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

Portland General Electric Company;
Avista Corporation; PacifiCorp; and
Puget Sound Energy, Inc.,

Plaintiffs,

v.

NorthWestern Corporation; Talen
Montana, LLC; and Austin Knudsen,
in his official capacity as Attorney
General for the State of Montana,

Defendants.

Case No. 1:21-cv-00047-SPW-KLD

Defendant Talen Montana, LLC's Brief
in Opposition to Plaintiffs' Motion for
Partial Summary Judgment (Dkt. 102)
and Partial Joinder in State of
Montana's Motion to Stay (Dkt. 116)

Oral Argument Requested

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Defendant Talen Montana, LLC (“Talen Montana”) opposes Plaintiffs’ Motion for Partial Summary Judgment Regarding Their Fourth and Fifth Claims for Relief (the “PNOs’ Motion for Permanent Injunction”) and partially joins the State of Montana’s Motion to Stay.

Necessity of Opposition and Partial Joinder

Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. (the “Pacific Northwest Owners” or “PNOs”) seek to convert a preliminary injunction into a permanent one before trial while depriving defendants Talen Montana, NorthWestern Corporation (“NorthWestern”), and the State of Montana of any opportunity to take the substantial discovery and develop expert evidence necessary to fully contest the PNOs’ numerous factual assertions in eight different declarations, including two new ones. (Dkt. 102 at 3-4). The audacity of the PNOs’ Motion for Permanent Injunction prompted the State of Montana to move for, among other relief, a six-month stay “to allow the State to conduct discovery to respond to [the PNOs’] argument and statement of undisputed facts.” (Dkt. 117 at 7). Talen Montana agrees with the State of Montana about the need for discovery before the Court rules on the PNOs’ request for a pre-trial permanent injunction and therefore partially joins Montana’s Motion to Stay. The PNOs’ Motion for Permanent Injunction also fails to establish a ripe dispute over possible

enforcement of Montana Senate Bill 266 (“SB 266”) and to prove the right to a permanent injunction on the merits. The PNOs’ Motion for Permanent Injunction should be denied, and Montana’s Motion to Stay should be granted in relevant part.

Statement of the Case

The PNOs brought this case on May 4, 2021, against NorthWestern and Talen Montana to challenge the constitutionality of Montana Senate Bill 265. On May 19, they amended their complaint to add claims against Austin Knudsen, in his official capacity as the Montana Attorney General, regarding the constitutionality of SB 266. NorthWestern and Talen Montana filed separate answers. Dkts. 40 & 58. The PNOs moved for, and on October 13 the Court granted, a preliminary injunction with respect to SB 266. Dkt. 100. The PNOs also moved for partial summary judgment with respect to their challenges to SB 265. Dkt. 88. Talen Montana opposed that motion, which remains pending. Dkt. 93. On October 29, the PNOs’ Motion for Permanent Injunction was filed. Dkt. 102 The State of Montana responded with Montana’s Motion to Stay on November 19. Dkt. 116. The parties have scheduled a Rule 26(f) conference on December 9.¹

¹ On December 1, Magistrate Judge Timothy J. Cavan recommended remand of *Talen Montana, LLC v. Avista Corp.*, No. 21-cv-58 (D. Mont.), Dkt. 56, to the Thirteenth Judicial District Court, Yellowstone County, Montana. In light of the recommendation, Talen Montana reserves its rights to seek appropriate relief, which may include a stay or dismissal of this case for declaratory relief.

Facts Relevant to PNOs' Motion for Permanent Injunction

SB 266 requires each co-owner of a power plant to “fund its share of operating costs,” defined as “costs . . . in accordance with prudent utility practices.” SB 266 §§ 1(4), 2(1)(a). Section 2(1)(b) of SB 266 prohibits “[c]onduct . . . to bring about permanent closure . . . without seeking and obtaining the consent” of all the co-owners.

The Montana Attorney General has given notice that “the State does not anticipate enforcing Senate Bill 266 in the immediate future.” Dkt. 57. The PNOs concede they have no plans to propose closure of Colstrip in the foreseeable future. Dkt. 38 at 28. The PNOs have presented no evidence that they have complied with the requirements of the O&O Agreement for proposing closure of Colstrip or that they are ready, willing, and able to do so.

Summary Judgment Standard

Rule 56 requires the movant to show “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).

Motions for summary judgment are particularly disfavored when, as here, discovery has not yet commenced. “[M]otions for summary judgment are more appropriately made after the parties have had sufficient opportunity to conduct

discovery and develop the factual record in the case.” *Shook v. Ravalli Cty.*, 2009 WL 10678821, at *1 (D. Mont. Apr. 1, 2009). “The nonmoving party, of course, must have had sufficient time and opportunity for discovery before a moving party will be permitted to carry its initial burden of production by showing that the nonmoving party has insufficient evidence.” *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1105-06 (9th Cir. 2000). And “it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Argument

The PNOs’ Motion for Permanent Injunction should be denied in its entirety and Montana’s Motion to Stay should be granted at least in part. The case is not ripe for consideration, either in the Article III sense or in the sense that summary judgment is appropriate before discovery regarding the PNOs’ eight declarations brimming with contestable factual assertions. Nor have the PNOs presented credible evidence that they are suffering or are likely to suffer any harm due to SB 266’s existence, much less the irreparable kind—not least because there is already in place a preliminary injunction. Furthermore, the PNOs’ constitutional challenges are bound to fail on the merits.

I. There Is No Article III Case or Controversy

“Article III of the Constitution empowers [courts] to adjudicate only ‘live cases or controversies,’ not ‘to issue advisory opinions [or] to declare rights in hypothetical cases.’” *Clark v. City of Seattle*, 899 F.3d 802, 808 (9th Cir. 2018) (quoting *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). “[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the ‘case or controversy’ requirement.” *Thomas*, 220 F.3d at 1138.

A fundamental defect in the PNOs’ Motion for Permanent Injunction is that they have no right to do the thing they claim SB 266 hinders them from doing—seeking closure of Colstrip—except by following the process and procedures specified in the O&O Agreement. The O&O Agreement provides that it “*shall continue* for so long as the Project or any part thereof . . . is, or can be made, capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction.” O&O Agreement § 32 (emphasis added). Section 17 specifies co-owners must present proposals relating to maintenance, operation, and capital expenditures at Colstrip to the co-owners’ Project Committee, and sections 17, 18 and 21(h) mandate the processes they must invoke for resolving disputes over decisions by the Project Committee.

Yet the PNOs make no effort to show that they ever initiated—or even that they are now ready, willing, and able to initiate—any of the steps contractually required for “seeking and obtaining” (in the words of SB 266) the consent of all co-owners to closing Colstrip. They present no evidence, for example, that Colstrip is no longer “capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction” as required by section 32 of the O&O Agreement, that the PNOs have ever made a closure proposal complying with the requirement of section 17(g) for “itemized cost estimates and other detail sufficient to support a comprehensive review”, or that they gave 15 days’ advance notice of intent to make a closure proposal as also required by section 17(i). Under these circumstances, there is no ripe dispute. *See Lower Colorado River Auth. v. Papalote Creek II LLC*, 858 F.3d 916, 926 (5th Cir. 2017) (holding that “the circumstances in this case, on the record before us, do not demonstrate that the contingency at issue—*i.e.*, LCRA deciding to stop taking energy [electricity] from the Project and paying liquidated damages instead—was likely to occur at the time the district court” ruled).

Nor can the PNOs establish a “genuine threat of imminent prosecution” if they do comply with the O&O Agreement’s requirements. *Thomas*, 220 F.3d at 1139. Three factors are relevant: (1) “whether the plaintiffs have articulated a ‘concrete

plan’ to violate the law in question,” (2) “whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings,” and (3) “the history of past prosecution or enforcement under the challenged statute.” *Id.*

There is no ripe dispute in this case because this case satisfies none of the *Thomas* factors. The PNOs do not articulate any concrete plan to do anything at all, much less one that would violate SB 266. Nor have the prosecuting authorities communicated a specific warning or threat to enforce the law. To the contrary, the Montana AG has disclaimed any intention of doing so (and is prohibited from doing so by this Court’s preliminary injunction). Br. at 8²; *see also* Dkt. 57 (Notice of AG Regarding Motion for Preliminary Injunction) at 2. Nor is there any history of enforcement. Thus, this Court should not rule on the constitutionality of SB 266.

The PNOs have argued that *Thomas* “applies only when a plaintiff claims to be injured by the *risk of prosecution itself*,” not where they have “*already* suffered actual, ongoing . . . harm.” Dkt. 67 at 1-2. But the PNOs have not asserted “actual, ongoing harm” and have instead focused on *potential* harm tied to a purported “risk of prosecution.” *Id.*

² “Br.” refers to Plaintiffs’ Brief in Support of Motion for Partial Summary Judgment,” filed at Dkt. 104. Copies of SB 266 and the O&O Agreement, which are also referenced throughout this opposition, can be found at Dkt. 32-1 and Dkt. 39-2 at Exhibit A, respectively. The “Frawley Rule 56(d) Decl.” refers to the Declaration of Alexander Frawley filed concurrently herewith.

The PNOs describe their alleged harm in these three ways:

- “The PNW Owners had planned to call a vote to close Colstrip Unit 3 at a date several years in the future at the Committee meeting on May 19, 2021 They chose not to call for that vote due to the *risk* of aggressive enforcement of SB 266.”
- “The *threat* of enforcement of SB 266 further harms the PNW Owners by creating uncertainty about whether advocating their position in arbitration—i.e., pursuant to the terms of the Agreement, all or part of Colstrip can be shut down by a less than unanimous vote of the Committee—*could be* a violation of SB 266.”
- “SB 266 also harms the PNW Owners because the Montana Attorney General *might* bring an enforcement action relating to the Colstrip budget process [T]he PNW Owners’ actions and options in [budget] negotiations will be constrained without a permanent injunction”

Br. at 7-8 (emphases added). None of those suggests the type of “actual, ongoing harm” that the PNOs alluded to in support of their motion for a preliminary injunction. Dkt. 67 at 1-2. Therefore, the *Thomas* ripeness test for pre-enforcement challenges applies.

II. The PNOs Have Not Proven that They Are Suffering or Likely Will Suffer Any Harm

The PNOs’ motion for summary judgment should be denied even if the Court treats the PNOs’ three descriptions of potential, future harm as current harm. Those factual assertions remain unsubstantiated, they are dubious, and Talen Montana is entitled to take discovery to test them. Relatedly, in this pre-enforcement challenge,

the PNOs have not established, and cannot establish, that they will suffer irreparable harm absent permanent injunctive relief.

A. Discovery Is Required to Assess Any Assertion of Actual Harm

All three of the PNOs' claimed harms rely on disputed facts. The first is the PNOs' assertion that they intended to, but ultimately did not, call for a vote to close Colstrip during the May 19, 2021 meeting "due to the risk of aggressive enforcement of SB 266." Br. at 7. That is not credible. The PNOs could not have called for such a vote by the Project Committee because they failed to comply with the contractual procedures to do so. Section 17(i) of the O&O Agreement required them to first "serv[e] a copy of [their] proposal on all other Committee members." The PNOs never served such a proposal. Equally fatal is that the O&O Agreement requires all proposals to "include itemized cost estimates and other detail sufficient to support a comprehensive review." O&O Agreement § 17(g). The PNOs never provided such a thing. The PNOs likewise overlook that the O&O Agreement provides that Colstrip shall continue to operate "for so long as the Project or any part thereof . . . is, or can be made, capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction." O&O Agreement § 32. SB 266 does not prevent the PNOs from making their case to the other co-

owners for why Colstrip will as of 2026 fail to operate consistent with prudent utility practice.

