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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**BILLINGS DIVISION**

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| **PORTLAND GENERAL ELECTRIC COMPANY; AVISTA CORPORATION; PACIFICORP; and PUGET SOUND ENERGY, INC.**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**NORTHWESTERN CORPORATION; TALEN MONTANA, LLC; AUSTIN KNUDSEN, in his official capacity as Attorney General for the State of Montana,**<br><br>**Defendants.** | Case No. 21-cv-00047-SPW-KLD<br><br>**DEFENDANT NORTHWESTERN CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND APPOINT A MAGISTRATE JUDGE TO OVERSEE ARBITRATION PROCEDURE NEGOTIATIONS** |

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## INTRODUCTION

Plaintiffs want to shut down Colstrip Units 3 and 4 by the end of 2025. They have made that goal clear. The actions they took and views they expressed during the Colstrip 2021 budgeting process, from fall 2020 into winter 2021, made that threat palpable. Because Defendant NorthWestern Corporation depends on Colstrip Units 3 and 4 to generate electricity to meet the needs of its Montana customers, it commenced arbitration to address that real threat, following the procedures set forth in the Colstrip Ownership and Operation Agreement arbitration clause (O&O Agreement section 18).

The parties agree this dispute over the ongoing operation of Colstrip Units 3 and 4 ("the Project" or "Colstrip") belongs in arbitration. They disagree, however, on the basic structure of that arbitration, with Plaintiffs (also known as the Pacific Northwest Owners ("the PNW Owners")) calling for application O&O Agreement section 18, and with Defendant Talen Montana LLC ("Talen") insisting on the structure required by Montana Senate Bill 265, legislation enacted three months after Defendant NorthWestern Corporation ("NorthWestern") commenced arbitration.

Plaintiffs brought this lawsuit in part to challenge the viability of Senate Bill 265 and Senate Bill 266. This is but one of three lawsuits now venued in this

District.[1] These lawsuits, while not addressing the merits of the claims in arbitration, create a real problem for the proper management of the Project and the delivery of electricity to NorthWestern's Montana customers: they delay the prosecution and outcome of the arbitration NorthWestern began in March 2021, over eight months ago. That ongoing delay jeopardizes NorthWestern's ability to plan for how it will meet the electricity needs of its Montana customers.

It is imperative that the parties proceed promptly to arbitration. For this reason, NorthWestern urges the Court to enter an order compelling arbitration and referring the matter to a magistrate judge to oversee the negotiations of the processes and procedures by which that arbitration will proceed. Only then will the parties' rights truly be protected.

## BACKGROUND

### A. The Project

The Project consists of two active coal-fired generating units—Units 3 and 4—capable of producing up to 1,480 Megawatts of electricity.[2] Declaration of John

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[1] *Talen Montana, LLC v. Avista Corporation; et al.* case number: CV 21-58-BLG-SPW-TJC; *Avista Corporation et al. v. Northwestern Corporation et al.* case number CV 21-90-BLG-SPW-TJC. Matter CV-58 is subject to a motion to remand.

[2] Units 3 and 4 were constructed in the 1980s and were operational in 1984 and 1986, respectively. Since February 2002, the Parties jointly owned the Project in varying shares

Tabaracci dated Dec. 2, 2021 ("Second Tabaracci Decl.") ¶ 5. The Parties, other than Defendant Austin Knudsen, in his official capacity as Attorney General for the State of Montana, are Owners of the Project as tenants in common (O&O Agreement § 2). The O&O Agreement, entered into on May 6, 1981, and amended four times thereafter, governs the operation of the Project.

### B. NorthWestern's Reliance on the Project as a Source of Electrical Power

NorthWestern provides energy to 743,000 customers in Montana, South Dakota, Nebraska, and Yellowstone National Park, including approximately 379,400 electricity customers (individuals and businesses) in Montana alone. Long term resource planning is a core responsibility of NorthWestern's portfolio management; it is essential to ensuring safe, reliable, and affordable electrical service to its customers. Because development of new utility assets can take many years, long-range resource planning is necessary to identify a multi-year course of action to ensure there are enough utility resources to meet customer needs at a reasonable price and to comply with applicable laws and regulations.

Montana law requires NorthWestern, as a regulated public utility, to provide a long-range plan every three years to ensure efficient utility operations, efficient use of utility services, and efficient rates; and to ensure a clean, healthful, safe, and economically productive environment. MCA § 69-3-1202(1)-(2). Section 69-3-1204 of the Montana Code requires a long-range plan to include specific

considerations.

