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Attorneys for Defendant State of Montana

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

DECLARATION OF
AISLINN BROWN IN
SUPPORT OF STATE OF
MONTANA'S MOTION TO
STAY—FED. R. CIV. P. 56(d)

Aislinn W. Brown hereby declares as follows.

1. I am one of the attorneys representing Defendant Austin Knudsen, in his official capacity as Attorney General for the State of Montana (State), and I am competent to testify to the matters set forth in this declaration.

2. One of my roles in defending this case is to conduct discovery into Plaintiffs' claims, including the specific factual allegations made in their Amended Complaint (Doc. 32).

3. Plaintiffs' filed their Amended Complaint challenging Senate Bill (SB) 266 on May 19, 2021. *Id.*

4. One week later, Plaintiffs filed their preliminary injunction motion, requesting that the Court enjoin the State from enforcing SB 266 against them. (Doc. 37.) On October 13, 2021, the Court granted Plaintiffs' motion. (Doc. 100.)

5. A preliminary pretrial conference that was initially set for August 3, 2021, has been vacated along with all deadlines. (Doc. 73.) There is currently no scheduling order in this case, and none of the parties have filed a preliminary pretrial statement.

6. On October 29, 2021, Plaintiffs filed a motion for summary judgment on two of their three claims related to SB 266. (Docs. 102–106.)

7. On November 10, 2021, the State propounded discovery requests on Plaintiffs. (Exh. A.) No other discovery has been conducted in this matter, though counsel for Talen has indicated it wishes to depose Plaintiffs' representatives.

8. At this stage in litigation, the State cannot present facts essential to its position because it possesses very little information about the allegations in Plaintiffs' Amended Complaint and summary judgment motion. As a non-party to the Ownership and Operation Agreement (O&O Agreement) governing Colstrip Units 3 and 4, the State is severely disadvantaged in its ability to respond to Plaintiffs' motion without knowledge of the underlying facts.

9. In addition to the questions set forth in the attached discovery requests, in order to be able to meaningfully defend itself in this case, the State must be able to investigate the claims made by Plaintiffs, including through discovery requests and depositions seeking the following information:

- a. Governmental mandates faced by Plaintiffs that allegedly require them to shut down Colstrip. (Doc. 32, ¶ 3.)

- b. Documents and information regarding contract disputes between the owners and operators of Colstrip. *Id.*
- c. The status of arbitration proceedings and related information. *Id.*
- d. Information regarding “the expense of out-of-state utilities necessarily seeking to comply with certain governmental mandates to eliminate the use of coal-fired electricity.” *Id.*, ¶ 7.
- e. Information regarding how SB 266 impairs Plaintiffs’ contract rights, including the bases for Plaintiffs’ interpretation of the O&O Agreement. *Id.*, ¶¶ 9, 127–143.
- f. Information regarding each Plaintiff’s customer base and their inability to serve those customers using Colstrip. *Id.* ¶¶ 18–21.
- g. Information regarding the O&O Agreement and how the parties have interpreted it historically. *Id.*, ¶¶ 28–38.
- h. Information regarding Plaintiffs’ “plan[s] for and transition from Colstrip.” *Id.*, ¶ 43.
- i. Information regarding past budget approvals. *Id.*, ¶ 50.

j. Information regarding Plaintiffs' statement that SB 266 "would punish Colstrip owners for exercising their rights under the O&O Agreement." *Id.*, ¶¶ 64, 66, 70.

k. Information regarding Plaintiffs' claim that SB 266 discriminates against them. *Id.*, ¶ 120.

l. Information regarding how Plaintiffs are "burden[ed]" by SB 266 and their claim that "[t]he burdens on [Plaintiffs] are great." *Id.*, ¶ 123.

m. Information regarding alleged harm caused to Plaintiffs by SB 266.

n. Documents and information regarding Plaintiffs' alleged obligation to remove Colstrip from their energy portfolio and steps they have taken to do so. (Doc. 38 at 33.)

o. Persons with knowledge of Plaintiffs' allegations.