The entire scenario the PNOs assert is implausible and unlikely to withstand scrutiny during discovery. Washington and Oregon enacted their laws limiting coal-fired electricity in 2019 and 2016, respectively. Yet the PNOs suggest they did nothing for years only to decide it was time to call for a vote to close Colstrip a few weeks after the Governor of Montana signed SB 266 on May 3, 2021. Indeed, the PNOs filed their First Amended Complaint the same day that they now say they planned to ask for a vote (May 19, 2021) and never once mentioned this purported plan in their pleading. Nor in the weeks since this Court entered its preliminary injunction have the PNOs even begun the process of calling for such a vote. And even if the PNOs had intended to call a vote, SB 266 did not stand in their way. The statute applies only to “[c]onduct by one or more owners . . . to bring about permanent closure . . . *without seeking and obtaining the consent of all co-owners.*” SB 266 § 2(1)(b) (emphasis added). Calling for a vote is the definition of seeking consent.

The PNOs’ second example of harm is even more dubious. The PNOs suggest that SB 266 “create[es] uncertainty about whether advocating their position [that] . . . Colstrip can be shut down by less than unanimous vote of the Committee—could

be a violation of SB 266.” Br. at 7. But the PNOs’ conduct belies this argument. The PNOs have repeatedly advocated their positions in response to NorthWestern’s arbitration demand, including within this very motion. *See* Br. at 3. In fact, the entire basis of the PNOs’ Contracts Clause challenge is that SB 266 substantially impairs an alleged contractual right to close Colstrip without unanimous approval. The PNOs cannot credibly argue that they are harmed by not being able to forcefully advocate their position, while simultaneously forcefully advocating that position *in the same motion*. Nor has this purported threat of prosecution dissuaded the PNOs from attempting to arbitrate this issue. The PNOs have submitted and responded to proposals among the parties about an arbitration protocol, including shortly before filing this motion. *See* Frawley Rule 56(d) Decl. Ex. 1; *id.* Ex. 2.

The PNOs’ third assertion of harm—that they are “constrained” in the 2022 budget negotiation process, Br. at 8—is at best a disputed issue of fact. The PNOs have actively engaged with the proposed 2022 budget. They requested and received five separate budget “workshops,” each addressing a particular category of expenditures. *See* Frawley Rule 56(d) Decl. Ex. 3; *id.* Ex. 4. The PNOs also hired an outside consultant, KPMG, which requested and received detailed expenditure information and also conducted a three-day visit to Colstrip during which it

conducted interviews and observed employees. *See* Frawley Rule 56(d) Decl. Ex. 3; *id.* Ex. 4.

The PNOs’ supposed fear of violating SB 266 by voting “no” to a proposed budget (Br. at 8-9) cannot be squared with the PNOs’ actual conduct. The PNOs have already done exactly that. On July 27, Talen Montana submitted a revised budget for the remainder of 2021 that reflected approximately \$5.6 million in cost savings relative to the 2021 budget that the PNOs unanimously approved in March. Frawley Rule 56(d) Decl. Ex. 5. Yet the PNOs on August 16 sent a letter “declin[ing] to approve the budget revision.” Frawley Rule 56(d) Decl. Ex. 6. Moreover, the 2022 budget now under review would look the same regardless of whether the owners intended to close the plant in 2026 or keep it running indefinitely. Frawley Rule 56(d) Decl. Ex. 7. Therefore, the PNOs’ suggestion that their desire to close the plant in 2026 affects their negotiation of the 2022 budget makes no sense.

These and other factual disputes require that the PNOs’ motion for summary judgement be denied so that Talen Montana can take discovery to refute the PNOs’ assertion of harm. *See Shook*, 2009 WL 10678821, at *2 (denying early motion for summary judgment that was filed before discovery had begun, and explaining that “motions for summary judgment are more appropriately made after the parties have

had sufficient opportunity to conduct discovery and develop the factual record in the case.”).

Here, discovery is necessary to resolve the following material factual disputes:

- Whether and to what extent the PNOs actually planned to call for a vote to close Colstrip Unit 3 in 2025 and, if they had such a plan, the reason they did not call for such a vote. Br. at 7.
- Whether Colstrip will as of 2026 be incapable of operating consistent with prudent utility practice.
- The PNOs’ alleged need to close Colstrip in response to the Washington and Oregon laws that will limit the importation of coal-generated electricity as of 2026 and 2031.
- The PNOs’ claim that they are “uncertain[] about whether advocating their position [that] . . . Colstrip can be shut down by less than unanimous vote of the Committee—could be a violation of SB 266.” Br. at 7.
- The extent to which the PNOs have been “constrained” in the 2022 budget negotiation process, as well as whether the PNOs are afraid to vote “no” merely because of SB 266. Br. at 8-9.
- Why the preliminary injunction that the PNOs have already secured is insufficient to protect them from any possible harm.

That the AG recently propounded discovery requests about these factual issues counsels in favor of denying the motion. *See Barovich Assocs., Inc. v. Aura Sys., Inc.*, 134 F.3d 376 (9th Cir. 1998) (unpublished) (reversing district court’s grant of summary judgment because the non-moving party “had outstanding discovery requests pending” and “had not received any documents” at the time of the summary

judgment hearing); *see also* Dkt. 118-1 (copy of the discovery requests). The Court should deny the PNOs' attempt to end the case before they produce evidence that will undermine their claims.

B. The PNOs Cannot Demonstrate Irreparable Harm

Nor have the PNOs established they will suffer irreparable harm absent relief. To be entitled to a permanent injunction, a plaintiff must, among other requirements, demonstrate "that it has suffered an irreparable injury." *Indep. Training & Apprenticeship Program v. California Dep't of Indus. Rels.*, 730 F.3d 1024, 1032 (9th Cir. 2013). "The propriety of a request for injunctive relief hinges on demonstrated and immediate threatened irreparable injury that must be imminent in nature." *Brady v. Jones*, 2021 WL 1904914, at *2 (E.D. Cal. May 12, 2021). "In suits such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992).

Here, enforcement of SB 266 against the PNOs is neither imminent nor legally possible. We know this because (1) the Montana Attorney General said so, *see* Dkt. 57 ("the State does not anticipate enforcing Senate Bill 266 in the immediate future"), (2) because the PNOs have no plans to do something that might violate SB

266, and (3) because the Court’s preliminary injunction prohibits the State of Montana from enforcing SB 266 pending trial on the merits. The PNOs admit there is no “risk that [they] will [seek to] close Colstrip in the immediate future.” Dkt. 38 at 28. And the PNOs nowhere suggest that they plan to (or would even like to) stop paying their bills. “Under the circumstances, it would be an act of judicial overreach to grant the Plaintiff the remedy it seeks.” *Drs. for a Healthy Montana v. Fox*, 460 F. Supp. 3d 1023, 1030 (D. Mont. 2020) (denying application to enjoin prosecution of entity for violation of Montana statute where State of Montana “does not anticipate future prosecution”).

III. The PNOs’ Constitutional Challenges Fail on the Merits

The PNOs’ motion should be denied for the additional reason that their Contract Clause and Commerce Clause challenges are meritless.

Indeed, as this case moves forward into discovery and towards trial on the merits, the PNOs’ arguments will face a steepening challenge. As the Court knows, the “findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at the trial on the merits.” *Camenisch*, 451 U.S. at 395. In its order granting a preliminary injunction, the Court took care to note the unique circumstance that the Montana AG, “whom the injunction request is directed at, chose to take no position on the motion or the underlying merits at this time.” Dkt.

100 at 7. The Court also stressed that the PNOs only “likely” could make necessary showings, that evidence at the time was “yet to be contested by the state”, and that the PNOs “presented” uncontested assertions in the form of “declarations” (which would not be admissible at trial and are subject to cross-examination and impeachment). Dkt. 100 at 7, 9, 10 & 12.

A. Contracts Clause

In Montana, “[s]tatutes enjoy a presumption of constitutionality.” *City of Billings v. Albert*, 203 P.3d 828, 830 (Mont. 2009). Similarly, “both the Supreme Court and [the Ninth Circuit] have upheld as reasonable various laws that nonetheless may have affected private contracts.” *Apartment Ass’n of Los Angeles Cty., Inc. v. City of Los Angeles*, 10 F.4th 905, 914 (9th Cir. 2021). It is also “[s]ignificant . . . that the parties are operating in a heavily regulated industry.” *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983). Parties in “heavily regulated industr[ies]” like this one know their “contractual rights [are] subject to alteration by state [] regulation.” *Id.* at 413, 416.

The PNOs must prove two elements to succeed. “The threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship.” *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (citation omitted). If yes, “the Court . . . ask[s] whether the state law is drawn in an appropriate and reasonable

way to advance a significant and legitimate public purpose.” *Id.* Here, the PNOs cannot meet either element.

i. SB 266 Does Not Impair Any Contractual Rights

The Contracts Clause challenge fails at the first step because SB 266 does not affect any contractual rights, let alone substantially impair one. “To establish a substantial impairment of a contractual relationship, a party must show, at a minimum, that a law effects an ‘alteration of contractual obligations’—in other words, that it alters the rights or duties created by a contract.” *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1279 (9th Cir. 2021) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978)).

The PNOs gloss over the fact that SB 266 contains two different provisions. One concerns “[c]onduct by one or more owners . . . to bring about permanent closure . . . without seeking and obtaining the consent of all co-owners.” SB 266 § 2(1)(b). The other provision addresses the “failure or refusal of an owner . . . to fund its share of operating costs”—defined as “costs to construct, operate, and maintain the electrical generation facility in accordance with prudent utility practices.” SB 266 §§ 1(4), 2(1)(a). These two provisions do very different things, and they therefore require different analyses under the Contracts Clause.

The PNOs primarily challenge the first provision, but nothing in “SB 266 prohibits the PNW Owners from exercising their contract right to engage in conduct to close Colstrip.” Br. at 11. On the contrary, the statute expressly allows co-owners of a power plant to engage in conduct for “seeking and obtaining the consent of all co-owners” and would bar them from conduct “to bring about permanent closure” only if their efforts to secure unanimous consent failed. The PNOs’ claim that they fear prosecution for exercising their right to advocate closure under the process the O&O Agreement prescribes for bringing about permanent closure of Colstrip is, to put it politely, a serious misreading of SB 266’s plain language.