Planning for reliable service requires NorthWestern to ensure that it has enough resources to meet its customer demands every hour of the year, even with changing weather and demands. Because energy use fluctuates hourly, daily, and seasonally, NorthWestern must ensure that it has sufficient resources to serve demand during the times of the year when demand is highest.

An additional challenge is the time required for NorthWestern to be in a position to use new sources of electricity.[3] NorthWestern would need to plan for and locate new sources of electrical generation. Some alternatives may require several years of development, possibly including facility and transmission construction. NorthWestern would also need to obtain regulatory approval for new sources of electrical generation, and it would need time to address each issue long before the Project is to close. Otherwise, NorthWestern could suffer significant damages and the citizens of Montana—NorthWestern's primary customers—could suffer electricity shortfalls. Second Tabaracci Decl. ¶ 6.

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[3] Distinct types of generating resources have different operating characteristics that affect their ability to provide capacity and energy. Renewable energy resources—such as wind and solar—are considered intermittent because they cannot be called upon when needed but instead only produce electricity when conditions are right. Declaration of John Tabaracci (Doc. 61-1) "("Tabaracci Decl.") ¶ 20.

### C. The PNW Owners' View of the Project and Its Future Beyond 2025

In 2017, Plaintiff Avista Corporation ("Avista") began considering scenarios to retire Colstrip Units 3 and 4 in 2030 and 2035.[4] In its 2020 Integrated Resource Plan ("2020 IRP"), Avista moved up the retirement date when it assumed "Colstrip no longer serves customers after 2025."[5] Noting the directives of the Washington Clean Energy Transformation Act (Chapter 19.405 RCW)[6], Avista posed three likely scenarios in its 2020 IRP for Units 3 and 4 after December 31, 2025,

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[4] Avista 2017 Electric Integrated Resource Plan Final at 12-2; 12-6; 12-8; 12-9; Table 12.4, https://www.myavista.com/-/media/myavista/contentdocuments/about-us/our-company/irp-documents/2017-electric-irp-final.pdf.

[5] Avista 2020 Electric Integrated Resource Plan Final ("Avista 2020 Electric IRP") at 1-1, n.1. 2020; *see also* 2-1; 10-5 (stating, "This IRP modeled Colstrip Units 1 and 2 to be offline at the end of 2019 and one of the remaining units is modeled to go offline at the end of 2025); 12-1 (stating "Colstrip is more economically retired at the end of the 2025/26 heating season as compared to 2035.") 13-5 (This IRP's analysis determines Colstrip is best to shut down after 2025 compared to…a 2035 closure or operating a single unit through 2035."), https://www.myavista.com/-/media/myavista/content-documents/about-us/ourcompany/irp-documents/2020-electric-irp-final-with-cover.pdf.

[6] In May 2019, the Clean Energy Transformation Act ("CETA") became law in the state of Washington. RCW 19.405, *et seq.* Avista, PSE, and PacifiCorp are based in Washington and subject to the CETA, which prohibits Washington-based utilities from recovering the cost of coal-based energy from their customers beginning in 2025.

including shutting down both units.[7]

Avista agreed not to support capital expenditures that extend the Project's operational life beyond December 31, 2025.[8] Based on its 2020 IRP, Avista has also obtained approval from the Washington Utilities and Transportation Commission ("WUTC") to assume for purposes of depreciation that Colstrip Units 3 and 4 will no longer be available for power generation as of the end of 2025.[9]

In 2017, PSE began analyzing alternatives to retiring the Project as early as 2025.[10] In June 2017, the Seattle City Council passed a resolution explicitly calling on PSE to retire Colstrip by 2025.[11] In August 2017, the Olympia City Council

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[7] Avista 2020 Electric IRP at 4-21("one or more of the units will continue to operate with the same ownership; one or more of the units will continue to operate, but the ownership in the units will change; and the units will be shut down").

[8] *Wash. Utils. & Transp. Comm'n v. Avista Corp. d/b/a Avista Utils.,* Dockets UE-190334, UG-190335, UE-190222 (*Consolidated*), Order 09, Final Order Rejecting Tariff Sheets; Approving and Adopting Partial Multiparty Settlement Stipulation; Resolving Contested Issues; Authorizing and Requiring Compliance Filing, 19-20, ¶ 51 (Mar. 25, 2020).