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

10. The State has identified a significant number of "facts" that the Plaintiffs have alleged in supporting their constitutional claims,

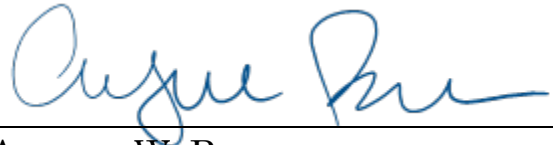
interpretation of the O&O Agreement, and claimed harms and injuries, for which the State must be permitted discovery in order to defend this case.

11. Proceeding with Plaintiffs' motion for summary judgment at this time will significantly (if not completely) prejudice the State by denying discovery into the claims made by Plaintiffs, particularly given that the State is not a party to the O&O Agreement and does not have readily available access to this information. Discovery may demonstrate that Plaintiffs' interpretation of the O&O Agreement is baseless or that the perceived harm is not supported by sufficient admissible facts. These facts and defenses must be fleshed out before any dispositive motion is entertained.

12. The State submits that this case should proceed in the normal course of civil litigation. Plaintiffs' pending motion for summary judgment should be stayed for six months so that the State has the opportunity to proceed through discovery.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 19th day of November, 2021.



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

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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.

CV-21-47-SPW-KLD

STATE OF MONTANA'S
FIRST DISCOVERY
REQUESTS TO PLAINTIFFS

To: Plaintiffs and their attorneys.

Pursuant to Rules 26, 33, 34, and 36 of the Federal Rules of Civil Procedure, you are hereby required to answer under oath the following discovery requests from Defendant Austin Knudsen, in his official capacity as Attorney General for the State of Montana.

INSTRUCTIONS

A. In answering these discovery requests, you are required to not only furnish such information as you know of your own personal knowledge, but also information available to you, including but not limited to, nonprivileged information or facts in the possession of or known to your attorneys, investigators, or anyone else acting in your or their behalf. These discovery requests shall be deemed continuing in nature, and supplemental answers shall be promptly served if Plaintiffs directly or indirectly obtain further information of the nature sought herein between the time answers are served and time of trial.

B. If you refuse to answer or respond to any discovery request, in whole or in part, identify the basis for your refusal to answer or respond, including any claim of privilege.

C. If you assert a claim of privilege to the production of any document requested, identify or state for each document the following information:

1. The nature or type of privilege claimed;
2. A precise statement of the facts upon which the claim of privilege is based;
3. The following information as to each purportedly privileged document:
 - a. The nature of the document, *e.g.*, letter, memo, minutes, etc.;
 - b. The date it bears, if any;
 - c. The identity of the person preparing or sending it;
 - d. The identity of each person receiving it or any copy; and,
 - e. The subject matter of the document.

If you contend only a portion of the document is privileged, please provide a redacted copy of the document with a listing of the above information as to the redacted portion.

D. With respect to any discovery request, if you can provide some, but not all, of the information requested, provide the information you can and specifically identify each item for which you do not have sufficient information to fully respond.

E. The documents requested below shall be produced and made available for inspection and copying at the office of the Attorney General, 215 North Sanders, Helena, Montana, 59601. Alternatively, you may provide copies of responsive documents with your answers to the discovery requested.

F. When the discovery request is directed to “each Plaintiff,” then every Plaintiff shall individually answer that discovery request and so indicate on a separate attestation sheet, attached hereto. Discovery requests limited or directed to any specific Plaintiff will be indicated by that party’s name in bold.

G. Each answering Plaintiff shall use the attached signature page corresponding to the discovery requests.

DEFINITIONS

1. “Plaintiffs,” “you,” and “your” means Portland General Electric Company; Avista Corporation; Pacificorp; and Puget Sound Energy, Inc.
2. “O&O Agreement” means the Ownership and Operation Agreement, dated May 6, 1981, and each of its Amendments.
3. “Colstrip Owners and Operators” means each Plaintiff; Northwestern Corporation; and Talen Montana, LLC.
4. “Colstrip” means Units 3 and 4 of the Colstrip power plant.
5. “SB 266” means Senate Bill 266, passed during the 2021 session of the Montana Legislature.
6. “Pacific Northwest electricity region” means the electricity grid located in Montana, Idaho, Oregon, and Washington.
7. “Useful life” means the estimated duration of utility placed on assets that terminate at the point when assets are expected to become obsolete, require major repairs, or cease to deliver economical results.
8. “Rate base” means the investor-supplied plant facilities and other investments required to supply utility service to customers.