Nor have the PNOs established, as a matter of law, that the O&O Agreement would permit them to press, by any method they might choose, for closure of Colstrip without the consent of NorthWestern and Talen Montana. NorthWestern contends that the O&O Agreement already requires unanimous consent for closure, Br. at 3—a position at issue in its demand for arbitration, Statement of Disputed Facts ¶¶ 5-6; Br. at 3. The O&O Agreement also requires the concurrence of the Operator (Talen) with other co-owners’ proposals to the Project Committee. *See* O&O § 17(f) (stating that “approval must be by a vote of the Operator’s Committee member, plus at least two other Committee members”). The PNOs thus have failed

to show that SB 266 impairs a contractual right to advocate closure outside of the process the O&O Agreement prescribes.³

As for the second provision in SB 266, the PNOs barely address it. That is because they do not have a contractual right to refuse to pay their share of operating costs. The PNOs' own brief makes this point. They admit that under "the Agreement, the Operator is required to pay costs only that are in accordance with Prudent Utility Practice, and [that] both the Agreement and SB 266 define Prudent Utility Practice [in the same way]." Br. at 9 n.6. Talen then bills the co-owners their share of those costs, which they have a contractual obligation to pay. O&O Agreement §§ 3(b), 10(c). The PNOs elsewhere admit that section 10(c) of the O&O Agreement requires the co-owners to contribute their share of those costs even absent an approved budget. *See* Dkt. 39-2 ¶ 32 (acknowledging that section 10(c) "authorizes the Operator" to make such expenditures and to charge them to the co-owners); *see also* O&O Agreement § 10(c) (authorizing the Operator to "make all expenditures in the normal course of business or in an emergency, all as the same are necessary for the proper and safe operation and maintenance of the Project"). The upshot is that this

³ The PNOs do not contend that they had a right to circumvent the O&O Agreement's decision-making process. Nor could they. "Every contract contains an implied covenant of good faith and fair dealing." *Bridger Del Sol, Inc. v. Vincentview, LLC*, 406 P.3d 460, 463 (Mont. 2017).

funding provision within SB 266 is nothing new. It does not require anything different from what the O&O Agreement already requires, namely, that the co-owners pay their share of costs that are consistent with prudent utility practice.

The PNOs’ attack on this part of SB 266 is based on a straw man, namely, that it forbids them from voting “no” on any budget proposal. The PNOs recognize that this interpretation takes the statute “to its extreme,” Dkt. 39-5 ¶ 10, but it does more than that: it completely ignores the statutory text and the governing contract. The statute applies only to the “failure or refusal of an owner . . . to fund its share of operating costs,” which are expressly limited to “costs . . . in accordance with prudent utility practices.” SB 266 §§ 1(4), 2(1)(a). This requirement cannot plausibly take away their right to vote “no” on a budget that is inconsistent with prudent utility practice, since whether or not such a budget is approved the PNOs still would be obligated to pay their share of the actual, going forward costs to operate the plant. O&O Agreement § 10(c). Thus, voting no on a budget proposal cannot be a “failure or refusal” to fund operating costs consistent with prudent utility practice.

The PNOs speculate that the AG might adopt an admittedly “extreme” interpretation of SB 266 solely in light of the AG’s statement that he had no plans to act because “there is a[] budget in place for . . . 2021.” Dkt. 57. That statement merely reflects the AG’s awareness that the PNOs had effectively agreed to pay their bills

for the foreseeable future. The PNOs' purported concern hyperbolizes the AG's reasonable statement beyond recognition.

Regardless, rather than strike down the statute based on an interpretation the PNOs admit is "extreme," the better approach is to clarify the statute's meaning so as to avoid any potential constitutional issue. "It is a well established principle of statutory construction that a court must construe a statute so as to avoid raising constitutional questions." *Tashima v. Admin. Off. of U.S. Cts.*, 967 F.2d 1264, 1269 (9th Cir. 1992). Similarly, under Montana law, "[s]tatutes carry the presumption of constitutionality" and courts must "construe statutes narrowly to avoid an unconstitutional interpretation if feasible." *City of Great Falls v. Morris*, 134 P.3d 692, 694-95 (Mont. 2006)). Here, the court should construe SB 266 to only prohibit the co-owners from refusing to pay their share of the operating costs actually owed under the parties' contract.

The PNOs next list a slew of other contractual voting rights that SB 266 supposedly impairs. Br. at 16-17 (citing O&O Agreement § 17(f)(iv), (vi), and (viii)). Yet those voting provisions each requires the Operator's approval to proceed. *See* O&O Agreement § 17(f). So even assuming SB 266 had something to do with those provisions, it would have no practical effect on the PNOs because with or without SB 266 they could not act unilaterally. Furthermore, the PNOs may still vote

against proposals made under the provisions they cite, provided they pay their fair share if they lose the vote.

Finally, SB 266’s so-called “draconian fine” is no basis to find a constitutional violation. Br. at 17. That provision may be relevant to deciding whether the statute *substantially* impairs a contractual right, but there has to be an impaired right in the first instance. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 504 (1987), which the PNOs cite, explains that “we begin by identifying the precise contractual right that has been impaired.” The PNOs’ argument skips this step.

The upshot is that the PNOs have not identified any contractual right that has been impaired by SB 266.

ii. SB 266 Is an Appropriate and Reasonable Way to Advance a Significant and Legitimate Public Purpose

Even if SB 266 operates as a substantial impairment, the statute is constitutional because it is an appropriate and reasonable way to advance a significant and legitimate public purpose. *See Apartment Ass’n of L.A. Cty.*, 10 F. 4th at 913.

The Montana Legislature declared that SB 266 advanced a significant and legitimate public purpose. The statute provides: “electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers;” “closure of electrical generation

facilities without the unanimous consent of all co-owners threatens the reliable supply of electricity for Montanans;” and “failure or refusal to fund operations of Montana electrical generation facilities by facility owners . . . threatens the safety of workers at the facility, threatens Montana’s interest in environmental remediation of the facility, and threatens the reliable supply of electricity for Montana consumers.” Dkt. 32-1 at 1. The PNOs do not dispute that these purposes are significant and legitimate. Nor could they.

The PNOs instead ask the court to second guess the Montana Legislature’s rationale, arguing that “[t]he substance of SB 266 does not address any of the stated objectives.” Br. at 19-21. The Court should decline their invitation to flout well-settled Ninth Circuit law. When (as here) the state is not a contracting party, “courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004).

Even if the court could second-guess the state, there is no basis for doing so here. The PNOs’ arguments are (once again) based on a strawman version of the statute. SB 266 does not require the PNOs to approve “proposed budgets and repairs [that] are inconsistent with Prudent Utility Practice.” Br. at 19. The plain language of SB 266 forecloses that interpretation: the statute defines “operating costs” by

reference to “prudent utility practice.” SB 266 § 1(4). Properly interpreted, SB 266’s funding requirement advances Montana’s interest in ensuring the “safety of workers” and the “reliable supply of electricity for Montana consumers.” *Id.* A failure to adequately fund costs consistent with prudent utility practice increases the risk that the plant could suffer a mechanical failure (threatening energy supply and worker safety). At a minimum, Talen Montana is entitled to take discovery to prove how underfunding Colstrip would threaten Montana’s energy supply and Colstrip’s workers.

True, this Court previously suggested that it “fails to see . . . how non-unanimous closure imperils those interests differently than unanimous closure.” Dkt. 100 at 9. The answer is that NorthWestern is a utility company that serves customers in Montana. FAC ¶ 22. Retiring Colstrip over NorthWestern’s objection could therefore threaten energy supply within Montana. In any event, the Court’s observation only applies to SB 266’s unanimity provision, not the funding provision. The funding provision should therefore be upheld even if the court is inclined to strike down the unanimity provision. *See* SB 266 § 4 (severability clause); *Nat’l Ass’n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102, 1122 (9th Cir. 2019) (applying severability clause and upholding the portions of a Montana law). It also emphasizes the need for discovery. Talen Montana should be allowed to demonstrate that

allowing idiosyncratic rationales for closing Colstrip like the rationale the PNOs propose here would undermine the significant and legitimate state interests animating SB 266.

B. Commerce Clause

The PNOs do not even try to argue that SB 266's funding provision violates the Commerce Clause, nor could they. That provision should be upheld. It is neither discriminatory nor unduly burdensome for a state to require the co-owners of an electrical generation facility to pay expenses they have already agreed to pay.

The Court should also reject the PNOs' attack on the unanimity provision. "[A] state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). "We analyze dormant Commerce Clause claims using the Supreme Court's two-tiered approach." *Pharm. Rsch. & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014). "The first tier asks whether the [statute] either discriminates against or directly regulates interstate commerce." *Id.* If the answer is "yes," the statute is likely unconstitutional. If the answer is "no," then the court moves on to the second tier, which "has come to be known as the *Pike* balancing test," which asks "whether

the burden [the statute] imposes on interstate commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 1044.

SB 266’s unanimity provision does not violate the first tier. “[A] statute that treat[s] all private companies exactly the same does not discriminate against interstate commerce.” *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013). SB 266 does not “impose[] commercial barriers or discriminate[] against an article of commerce by reason of its origin or destination out of State.” *County of Alameda*, 768 F.3d at 1041. SB 266 instead “treats out-of-state [co-owners] . . . the same as in-state [co-owners].” *Nat’l Ass’n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). “[B]oth on its face and in effect, [SB 266] applies to all [owners of a jointly electrical generation facility in the state] without respect to the geographic location of the [co-owner.]” *County of Alameda*, 768 F.3d at 1042; *see also* SB 266 § 2.

Nor is the unanimity provision unconstitutional under the *Pike* test, which asks “whether the burden [the statute] imposes on interstate commerce is clearly excessive in relation to the putative local benefits.” *County of Alameda*, 768 F.3d at 1044 (citation omitted). “A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden on interstate commerce*.” *Opticians*, 682 F.3d at 1148 (emphasis in original).

The PNOs cannot identify a substantial burden. Their argument is (once again) based on a strawman version of the statute. The PNOs suggest that SB 266 “requires the PNW Owners to continue to operate and source electricity from Montana instead of obtaining that same amount of power from other states” and that SB 266 thus “impose[s] a straitjacket on the PNW Owners.” Br. at 26. But the PNOs remain free to sell their shares and move on from Colstrip. There is no straitjacket.

Moreover, “regulations that touch upon safety [like SB 266] are those that the Supreme Court has been most reluctant to invalidate. Indeed, if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.” *County of Alameda*, 768 F.3d at 1045 (cleaned up). When the law is “motivated by a desire to protect public safety,” which is a “legitimate matter of local concern,” “there is no significant interference with interstate commerce.” *Fusion IV Pharms., Inc. v. Herold*, 2019 WL 12375427, at *10 (C.D. Cal. June 21, 2019) (cleaned up). At best, the PNOs’ challenge raises disputed factual questions about the benefits of SB 266 relative to its purported burden. The court should permit discovery to prove that SB 266 furthers its stated purposes.

Conclusion

The Court should deny the PNOs' Motion for Permanent Injunction in its entirety and grant Montana's Motion to Stay to the extent it requests an appropriate amount of time to conduct discovery regarding the PNOs' claims and relevant defenses.

Dated: December 3, 2021

Respectfully submitted,

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Certificate of Compliance

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment and Partial Joinder in State of Montana's Motion to Stay 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 6,437 words.

Dated this 3rd day of December, 2021

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

Portland General Electric Company;
Avista Corporation; PacifiCorp; and
Puget Sound Energy, Inc.,

Plaintiffs,

v.

NorthWestern Corporation; Talen
Montana, LLC; and Austin Knudsen,
in his official capacity as Attorney
General for the State of Montana,

Defendants.

Case No. 1:21-cv-00047-SPW-KLD

Defendant Talen Montana, LLC's
Statement of Disputed Facts in
Opposition to Plaintiffs' Motion for
Partial Summary Judgment (Dkt. 102)

Oral Argument Requested

Under Rule 56 of the Federal Rules of Civil Procedure, and Local Civil Rule 56(b), defendant Talen Montana, LLC (“Talen Montana”) submits this Statement of Disputed Facts in opposition to Portland General Electric Company’s, Avista Corporation’s, PacifiCorp’s, and Puget Sound Energy’s (“Plaintiffs”) Partial Motion for Summary Judgment, Dkt. 102.

