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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PORTLAND GENERAL ELECTRIC COMPANY; et. al, Plaintiffs, v. NORTHWESTERN CORPORATION, et al., Defendants.	CV-21-47-SPW-KLD STATE OF MONTANA'S BRIEF IN SUPPORT OF MOTION TO STAY

Defendant Austin Knudsen, in his official capacity as Attorney General for the State of Montana (State), moves to stay proceedings related to Plaintiffs Portland General Electric Company, Avista Corporation, Pacificorp, and Puget Sound Energy, Inc.'s claims regarding Senate Bill (SB) 266 because these claims must be stayed until arbitration has taken place. Alternatively, the State moves for a six-month extension to respond to summary judgment under Fed. R. Civ. P. 56(d). And finally, judicial economy warrants a stay on summary judgment proceedings given the pending motion to remand in CV 21-58-BLG-SPW-TJC and motion to consolidate in this case.

1. Plaintiffs' claims must be stayed until they have proceeded through arbitration.

"It is well established 'that where [a] contract contains an arbitration clause, there is a presumption of arbitrability.'" *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009) (citing *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643, 650, (1986)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (quoting *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139 (9th Cir. 1991)) (cleaned up); *see also Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009)

("In determining whether parties have agreed to arbitrate a dispute, we apply general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.") (citation and internal quotation marks omitted).

According to Plaintiffs' Amended Complaint, the Ownership and Operation Agreement (O&O Agreement) governing Colstrip Units 3 and 4 requires the parties to arbitrate "[a]ny controversies arising out of or relating to this Agreement which cannot be resolved through negotiations among the Project Users ...." (Doc. 32, ¶ 71.) [1] Though Plaintiffs' claims are based on alleged constitutional violations, they rely on Plaintiffs' interpretation of the O&O Agreement, which is subject to arbitration before this Court can review Plaintiffs' claims.

Plaintiffs contend SB 266 violates the federal commerce clause, U.S. Const. Art. I, § 8, Cl. 3; contracts clause, U.S. Const. Art. II, § 10, Cl.

[1] Because the State is not an owner or operator of Colstrip and has not had a meaningful opportunity to conduct discovery in this case, for the purposes of this motion it must rely on the parties' allegations regarding what the O&O Agreement says and their discussions regarding closure of Colstrip.

1; and due process clause, U.S. Const. Amend. XIV. [2] (Doc. 32 at 31, 35, 39.) [3] To support their commerce clause claim, Plaintiffs allege that SB 266 "prevents [them] from exercising their contractual rights to vote to close the Colstrip units with less-than-unanimous consent and to propose and vote to close one or both units." *Id.*, ¶ 120. To support their contracts clause claim, Plaintiffs allege that SB 266 violates O&O Agreement provisions that "give[] each Committee member the right to not approve the budget for Colstrip's operating costs so long as the Committee member does not 'unreasonably' withhold its approval of the budget"; "give[] Committee members the right to withhold approval for Capital Additions and Elective Capital Additions for any reason"; and "give[] the Committee the right to close Unit 3, Unit 4, or both if certain quorum requirements are satisfied and Committee members with a total of 55% of the Project Shares vote to close the units." *Id.*, ¶¶ 129, 132, 138.

Each of the interpretive assumptions upon which Plaintiffs' constitutional claims rest is disputed by the parties to the O&O Agreement.

[2] Plaintiffs have only moved for summary judgment on their contract and commerce clause claims. (Doc. 102.)
[3] Citations to page numbers in ECF documents are citations to the ECF stamp.

According to Plaintiffs, in March 2021, Defendant NorthWestern Corporation "sent a demand for arbitration" to Plaintiffs and Defendant Talen Montana, LLC. *Id.* Among the claims NorthWestern asserted in its demand were: "Colstrip cannot be shut down except upon a unanimous vote of the owners," and "any future action by any owner that may have the effect of causing closure of the Project before the Owners vote unanimously to shut down the Project is an action in breach of the terms and conditions of the O&O Agreement." (Doc. 32, ¶ 48.) These claims directly contradict Plaintiffs' contentions that a 3/5 vote is all that is required to close Colstrip and that the O&O Agreement allows them to take action to begin shutting Colstrip down now. The parties' disagreement about how to interpret the O&O Agreement therefore is subject to arbitration. *See* Doc. 31, ¶ 72 (stating the arbitration clause requires arbitration of "[a]ny controversies … relating to this Agreement ….").

