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*Attorneys for Defendant NorthWestern Corporation*

**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. 21-cv-00047-SPW-KLD

**DECLARATION OF J DAVID  
JACKSON IN SUPPORT OF  
DEFENDANT  
NORTHWESTERN  
CORPORATION'S MOTION TO  
COMPEL ARBITRATION AND  
APPOINT A MAGISTRATE  
JUDGE TO OVERSEE  
ARBITRATION PROCEDURE  
NEGOTIATIONS**

I, J David Jackson hereby certify under penalty of perjury:

1. I am a partner in the law firm of Dorsey & Whitney LLP.
2. I have personal knowledge of, and am competent to testify to, the matters set forth in this Declaration.

### **The Arbitration**

3. Because an actual and substantial controversy exists between NorthWestern and the other Owners regarding their respective rights and duties arising out of or in connection with the Ownership and Operation Agreement (“O&O Agreement”), NorthWestern, acting pursuant to O&O Agreement Section 18, commenced an arbitration proceeding.

4. NorthWestern commenced arbitration by providing 30-day notice to all Owners on February 9, 2021, and serving its demand for arbitration on March 12, 2021, which it amended and served on April 2, 2021.

5. In the arbitration, NorthWestern seeks an award declaring, among other things:

The Project can only be shut down upon a unanimous vote of the Owners when the Project, or any part thereof as originally constructed, reconstructed or added to, can no longer be made capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction.

and

Any Owner which either proposes or withholds their approval of the annual operating budget, in whole or in part, in an effort to cause the closure of the Project by 2025 (or any other date prior to unanimous approval of the Owners to close), may be found to be in breach of the terms and conditions of the O&O Agreement, including their obligations under section 10(a) of the O&O Agreement.

NorthWestern's Amended Arbitration Demand Claim for Relief ¶¶ 1 & 5.

6. Each of the Plaintiffs (the PNW Owners) served formal responses to NorthWestern's Amended Demand for Arbitration, denying NorthWestern's claims and asserting their own counter demand seeking closure of the Project by December 31, 2025.

7. The PNW Owners claimed a majority of the Owners could close the Project. NorthWestern contended a unanimous vote of the Owners is required.

8. Talen has not formally responded to NorthWestern's Arbitration Demand or Amended Arbitration Demand.

#### **Negotiating the Arbitration Process to a Standstill**

9. The parties have had several teleconferences and email communications to address the terms of the arbitration. However, the parties have been unable to agree on the number of arbitrators, how to select the arbitrator(s), or arrive the arbitration process and procedure.

10. Talen, among other things, has departed from the terms of the O&O Agreement by objecting to one arbitrator and to venue in Spokane. Instead, similar

to the language of SB 265, Talen originally demanded a panel of three arbitrators, and has consistently demanded venue of the arbitration in Montana and for Montana law to govern.

11. The PNW Owners have been steadfast in their position there be only one arbitrator, the venue of the arbitration in Washington, and for Washington law to govern.

12. NorthWestern, which has been willing to meet the parties on any point in order to proceed with the arbitration, provided a proposal by which the parties would blindly select an arbitrator or arbitrators.

13. On June 25, 2021, Talen agreed to proceed with one arbitrator, but it altered the arbitrator's qualifications, proposed a new method for selection of the arbitrator, ignoring a selection process agreed to by NorthWestern and the PNW Owners, and added a provision allowing the parties to appeal "the Hearing Arbitrator's award . . . pursuant to the JAMS Optional Appeal Procedure." A true and correct copy of Talen's email correspondence enclosing its June 25, 2021 proposal and Talen's June 25, 2021 proposal are attached to this Declaration as Exhibit 1.

14. Because Talen's June 25 proposal varied so materially from proposals submitted by NorthWestern and the PNW Owners, because Talen ignored the arbitrator selection process agreed to by NorthWestern and the PNW Owners, and

because of increased litigation activity, neither NorthWestern nor the PNW Owners immediately responded to Talen's proposal.

15. On October 27, 2021, counsel for NorthWestern revised the proposed arbitrator selection proposal.

16. On October 28, 2021, I contacted counsel for Talen to discuss the revised proposed arbitrator selection proposal. Following the discussion, I sent the revised proposed arbitrator selection proposal to Talen's counsel.