1. Portland General Electric Company, Avista Corporation, PacifiCorp, Puget Sound Energy, Inc., Talen Montana LLC, and NorthWestern Corporation jointly own two coal-fired steam electric generation units in Colstrip, Montana. (Decl. of Ronald J. Roberts (“Roberts Decl.”) ¶¶ 6, 9, Doc. 39-2; Decl. of Brett Greene in Support of Pls.’ Mot. for Prelim. Injunction (“First Greene Decl.”) ¶¶ 6, 8, Doc. 39-4; Decl. of Mike Johanson (Doc. 39-5) (“Johanson Decl.”) ¶ 2; Decl. of Jason R. Thackston (“Thackston Decl.”) ¶ 7, Doc. 39-3.) Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. are referred to collectively herein as the “PNW Owners.”

Disputed: Talen Montana does not jointly own both units. Dkt. 32 (FAC) ¶ 29.

2. The PNW Owners, Talen Montana LLC, and NorthWestern Corporation are parties to an Ownership and Operation Agreement (“Agreement”), signed in 1981, which governs the operation of Colstrip. (Roberts Decl. ¶ 6.) (A

true and correct copy of the Agreement is attached as Exhibit A to the Roberts Declaration, Doc. 39-2.) The parties have the following ownership interests:

Owner	Unit 3	Unit 4
PSE	25%	25%
PGE	20%	20%
Avista	15%	15%
PacifiCorp	10%	10%
Talen	30%	—
NorthWestern	—	30%

(Roberts Decl. ¶ 9.)

Disputed: The O&O Agreement speaks for itself.

3. The Agreement has been amended four times. (*Id.* ¶ 6; First Greene Decl. ¶ 6.) Despite those amendments, Section 18 has never been altered or amended. (Decl. of Brett Greene in Support of Motion for Partial Summ. J. Regarding Their First, Second, and Third Claims for Relief (“Second Greene Decl.”) ¶ 2, Doc. 88-1.) The Agreement establishes a five-member Project Committee “to facilitate effective cooperation, interchange of information and efficient management of the Project.” (Doc. 39-2 at 38.) The Agreement provides that an “Operator” manages Colstrip on a day-to-day basis (*id.* at 26), and Talen is the current Operator. (Roberts Decl. ¶ 9.) The Operator prepares the annual operating

budget each September 1 and the Committee votes to approve that budget. (Doc. 39-2 at 9-10.)

Disputed: The amendments did not address Section 18. Otherwise, the O&O Agreement speaks for itself.

4. The PNW Owners face legislative mandates to eliminate coal-fired resources like Colstrip from their allocation of electricity for their customers in Washington and Oregon. (Roberts Decl. ¶¶ 16-17; First Greene Decl. ¶¶ 11-13; Second Greene Decl. ¶ 4; Thackston Decl. ¶¶ 10-12; Johanson Decl. ¶¶ 5-6.) Talen and NorthWestern want to keep Colstrip open for the indefinite future. (Roberts Decl. ¶ 22.) NorthWestern estimates that Colstrip’s useful life runs through 2042 (Doc. 39-6 at 17, Tr. 12:3-4), and Talen testified that as long as Colstrip is economically viable (for itself) it will support the 2042 date. (*Id.* at 50, Tr. 45:20-22.) Talen testified that the basis for its continuing economic investment in Colstrip is its belief that “Colstrip has a long life cycle.” (*Id.* at 129, Tr. 59:2-7.) NorthWestern contends that the Agreement requires unanimous consent to close Colstrip. (Roberts Decl. ¶ 36; Thackston ¶ 15.) The PNW Owners disagree. (First Greene Decl. ¶ 17.)

Disputed: There are no “legislative mandates.” Washington and Oregon

have passed laws relating to coal-fired generation, but these laws do not require Plaintiffs to eliminate coal-fired resources like Colstrip from their allocation of electricity for their customers in Washington and Oregon. Dkt. 58 (Talen Montana's Answer) ¶¶ 3, 40-42; Dkt. 40 (NorthWestern Corporation's Answer) ¶¶ 40-41; Aug. 6 Hearing Tr. at 30:1-4 (Argument by J Jackson, counsel for NorthWestern Corporation); FAC ¶¶ 40-42.

Talen Montana is obligated to keep Colstrip running as long as it is economically viable, and Talen Montana expects this to be the case for the foreseeable future. Talen Montana's Answer ¶ 44. NorthWestern contends that Colstrip is capable of operating efficiently and consistent with its purpose until at least 2042. Aug. 6 Hearing Tr. at 23:8-11.

5. On February 9, 2021, NorthWestern noticed its intent to initiate an arbitration to “obtain a definitive answer to the questions of what vote is required to close Units 3 and 4 and what is the obligation of each co-owner to fund operations of the plant.” (Roberts Decl. ¶ 36.) NorthWestern served an arbitration demand on March 12, 2021, and an amended arbitration demand on April 2, 2021. (*Id.* ¶¶ 36-37; Thackston Decl. ¶¶ 15-16; First Greene Decl. ¶ 16.)

Undisputed

6. The PNW Owners served responses and their own arbitration demands in April 2021. (Roberts Decl. ¶ 38; Thackston Decl. ¶ 17.) The arbitration has not begun because the parties have been unable to agree on the arbitrator selection process. (Roberts Decl. ¶ 38.)

Disputed: The parties have exchanged proposals regarding the number of arbitrators and the arbitrator selection process, the venue for the arbitration, and the procedures the parties might follow during an arbitration. Talen Montana’s Answer ¶ 73; Roberts Decl. ¶ 38; Aug 6 Hearing Tr. at 48:17-23 (Argument by Barry Barnett, counsel for Talen Montana). For example, Talen Montana proposed arbitrating in Denver before a single arbitrator, among other protocols, but Plaintiffs have not made a counter-proposal. *See* Aug 6 Hearing Tr. at 48:17-23.

7. During Montana’s 2021 legislative session, Montana State Senator Steve Fitzpatrick sponsored Senate Bill 266. (A copy of SB 266 is attached as Exhibit A to the First Amended Complaint (Doc. 32-1) and is available at the Montana Legislature website: <https://legiscan.com/MT/text/SB266/2021>.) The Bill provides that “The failure or refusal of an owner of a jointly owned electrical generation facility in the state to fund its share of operating costs associated with a jointly owned electrical generation facility is an unfair or deceptive act or practice in the conduct of trade or commerce in accordance with 30-14-103.” (*Id.* at 2.)

Senate Bill 266 also provides that “Conduct by one or more owners of a jointly owned electrical generation facility in the state to bring about permanent closure of a generating unit of a facility without seeking and obtaining the consent of all co-owners of a generating unit is an unfair or deceptive act or practice in the conduct of trade or commerce in accordance with 30-14-103.” (*Id.* at 2-3.) It also provides that the Montana Department of Justice can petition a court to impose “\$100,000 for each violation,” with “[e]ach day of a continuing violation” counting as “a separate offense.” (*Id.* at 3.)

Disputed: The statute speaks for itself.

8. In testimony before the Montana Senate Committee on Business, Labor and Economic Affairs, on February 23, 2021, Senate Bill 266’s sponsor, Senator Fitzpatrick, introduced the bill as “an important piece of legislation because it allows us to have greater control over the Colstrip facility.” (Doc. 39-6 at 7, Tr. 2:20-22.) Senator Fitzpatrick complained about the “West Coast owners of the facility” (*id.* at 7, Tr. 2:25), and that “[Montana] ha[s] out-of-state corporations who are acting in a way . . . that could destroy a valuable asset [Colstrip] for the State of Montana.” (*Id.* at 56, Tr. 51:4-6.) He also stated:

What we’re doing is we’re pushing back against really regulators in other states who are trying to impose kind of their new green deal type of public policy in the state of Montana, and it’s hurting Montana. And so I think we have every right to stand up and say no, and use any means

necessary here at the legislature to make sure that our interests aren't trampled by the environmental views in the states of Washington and Oregon.

(*Id.* at 54, Tr. 49:15-22.). He claimed that keeping Colstrip open was important to keep “jobs” in Montana and to protect “tax revenue.” (*Id.* at 8, Tr. 3:18-25.) In his comments discussing Senate Bill 266, Senator Fitzpatrick did not make more than a passing reference to any other electric generation facility in Montana. (*Id.* at 6-60, *see id.* at 59, Tr. 54:2-9.)

Disputed: Senate Bill 266 does not apply only to owners of Colstrip but to “an owner of a jointly owned electrical generation facility in the state.” Dkt. 32-1 (copy of Senate Bill 266). As clarified by Senator Fitzpatrick during his testimony: “I know I heard one of the objections from one of the bill opponents that this was only applied to Colstrip. It applies to all coal generating facilities, that includes Hardin and others.” Dkt. 39-6 at 98, Tr. at 28:3-7.

9. In testimony before the Montana House of Representatives Committee on Energy, Technology, and Federal Relations, Senator Fitzpatrick made clear that Senate Bill 266 applied to a single plant: Colstrip. He described Senate Bill 266 as providing that “unless there’s unanimous consent to close an electrical generation facility or unanimous consent to not perform maintenance, those can be subject to this law, this unfair trade practices act, and then there’s a penalty in it. And I think

everybody knows what's going on here. We know that out in Colstrip there's been a really big push by the West Coast utilities to get out of Colstrip.” (*Id.* at 72, Tr. 2:17-23.) He contended that what the so-called West Coast utilities were “fundamentally doing is coming into the state of Montana and destroying an asset that is a value to the people of Montana, an asset that employs people, pays a tremendous amount of taxes, is important for our economy. It's important for users of energy facilities in the state of Montana.” (*Id.* at 73, Tr. 3:1-6.) Senator Fitzpatrick also stated that Colstrip is “an important facility . . . for the people of Montana.” (*Id.* at 73, Tr. 3:9-10.) He also stated that Senate Bill 266 and Senate Bill 265 (which purports to void the arbitration venue clause in the Agreement) “were the product of some discussions that we started to have with Senator Ankey, Senator Small. They were very concerned at the time of the refusal of the West Coast operators to participate in the budget making process was ultimately going to lead to the closure of the plant.” (*Id.* at 123, Tr. 53:15-19.)

Disputed: Senate Bill 266 does not apply only to Colstrip but to “an owner of a jointly owned electrical generation facility in the state.” Dkt. 32-1 (copy of Senate Bill 266). As clarified by Senator Fitzpatrick during his testimony: “I know I heard one of the objections from one of the bill opponents that this was only applied

to Colstrip. It applies to all coal generating facilities, that includes Hardin and others.” Dkt. 39-6 at 98, Tr. at 28:3-7.

10. During both hearings, the proponents of SB 266 were specific that they supported the bill because of its application to Colstrip. (*Id.* at 10-23, Tr. 5:21-18:21; *id.* at 74-81, Tr. 4:20-11:2.) Every speaker in favor of the bill referenced Colstrip or adopted prior statements about SB 266’s impact on Colstrip. (*Id.* at 7-59, Tr. 2:4-54:13; *id.* at 72-143 Tr. 2:4-73:2.)

Disputed: Not “[e]very speaker in favor of the bill referenced Colstrip or adopted prior statements about SB 266’s impact on Colstrip.” *See* Dkt. 39-6 at 79-80, Tr. at 9:18-10:3 (testimony of Mr. Forkan).

11. Representatives of Talen and NorthWestern spoke in support of Senate Bill 266 in committee hearings in the Montana legislature. (*Id.* at 17, Tr. 12:11-14 (NorthWestern “thanks Senator Fitzpatrick for bringing this measure”); *id.* at 19, Tr. 14:6-8 (Talen “believe[s] that this bill is important”); *id.* at 147 (minutes listing Talen and NorthWestern as proponents of Senate Bill 266 at the hearing before the House committee.) Representatives of the PNW Owners spoke in opposition. (*Id.* at 64, 148 (minutes listing those who spoke in opposition to Senate Bill at the two hearings).)

