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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 IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Senate Bill 265 is invalid under the Federal Arbitration Act, the United States Constitution, and the Montana Constitution. NorthWestern Corporation makes no effort to defend the law. Talen Montana, LLC, raises several meritless legal arguments. Neither NorthWestern nor Talen identifies any dispute of material fact precluding summary judgment. Accordingly, because the FAA preempts SB 265 and because it violates the Contract Clauses of both the United States Constitution and Montana Constitution, the Court should grant plaintiffs' (the "PNW Owners") motion for summary judgment on their first, second, and third claims for relief.

REPLY

I. There are no disputes of material fact.

A party is entitled to summary judgment if "the movant shows 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). NorthWestern disputes none of the Plaintiffs' Statement of Undisputed Facts. (Doc. 96.) Talen makes minor quibbles about immaterial facts. For example, Talen challenges the PNW Owners' descriptions of state laws governing coal-fired resources (Doc. 93-2 at 3-4),[1] but

[1] Page citations to documents in the court record are to the court-stamped page numbers.

those laws do not bear on whether SB 265 is preempted by the FAA or is unconstitutional.

Talen also contends that the PNW Owners make two factual assertions that could warrant discovery, but Talen also contends "each of these factual assertions is irrelevant to the motion." (Doc. 93-1 at 3.) Because there are no disputes of material fact, the only issues are legal and the Court should grant summary judgment to plaintiffs as a matter of law.

II. SB 265 is preempted by the FAA.

The FAA preempts state legislation that singles out arbitration clauses or stands as an obstacle to the objectives of the FAA. SB 265—which is codified as Montana Code § 27-5-323(2)—does both and is therefore preempted.

Talen's argument hinges on *Keystone, Inc. v. Triad Systems Corp.*, 971 P.2d 1240 (Mont. 1998), a case holding that the FAA did not pre-empt Montana Code § 27-5-323(1)—not the subject of the PNW Owners' motion—which states: "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." In doing so, *Keystone* pointed to Montana Code § 28-2-708, which "has been applied to invalidate forum selection clauses that would have the effect of forcing Montana residents to litigate disputes outside of Montana." *Id.* at 1244. *Keystone* rejected the FAA-preemption argument on the ground that Montana law treats venue

provisions equally, concluding that § 27-5-323(1) invalidates venue provisions in arbitration agreements and § 28-2-708 does the same in any contract. *Id.* at 1245-46. Talen argues that this holding extends past the first sub-section of § 27-5-323 and protects SB 265, codified at sub-section (2).

Talen is wrong for four reasons. First, § 28-2-708 does *not* invalidate forum-selection clauses generally or on the same terms as SB 265. Talen, in fact, concedes that "Montana law does not 'automatically' invalidate forum-selection clauses." (Doc. 93 at 17.) The concession is both inescapable and fatal to Talen's argument. After *Keystone*, the Montana Supreme Court changed course and held that "forum selection clauses are not presumptively void as against public policy." *Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 476, 482 (Mont. 2008) (citing *Milanovich v. Schnibben*, 160 P.3d 562, 564 (Mont. 2007)). This shift in Montana law interpreting § 28-2-708 is discussed in *Frontline Processing Corp. v. Merrick Bank Corp.*, No. CV 13-20-BU-JCL, 2013 WL 12130638, at *3-4 (D. Mont. May 29, 2013), and at length in *Rattler Holdings, LLC v. United Parcel Service, Inc.*,

505 F. Supp. 3d 1076, 1084 (D. Mont. 2020).[2] Whereas SB 265 automatically invalidates a venue provision in an arbitration agreement if it involves an electrical generation facility and does not conform to specific requirements, § 28-2-708 would *not* automatically invalidate a *litigation* forum-selection provision in the same contract. SB 265 thus discriminates against arbitration and is preempted by the FAA.[3]

Second, the U.S. Supreme Court has rejected Talen's and *Keystone*'s argument that the "equal treatment" principle saves state laws that target arbitration by name: "an equal treatment principle cannot save from preemption general rules 'that target arbitration either by name or by more subtle methods[.]'" *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (citation omitted). SB 265 targets arbitration by name, specifically calling out agreements that fail to provide for

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[2] Talen relies on *Swank Enterprises Inc. v. NGM Insurance Co.*, 2020 WL 1139607 (D. Mont. Mar. 9, 2020), but omits that in *Rattler*, Judge Christensen explains that his holding in *Swank* was wrong, 505 F. Supp. 3d at 1082 ("Today, the Court reconsiders that holding [in *Swank*], and must admit it erred. . . . Montana's treatment of forum selection clauses has not been uniform, and a full examination of its caselaw compels the conclusion that its public policy is not so strong as to invalidate all forum selection clauses.").