[9] Avista 2020 Electric IRP at 4-5, n.6 (Avista modeled the depreciable life ending in 2027 in Idaho but had not received authorization from Idaho at the time it published its 2020 Electric IRP).

[10] PSE 2017 Integrated Resource Plan ("PSE 2017 IRP") 4-5; 4-28, https://www.pse.com/-/media/PDFs/001-Energy-Supply/001-Resource-Planning/8a_2017_PSE_IRP_Chapter_book_compressed_110717.pdf

[11] *Id.* at 3-4; *see also* Seattle City Council Legislative Summary Res. 31757, http://clerk.seattle.gov/~archives/Resolutions/Resn_31757.pdf.

passed a similar resolution.[12] Then in May 2019, Washington passed the CETA.

In 2019, Plaintiff PacifiCorp modified the preferred retirement year from 2046 to 2027 for the Project.[13] In June 2020, PacifiCorp agreed to accelerate its exit by 2023. On July 21, 2020, it reached a settlement in Washington to conclude its investment in Colstrip Unit 4 by the end of 2023.[14]

Plaintiff Portland General Electric Company's ("PGE") 2019 IRP reflected the depreciation of the Project by the end of 2030 and the removal of the units from PGE's portfolio by the end of 2034.[15] However, during the 2019 public process, PGE stakeholders "requested that PGE incorporate Colstrip scenarios that contemplate the removal of Colstrip from PGE's portfolio by 2027."[16] In July

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12 *Id.*; *see also* Olympia City Council Resolution No. M-1898, http://m.olympiawa.gov/~/media/Files/Executive/Council Resolutions/M-1898.pdf?la=en.

13 PacifiCorp 2019 Integrated Resource Plan Vol. 1 at 13, Table 5.2, https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/energy/integrated-resource-plan/2019_IRP_Volume_I.pdf.

14 Adam Fondren, *Cosltrip owner accelerates exit plans, again*, Billings Gazette, July 22, 2020, https://billingsgazette.com/news/state-andregional/colstrip-owner-accelerates-exit-plans-again/article_9d722c23-6ff7-5269-adca-f893b77a802c.html.

15 PGE 2019 Integrated Resource Plan ("PGE 2019 IRP"), July 2019 at 208, https://downloads.ctfassets.net/416ywc1laqmd/6KTPcOKFlLvXpf18xKNseh/271b9b966c913703a5126b2e7bbbc37a/2019-Integrated-Resource-Plan.pdf.

16 *Id.*

2021, Oregon's clean energy bill was signed into law. As a result, PGE must submit plans to reduce emissions by 80% by 2030, 90% by 2035, and 100% by 2040.

### D. The 2021 Budgeting Process

#### 1. Budgeting Under the O&O Agreement

Sections 7 and 10(a) of the O&O Agreement require Talen as Operator to submit a Construction and Operating Budget to the Project Committee for approval.

> On or before September 1 of each year, the Operator shall submit to the Committee a budget of its estimate of Costs of Operation by calendar months for the operating year beginning January 1 next following. Such budget shall be subject to approval by the [Project] Committee which approval shall not unreasonably be withheld. The [Project] Committee shall approve such budget or a revised budget on or before November 1 in any such year.

#### 2. Talen, as Operator, Commences the 2021 Budgeting Process

In compliance with O & O Agreement section 10, on September 1, 2020, Talen provided the Owners with the proposed 2021 Colstrip Units 3 & 4 Operating Budget and the corresponding documents. Talen requested approval of the proposed budget by November 1, 2020. Second Tabaracci Decl. ¶ 7.

#### 3. The PNW Owners' Goal of Closing the Project by 2025 and the Damage that Would Inflict on NorthWestern

Between September 1, 2020, and November 19, 2020, the parties exchanged

multiple correspondence—Talen sought guidance from the PNW Owners on how the budget could be revised to meet the $13 million capital cost reduction the PNW Owners requested. The PNW Owners provided guidelines for Talen to revise the budget. NorthWestern stressed its reliance on the Project to meet its supply obligations and explained that while NorthWestern supports prudent reductions to the 2021 budget for Colstrip Units 3 and 4, it cannot and does not support cuts that put safety, environmental compliance, or reliability at risk. Second Tabaracci Decl. ¶ 8.