Undisputed

12. The Montana Legislature passed Senate Bill 266 and it became law on May 3, 2021. (*See* <https://legiscan.com/MT/bill/SB266/2021>.)

Undisputed

13. Starting in 2026, if Avista, PacifiCorp and PSE provide electricity to customers in Washington from electricity generated from coal, Avista, PacifiCorp and PSE must pay the State of Washington a \$150 penalty for each such megawatt hour. Wash. Rev. Code §§ 19.405.030(4), 19.405.090(1)(a)(i). That fine would be in addition to the cost to produce that megawatt hour. Current revenue per megawatt hour is lower than the fine per megawatt hour. Currently, Avista can charge only \$80.01 for the first megawatt hour it provides per month to residential customers under Washington-approved tariffs, \$98.73 for the second megawatt hour, and \$106.86 for subsequent megawatt hours. (Avista “Shortcut Sheet” Sch. 1 residential service rates, Eff. Oct. 1, 2021, *available at* <https://www.myavista.com/about-us/our-rates-and-tariffs/washington-electric>.) PacifiCorp can charge \$85.18 for the first megawatt hour it provides per month to residential customers under Washington-approved tariffs (Schedule 16 – residential service), and \$102.71 for subsequent megawatt hours. (PacifiCorp Wash. Price Summary Eff. Oct. 1, 2021, *available at* <https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rate>

s-regulation/washington/WA_Price_Summary.pdf.) PSE can charge \$103.96 for the first megawatt hour it provides per month to residential customers under Washington-approved tariffs (Sch. 7 – residential service), and \$115.87 for subsequent megawatt hours. (PSE Electric Price Summary Eff. Oct. 1, 2021, *available at* https://www.pse.com/-/media/Project/PSE/Portal/Rate-documents/summ_elec_prices_2021_10_01.pdf?sc_lang=en.) (Decl. of Ronald J. Roberts in Support of Plaintiffs’ Motion for Partial Summary Judgment Regarding Their Fourth and Fifth Claims for Relief (“Second Roberts Decl.”) ¶ 9.)

Disputed: The sources Plaintiffs cite do not support their conclusions, including because at least one of the sources is now outdated. *See* Avista citation (now linking to a “Shortcut Sheet” dated November 1—days after Plaintiffs filed this motion). Ownership of an interest in Colstrip does not oblige any of the Plaintiffs to sell electricity the plant generates to customers in Washington. Plaintiffs’ interests in Colstrip are valuable and can be sold if they choose.

14. The PNW Owners had 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. (Decl. of Brett Greene in Support of Pls.’ Mot. For Partial Summ. J. Regarding Their Fourth and Fifth Claims for Relief (“Third Greene Decl.”) ¶ 4.) The PNW Owners chose not to call for that vote now due to the risk of aggressive

enforcement of Senate Bill 266. (Roberts Decl. ¶ 42; Third Greene Decl. ¶ 4.) The vagueness of the statute and the risk of a potential \$100,000 per day fine dissuaded the PNW Owners from holding the vote. (Roberts Decl. ¶ 42; Third Greene Decl. ¶ 4.) Senate Bill 266 also harms the Pacific Northwest Owners because the State of Montana might try to rely on the same vague language (or other language in the law) to bring an enforcement action relating to the Colstrip budget process. (Roberts Decl. ¶ 43; Third Greene Decl. ¶ 5.)

Disputed: The First Amended Complaint, filed on the same day Plaintiffs claim they would have called for a vote (May 19), lacks any allegations about this plan. Nor do Plaintiffs offer any evidence, beyond a declarant’s conclusory statement, that any such plan existed. Casting further doubt, Section 17(i) of the O&O Agreement would have required Plaintiffs to “serv[e] a copy of [their] proposal on all other Committee members” before the vote—a condition precedent Plaintiffs did not satisfy. Dkt. 39-2 at Ex. A. They also failed to comply with the contractual requirement that all proposals must “include itemized cost estimates and other detail sufficient to support a comprehensive review.” O&O Agreement § 17(g).

The notion of a May 19 vote is also implausible. The Washington and Oregon laws were enacted in 2019 and 2016, respectively. SB 266 was signed into law on May 3, 2021. It defies reason for Plaintiffs to claim that they waited years to call a

closure vote and decided to request one two weeks after Montana enacted SB 266. Finally, even assuming Plaintiffs did plan a May 19 vote, SB 266 did not stand in their way. It would apply only if co-owners try to force closure “without seeking and obtaining the consent of all co-owners.” SB 266 § 2(1)(b). Complying with their obligation under the O&O Agreement to seek and obtain the other co-owners’ consent to permanent closure is the very conduct SB 266 approves.

As for the budget, there is no indication, in Plaintiffs’ moving papers or otherwise, that Plaintiffs will reject Talen Montana’s 2022 budget proposal, which is currently under review. But even if Plaintiffs were to vote “no,” the Attorney General could not impose fines. SB 266 applies only to the “failure or refusal of an owner . . . to fund its share of operating costs,” which are expressly limited to “costs . . . in accordance with prudent utility practices.” Dkt. 32-1 at 2-3; SB 266 §§ 1(4), 2(1)(a). SB 266 is therefore nothing new. The O&O Agreement already requires the Operator to “pay costs only that are in accordance with Prudent Utility Practice.” Plaintiffs’ Br. at 9 n.6. And the co-owners are already required to pay their share of those expenses whether or not a budget is in place. *See* O&O Agreement § 10(c).

15. To protect their rights under the Agreement, the PNW Owners filed a motion for preliminary injunction. (Docs. 37 & 38.) On October 13, 2021, the Court granted the PNW Owners’ motion and issued an injunction that enjoins

Attorney General Knudsen from enforcing SB 266 against the PNW Owners during the pendency of this lawsuit. (Doc. 100.)

Undisputed:

16. The PNW Owners did not vote to approve the 2021 capital budget and operations budget until January and March 2021, respectively. They did not vote to approve those budgets until Talen provided more information that the PNW Owners had requested and until Talen made changes to the budgets. (Third Greene Decl. ¶ 3.) Although they did not vote to approve the budgets for 2021 until after 2021 began, they continued to pay their share of each monthly bill; at no point did they fail or refuse to pay any bill that Talen as operator presented. (*Id.*)

Disputed: Plaintiffs on March 22, 2021 unanimously approved Talen Montana's March 11, 2021 budget proposal for Colstrip Units 3 and 4. The proposed budget that Plaintiffs approved included both operating and maintenance costs as well as capital costs.

17. Attorney General Knudsen took no position in response to the motion for a preliminary injunction to enjoin enforcement of SB 266. He stated, "Plaintiffs have represented that there is an operations and maintenance budget in place for Colstrip for the 2021 operating year, and that there is no risk they will close Colstrip in the immediate future. In the same vein, the State does not anticipate enforcing SB

266 in the immediate future.” (Doc. 57 at 2.) At oral argument on the motion for a preliminary injunction to enjoin Attorney General Knudsen from enforcing SB 266, the Attorney General stated, “The AG has no intent to enforce the statute anytime soon, and indeed there is an O&M budget in place currently.” (Third Greene Decl. Ex. 1, Hearing Aug. 6, 2021, Tr. 21:12-14.)

Disputed: The Montana Attorney General argued that Plaintiffs’ claims are unripe. At the hearing on Plaintiffs’ motion for a preliminary injunction, the Attorney General explained that “there’s no imminent or irreparable harm that is posed by this statute.” Aug. 6 Hearing Tr. at 21:17-18. The Attorney General likewise promised to “defend the statute at the appropriate time and will argue its constitutionality” and clarified that “we do not agree with plaintiffs’ reading of SB 266.” Aug. 6 Hearing Tr. at 21:21-25.

18. The statements of the Attorney General and of Senator Fitzpatrick create a significant and chilling concern that a “no” vote to a Talen-proposed budget will lead the Attorney General to file an action under SB 266 asking a court to impose \$100,000 per day fines after the preliminary injunction expires. (Third Greene Decl. ¶ 5).

Disputed: Voting against a budget proposal creates no risk of prosecution for not paying operating costs. SB 266 applies only to the “failure or refusal of an owner

. . . to fund its share of operating costs,” which are expressly limited to “costs . . . in accordance with prudent utility practices.” Dkt. 32-1 at 2-3; SB 266 §§ 1(4), 2(1)(a). SB 266 is therefore nothing new. The O&O Agreement already requires the Operator to “pay costs only that are in accordance with Prudent Utility Practice.” Plaintiffs’ Br. at 9 n.6. And the co-owners are already required to pay their share of those expenses whether or not a budget is in place. *See* O&O Agreement § 10(c).

19. The threat of enforcement of SB 266 further harms the PNW Owners by creating uncertainty about whether advocating their position in arbitration—i.e., pursuant to the terms of the Agreement, all or part of Colstrip can be shut down by a less than unanimous vote of the Committee—could be a violation of SB 266. (Third Greene Decl. ¶ 6).

Disputed: Plaintiffs have no qualms about “advocating their position in arbitration.” Plaintiffs have repeatedly advocated their positions in response to NorthWestern’s arbitration demand, including within this very motion. *See* Plaintiffs’ Br. at 3 (“NorthWestern contends that the Agreement requires unanimous consent to close Colstrip. The PNW Owners disagree.”). The entire basis of Plaintiffs’ Contracts Clause challenge is that SB 266 substantially impairs an alleged contractual right to close Colstrip.

Nor are Plaintiffs afraid to move forward with the arbitration on this issue. Plaintiffs have submitted and responded to proposals among the parties about an arbitration protocol, including after SB 266's enactment. *See* Frawley Rule 56(d) Decl. Ex. 1. In June, for example, Plaintiffs agreed with a proposal made by NorthWestern and specifically thanked NorthWestern for trying to "move the process forward." *Id.* at 1. Plaintiffs similarly commented on (and allegedly approved) a proposal made by NorthWestern just one day before Plaintiffs filed the current motion. Frawley Rule 56(d) Decl. Ex. 2.

20. Removing Colstrip Units 3 and 4 from PSE's electricity supply portfolio by the end of 2025 means PSE must turn to other sources to replace the significant amount of electricity currently supplied to PSE from Colstrip Units 3 and 4. Doing so will necessarily require PSE to make significant expenditures in generation assets other than Colstrip and/or in acquiring electricity from third parties, including options in states other than Montana. (Second Roberts Decl. ¶ 11.)

Disputed: Colstrip is producing electricity consistent with Prudent Utility Practice, and Talen Montana expects that to be the case for the foreseeable future. Talen Montana's Answer ¶ 44. Even Plaintiffs admit there is no "risk the PNW Owners will close Colstrip in the immediate future." Dkt. 38 at 28. Plaintiffs offer

no evidence of what exactly they must do *now* to replace the electricity supplied by Colstrip, nor why they must do anything at all.

* * *

Additional facts on which Talen Montana relies to oppose Plaintiffs’ motion

21. Within SB 266, the Montana Legislature declared legislative purposes that “electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers;” “closure of electrical generation facilities without the unanimous consent of all co-owners threatens the reliable supply of electricity for Montanans;” and “failure or refusal to fund operations of Montana electrical generation facilities by facility owners . . . threatens the safety of workers at the facility, threatens Montana’s interest in environmental remediation of the facility, and threatens the reliable supply of electricity for Montana consumers.” Dkt. 32-1 at 1.