In fact, on April 14, 2021, Plaintiffs filed a petition to compel arbitration in Spokane County Superior Court, which Talen then removed to the U.S. District Court for the Eastern District of Washington, and which that Court then transferred to the U.S. District Court for the District of Montana, Billings Division. *Avista Corp., et. al v. Northwestern Corp., et*

al., No. 2:21-90-SPW-TJC, Doc. 43 at 4, 5, 19 (D. Mont.). Plaintiffs' petition is based on the same underlying disagreements as NorthWestern's demand for arbitration. *See generally id*. at Doc. 1. Because Plaintiffs' constitutional claims regarding SB 266 are based on their allegations of what the O&O Agreement says, arbitration must occur before this Court can consider those claims. If an arbitrator decides NorthWestern is correct in that the O&O Agreement can be read to require unanimous consent to close Colstrip, for example, Plaintiffs cannot state a constitutional violation based on SB 266's unanimous consent requirement.

The parties to the O&O Agreement dispute whether arbitration must occur in Washington or Montana; regardless, both states require a stay on any judicial proceeding involving a claim alleged to be subject to the arbitration until the court rules on a petition to compel arbitration. *See* MCA § 27-5-115(4) ("An action or proceeding involving an issue subject to arbitration must be stayed if an order or application for arbitration has been made under [the Uniform Arbitration Act]."); RCW 7.04A.070(5) ("If a party files a motion with the court to order arbitration … the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration ….").

Plaintiffs' motion for summary judgment—and all other proceedings regarding SB 266—must be stayed until there is a ruling on their petition for arbitration, or until arbitration occurs if ordered by the court. Until an arbitrator resolves—in the first instance—the parties' dispute regarding what the O&O Agreement says, Plaintiffs' claims regarding SB 266's effect on their rights under the O&O Agreement are not ripe for judicial review.

II. A stay of summary judgment proceedings is warranted under Fed. R. Civ. P. 56(d).

Because Plaintiffs' claims must be stayed pending resolution of their petition for arbitration, this Court need not reach this section or the following. However, in the event this Court does not issue a stay pursuant to the arbitration clause and petition to compel arbitration, a stay is necessary to allow the State to conduct discovery to respond to Plaintiffs' argument and statement of undisputed facts.

Federal Rule of Civil Procedure 56(d) provides that, if a party responding to summary judgment "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to ... take discovery; or (3) issue any other appropriate order."

Plaintiffs filed twelve pages of "undisputed facts" with their summary judgment motion. (Doc. 103.) These "facts" pertain to the effect on Plaintiffs of legislative mandates in other states, estimates of the useful life of Colstrip, economic impacts to Plaintiffs of not closing Colstrip, arbitration proceedings between the owners and operators of Colstrip, and discussions among the owners and operators. *See generally id.* The State is not an owner or operator of Colstrip, nor is it a party to the arbitration proceedings. It is severely disadvantaged by not having access to information Plaintiffs possess about these issues.

The State disputes Plaintiffs' "facts" until it can verify them. To that end, on November 10, 2021, the State propounded discovery requests on Plaintiffs. These requests, attached as Exhibit A to the undersigned's declaration in support of this motion, ask for information and documents relevant to Plaintiffs' claims and the State's defenses, including:

- Governmental mandates faced by Plaintiffs that allegedly require them to shut down Colstrip;
- Documents and information regarding contract disputes between the owners and operators of Colstrip;
- The status of arbitration proceedings and related information;

- Information regarding the alleged "expense of out-of-state utilities necessarily seeking to comply with certain governmental mandates to eliminate the use of coal-fired electricity";

- Information regarding how SB 266 impairs Plaintiffs' contract rights, including the bases for Plaintiffs' interpretation of the O&O Agreement;

- Information regarding each Plaintiff's customer base and their inability to serve those customers using Colstrip;

- Information regarding the O&O Agreement and how the parties have interpreted it historically;

- Information regarding Plaintiffs' plans for transitioning from Colstrip;