By letter dated November 19, 2020, the PNW Owners, in connection with the budgeting process, demanded that Talen, as both Operator and Owner, and NorthWestern "plan and successfully execute a strategy that provides a framework for our individual exits from the Colstrip Project within the next 60 months." Second Tabaracci Decl. ¶ 9.

In that same November 19, 2020 letter, the PNW Owners insisted the budget reflect "a change in operations [that] . . . provide[s] for a transition of the project in the long term," adding, "Ultimately, the 2021 Budget must realize savings and reflect a cost structure that is consistent with the orderly transition of the project as well as the exit of the majority of individual owners over the next 60 months." *Id.* at ¶ 10. The PNW Owners identified "[c]losure of one or both units within the next 60 months" as a key objective supported by key project and operational

assumptions (or alternatively closure of Unit 3 by 2025 and Unit 4 by 2027). *Id.* The PNW Owners reiterated their focus on closing the Project by 2025 in their letters of November 25, 2020, December 9, 2020, and January 7, 2021. *Id.* at ¶ 11. Ultimately, the parties arrived at a 2021 budget with the consent, and over the protests, of the PNW Owners. *Id.* at ¶ 12.

**4. The 2022 Budgeting Status**

In compliance with O & O Agreement section 10, on September 1, 2021, Talen provided the Owners with the proposed 2021 Colstrip Units 3 & 4 Operating Budget largely based on the costs incurred during 2021 budget year and the corresponding documents. Second Tabaracci Decl. ¶ 13. While O&O Agreement § 10 requires approval of the budget by November 1, the owners have not yet approved the 2022 budget. *Id.* at ¶ 15. Similar to last year, the PNW Owners maintain the proposed budget needs to be reduced by $25 million. *Id.* at ¶ 16. Discussions between the parties are ongoing. *Id.* at ¶ 17.

The PNW Owners claim their closure demands arise solely from Washington's CETA, RCW 19.405, *et seq.,* and ORS 757.518(2). They claim the Washington (and Oregon) legislative directives compel them to close the Project.

Pls.' Statement of Undisputed Facts ¶¶ 4, 14, Doc. 103.[17]

While the 2022 budgeting process is taking place after the commencement of arbitration, it reflects the need for prompt resolution of the issues in arbitration, as the PNW Owners' position on closing the Project by the end of 2025 has not changed and will not change. Nor will NorthWestern's position. The Project's operation is vital to NorthWestern's ability to meet customer demand, especially during peak demand, and acquisition of electrical energy in the open marketplace, with varying and perhaps prohibitive prices, is not a workable solution. NorthWestern would need years to plan and perhaps build alternate generating sources to meet customer demand were the Project to close. The recent actions taken by the PNW Owners show the dispute about whether the PNW Owners can bring about the Project's closure without the unanimous support of all the owners requires prompt resolution in arbitration. O&O Agreement § 18.

### E. The Arbitration

#### 1. NorthWestern Commences the Arbitration and the PNW Owners Respond

NorthWestern commenced arbitration by providing section 18's required 30-

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[17] Unbeknownst to NorthWestern, and further evidencing the need for the Court to compel the parties to move forward with arbitration, the PNW Owners planned to call a vote to close Colstrip Unit 3 at the Committee meeting on May 19, 2021, under the terms of the O&O Agreement. *Id.* at ¶ 14.

day notice to all Owners on February 9, 2021. Declaration of J Jackson ("Jackson Decl.") ¶ 4. It served its demand for arbitration on March 12, 2021, and its amended demand on April 2, 2021. *Id.* The issue to be resolved through arbitration is what vote is required to close Units 3 and 4 and the obligation of each co-owner to fund operations of the Project. Each of the PNW Owners served formal responses to NorthWestern's Amended Demand for Arbitration, each denying NorthWestern's claims and asserting their own counter demand seeking closure of the Project by December 31, 2025. *Id.* at ¶ 6. The PNW Owners claimed a majority of the Owners could close the Project. NorthWestern contended a unanimous vote of the Owners is required. *Id.* at ¶ 7. Talen has not formally responded to NorthWestern's Demand or Amended Arbitration Demand. *Id.* at ¶ 8.

**2. Negotiating the Arbitration Process to a Standstill**

O & O Agreement section 18 requires the parties to submit

> [a]ny controversies arising out of or relating to this Agreement . . . to an Arbitrator having demonstrated expertise in the matter submitted. * * * The arbitration shall be conducted in Spokane, Washington, pursuant to the Washington Arbitration Act, RCW Chapter 7.04 as the same may be amended from time to time. The Arbitrator shall render his decision in writing not later than thirty (30) days after the matter has been submitted to him, and such decision shall be conclusive and binding upon the Project Users.