9. The term “person” or “individual” includes any natural person, firm, company, association, partnership, limited partnership, joint venture, corporation, limited liability company, and any other form of legal entity, and any city, state, or federal government entity or any agency, board or court thereof.

10. The terms “identify” or “identity,” when used in reference to a natural person, shall mean to state his or her full name, current or last known home and business addresses, current or last known employer and position held, and current or last known home and business telephone numbers.

11. The terms “identify” or “identity,” when used with respect to a person or individual other than a natural person, shall mean to state its full name, address, telephone number, and the nature of its organization (*e.g.*, corporation, partnership, association, etc.).

12. The terms “identify” or “identity,” when used in reference to a document, shall mean to state the date and author, type of document (*e.g.*, letter, email, text message, memorandum, telegram, chart, etc.) or some other means of identifying it, and its present location and custodian. Documents prepared before or after any period covered by these

discovery requests but that relate or refer thereto are to be included. If you are not in the possession of the document, “identify” or “identity” shall also mean describing in detail whether it was lost, destroyed or otherwise disposed of and the accompanying circumstances.

13. The terms “identify” or “describe,” when used with respect to an act, occurrence, contract, transaction, decision, statement, communication or conduct (collectively, “act”), mean to describe in detail the event or events constituting the act, or what transpired; the place, the date, and time of the act; and to identify the persons involved in or with the act and the documents referring or relating thereto.

14. The term “document” or “documents” shall mean any type of written, typewritten, printed, recorded, or other material from which information can be obtained including, but not limited to, all written, graphic, or printed matter of any kind, however produced or reproduced, including all originals, drafts, working papers and nonidentical copies, whether different from the originals by reason of any notation made on such copies or otherwise including, but not limited to, papers, books, patents, letters, photographs, tangible things, correspondence, emails, text messages, telegrams, cables, telexes or telefax messages or

transmissions, memoranda, notes, data, notations, reports, diaries, logs, work papers, interoffice communications, minutes, records of any communications (including telephone or other conversations, interviews, conferences or committee or other meetings), affidavits, statements, summaries, opinions, reports, studies, analyses, plans, specifications, contracts, licenses, agreements, journals, books or other records of accounts, summaries of accounts, bills, receipts, balance sheets, income statements, advertisements, desk calendars, appointment books, diaries, lists, charts, graphs, maps, surveys, computer programs, computer records or impressions, microfilm, drawings, diagrams, sketches, audio recordings, video recordings, and all other records kept by electronic, photographic, or mechanical means, and things similar to any of the foregoing, however denominated.

The term “document” or “documents” shall further include all written, printed, typed, recorded, electronically stored, or graphic matter of every kind and description, both originals and copies, and all attachments and appendices thereto, which are in your possession, custody, or control. Without limitation of the term “possession, custody, or control,” a document is deemed to be within your possession, custody or control if

you physically possess the document or a copy thereof or if you have access to or the right to secure a document or a copy thereof from any other person. The term “document” or “documents” shall further include the meaning of the terms “writings and recordings” and “photographs” as those terms are defined in Rule 1001, Federal Rules of Evidence.

15. The terms “basis” or “bases” as in the bases for an allegation shall mean the facts, cause, grounds or reasons for such allegation.

16. The terms “relate,” “in relation to,” or “relating to” mean directly or indirectly referring to, pertaining to, discussing, describing, consisting of, arising out of, commenting on, constituting, evidencing, referencing, comprising, or reflecting upon a stated subject, in whole or in part, or being in any way or manner be factually or logically connected with the matter discussed.

17. “Concerning” means relating to, referring to, describing, evidencing, or constituting.

18. In construing these discovery requests, the singular of each term shall include the plural and the plural shall include the singular, and a masculine, feminine, or neuter pronoun shall not exclude the other genders.