- Information regarding past budget approvals;

- Information regarding Plaintiffs' statement that SB 266 "would punish Colstrip owners for exercising their rights under the O&O Agreement";

- Information regarding Plaintiffs' claim that SB 266 discriminates against them;

- Information regarding how Plaintiffs are allegedly burdened by SB 266 and their claim that "[t]he burdens on [Plaintiffs] are great";

- Information regarding alleged harm caused to Plaintiffs by SB 266;

- Documents and information regarding Plaintiffs' alleged obligation to remove Colstrip from their energy portfolio and steps they have taken to do so;

- Persons with knowledge of Plaintiffs' allegations; and

- Plaintiffs' long-term electricity portfolio plans and the impact of potential closure of Colstrip.

(Brown Declaration (Decl.), ¶ 9.)

This information is essential to respond to Plaintiffs' motion for summary judgment. *Id.* ¶¶ 8–11. Whether—and the extent to which—Plaintiffs are allegedly harmed by SB 266 is central to claims set forth in their Complaint that SB 266 is discriminatory in violation of the federal commerce clause, that keeping Colstrip open is detrimental to them, and that SB 266 contravenes the language of the O&O Agreement (though, as stated above, this is an issue for arbitration). *E.g.*, Doc. 32, ¶ 123 ("The burdens on the Pacific Northwest Owners … are great."). Discovery is also necessary to respond to Plaintiffs' summary judgment allegations that SB 266 impairs Plaintiffs' contract rights, harms them, and is discriminatory. *See generally*, Doc. 104.

And after reviewing responses to Plaintiffs' discovery requests, it may be necessary for the State to promulgate additional requests, or to depose Plaintiffs' representatives to glean further information. Therefore, in the event the Court does not stay the proceedings due to the fact that the issues underlying Plaintiffs' claims are subject to arbitration,

the State requests a six-month extension of time to respond to Plaintiffs' summary judgment motion so that it can conduct discovery as to Plaintiffs' claims.

Notably, Plaintiffs will not be prejudiced by this extension because there is a preliminary injunction in place (Doc. 100), and there is no scheduling order currently in effect in this case. The parties have not even filed their preliminary pretrial statements yet. By contrast, the State will be severely prejudiced if forced to respond to summary judgment with insufficient information.

III. A stay of summary judgment proceedings serves the interests of judicial economy.

In addition to the reasons set forth above, a stay of summary judgment will also serve the interests of judicial economy. Plaintiffs have moved to consolidate this case with Cause No. CV 21-58-BLG-SPW. (Doc. 44.) As this Court noted in its October 21, 2021 order staying that motion, there is a pending motion to remand in Cause No. CV 21-58-BLG-SPW. (Doc. 101 at 2.) If the motion to remand is denied, and if this case is consolidated with the other case, Plaintiffs likely will have to either designate the operative complaint or file a consolidated complaint. This issue is further complicated by the fact that Talen is the plaintiff in Cause

No. CV 21-58-BLG-SPW and a defendant in this case. Given these issues, there is the potential that Plaintiffs' summary judgment motion may be mooted by consolidation. Therefore, for the same reasons that the Court issued a stay on Plaintiffs' motion for consolidation, it should issue a stay on Plaintiffs' motion for summary judgment until the motion to remand in Cause No. CV 21-58-BLG-SPW is denied or, if granted, the motion for consolidation in this case is resolved.

CONCLUSION

Plaintiffs' claims regarding the constitutionality of SB 266 are not ripe because they are based on Plaintiffs' disputed interpretation of the O&O Agreement, which is subject to arbitration. Therefore, this Court should stay proceedings with respect to Plaintiffs' fourth and fifth claims for relief until arbitration has occurred. Alternatively, this Court should stay the State's deadline to respond to summary judgment for six months to allow the State an opportunity to conduct discovery. And finally, the interests of judicial economy support a stay as Plaintiffs' pending motion

to consolidate could affect the operative complaint and, correspondingly, summary judgment.

DATED this 19th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,190 words, excluding tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

/s/ *Aislinn W. Brown*
AISLINN W. BROWN

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: November 19, 2021

/s/ *Aislinn W. Brown*
AISLINN W. BROWN