Beyond these requirements, section 18 provides no guidance on how the parties are to select the arbitrator or the manner by which the arbitration is to proceed.

Although the Owners have had several teleconferences and email communications to address the terms of the arbitration, the parties have been unable to appoint an arbitrator or arbitrators or arrive at an arbitration process. Jackson Decl. ¶ 9.

From the onset, Talen and the PNW Owners have been at loggerheads. Talen, among other things, has departed from the terms of the O&O Agreement by objecting to one arbitrator and to venue in Spokane. Instead, similar to the language of Senate Bill 265, Talen originally demanded a panel of three arbitrators, and has consistently demanded venue of the arbitration in Montana and for Montana law to govern. *Id.* at ¶ 10. The PNW Owners have been steadfast in their position there be only one arbitrator, the venue of the arbitration in Washington, and for Washington law to govern. *Id.* at ¶ 11. NorthWestern, which has been willing to meet the parties on any point in order to proceed with the arbitration, provided a proposal by which the parties would blindly select an arbitrator or arbitrators. *Id.* at ¶ 12.

On June 25, 2021, Talen agreed to proceed with one arbitrator, but it altered the arbitrator's qualifications, proposed a new method for selection of the arbitrator, ignoring a selection process agreed to by NorthWestern and the PNW Owners, and added a provision allowing the parties to appeal "the Hearing

Arbitrator's award . . . pursuant to the JAMS Optional Appeal Procedure."[18] *Id.* at ¶ 13. Because Talen's June 25 proposal varied so materially from proposals submitted by NorthWestern and the PNW Owners, because Talen ignored the arbitrator selection process agreed to by NorthWestern and the PNW Owners, and because of increased litigation activity, neither NorthWestern nor the PNW Owners immediately responded to Talen's proposal. *Id*. at ¶ 14.

On October 27, 2021, counsel for NorthWestern revised the proposed arbitrator selection proposal. *Id*. at ¶ 15. On October 28, 2021, counsel for NorthWestern contacted counsel for Talen to discuss the refined arbitrator selection proposal. Following the discussion, counsel for NorthWestern sent the revised proposed arbitrator selection proposal. *Id.* at ¶ 16. Counsel for NorthWestern did not hear from counsel for Talen until November 9, 2021. The conversation did not result in any meaningful movement to approve the revised proposed arbitrator selection proposal. *Id.* ¶ 17.

On November 15, 2021, counsel for Talen contacted counsel for Puget

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[18] JAMS optional Appeal Procedure calls for three arbitrators to act as an appellate court: "The Appeal Panel typically consists of three JAMS neutrals with significant appellate experience and provides for the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision." *See* https://www.jamsadr.com/appeal/. This proposal effectively reinserts a three-arbitrator panel.

Sound Energy, Inc. regarding the arbitrator selection proposal. Talen has yet to provide any written feedback regarding the refined arbitrator selection proposal. *Id.* at 18.

## ARGUMENT

### A. The Court Should Issue an Order Compelling Arbitration Pursuant to the Parties' Arbitration Agreement

#### 1. Arbitration Is Favored under Both State and Federal Law

Both state and federal law favor enforcement of arbitration agreements. The Montana and Washington Supreme Courts have recognized a strong policy favoring arbitration of disputes. *Ratchye v. Lucas*, 288 Mont. 345, 353, 957 P.2d 1128, 1133 (1998); *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wash. 2d 885, 892, 16 P.3d 617, 620 (2001). Under section 4 of the Federal Arbitration Act ("FAA"), "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United Sates district court, which, save for such agreement, would have jurisdiction under title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. §4. Under the FAA, "[a] written provision in . . . a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2. Federal

courts have repeatedly recognized there is a "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (FAA embodies "national policy favoring arbitration"); *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) (citing *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (quoting 9 U.S.C. § 2)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000); *see also Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301–02, 103 P.3d 753 (2004).

