quoting *Keystone*, 971 P.2d at 1242). The PNOs do not argue that Washington law would prevail under this Restatement analysis. Nor could they because the O&O Agreement is "performed . . . exclusively in Montana" and "the subject matter of the contract is located in Montana." *Id.* To the contrary, by seeking a declaration that SB 265 is invalid as applied to Section 18, the PNOs tacitly admit that Montana law (not Washington law) applies.

The PNOs also rely on inapposite case law. This case is nothing like *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *see* Mot. at 20. *Spannaus* struck down a statute that "retroactively modif[ied] the compensation that [a] company had agreed to pay its employees," thus "invad[ing] an area never before subject to regulation" and "impos[ing] a completely unexpected liability in potentially disabling amounts." *Id.* at 246-47, 250.

Their reliance on *Angostura International Ltd. v. Melemed* is likewise unavailing. *See* Mot. at 19. The statute in that case required the plaintiff to submit to arbitration, which was a "substantial impairment" on its contractual right to "seek redress in court." 25 F. Supp. 2d 1008, 1010 (D. Minn. 1998). The amendment, by contrast, does not disturb the parties' agreement to arbitrate. And neither *Stolt-Nielsen*, 559 U.S. at 684-86 (holding that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding

that the party agreed to do so"), nor *Atlantic Marine Construction Company v. U.S. District Court for Western District of Texas*, 571 U.S. 49, 68 (2013) (discussing circumstances under which a court may disregard a forum-selection clause and remanding), even mention the Contracts Clause, and so they cannot begin to bear the weight the PNOs place on them. *See* Mot. at 16-17.

The PNOs have not cited any case suggesting that an amendment to a state statute invalidating the venue provision of an arbitration agreement constitutes a substantial impairment under the Contracts Clause. *Cf. Mid-Continent Cas. Co. v. Gen. Reinsurance Corp.*, No. 06-CV-0475, 2007 WL 539217, at *5 (N.D. Okla. Feb. 15, 2007), *rev'd and remanded on other grounds*, 331 F. App'x 580 (10th Cir. 2009). The cases hold otherwise. In *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, 81 F. Supp. 3d 993, 1004 (D. Haw. 2014), for example, the court rejected a Contracts Clause challenge to a statute that "add[ed] a venue requirement that is different from the venue selected by the parties," reasoning that any "impairment . . . is not substantial." The same outcome is warranted here.

2. <u>The amendment is an appropriate and reasonable way to advance a significant and legitimate public purpose</u>

Even if it operates as a substantial impairment, the amendment is constitutional because it is an appropriate and reasonable way to advance a significant and legitimate public purpose.

Within SB 265, the Montana Legislature declared a legislative purpose that "electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers;" and that "arbitration of disputes concerning Montana electrical generation facilities outside of Montana threatens Montana's laws, policies, and the interests of Montana in securing and maintaining a reliable source of electricity." S.B. 265, 67th Leg. (Mont. 2021). The PNOs cannot meet their "burden [to] demonstrat[e] that retroactive application of [SB 265] does not serve a valid public purpose." *In re Seltzer*, 104 F.3d 234, 236 (9th Cir. 1996). The PNOs do not even dispute that the Montana Legislature's stated purpose is significant and legitimate.

The PNOs instead rely on inapposite cases (Mot. at 20-22) in which "[t]here [was] no statement of legislative intent or any other legislative history from which to directly ascertain the purpose of the Act." *Equipment Manufacturers Inst. v. Janklow*, 300 F.3d 842, 860 (8th Cir. 2002); *see also Spannaus*, 438 U.S. at 247 & n.19 (noting that "[t]he only indication of legislative intent in the record" was "a statement in the District Court's opinion" and that "[t]he Minnesota Supreme Court engaged in mere speculation as to the state legislature's purpose." (citation omitted)).

The PNOs' principal case, *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 191 (1936) (Mot. at 21-22) is inapt for the same reason. The statute struck down did

"not purport to deal with any existing emergency." *Id.* at 195. "The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made." *Id.* The 1936 *Treigle* decision is also outdated. The Ninth Circuit has "specifically recognized the shift in the law created *by Energy Reserves*. 'The Court [in *Energy Reserves*] retreated from its [prior case law],' and has 'indicated a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts.'" *In re Seltzer*, 104 F.3d at 236 (alterations in original) (quoting *State of Nev. Emps. Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1990)) (citing *Energy Reserves*, 459 U.S. at 400).

The PNOs' other cases (Mot. at 22-23) are distinguishable because "the State [was] a contracting party," and so the court gave "less deference to its claims of justification for impairment." *Cont'l Illinois Nat. Bank & Tr. Co. of Chicago v. State of Wash.*, 696 F.2d 692, 701 (9th Cir. 1983); *see also U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 25-26 (1977) ("[D]eference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."); *City of Billings*, 935 P.2d at 252 ("point[ing] out at the outset that a heightened level of scrutiny applies when a governmental entity is a party to the contract"). And *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1250 (3d Cir. 1987), involved legislation that could "hardly be viewed as general legislation

for the public welfare" because it was designed "to abolish Hess' tort immunity on behalf of those six plaintiffs."

By contrast, when (as here) the state is not a contracting party, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004); *see also Energy Rsrvs. Grp., Inc.*, 459 U.S. at 417 (noting that a state's interest in "protect[ing] consumers from the escalation of natural gas prices" is "significant and legitimate," and deferring to the legislature for how to do so); *see also Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, No. CV-088525-PSGPJWX, 2010 WL 11519316, at *2 (C.D. Cal. June 2, 2010) (rejecting a Contracts Clause challenge to a California statute because the Legislature "identified a significant and legitimate public purpose behind the Act," and "courts properly defer to legislative judgment as to the necessity and reasonableness").

Because this Court should defer to the Montana Legislature's judgment on the appropriateness of the amendment, the PNOs' unsubstantiated factual attacks on the Legislature's judgment are irrelevant.[5] But to the extent the Court concludes that

[5] The PNOs claim that the amendment is unjustified because "the State of Montana, like its neighboring states, has many options for building and maintaining its energy infrastructure." Mot. at 23. The PNOs do not identify any examples, nor point to anything in the record to support their assertion. The PNOs likewise speculate about what the amendment "was targeted to achieve," suggesting there is "no doubt" that

these attacks are relevant, Talen Montana requests discovery to show that the Montana Legislature is right and that the PNOs are wrong. "When 'a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly freely.'" *Shook v. Ravalli Cty.*, No. CV-08-172-M-DWM, 2009 WL 10678821, at *1 (D. Mont. Apr. 1, 2009) (quoting *Burlington Northern Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes*, 323 F.3d 767, 773 (9th Cir. 2003)).

Conclusion

The Court should deny the motion in its entirety.

Respectfully submitted,

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its "narrow aim" was to "abrogate the privately-agreed venue provision in the O&O Agreement." Mot. at 20.

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Certificate of Compliance

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Brief in Opposition to Plaintiffs' Partial Motion for Summary Judgment is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Office Word is 5,845 words.

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