19. In answering these discovery requests, words used in the interrogatories, requests for admissions, and/or requests for production of documents are to be given their ordinary meaning in the context of the question posed. Objections such as “vague” and/or “ambiguous” may be avoided by the answering party or entity consulting a dictionary or other resource in order to understand the ordinary meaning of the word contended to be “vague” and/or “ambiguous.”

20. Each of the following discovery requests is directed to all four Plaintiffs.

DISCOVERY REQUESTS

Request for Production No. 1: Please provide a copy of the O&O Agreement, including all of its amendments.

Response:

Request for Production No. 2: Provide all correspondence between the Colstrip Owners and Operators related to the O&O Agreement.

Response:

Request for Production No. 3: Provide all documents and correspondence concerning Plaintiffs' attempts to remove Colstrip from their energy portfolios.

Response:

Request for Production No. 4: Provide all correspondence between Colstrip Owners and Operators regarding "contract disputes" as alleged in Doc. 32, ¶ 3.

Response:

Request for Production No. 5: Provide all public statements, including statements to media, press releases, interviews, and all other statements regarding the O&O Agreement.

Response:

Request for Production No. 6: Provide all public statements, including statements to media, press releases, interviews, and all other statements regarding Plaintiffs' alleged obligation to remove Colstrip from their energy portfolios.

Response:

Request for Production No. 7: Provide all correspondence between Colstrip Owners and Operators regarding settlement, including alternative dispute resolution and arbitration.

Response:

Interrogatory No. 1: Identify each and every “governmental mandate[] to eliminate the use of coal-fired electricity” that each Plaintiff is subject to. (See Doc. 32, ¶ 3.)

Response:

Interrogatory No. 2: Identify each and every way SB 266 “impairs the parties’ rights under the O&O Agreement” (Doc. 32, ¶ 5) including each specific provision of the O&O Agreement Plaintiffs believe is impaired with the reasons why.

Response:

Interrogatory No. 3: Identify each and every way SB 266 violates the Commerce Clause. (See Doc. 32, ¶ 8.)

Response:

Interrogatory No. 4: Identify each and every way SB 266 violates the Contract Clause. (See Doc. 32, ¶ 9.)

Response:

Interrogatory No. 5: Identify each and every way SB 266 is void for vagueness. (See Doc. 32, ¶ 10.)

Response:

Interrogatory No. 6: Identify whether Colstrip Owners & Operators are currently arbitrating this dispute and the status of that arbitration.

Response:

Interrogatory No. 7: Identify each and every case—in court, arbitration, or otherwise—that each Plaintiff has or currently is litigating regarding the laws listed in response to Interrogatory No. 1.

Response:

Interrogatory No. 8: Identify each and every person with knowledge of the allegations set forth in Plaintiffs' Amended Complaint (Doc. 32) and motion for summary judgment (Docs. 102–106), including the subject matter of that knowledge and contact information for that person.

Response:

Interrogatory No. 9: Identify whether any Plaintiffs lobbied on behalf or against the laws listed in Response to Interrogatory No. 1, including a description of those lobbying efforts.

Response:

Request for Production No. 8: Provide all public statements, including statements to media, press releases, interviews, and all other statements each Plaintiff or its agents have made regarding the laws listed in response to Interrogatory No. 1.

Response:

Request for Production No. 9: Provide all documents and communications regarding Plaintiffs' actions "to plan for and transition from Colstrip," as set forth in Paragraph 3 of Doc. 32.

Response:

Request for Production No. 10: Provide all documents reflecting “disputes” between Colstrip Owners and Operators as alleged in Doc. 33, ¶ 46.

Response:

Request for Production No. 11: Provide all documentation of budget negotiations between Colstrip Owners and Operators for the past five years.

Response:

Request for Production No. 12: Provide copies of all budgets and draft budgets for operation of Colstrip for the past ten years.

Response:

Request for Production No. 13: Provide all documents and correspondence between Plaintiffs and any other person related to SB 266, both before and after enactment.

Response:

Request for Production No. 14: Identify each expert you intend to call in this case and provide a summary of their expected testimony.