Arbitration "[s]hould not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techn., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419 (1986). Importantly, the FAA "leaves no place for the exercise of discretion by a court" when an issue falls under an arbitration agreement. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Under MCA § 27-5-115, " On the application of a party showing an agreement described in 27-5-114 and the opposing party's refusal to arbitrate, the district court shall order the parties to proceed with arbitration." Montana law

requires the enforcement of pre-dispute arbitration clauses "except upon grounds that exist at law or in equity for the revocation of a contract." MCA § 27-5-114(2). Generally, these provisions require a court to follow a liberal policy in enforcing arbitration agreements, including resolving any doubts about the scope of arbitrable issues in favor of arbitration. *See Vukasin v. D.A. Davidson & Co.* (1990), 241 Mont. 126, 128-29, 785 P.2d 713, 715.

Similarly, the Washington Uniform Arbitration Act requires a court to order parties to arbitrate "[u]nless the court finds that there is no enforceable agreement to arbitrate." RCW 7.04A.060 recognizes that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract."

**2. The FAA Governs the Arbitration Agreement between the Parties and Provides the Framework for the Court to Determine Its Enforceability**

A court's inquiry under the FAA is simple. First, it must determine whether the FAA applies to the parties' arbitration agreement. Section 2 of the Federal Arbitration Act provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out

> of a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Thus, the Act mandates the enforcement of arbitration agreements where such agreements (1) are part of a contract or transaction involving commerce and (2) are valid under general principles of contract law. *Id; Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). The O&O Agreement satisfies both requirements and is enforceable under the FAA.

Because the FAA applies to the O&O Agreement, a court must order arbitration, as long as: (i) the parties have agreed to arbitrate; and (ii) the dispute falls within the scope of the agreement. *See Lifescan, Inc. v. Premier Diabetic Serv., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004) (when the FAA applies, the court's role is "limited to determining whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue").

Here, the parties agreed by contract that "Any controversies arising out of or relating to this Agreement which cannot be resolved through negotiations among the Project Users within thirty (30) days after inception of the matter in dispute shall, upon demand of any Project User involved in the controversy, be submitted to an Arbitrator." O&O Agreement § 18. There is a dispute among the Owners about the ongoing operation of Colstrip Units 3 and 4 beyond the year 2025.

As required by the O&O Agreement, NorthWestern initiated arbitration to

resolve "controversies arising out of or relating to th[e] Agreement," which the Parties could not resolve through negotiations. The parties agree this controversy—the vote required to close Colstrip—is subject to the arbitration agreement. The parties only disagree on the arbitration procedure. *See infra* Section B. Accordingly, the Parties are bound to arbitrate their claims and this court should compel arbitration.

### 3. The Issues regarding the Enforceability of Senate Bills 265 and 266 Are Not subject to Arbitration and the Court Should Decide Them

Motions to compel arbitration typically arise under circumstances where a party to an arbitration agreement seeks to address the arbitral issues in proceedings before a court. Under those circumstances, section 3 of the FAA provides that where a valid arbitration agreement requires the submission of a dispute to binding arbitration, the district court should stay the action "until such arbitration has been had in accordance with the terms of the agreement."

Here, however, no party seeks to resolve in court the issues NorthWestern submitted to arbitration. Rather, the three lawsuits now before this Court address the impact of Senate Bills 265 and 266 on how the arbitration is to proceed. Because no party seeks judicial determination of the claims raised in arbitration, and because the enforceability of Senate Bills 265 and 266 affects how the arbitration will proceed, in several ways contrary to the language of O&O

Agreement section 18, the Court should compel arbitration of the proceedings commenced by Northwestern in early 2021, and retain jurisdiction to address and resolve the enforceability of Senate Bills 265 and 266, at least to the extent 266 would prohibit the PNW Owners from asserting their respective positions regarding the proper construction of the O&O Agreement in the arbitration.[19].

### B. This Court Should Appoint a Magistrate Judge to Oversee the Parties' Discussions Addressing the Arbitration Selection Process and Procedure

Given the proliferation of litigation now before this Court, it should come as no surprise that the parties cannot agree on the number of arbitrators, an arbitration selection process, or the procedure they will follow once the arbitration proceeds. The parties will benefit from the assistance of a Magistrate Judge appointed by the Court who can help guide them to agreement. Section 636(b)(1) of title 28 of the United States Code allows a court to oversee the parties' discussions to agree on the number of arbitrators, the process for selection of an arbitrator or arbitrators, and the manner by which the arbitration will proceed. *See* Manual for Complex Litigation Fourth at § 10.14 ("Magistrate judges may . . . help counsel formulate

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[19] Meantime, the Court's Order granting the PNW Owners' motion for a preliminary Injunction, Doc. 100, should give them comfort to advocate their position in arbitration regarding closing the Project without fear of an enforcement action from the Attorney General.

stipulations and statements of contentions, and may facilitate settlement discussions."); § 13.13 (referrals to a magistrate judge or special master may be an effective way to bring about settlement).