22. The people of Montana rely on Colstrip for jobs, power, and prosperity. Talen Montana’s Answer at 21.

Respectfully submitted,

Dated: December 3, 2021

/s/ Alexander Frawley

Barry Barnett (admitted *pro hac vice*)

Adam Carlis (admitted *pro hac vice*)

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

Portland General Electric Company;
Avista Corporation; PacifiCorp; and
Puget Sound Energy, Inc.,

Plaintiffs,

v.

NorthWestern Corporation; Talen
Montana, LLC; and Austin Knudsen,
in his official capacity as Attorney
General for the State of Montana,

Defendants.

Case No. 1:21-cv-00047-SPW-KLD

Rule 56(d) Declaration of Alexander
Frawley in Opposition to Plaintiffs'
Motion for Partial Summary Judgment
(Dkt. 102)

Oral Argument Requested

Declaration of Alexander Frawley

Under Rule 56(d) of the Federal Rules of Civil Procedure, and Local Civil Rule 56(b), I, Alexander Frawley, declare as follows:

1. I am an associate with the law firm of Susman Godfrey, LLP, counsel for Defendant Talen Montana, LLC in this matter. I am an attorney at law admitted to practice *pro hac vice* in the District of Montana for this case. Dkt. No. 82. I have personal knowledge of the matters set forth herein and am competent to testify.

2. I respectfully submit this Declaration in opposition to Plaintiffs' motion for partial summary judgment. Dkt. No. 102.

3. Discovery in this case has not yet commenced. On May 4, the Court set a preliminary pretrial conference for August 3, and ordered the parties to hold a Rule 26(f) conference by July 20. Dkt. No. 3. But on July 7, the preliminary pretrial conference and all corresponding deadlines were adjourned. Dkt. No. 68. The preliminary pretrial conference has not been rescheduled.

4. Plaintiffs' motion includes several disputed and unsubstantiated factual assertions regarding (1) how Plaintiffs have allegedly been harmed by Montana Senate Bill 266 and (2) the extent to which the bill furthers its stated purposes:

- Starting January 1, 2026, PSE, Avista, and PacifiCorp cannot use Colstrip to serve Washington customers without paying substantial penalties designed to make that option economically irrational. Br. at 3.
- The PNW Owners had planned to call a vote to close Colstrip Unit 3 at a date several years in the future at the Committee meeting on May 19, 2021, under the terms of the Agreement. They chose not to call for that vote due to the risk of aggressive enforcement of SB 266. Br. at 7.
- The threat of enforcement of SB 266 further harms the PNW Owners by creating uncertainty about whether advocating their position in arbitration—i.e., pursuant to the terms of the Agreement, all or part of Colstrip can be shut down by a less than unanimous vote of the Committee—could be a violation of SB 266. Br. at 7.
- SB 266 also harms the PNW Owners because the Montana Attorney General might bring an enforcement action relating to the Colstrip budget process after the preliminary injunction expires. Br. at 7.
- The owners of Colstrip annually engage in budget negotiations for the following year, and the PNW Owners’ actions and options in those negotiations will be constrained without a permanent injunction because the Attorney General may seek to impose fines under SB 266 if they exercise their voting rights to vote “no” to budget proposals that contain excessive or unnecessary spending and are not consistent with the terms of the Agreement. Br. at 7-8.
- There is no public policy interest served and no social problem solved by SB 266’s requirements and fines. Br. at 21
- Removing Colstrip Units 3 and 4 from PSE’s electricity supply portfolio by the end of 2025 means PSE must turn to other sources to replace the significant amount of electricity currently supplied to PSE from Colstrip Units 3 and 4. Doing so will necessarily require PSE to make significant expenditures in generation assets other than Colstrip and/or in acquiring electricity from third parties, including options in states other than Montana. Dkt. No. 103 ¶ 20.

5. Talen Montana respectfully requests that the Court deny the motion so that Talen Montana may take and obtain discovery to test and refute these assertions. Discovery will prove that Plaintiffs have not suffered any harm and that Montana Senate Bill 266 furthers its stated purposes of ensuring the reliable supply of electricity for Montanans and protecting the safety of Colstrip's workers. Talen Montana specifically seeks discovery regarding these disputed factual issues:

- Plaintiffs' alleged plan to call a vote to close Colstrip Unit 3 in 2025. Br. at 7.
- Whether Colstrip will as of 2026 be incapable of operating consistent with prudent utility practice.
- Plaintiffs' alleged need to close Colstrip in response to the Washington and Oregon laws that will limit the importation of coal-generated electricity as of 2026 and 2031.
- Plaintiffs' claim that they are "uncertain[]" about whether advocating their position [that] . . . Colstrip can be shut down by less than unanimous vote of the Committee—could be a violation of SB 266." Br. at 7.
- The extent to which Plaintiffs have been "constrained" in the 2022 budget negotiation process, as well as whether Plaintiffs are afraid to vote "no" merely because of SB 266. Br. at 8-9.
- Why the preliminary injunction that Plaintiffs have already secured is insufficient to protect them from any possible harm.
- Whether underfunding or prematurely closing Colstrip will threaten Montana's energy supply and the safety of Colstrip's workers.

6. Defendant, Austin Knudsen, in his official capacity as Attorney General for the State of Montana, has already propounded interrogatories, requests

for admission, and document requests on Plaintiffs. *See* Dkt. No. 118-1 (copy of discovery requests). Plaintiffs’ responses to these requests will begin to help the parties resolve the numerous factual disputes in this case.

7. Mr. Knudsen has also moved to stay any decision on Plaintiffs’ motion until after the arbitration that Defendant NorthWestern has initiated, which seeks to “obtain a definitive answer to the questions of what vote is required to close Units 3 and 4 and what is the obligation of each co-owner to fund operations of the plant.” Dkt. No. 116. Mr. Knudsen alternatively seeks a six-month extension of its deadline to respond to Plaintiffs’ motion so that the State has time to conduct discovery. *Id.* Talen Montana agrees with Mr. Knudsen that this motion is premature.

8. Talen Montana also intends to serve interrogatories, requests for production, requests for admissions, and to take depositions regarding Plaintiffs’ factual assertions.

9. On November 24, 2021, counsel for all of the parties convened to discuss discovery in this case. The parties agreed to hold a Rule 26(f) conference on December 9, and to jointly petition the Court to schedule a preliminary pretrial conference. The parties also agreed to meet-and-confer on December 9 regarding Plaintiffs’ anticipated objections to the AG’s discovery requests.

10. Attached as Exhibit 1 is a true and correct copy of a June 17, 2021 email sent by Jeff Hanson, counsel for Plaintiffs, to J Jackson, counsel for NorthWestern, and Barry Barnett, counsel for Talen Montana, describing NorthWestern's proposed arbitration selection protocol as "a fair compromise" and thanking NorthWestern for "mov[ing] the process forward."

11. Attached as Exhibit 2 is a true and correct copy of an October 28, 2021 email sent by J Jackson, counsel for NorthWestern, to Barry Barnett, counsel for Talen Montana, regarding a "refined proposed arbitrator selection proposal."

12. Attached as Exhibit 3 is a true and correct copy of a June 23, 2021 letter from Plaintiffs to Talen Montana requesting a series of "workshops" regarding Talen Montana's 2022 budget proposal, and explaining that Plaintiffs had hired a budget consultant.

13. Attached as Exhibit 4 is a true and correct copy of a September 29, 2021 letter from Talen Montana to Plaintiffs summarizing the budget workshops organized by Talen Montana and Talen Montana's work with Plaintiffs' budget consultant.

14. Attached as Exhibit 5 is a true and correct copy of a July 27, 2021 email from Talen Montana to Plaintiffs and NorthWestern accompanying Talen Montana's revised budget proposal for 2021.

15. Attached as Exhibit 6 is a true and correct copy of an August 16, 2021 letter from Plaintiffs to Talen Montana regarding Talen Montana's revised budget proposal for 2021.

16. Attached as Exhibit 7 is a true and correct copy of a September 1, 2021 letter from Talen Montana to Plaintiffs and NorthWestern accompanying its 2022 Colstrip budget proposal.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 3rd day of December 2021, at New York, New York.

/s/ Alexander Frawley

EXHIBIT 1

From: [Hanson, Jeff \(Perkins Coie\)](#)
To: [Jackson.J@dorsey.com](#); [Barry Barnett](#)
Cc: [william.schroeder@ksblit.legal](#); [harrywilson@markowitzherbold.com](#); [davidmarkowitz@markowitzherbold.com](#); [gmz@uazh.com](#); [CSMartin@schwabe.com](#); [tgreenfield@schwabe.com](#); [Michael.Andrea@avistacorp.com](#); [robert.neate@pse.com](#); [Brown.Andrew@dorsey.com](#); [gonzalez.roxanna@dorsey.com](#); [John.Tabaracci@northwestern.com](#); [DallasDeluca@markowitzherbold.com](#); [Adam Carlis](#); [Alex Frawley](#); [Jeff McLaren](#); [Tyson Garcia](#); [lorna.luebbe@pse.com](#); [Steele, David S. \(Perkins Coie\)](#); [King, Marten \(Perkins Coie\)](#)
Subject: RE: [EXTERNAL] Re: Talen Montana v. Avista Corp.--Complaint, Comments on Arbitration Proposals, and 4-23-21 Letter
Date: Thursday, June 17, 2021 4:08:48 PM

EXTERNAL Email

J,

Thanks for circulating NorthWestern's arbitrator-selection proposal and the effort to try to move the process forward. The PNW Owners think NorthWestern's proposed blind-selection process with JAMS is a fair compromise, and we look forward to Talen's response to the proposal. The PNW Owners continue to anticipate arbitration before a single arbitrator, consistent with the O&O Agreement.

Regards,

Jeff

Jeff Hanson | Perkins Coie LLP

PARTNER
1201 Third Avenue Suite 4900
Seattle, WA 98101-3099
D. +1.206.359.3206
F. +1.206.359.4206
E. JHanson@perkinscoie.com

From: Jackson.J@dorsey.com <Jackson.J@dorsey.com>
Sent: Tuesday, June 15, 2021 10:55 AM
To: Hanson, Jeff (SEA) <JHanson@perkinscoie.com>; BBARNETT@SusmanGodfrey.com
Cc: william.schroeder@ksblit.legal; harrywilson@markowitzherbold.com; davidmarkowitz@markowitzherbold.com; gmz@uazh.com; CSMartin@schwabe.com; tgreenfield@schwabe.com; Michael.Andrea@avistacorp.com; robert.neate@pse.com; Brown.Andrew@dorsey.com; gonzalez.roxanna@dorsey.com; John.Tabaracci@northwestern.com; DallasDeluca@markowitzherbold.com; ACarlis@susmangodfrey.com; AFrawley@susmangodfrey.com; JMcLAREN@SusmanGodfrey.com; TGarcia@susmangodfrey.com; lorna.luebbe@pse.com; Steele, David S. (BEL) <DSteele@perkinscoie.com>; King, Marten (SEA) <MKing@perkinscoie.com>
Subject: RE: [EXTERNAL] Re: Talen Montana v. Avista Corp.--Complaint, Comments on Arbitration Proposals, and 4-23-21 Letter

Jeff and Barry—In a further effort to move these proceedings forward, attached is NorthWestern's updated arbitrator selection proposal which uses a "blind" selection process. We propose a "blind" selection process as a way of addressing the parties' conflicting views as to how many arbitrators the parties may propose, how many peremptory strikes the parties get, and the weight given to the rankings made by the parties. This proposal does not address the number of arbitrators or the qualifications necessary to be an arbitrator.