[3] By its terms, § 27-5-323(1) applies only to Montana residents, and the policy behind § 28-2-708 is also to protect Montana residents. *See Keystone*, 971 P.2d at 1243. Thus, for contracts concerning electrical generation facilities where no party is a Montana resident—exactly the case here (*see* Doc. 32 ¶¶ 18-23; Doc. 40 ¶¶ 18-23; Doc. 58 ¶¶ 18-23)—§ 28-2-708 has less application, if any. This further shows how SB 265 impermissibly discriminates against arbitration.

arbitration in Montana or a panel of three arbitrators. It makes no difference that another state statute purportedly treats other contracts in a similar fashion.

SB 265 also attacks arbitration "by more subtle methods," interfering "with fundamental attributes of arbitration[.]" *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Talen asks this Court to apply the narrowest construction of the "benefits of arbitration": whether arbitration proceeds. (Doc. 93 at 21.) But contractual terms that "specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted" are fundamental and must be "rigorously enforced." *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (cleaned up). SB 265 voids the fundamental terms of the Colstrip Ownership and Operation Agreement ("Agreement"), which establish the rules for the arbitration (Washington law) and the adjudicator (a single arbitrator with "demonstrated expertise in the matter submitted"). (Doc. 39-2 at 42.) SB 265 targets arbitration agreements, undermining the parties' chosen rules and procedures. The FAA preempts such laws, even if those laws treat other contracts equally.[4]

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[4] This Court need not pass on the validity of *Keystone* to decide this case because SB 265 is distinct from sub-section (1) of § 27-5-323. Nonetheless, it is clear from *Concepcion* and *Lamps Plus, Inc.*, among other decisions after *Keystone*, that *Keystone* is an inaccurate interpretation of federal law. Whatever the merits of *Keystone* when it was decided 23 years ago, the law today requires significantly more rigor when evaluating state laws that affect arbitration.

Third, SB 265 is not the "same statute" as Montana Code § 27-5-323(1) as Talen asserts. (*See* Doc. 93 at 13.) It does more than restrict venue: SB 265 applies to residents and non-residents, and it specifically targets arbitration agreements that do not adhere to a narrow set of requirements, including application of Montana law to govern the arbitration and a panel of three arbitrators. These provisions apply *only* to arbitration agreements, not to any contract. Thus, even if it were true that the venue restriction in § 27-5-323(1) puts arbitration agreements on equal footing with contractual venue provisions generally in Montana, SB 265 (§ 27-5-323(2)) has no parallel statute that restricts non-arbitration contracts. "Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

Fourth, *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), and other courts have invalidated laws targeting venue restrictions in specific kinds of contracts because they are preempted by the FAA. SB 265 targets a specific kind of contract, only those "involving an electrical generation facility in this state." Accordingly, the FAA preempts SB 265.

Additionally, Talen's contention that *Bradley* is no longer good law is wrong. (*See* Doc. 89 at 19 n.4.) Talen contends that "*Sakkab* in fact 'abrogated' *Bradley*" (Doc. 93 at 19), citing *Lim v. TForce Logistics, LLC*, No. 20-55562, 2021

WL 3557294 (9th Cir. Aug. 12, 2021) (unpublished). But *Lim* simply uses the word "abrogated" in a parenthetical and does not analyze whether *Sakkab* actually abrogates *Bradley*. Not even *Sakkab* itself purports to abrogate *Bradley*. *See Sakkab v. Luxottica Retail N. Am., Inc.,* 803 F.3d 425, 432 (9th Cir. 2015). *Bradley* "'remains good law in the Ninth Circuit and binding precedent'" on district courts. *Fleming v. Matco Tools Corp.*, 384 F. Supp. 3d 1124, 1130 n.2 (N.D. Cal. 2019) (citation omitted).

SB 265 also stands as an obstacle to arbitration. Talen's argument that SB 265 does not "deprive [plaintiffs] of the benefits of arbitration" (Doc. 93 at 21) misunderstands the FAA and Supreme Court precedent. "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced *according to their terms*.'" *Concepcion*, 563 U.S. at 344 (emphasis added, citation omitted). SB 265 interferes with that purpose by altering the terms in the Agreement about the appropriate venue, rules, and number of arbitrators. Also, by requiring the parties to hire additional panel members, SB 265 deprives the parties of the "lower costs, greater efficiency and speed" offered by the single-arbitrator procedure in the Agreement, which are "benefits of private dispute resolution" ensured by the FAA. *Concepcion*, 563 U.S. at 348 (cleaned up).