The Federal Magistrates Act of 1968 (Act) (28 U.S.C.A. §§ 631 et seq.) and its subsequent amendments created and expanded the scope of the magistrate judges' powers and duties. Local Rule of Civil Procedure 72.1 specifies the Authority of Magistrate Judges stating,

> Each United States magistrate judge appointed by this court is authorized and designated by the Article III judges of the court to exercise all powers and perform all duties described by 28 U.S.C. § 636 and by federal rules and other federal law and may perform any additional duty that is not inconsistent with the Constitution or laws of the United States or with these rules.

Importantly, "[a] district court may designate a magistrate judge to determine any pretrial matter in civil cases, except 'a motion for injunctive relief, for judgment on the pleadings, for summary judgment, . . . to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.'" *O'Neil v. Steele*, No. CV 19-140-M-DLC, 2021 U.S. Dist. LEXIS 23709, at *1-2 (D. Mont. Feb. 8, 2021) (quoting 28 U.S.C. § 6363(b)(1)). Similarly, under Local Rule 72.2(b), "An active Article III judge may at any time designate a United States magistrate judge to exercise jurisdiction over a civil case, matter, or motion in accordance with 28

U.S.C. § 636."

This Court has previously and of its own volition referred matters to magistrate judges to conduct settlement conferences. *See Cintron v. Title Fin. Corp.*, No. CV 17-108-M-DLC, 2018 U.S. Dist. LEXIS 212132, at *23 (D. Mont. Dec. 17, 2018); *Gorniak v. Wharton*, No. CV 16-103-H-CCL, 2018 U.S. Dist. LEXIS 133800, at *30-31 (D. Mont. Aug. 8, 2018); *CLB Dev. Partners Ltd. v. Bryant*, No. CV 15-08-BU-BMM, 2017 U.S. Dist. LEXIS 22494, at *2 (D. Mont. Feb. 16, 2017); *Saypo Cattle Co. v. RMF Deep Creek, Ltd. Liab. Co.*, 901 F. Supp. 2d 1267, 1286 (D. Mont. 2012); *John Knows His Gun v. Montana*, 866 F. Supp. 2d 1235, 1248 (D. Mont. 2012).

In *West Watersheds Project v Salazar*, this Court ordered a formal settlement conference after the parties had attempted unsuccessfully for years to negotiate a settlement. 766 F. Supp. 2d 1095 (D. Mont. 2011). In describing the magistrate judge's pivotal role in the eventual settlement, the Court wrote, "he . . . entered the negotiations, and worked and worked and worked with the parties so that . . . a final agreement was reached." *Id.* Similarly, NorthWestern urges this Court to appoint a magistrate judge so the parties may meaningfully discuss and resolve how to proceed with arbitration to address the underlying dispute.

NorthWestern depends upon the Project to meet the demand for electricity from its customers in Montana. Given the lengthy lead time for NorthWestern to

plan for, locate, obtain regulatory approval for, address inevitable litigation, and construct new sources of electrical generation to replace the Project were it closed prematurely, any delay in obtaining a final decision regarding whether the O&O Agreement requires unanimity or a majority to close the Project would severely damage NorthWestern and create potential electricity shortfalls for NorthWestern's customers in Montana. Time is of the essence.

Protracted litigation, including these ongoing proceedings, has and will materially delay arbitration proceedings and the resolution of this dispute. There is a need to move forward with the arbitration now without substantial delay. Appointing a magistrate judge to facilitate negotiations over the arbitration processes and procedures is essential and necessary to protect the parties' rights and NorthWestern's Montana customers.

## CONCLUSION

For the reasons stated above, NorthWestern urges the Court to enter an order compelling the parties to move forward promptly with arbitration and appointing a magistrate judge to oversee negotiations ensuring that they will.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1(d)(2)(E), I certify that NorthWestern's Memorandum in Support of its Motion to Compel Arbitration And Appoint A Magistrate Judge To Oversee Arbitration Procedure Negotiations is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Office Word is 5,290 words.

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