With hope you address this proposal with an open mind, J

J Jackson

Dorsey & Whitney LLP

P: 612.340.2760

F: 952.516.5596

C: 612.940.2047

EXHIBIT 2

From: Jackson.J@dorsey.com <Jackson.J@dorsey.com>

Date: Thursday, October 28, 2021 at 4:31 PM

To: Barry Barnett <BBARNETT@SusmanGodfrey.com>

Subject: Refined Proposed Arbitrator Selection Protocol

EXTERNAL Email

Barry—As we discussed, attached is the refined proposed arbitrator selection proposal I prepared. It includes feedback from counsel for the PNOs. Please review this proposal with your client and let me know your thoughts. If you have questions or ideas that would be best to discuss, let me know I can arrange a call between the two of us and counsel for the PNOs. As you suggested, perhaps such a call, if needed, could be among you, Jeff Hanson, and me, though I am certain Jeff does not have authority to bind all the PNOs. I support any appropriate process that will help move this proceeding forward.

Thanks very much, and I look forward to hearing from you. J

J Jackson

Dorsey & Whitney LLP

P: 612.340.2760

F: 952.516.5596

C: 612.940.2047

EXHIBIT 3



Portland General Electric Company
121 SW Salmon Street, 1WTC 1301
Portland, Oregon 97204



Avista Corporation
Post Office Box 3727
Spokane, Washington 99220



PacifiCorp
825 NE Multnomah Street
Portland, Oregon 97232



Puget Sound Energy
355 110th Avenue Northeast
Bellevue, Washington 98004

June 23, 2021

[Via Email]

Attention: Eric Wheatley
Talen Montana

Re: Request Pre-release Budget workshops

Dear Mr. Wheatley:

Portland General Electric Company, PacifiCorp, Avista Corporation, and Puget Sound Energy, Inc. (collectively referred to herein as “we” “us” or “our”) are writing to request Talen Montana provide pre-release 2022 budget workshops (“Budget Workshops”).

To facilitate the smooth review and approval of the 2022 operating budget, the undersigned members of the operator committee request the entire Committee engage in a series of workshops in advance of the budget creation and submittal process.

We request a series of workshops led by Talen Montana, as Operator, covering the below mentioned topics with the objective of providing sufficient detail and information for all owners to make an informed decision as to how the proposed budget will ensure safe, reliable and compliant operations. We anticipate the culmination of the five proposed workshops before submitting the budget on September 1, 2021.

Attention: Eric Wheatley

Talen Montana

June 23, 2021

Page 2 of 3

1. Baseline O&M
 - a. Plant Management & Administration
 - b. Insurance premiums
 - c. Balance of Plant / Plant Operations
 - d. Power Generation
 - e. Project Management and Services
 - f. A&G costs
2. Variable O&M
 - a. Chemical budget and assumptions
 - b. Fuels budget and assumptions
 - i. Plant Chemicals
 - ii. Fleet fuel, startup fuel etc.
3. Labor
 - a. Headcount / Staffing
 - b. Additional process assumptions
4. O & M Special Maintenance costs
5. Common Expense Costs

Information provided during the workshops and as part of the budget submittal should include at minimum the following:

- Nature of proposed activities and how they individually and collectively deliver safe, reliable and/or compliant operations
- Cost basis for proposed activities (i.e. historical? Estimated?)
- Methodology used to arrive at the proposed cost for activities

As a supplement to this process, we have engaged a consultant to engage in benchmarking activities. Owner's consultant will provide data and information requests to perform their analysis and a designated owner's representative will coordinate with Talen Montana to satisfy those requests. This activity intends to provide the owners with data beyond what some would classify as anecdotal. For clarity, any deliverables from the benchmarking activities are strictly for those commissioning the activity.

We recognize that for the 2022 budget Talen Montana has proposed to replicate the 2021 budget simply without the costs associated with the Unit #3 outage, as the initial proposal. Additionally, we acknowledge that Talen Montana has requested that the owners recommend specific areas for budget reductions on several occasions. Because the owners are not directly engaged in day-to-day operations, the owners must rely on Talen Montana to provide a budget that meets owner

Attention: Eric Wheatley
Talen Montana
June 23, 2021
Page 3 of 3

guidance that suggests reductions and impacts to the owners. These workshops and the resulting reports from the consultant are intended to help to better understand a final proposed budget.

Sincerely,

**PORTLAND GENERAL ELECTRIC
COMPANY**

By: *Shawn P Davis*
Shawn P Davis (Jun 23, 2021 15:14 PDT)

Name: Shawn Davis

AVISTA CORPORATION

By: *Steve Wenke*

Name: Steve Wenke

PACIFICORP

By: *Mike Johanson*

Name: Mike Johanson

PUGET SOUND ENERGY

By: *Nancy L Atwood*

Name: Nancy Atwood

cc Northwestern Energy
Attention: John Hines
Mike Barnes










Letter to Talen Re Budget Workshop Request (06.23.2021)


Final Audit Report

2021-06-24

Created:	2021-06-23
By:	Danielle McCain (danielle.mccain@pgn.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAQgU7TiT7mMQbKoLD0JLxTXmTJQ5duPro

"Letter to Talen Re Budget Workshop Request (06.23.2021)" History


-  Document created by Danielle McCain (danielle.mccain@pgn.com)
2021-06-23 - 10:10:56 PM GMT- IP address: 147.79.176.155
-  Document emailed to Shawn P Davis (shawn.davis@pgn.com) for signature
2021-06-23 - 10:12:00 PM GMT
-  Email viewed by Shawn P Davis (shawn.davis@pgn.com)
2021-06-23 - 10:13:59 PM GMT- IP address: 107.77.212.224
-  Shawn P Davis (shawn.davis@pgn.com) has agreed to the terms of use and to do business electronically with PORTLAND GENERAL ELECTRIC CO
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-  Document e-signed by Shawn P Davis (shawn.davis@pgn.com)
Signature Date: 2021-06-23 - 10:14:43 PM GMT - Time Source: server- IP address: 107.77.212.224
-  Document emailed to Steve Wenke (steve.wenke@avistacorp.com) for signature
2021-06-23 - 10:14:45 PM GMT
-  Email viewed by Steve Wenke (steve.wenke@avistacorp.com)
2021-06-23 - 10:33:50 PM GMT- IP address: 104.47.73.126
-  Steve Wenke (steve.wenke@avistacorp.com) has agreed to the terms of use and to do business electronically with PORTLAND GENERAL ELECTRIC CO
2021-06-23 - 10:35:37 PM GMT- IP address: 198.181.18.24
-  Document e-signed by Steve Wenke (steve.wenke@avistacorp.com)
Signature Date: 2021-06-23 - 10:35:37 PM GMT - Time Source: server- IP address: 198.181.18.24

 Document emailed to Mike Johanson (mike.johanson@pacificorp.com) for signature


2021-06-23 - 10:35:39 PM GMT

 Email viewed by Mike Johanson (mike.johanson@pacificorp.com)


2021-06-24 - 12:27:41 PM GMT- IP address: 104.47.56.254

 Mike Johanson (mike.johanson@pacificorp.com) has agreed to the terms of use and to do business electronically with PORTLAND GENERAL ELECTRIC CO

2021-06-24 - 12:28:28 PM GMT- IP address: 131.219.2.1

 Document e-signed by Mike Johanson (mike.johanson@pacificorp.com)


Signature Date: 2021-06-24 - 12:28:28 PM GMT - Time Source: server- IP address: 131.219.2.1

 Document emailed to Nancy L. Atwood (nancy.atwood@pse.com) for signature

2021-06-24 - 12:28:30 PM GMT

 Email viewed by Nancy L. Atwood (nancy.atwood@pse.com)

2021-06-24 - 1:50:13 PM GMT- IP address: 67.183.236.87

 Nancy L. Atwood (nancy.atwood@pse.com) has agreed to the terms of use and to do business electronically with PORTLAND GENERAL ELECTRIC CO

2021-06-24 - 2:42:15 PM GMT- IP address: 204.61.56.35

 Document e-signed by Nancy L. Atwood (nancy.atwood@pse.com)

Signature Date: 2021-06-24 - 2:42:15 PM GMT - Time Source: server- IP address: 204.61.56.35

 Agreement completed.

2021-06-24 - 2:42:15 PM GMT

EXHIBIT 4



September 29, 2021

Via Email

Ron Roberts
Puget Sound Energy, Inc.
10885 N.E. 4th Street
Bellevue, WA 98004
ron.roberts@pse.com

Jason Thackston
Avista Corporation
1411 E Mission Ave MSC-7
Spokane, WA 99202
jason.thackston@avistacorp.com

Brett Greene
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brett.greene@pgn.com

Dana Ralston
PacifiCorp
1407 W. North Temple, Suite 210
Salt Lake City, UT 84116
dana.ralston@pacificorp.com

Re: 2022 Colstrip Units 3&4 Budget

Gentlemen:

I wanted to address the concerns about the 2022 budget process that you raised in your September 8, 2021 letter.

In hindsight, I realize that, in our September 1, 2021 email response to your "Requested Protocols for 2022 Budget Process" of August 16, 2021 (the "Requested Protocols"), we should have more clearly articulated our position regarding the Requested Protocols. To clarify, our suggestion that you submit your Requested Protocols to the Project Committee, as contemplated by the O&O Agreement, was not a refusal to provide you with any specific information that you might request during the budget review process. It was instead meant as a reminder that changing the budget protocols is not something that we, as Operator, can approve unilaterally and instead something that must be submitted to the Project Committee for discussion and a vote in accordance with Sections 17(d) and 17(f)(i).

That said, we remain committed to providing you the information necessary for you to review and approve the 2022 budget. In addition to the detailed supporting material provided with our September 1, 2021 budget submission, there is a robust review process for the 2022 budget among the Project Committee and Talen Montana's Colstrip team that started months before our formal submission of the 2022 budget on September 1 whereby we have provided and are continuing to provide your Project Committee representatives with a significant amount of information explaining and supporting the proposed budget. Among the considerable volume of documents provided, emails exchanged, and discussions held, I would like to particularly highlight

RE: 2022 Colstrip Units 3&4 Budget

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September 29, 2021

the materials shared via the following meetings and workshops that have been or will soon be conducted between plant personnel and your Project Committee representatives:

<u>Date</u>	<u>Topics Covered (or Scheduled to be Covered)</u>
June 16, 2021	Meeting on 2022 Units 3&4 Base Operations & Maintenance ("O&M") cost expectations compared to the 2016-2021 timeframe
July 21, 2021	Meeting to present Draft 2022 Units 3&4 budget and narrative (covered during July Owners Meeting)
August 17, 2021	Meeting to discuss potential alternatives to reduce 2022 budget with discussion of 2018-2020 costs and 2021 year-to-date progress in lowering costs
September 8, 2021	Workshop on Labor and Variable O&M (commodity) costs included in the proposed 2022 budget; discussion regarding expectations for the next workshop on September 15, 2021
September 15, 2021	Workshop on Non-labor O&M costs included in the proposed 2022 budget by responsibility center and category with a deep dive into on responsibility center and one category
October 6, 2021	Workshop on Brine Concentrator O&M, Special O&M and 3 plant capital projects included in the proposed 2022 budget; follow-ups requested from Project Committee during September 15, 2021 workshops
October 20, 2021	Workshop on Asset Retirement Obligation projects; any additional follow-up requests from Project Committee

Beyond those meetings and workshops, we will continue to provide you with the additional cost and budget information that you request. For instance, we have been working cooperatively with your budget consultants from KPMG for some time. We have responded to their numerous information requests for a substantial amount of information, and last week hosted their three-day site visit to Colstrip, making available over 15 employees for interviews, meetings, and field visits. We will continue to work with your consultant and respond to future requests for additional data.