The Court should grant summary judgment on plaintiffs' third claim for relief.

III. SB 265 violates the Contract Clauses of the United States and Montana Constitutions.

SB 265 violates the Contract Clause because it substantially impairs the Agreement without a significant and legitimate public purpose.

A. SB 265 substantially impairs the PNW Owners' rights under the Agreement.

A law substantially impairs a contract when it "deprives a private party of an important right, thwarts performance of an essential term, defeats the expectations of the parties, or alters a financial term[.]" *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003) (citations omitted). Talen advances several unavailing arguments that SB 265 does not substantially impair the Agreement.

First, Talen wrongly contends that SB 265 did not substantially impair the Agreement because electrical generation is "'a heavily regulated industry.'" (Doc. 93 at 22 (quoting *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983)).) The question is not whether an industry is regulated generally, but whether it is "regulated *in the particular* to which [the plaintiff] now objects," such that the plaintiff could have expected "further legislation upon *the*

same topic."[5] *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38 (1940) (emphasis added).

The fact that a state regulates an industry is relevant only if state law impairs a contractual term that is subject to the state's regulatory scheme. In *Garris v. Hanover Insurance Co.*, the parties entered into an agreement for Garris to serve as Hanover's agent to sell automobile insurance policies. 630 F.2d 1001, 1003 (4th Cir. 1980). Shortly thereafter, South Carolina passed "sweeping changes" to its automobile insurance laws. *Id.* Among those changes, South Carolina prohibited insurers from canceling agency agreements except in certain narrow circumstances. *Id.* The Fourth Circuit concluded that the law substantially impaired the parties' contract by abrogating Hanover's contract right to cancel the agreement. The court acknowledged that the insurance industry was heavily regulated, *id.* at 1006, but emphasized that the particular contract right at issue—the ability to cancel an agency agreement—was "outside the range of state regulatory interest." *Id.* at 1007.

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[5] In the main case Talen relies on, the Supreme Court did not simply conclude that natural gas was "a heavily regulated industry," but instead focused on "natural gas prices" specifically, stressing that regulation "effectively limits intrastate price increases," and the contractual terms indicated the parties "knew [their] contractual rights were subject to alteration by state price regulation." *Energy Rsrvs. Grp.*, 459 U.S. at 413-16. No such facts are present here.

The same is true here. Montana regulates the electrical generation industry. *See, e.g.,* Mont. Code Ann., Title 69, Ch. 3. But those regulatory schemes govern actions like ratemaking, not the rules and venue under which private parties arbitrate contract disputes. *Id.* Talen fails to identify any electrical generation regulation in Montana—or anywhere—that would give any of the parties an expectation that their agreement about the rules and venue for arbitration would be subject to regulation.

Second, Talen incorrectly asserts that the PNW Owners do not consider adjudication by a single arbitrator—as the Agreement provides—to be important because the PNW Owners refused to accept Talen's proposed arbitrator selection protocol, which called for a single arbitrator. (Doc. 93 at 24.) This argument is meritless; the PNW Owners rejected Talen's proposal because its other provisions (*e.g.*, right of appeal) negated the benefits of a single arbitrator.[6]

Third, Talen wrongly asserts that the Agreement's venue clause is void because it contravenes Montana public policy. (Doc. 93 at 25.) But a venue selection clause "control[s] absent a strong showing that it should be set aside." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). As explained above,

[6] As NorthWestern explains (Doc. 95 at 18-19 & n.17), Talen's proposal would add costs and delay.

Montana does not have a sufficiently strong public policy that permits invalidation of the parties' choice of venue.

Fourth, Talen mistakenly asserts that Montana's choice-of-law principles would invalidate the Agreement's choice of Washington's Arbitration Act regardless of SB 265. (Doc. 93 at 24-25.) But absent SB 265, the parties would arbitrate in Washington and an arbitrator would not apply Montana's choice-of-law principles at all. Furthermore, the PNW Owners have the right to defend the Agreement's choice of law and have the arbitrator decide the law that applies. SB 265 eliminates that right.

Talen's arguments are meritless. SB 265 purports to invalidate the Agreement's venue, choice of law, and selection of a single, experienced arbitrator. Hence, it substantially impairs the Agreement.

B. SB 265 does not advance a significant and legitimate public purpose, nor is it an appropriate and reasonable means of advancing its purported purpose.

