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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  
Statement of Disputed Facts in  
Opposition to Plaintiffs' Partial Motion  
for Summary Judgment

Oral Argument Requested

Under Rule 56 of the Federal Rules of Civil Procedure, and Local Civil Rule 56(b), defendant Talen Montana, LLC (“Talen Montana”) submits this Statement of Disputed Facts in opposition to the motion of Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy (the “PNW Owners” or “PNOs”) for partial summary judgment, ECF No. 88.

1. Portland General Electric Company, Avista Corporation, PacifiCorp, Puget Sound Energy, Inc., Talen Montana LLC, and NorthWestern Corporation jointly own two coal-fired steam electric generation units in Colstrip, Montana. (Decl. of Ronald J. Roberts (ECF No. 39-2) (“Roberts Decl.”) ¶¶ 6, 9; Decl. of Brett Greene (ECF No. 39-4) (“First Greene Decl.”) ¶¶ 6, 8; Decl. of Mike Johanson (ECF No. 39-5) (“Johanson Decl.”) ¶ 2; Decl. of Jason R. Thackston (ECF No. 39-3) (“Thackston Decl.”) ¶ 7.) (Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. are referred to collectively herein as the “PNW Owners.”)

**Disputed:** Talen Montana does not jointly own both units. ECF No. 32 (FAC) ¶ 29.

2. The PNW Owners, Talen Montana LLC, and NorthWestern Corporation are parties to an Ownership and Operation Agreement (“O&O Agreement”), signed in 1981, which governs the operation of Colstrip. (Roberts

Decl. ¶ 6.) (A true and correct copy of the O&O Agreement is attached as Exhibit A to the Roberts Declaration (ECF No. 39-2).)

**Disputed:** The O&O Agreement speaks for itself.

3. The O&O Agreement has been amended four times. (Roberts Decl. ¶ 6; First Greene Decl. ¶ 6.) Despite those amendments, Section 18, has never been altered or amended. (Decl. of Brett Greene Decl. in Supp. of Mot. for Sum. J. ¶ 2.)

**Disputed:** The amendments did not address Section 18. They also did not address Section 21(h).

4. The PNW Owners face legislative mandates to eliminate coal-fired resources like Colstrip from their allocation of electricity for their customers in Washington and Oregon. (Roberts Decl. ¶¶ 16-17; First Greene Decl. ¶ 11-13; Thackston Decl. ¶¶ 10-12; Johanson Decl. ¶¶ 5-6.) Talen and NorthWestern want to keep Colstrip open for the indefinite future. (Roberts Decl. ¶ 22.) NorthWestern contends that the O&O Agreement requires unanimous consent to close Colstrip. (Roberts Decl. ¶ 36; Thackston ¶ 15.) The PNW Owners disagree. (First Greene Decl. ¶ 17.)

**Disputed:** There is no “legislative mandate.” Washington and Oregon have

passed laws relating to coal-fired generation, but these laws do not require the PNOs to eliminate coal-fired resources like Colstrip from their allocation of electricity for their customers in Washington and Oregon. ECF No. 58 (Talen Montana’s Answer) ¶¶ 3, 40-42; ECF No. 40 (NorthWestern Corporation’s Answer) ¶¶ 40-41; Aug. 6 Hearing Tr. at 30:1-4 (Argument by J Jackson, counsel for NorthWestern Corporation); ECF No. 32 (FAC) ¶¶ 40-42.

Talen Montana wants to keep Colstrip running as long as it is economically viable and consistent with Prudent Utility Practice to do so. Talen Montana’s Answer ¶ 44. NorthWestern contends that Colstrip is capable of operating efficiently and consistent with its purpose until at least 2042. Aug. 6 Hearing Tr. at 23:8-11.

5. On February 9, 2021, NorthWestern noticed its intent to initiate an 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.” (Roberts Decl. ¶ 36.) NorthWestern served an arbitration demand on March 12, 2021, and an amended arbitration demand on April 2, 2021. (Roberts Decl. ¶¶ 36-37; Thackston Decl. ¶ 15; First Greene Decl. ¶ 16.)

### **Undisputed**

6. The PNW Owners served responses and their own arbitration demands in April 2021. (Roberts Decl. ¶ 38; Thackston Decl. ¶ 17.) The arbitration has not begun because the parties have been unable to agree on the selection of an arbitrator. (Roberts Decl. ¶ 38.)

**Disputed:** No party has proposed any potential arbitrator. The parties exchanged proposals regarding the number of arbitrators and the arbitrator selection process, the venue for the arbitration, and the procedures the parties might follow during an arbitration. Talen Montana’s Answer ¶ 73; Aug 6 Hearing Tr. at 48:17-23 (Argument by Barry Barnett, counsel for Talen Montana). The most recent proposal was made by Talen Montana, and it was to arbitrate in Denver before a single arbitrator, among other protocols, but the PNOs never responded. *See* Aug 6 Hearing Tr. at 48:17-23.

7. During Montana’s 2021 legislative session, Montana State Senator Steve Fitzpatrick sponsored Senate Bill 265. (A copy of SB 265 is attached as Exhibit B to the First Amended Complaint (ECF No. 32-2) and is available at the Montana Legislature website: <https://legiscan.com/MT/text/SB265/2021>.) The Bill provides that any “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.* at 2.)

### **Undisputed**

8. In testimony before the Montana House of Representatives, Committee on Energy, Technology, and Federal Relations, Senator Fitzpatrick made clear that Senate Bill 265 applied to a single contract: the O&O Agreement. (Ex. 1 to Decl. of Harry Wilson at 74:2-13, 86:24-87:5, 87:11-14.) Senator Fitzpatrick’s testimony specifically described the O&O Agreement and the Colstrip facility. (*Id.*, Ex. 1 at 74:2-13.) Representatives of Talen and NorthWestern spoke in support of Senate Bill 265 in committee hearings in the Montana legislature. (*Id.*, Ex. 1 at 75:23-76:17; 76:20-78:2.) Representatives of the PNW Owners spoke in opposition. (*Id.*, Ex. 1 at 78:24-80:11; 80:14-81:16.)

The Montana Legislature passed Senate Bill 265 and it became law on May 3, 2021. (*See* <https://legiscan.com/MT/bill/SB265/2021>.)

**Disputed:** The amendment to Montana Code § 27-5-323 applies to any “agreement concerning venue involving an electrical generation facility in this state.” ECF No. 32-2 (copy of Senate Bill 265). Montana has dozens of electricity-generating power stations. Senator Fitzpatrick testified that “I want to disagree with the point that this is for one type of company. All companies under my bill would

be able to use this arbitration provision.” ECF No. 88-2 (Plaintiffs’ Ex. 1) at 90:8-10.

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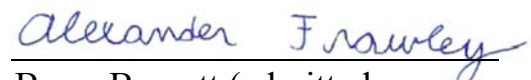
Additional facts on which Talen Montana relies to oppose Plaintiffs’ motion

9. Within the amendment to Montana Code § 27-5-323, 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); ECF No. 32-2.

10. The people of Montana rely on Colstrip for jobs, power, and prosperity. ECF No. 58 (Talen Montana’s Answer) at 21.

Dated: September 7, 2021

Respectfully submitted,



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