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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' STATEMENT
OF UNDISPUTED FACTS**

Under Rule 56 of the Federal Rules of Civil Procedure and Local Rules, Defendant NorthWestern Corporation submits this Response to Plaintiffs' Statement of Undisputed Facts.

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.")

Undisputed for purposes of the PNW Owners' motion for partial summary judgment.

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).)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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 for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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 for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

DATED this 15th day of September, 2021.

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