I hope that, after consultation with your Project Committee representative, you will agree with me that the dialogue and information sharing that is occurring between the Project Committee and Talen Montana's Colstrip team regarding the 2022 budget is both responsive to your requests and quite constructive. In a similar vein, I think that,

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rather than continuing to exchange letters, a meeting among the co-owners' executives to discuss how best to meet the November 1 deadline for an approved 2022 budget would be most conducive to a positive outcome for all co-owners. To that end, I will be reaching out to you separately to schedule that meeting.

Sincerely,



Dale Lebsack

President, Talen Montana, LLC

Cc: John Hines
NorthWestern Energy
208 N Montana Avenue
Helena, MT 59601
john.hines@northwestern.com

EXHIBIT 5

From: [Dennehy, Neil J](#)
To: [Brown, Shannon](#); [Dempsey, Thomas](#); [Michael Barnes \(michael.barnes@northwestern.com\)](#); [Mike Johanson; Nancy.Atwood@pse.com](#); [shawn.davis@pgn.com](#); [Wenke, Steve \(Steve.Wenke@avistacorp.com\)](#)
Cc: [Wheatley, Eric](#); [Diemel, Tony](#)
Subject: Colstrip U34 2021 Proposed Operating Budget, Rev 3. 7.27.21
Date: Tuesday, July 27, 2021 12:52:17 PM
Attachments: [06-21 Bud vs Act, Un 3-4rev1.xlsx](#)
[image001.png](#)
[Colstrip Units 3&4 2021 Proposed Operating Budget Rev3 7.27.21.pdf](#)
[image003.png](#)

Enclosed for your review and approval is our revised 2021 Colstrip Units 3 & 4 Operating Budget (Revision 3. 7.27.21) and its associated supporting documents that we shared during the 7/21/21 Project Committee meeting.

We are pleased to note that this revised budget reflects approximately \$5.6 million in cost savings (from \$127,651,456 to \$122,010,760) made possible by our continued spending discipline so far this year, and our increased confidence in our ability to accurately predict costs for the remainder of the year.

This revision is based on actual costs to date and our current forecast for the remainder of the year. It is designed to reflect the lowest reasonable cost to operate U34 through 2021, consistent with reliability, safety, expedition, and environmental compliance. We will submit additional budget revisions as may become necessary from time to time for Project Committee approval if conditions change during the operating year. We will also make all expenditures, on behalf of the owners, as are necessary for the proper and safe operation and maintenance of the Project.

We request approval of this revised budget by August 6, 2021. Please direct all communication regarding the budget in the form of questions, comments, or approvals through Tony Diemel as I will be on vacation and unavailable.



Neil Dennehy • Plant Manager

Colstrip Power Plant • (406) 748-5066 • Neil.Dennehy@TalenEnergy.com

Talen Energy • 580 Willow Ave • Colstrip, MT 59323-0038



EXHIBIT 6

Response to Colstrip 2021 Budget Revision and Requested Protocols for 2022 Budget Process

The PNW owners decline to approve the budget revision proposed by Talen (Revision 3.7.27.21), because it lacks the necessary information and support for the proposed capital and O&M expenditures required by Section 17(g) of the O&O Agreement.

The PNW owners request that Talen immediately adopt and implement the following Colstrip 2022 Budget protocols in order to proceed through the upcoming 2022 budgeting process in an orderly manner that results in the owners being in the best position possible to make informed, financially prudent choices that provide for the safe, reliable and compliant operation of the plant, consistent with Prudent Utility Practice.

The workshop will be undertaken consistent with the principles noted in the letter from the northwest utilities dated June 23, 2021. Further, there must be adherence to the timing requirements provided in the O&O Agreement.

With that background, in order for Talen to provide sufficient information and detail regarding the Colstrip 2022 Budget as required by Section 17(g) of the O&O Agreement and Prudent Utility Practice, the following protocols must be established for a proper and timely vetting of the proposed budget:

- Unit 3 and Unit 4 must be budgeted separately
- Proposed capital expenditures must itemize the following:
 - o What specific compliance requirements does the proposed expenditure address?
 - o What specific safety requirements does the proposed expenditure address?
 - o What alternatives were considered in lieu of the chosen budget expenditure, beyond do nothing leading to failure
 - o Is the expenditure an OEM recommendation and if so on what criteria – operational hours, testing, age, etc?
 - o Documentation of testing or specifications the expenditure seeks to resolve
 - o A listing of expenditures necessary to maintain each Unit's operations through 2025, and a separate listing of expenditures that will benefit either Unit post 2025
- Proposed O&M expenditures must itemize the following:
 - o What specific compliance requirements does the proposed expenditure address?
 - o What specific safety requirements does the proposed expenditure address?
 - o What alternatives were considered in lieu of the chosen budget expenditure, beyond do nothing leading to failure
 - Were different procedures or process considered
 - o Is the expenditure an OEM recommendation and if so on what criteria – operational hours, testing, age, etc? Documentation of testing or specifications the expenditure seeks to resolve or intends to maintain O&M
 - o A listing of expenditures necessary to maintain operations through 2025, and a separate listing of expenditures that will benefit either Unit post 2025
- Upon request of any owner, Talen shall provide detail of expenditures necessary and appropriate for ultimate submittal to relevant utility commissions in support of rate-basing Capital and O&M expenditures. Such detail shall include specific detail on operations and maintenance expenditures necessary for explanation to regulatory staff and interveners

EXHIBIT 7



Neil J Dennehy • Plant Manager • Colstrip Power Plant
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September 1, 2021

Ms. Nancy Atwood
Manager, Energy Resources Assets
P.O. Box 97034
Bellevue, WA 98009-9734

Mr. Mike Barnes
Superintendent Joint Owned Thermal Ops
P.O. Box 80330
1944 Monad Road
Billings, MT 593102

Mr. Steve Wenke
Senior Manager Generation
Strategy and Planning
AVISTA
Avista Utilities, MSC-51
1411 E. Mission Avenue
Spokane, WA 99220

Mr. Mike Johanson
Non-Operational Plant and Support Director
PacifiCorp
1407 West North Temple, Suite 210
Salt Lake City, UT 84116

Mr. Shannon Brown
Senior Director, Asset Management
Talen Energy
1780 Hughes Landing
The Woodlands, TX 77380

Mr. Craig Udy
Operations Manager-Carty Generating Station
Portland General Electric
73396 Tower Road
Boardman, OR 97818

Dear Colstrip Owners,

In accordance with Sections 7, 10, and 17 of the Ownership and Operation Agreement, enclosed for your review and approval is the 2022 Colstrip Units 3 and 4 budget.

Budget Methodology

In accordance with Prudent Utility Practice, and based on our reasonable judgment in light of the facts currently known, we have developed a 2022 budget that will allow us to operate Units 3 and 4 at the lowest reasonable cost consistent with reliability, safety, and expedition. Like the 2021 budget, this budget does not depend on whether Units 3 and 4 are projected to continue operations past 2025. It would look the same regardless of their operating status in 2026 and beyond.

This budget used as its starting point the actual cost to operate Units 3 and 4 since January 2020, when Units 1 and 2 were retired. We then adjusted those numbers to reflect changes we expect for 2022, including new systems and equipment (e.g., the new dry ash plant) and other factors. This is a different approach than the one we used in prior years, when we relied on estimating future costs and then building in contingencies that made it more likely than not that the plant would perform at or under budget (as it has done). This new approach makes that less likely, and we anticipate an equal chance of underrunning or exceeding this budget.

This methodology—relying on actual historical costs as a starting point, rather than building the budget from bottom-up estimates and then adding contingency—allows for an appropriately lean budget without meaningful contingency. One benefit of this approach is that the total budgeted amount is lower than it would have been under the estimating methodology that we have used in the past. Another benefit is that the co-owners may be better able to avoid setting aside reserves that prove to be unnecessary than in prior years.

But, as we have explained, this change in approach also makes it more likely than in prior years that the actual costs necessary to ensure the proper and safe operation and maintenance of the Project could exceed the budgeted amount. If that occurs, or if there is a budget underrun, we will submit necessary budget revisions for the Committee's approval, similar to the revision submitted on July 27, 2021 for the 2021 budget. We will also make all expenditures, on behalf of the owners, as are necessary for the proper and safe operation and maintenance of the Project.

Recent Refinement to the 2022 Budget

We are pleased to report that this proposed budget reflects additional operation and maintenance cost reductions on top of the already substantial reductions in the early draft 2022 budget we prepared at your request and provided to you for your convenience on July 21, 2021.

We noted when providing you that early draft budget that there "may be additional refinement between now and the 9/1/21 submission." This additional refinement has resulted in a reduction to 2022 operation and maintenance costs of approximately \$5 million, primarily from two sources:

1. Consistent with our overall approach to eliminate contingency, we have eliminated three special maintenance line items totaling approximately \$772,000. We expect that two of those items—additional funds for (1) paving, roofing, and dust control, and (2) fire protection underground piping—are adequately covered by our existing regular maintenance and are unlikely to need this additional funding in 2022. We have also eliminated the \$50,000 strike contingency due to the recent, successful contract negotiations.
2. We have received an updated pension expense calculation for 2022 from our actuary, which was provided to your representatives on August 26, 2021. The updated calculation lowered the 2022 pension expense by approximately \$4 million.

This continues an overall trend of budgeting discipline.

Materials for Your Review

In accordance with Section 17(g) of the Ownership and Operation Agreement, we are providing you with itemized cost estimates and other detail to support your comprehensive review. This includes, among other materials, the 2022 staffing plan, labor details, common cost details, generation summary, and tables that will help you compare this budget to those from prior years. This information we are providing supplements information we have already provided you, including monthly detailed actual costs through July 2021 (as reflected in monthly invoices), other materials provided to you regarding plant costs and prior budgets, other information made available to you as active participants in the Project Committee, and additional information made available to you as co-owners.

We are making available the capital project justification and support materials at <https://talenenergy.ftptoday.com/>. Please let us know if you have any issues accessing those materials. We are pleased to provide you with this information, which is more than we have provided in recent years, and to host the owner-requested workshops scheduled for 9/8/21 and 9/15/21.

We remain committed to answering any questions you have about this proposal. One of the benefits of the workshops we have agreed to host between now and November 1, 2021 is that we can use them to answer questions about the itemized cost estimates and other materials we have provided.

We look forward to reviewing this budget with you at our upcoming co-owners' meeting scheduled for September 15, 2021. We request approval by November 1, 2021.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Neil Deen", with a stylized flourish at the end.

Enclosures:

- 2022 Colstrip Units 3 and 4 budget
- 2022 Units 3 and 4 budget comparison table
- 2022 non-labor fixed base O&M details
- 2022 labor details
- 2022 ARO budget with monthly forecast
- 2022 capital budget with monthly forecast
- 2022 common cost details (Units 1-4)
- 2022 staffing plan details (Units 1-4)
- 2022 generation summary
- 2016-2022 recurring fixed and variable O&M costs trends
- 2018-2022 recurring fixed and variable O&M costs table
- 2022 capital project justification summaries (FTP site)