If a law substantially impairs a contract, the court then must decide whether it "is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (cleaned up). When, as here, state legislation targets a narrow class, not a broad societal interest, the state is not advancing a significant and legitimate public purpose. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248, 250 (1978).

SB 265 attempts to abrogate venue provisions in a narrow class of contracts involving electrical generating facilities—not address a broad societal problem. Talen, however, asks the Court to credit the Montana legislature's declared purpose rather than the law's actual terms. (Doc. 93 at 28.) The declaration states SB 265 was enacted because "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."

Generally, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Rsrvs. Grp.*, 459 U.S. at 413 (cleaned up). But that deference does not mean the courts must take legislative statements at face value. The "mere assertion of a conceivable public purpose is insufficient to justify a substantial impairment of contractual rights. . . . Whether the law passes constitutional muster requires a more discerning inquiry into the Act's structure and design." *Ass'n of Equip. Mfrs. v. Burgum*, 932 F.3d 727, 731 (8th Cir. 2019).

"Legislation aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the asserted public purposes." *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1249 (3d Cir. 1987). In *Nieves*, the legislature passed legislation that

retroactively abrogated a rule of law that controlled six pending personal injury lawsuits, and the legislature declared that the law's purpose, in part, was "to assist persons who are injured while on the job . . . ." *Id.* at 1248. The court concluded that the legislation's retroactive application to one employer and a small number of identified pending cases could not be squared with the legislature's declared purpose, even when affording deference to the legislature. *Id.* at 1251-52. If the stated purpose of the legislation could justify a retroactive application aimed at specific parties, "the Contract Clause would be rendered practically meaningless." *Id.* at 1252.

As in *Nieves*, the Montana legislature's declared purpose cannot be squared with SB 265's retroactive application to a narrow class of private contracts. The legislation is targeted solely at agreements "concerning venue involving an electrical generation facility" in Montana and vitiates those agreements unless they meet a narrow range of conditions. *See* Mont. Code Ann. § 27-5-323(2)(a). The legislative history demonstrates that this legislation specifically targeted the Agreement and the parties' arbitration. Senator Fitzpatrick, SB 265's sponsor, testified that it applied to a single, specific arbitration and was designed to be retroactive. (Doc. 88-2 at 24-25, 87:24-88:3 ("it's important that [SB 265] is retroactiv[e] because we have such an important issue coming up in the NorthWestern arbitration"); *see also id.* at 25, 88:7-9 and *id.* at 11, 74:2-8

(targeting Agreement).) SB 265, by its terms and according to the statements of its sponsor, retroactively abrogates the private rights of specific, identified parties. Even affording the legislature appropriate deference, its declared purpose and chosen means do not justify SB 265's substantial impairment of the PNW Owners' contractual rights.

Treigle v. Acme Homestead Association, 297 U.S. 189 (1936), demonstrates that legislation that deals only with private rights does not advance a significant and legitimate public purpose. Talen attempts to distinguish *Treigle* by claiming that the legislation it addressed was not intended to meet a public purpose. But the parties in *Treigle* asserted just that: "The appellee asserts the act was adopted to meet the existing economic emergency[.]" *Id.* at 195. The Supreme Court disagreed, concluding "the questioned sections deal only with private rights[.]" *Id.* at 197. The same is true here. The Montana legislature declared that SB 265 has a broad public purpose, but its terms reveal it affects only narrow private rights. This Court should conclude that SB 265 does not advance a legitimate public purpose.

IV. NorthWestern does not defend SB 265.

NorthWestern does not defend SB 265. It concedes that "[t]he PNW Owners have raised significant issues about the enforceability of S[enate] B[ill] 265." (Doc. 95 at 19.)

Instead, "NorthWestern urges the Court to enter an order compelling the parties to move forward promptly with arbitration and appoint either a magistrate judge or special master to oversee negotiations ensuring that it will." (*Id.* at 21.) Although the PNW Owners share the interest in moving to arbitration, NorthWestern has not moved for this relief.

CONCLUSION

This Court should grant summary judgment on plaintiffs' first, second, and third claims for relief and declare SB 265 is unenforceable as applied to the Agreement.

Dated this 28th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that Plaintiffs' Reply In Support Of Their Motion For Partial Summary Judgment is: printed with proportionately spaced Times New Roman text with 14-point typeface; is double-spaced; and the word count, calculated by Microsoft Office Word, is 3,241 words long, including footnotes, but excluding the Caption, Signature Blocks, Certificate of Service, Tables of Contents and Authorities, and Certificate of Compliance.

DATED this 28th day of September, 2021.

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