Response:

Interrogatory No. 10: Describe any efforts that Plaintiffs have engaged in to sell their ownership interests in Colstrip.

Response:

Interrogatory No. 11: State whether Plaintiffs are currently willing to sell their ownership interest in Colstrip.

Response:

Request for Production No. 15: Provide all documents and communications related to sales—completed, attempted, or proposed, of Colstrip Units 3 and 4.

Response:

Interrogatory No. 12: Identify each and every reason you believe “[a] decision to close one or both units of Colstrip falls within broad categories of Committee votes requiring 55% approval.” (Doc. 38 at 11.)¹

Response:

Interrogatory No. 13: Identify each and every way that “Montana could fund alternative sources of energy without imposing a discriminatory burden on [Plaintiffs].” (Doc. 38 at 29.)

Response:

Interrogatory No. 14: Identify each and every way that Plaintiffs, “under the respective long-term plans, . . . have signaled their intent to remove Colstrip Units 3 and 4 from their Washington and Oregon electricity portfolios in the interest of their customers.” (Doc. 38 at 33.)

Response:

¹ Citations to Doc. 38 pages are citations to the ECF-stamped pages.

Request for Production No. 16: Provide all documentation supporting your claim that Plaintiffs “chose not to call for” a vote “due to the risk of aggressive enforcement of [SB] 266.” (Doc. 39-2, ¶ 42.)

Response:

Request for Production No. 17: Identify each and every basis for your statement that there is no “risk that the PNW Owners will close Colstrip in the immediate future.” (Doc. 38 at 35.)

Response:

Request for Production No. 18: Provide minutes, recordings, and any other documents from all meetings concerning closure of Colstrip Units 3 or 4.

Response:

Request for Production No. 19: Provide any and all documents related to your statement that “PSE has always supported work necessary for reliability, safety and complaints (including environmental compliance).” (Doc. 39-2, ¶ 33.)

Response:

Interrogatory No. 15: Identify the bases for your statement that PSE believed the 2021 budget “has excessive or unnecessary spending.” (Doc. 39-2, 44.)

Response:

Interrogatory No. 16: Identify how SB 266 has “disrupted the owners’ arbitration.” (Doc. 39-3, ¶ 18.)

Response:

Interrogatory No. 17: Identify what “Washington law” you are referring to in Doc. 39-3, ¶ 24.

Response:

Request for Production No. 20: Provide a copy of the proposal you planned to submit on May 19, 2021, as discussed in Doc. 39-3, ¶ 21.

Response:

Request for Admission No. 1: Admit that the laws identified in Interrogatory No. 1 do not prevent you from providing power from Colstrip to customers in states other than Washington and Oregon.

Response:

Request for Admission No. 2: Admit that the sole reason for your desire to remove Colstrip from your energy portfolio is the impact of the laws listed in response to Interrogatory No. 1.

Response:

Request for Admission No. 3: Admit that using accelerated depreciation of Plaintiffs' remaining rate base in Colstrip from your portfolio will result in a higher price impact to your customers.

Response:

Request for Admission No. 4: Admit that the authorized accelerated depreciation of Plaintiffs' remaining rate base in Colstrip does not reflect the remaining useful life of the plant.

Response:

Request for Admission No. 5: Admit that the accelerated depreciation of Plaintiffs' remaining rate base in Colstrip is the result of political requirements in Oregon and Washington.

Response:

Request for Admission No. 6: Admit that the Northwest electricity region is facing a capacity shortage in the near future.

Response:

Request for Admission No. 7: Admit that closure of Colstrip will reduce the dispatchable capacity resources available in the Northwest electricity region.

Response:

Interrogatory No. 18: If your response to any of the Requests for Admission is anything other than an unqualified admission, identify each and every reason for your response.

Response:

DATED this 10th day of November, 2021.

AUSTIN KNUDSEN
Montana Attorney General

KRISTIN HANSEN
Lieutenant General

DAVID M.S. DEWHIRST
Solicitor General

/s/ Aislinn W. Brown

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Attorney for Defendant
Austin Knudsen

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing document by

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Dated: November 10, 2021

/s/ Rochell Standish

ROCHELL STANDISH