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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

Rule 56(d) Declaration of Barry Barnett
in Opposition to Plaintiffs' Partial
Motion for Summary Judgment

Oral Argument Requested

Declaration of Barry Barnett

Under Rule 56(d) of the Federal Rules of Civil Procedure and Local Civil Rule 56(b), I, Barry Barnett, declare as follows:

1. I am a partner in the law firm Susman Godfrey L.L.P., counsel for defendant Talen Montana, LLC, in this matter. I am an attorney at law admitted to practice *pro hac vice* in the District of Montana for this case. ECF No. 80. I have personal knowledge of the matters set forth herein and am competent to testify.

2. I respectfully submit this Declaration in opposition to Plaintiffs' (the "PNOs") partial motion for summary judgment. ECF No. 88.

3. Discovery in this case has not yet commenced. On May 4, the Court set a preliminary pretrial conference for August 3 and ordered the parties to hold a Rule 26(f) conference by July 20. ECF No. 3. On July 7, the preliminary pretrial conference and all corresponding deadlines were adjourned. ECF No. 68. The preliminary pretrial conference has not been rescheduled.

4. The PNOs' motion includes certain disputed and unsubstantiated factual assertions, including:

- The PNOs assert that "[t]he parties had—and have—an important reason for choosing Washington's law rather than Montana's" to govern Section 18 of the O&O Agreement. Mot. at 18.

- The PNOs assert that “[T]he State of Montana, like its neighboring states, has many options for building and maintaining its energy infrastructure” Mot. at 23.

5. Talen Montana’s concurrently filed Brief in Opposition to the PNOs’ partial motion for summary judgment explains why each of these factual assertions is irrelevant to the motion.

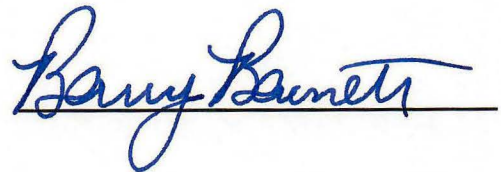
6. But to the extent this Court concludes that these factual assertions are relevant, Talen Montana respectfully requests that the Court defer consideration of the motion so that Talen Montana may take discovery to test and rebut the PNOs’ assertions about the original contracting parties’ choice of law in 1981 and whether Montana has realistic “many options” available if the PNOs succeed in forcing closure of Colstrip Units 3 and 4 to meet mandates of regulators in Oregon and Washington.

7. “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[d] 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)). “The motions for summary

judgment are more appropriately made after the parties have had sufficient opportunity to conduct discovery and develop the factual record in the case.” *Id.*

8. If given the opportunity, Talen Montana would propound interrogatories, document requests, and requests for production and take depositions to understand the PNOs’ bases for making these factual assertions. Talen Montana would also seek expert discovery regarding Montana’s purported “many options for building and maintaining its energy infrastructure.” Mot. at 23.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 7th day of September 2020, at Houston, Texas.

A handwritten signature in blue ink that reads "Barry Barnett". The signature is written in a cursive style and is positioned above a solid horizontal line.