17. I did not hear from Talen's counsel until November 9, 2021. The conversation did not result in any meaningful movement to approve the revised proposed arbitrator selection proposal.

18. On November 15, 2021, Talen's counsel contacted counsel for Puget Sound Energy, Inc. regarding the arbitrator selection proposal. Talen has yet to provide any written feedback regarding the revised arbitrator selection proposal I sent to him on October 28, 2021.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 3, 2021

/s/ J Jackson  
J David Jackson

# **EXHIBIT 1**

**Gonzalez, Roxanna**

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**From:** Barry Barnett <BBARNETT@SusmanGodfrey.com>  
**Sent:** Friday, June 25, 2021 2:40 PM  
**To:** Jackson, J  
**Subject:** NorthWestern v. Avista--Arbitration Agreement and Removal  
**Attachments:** Colstrip Arbitration Agreement 6-25-21.pdf

EXTERNAL: This email originated from outside the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

J,

It was good speaking with you just now.

I've attached the draft agreement Talen has authorized me to propose to NorthWestern and the group of co-owners in Oregon and Washington for review and comment. As mentioned, I plan to send it to the co-owners after I call Jeff Hanson in response to the email he sent me yesterday on the same subject.

I'll look forward to seeing NorthWestern's response to the Oregon and Washington co-owners' motion to remand.

Have a terrific weekend—and, if you run into her, please give Senator Klobuchar my best.

Truly yours,  
Barry

Barry Barnett  
866-754-1900

Emails to and from me often include confidential lawyer-client communications and lawyer work product. If you believe you may have received this email in error, please (1) notify me and (2) delete the email and any attachments to it without copying or forwarding or making any other improper use of it or them.

**DRAFT: For Discussion Only**

**June 25, 2021 2:27 MT**

**Colstrip Units 3 & 4 Dispute Resolution Agreement**

Avista Corporation, NorthWestern Corporation, PacifiCorp, Portland General Electric Company, Puget Sound Energy, Inc., and Talen Montana, LLC (the “Parties”) enter into this Colstrip Units 3 & 4 Dispute Resolution Agreement (the “Agreement”) effective the \_\_\_ day of June, 2021 (the “Effective Date”), as follows:

WHEREAS the Parties are co-owners of the Colstrip Units 3 & 4 Steam Electric Generating Project in Colstrip, Montana (the “Project”) and parties to the Ownership & Operation Agreement Colstrip Units #3 & #4 dated May 6, 1981, as amended (the “O&O Agreement”);

WHEREAS on March 12, 2021 NorthWestern sent an arbitration demand to the other Parties and on April 2, 2021 sent them an amended arbitration demand (the “Amended Demand”);

WHEREAS on April 14, 2021 Avista Corporation, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. (the “Pacific Northwest Parties”) filed a lawsuit against NorthWestern Corporation (“NorthWestern”) and Talen Montana, LLC (“Talen Montana”) in the Superior Court of the State of Washington for Spokane County (the “Spokane County Case”);

WHEREAS on May 4, 2021 the Pacific Northwest Parties filed a lawsuit against NorthWestern and Talen Montana in the United States District Court for the District of Montana, Billings Division, where it remains pending under No. 1:21-cv-00047-SPW-KLD, and on May 17, 2021 amended their complaint to allege a claim against the Attorney General of Montana (the “Montana Federal Case”);

WHEREAS on May 4, 2021 Talen Montana filed a lawsuit against the Pacific Northwest Parties and NorthWestern in the Thirteenth District Court of Yellowstone County, Montana (the “Yellowstone County Case”);

WHEREAS on May 10, 2021 Talen Montana removed the Spokane County Case to the United States District Court for the Eastern District of Washington, Spokane Division, where it remains pending under No. 2:21-cv-00163;

WHEREAS on May 17, 2021 the Pacific Northwest Parties removed the Yellowstone County Case to the United States District Court for the District of Montana, Billings Division, where it remains pending under no. 1:21-cv-00058-SPW-TJC;

WHEREAS the Parties have filed and responded to various motions to remand, for preliminary injunction, for transfer or dismissal, and for consolidation in the three pending cases;

WHEREAS the Parties have negotiated extensively regarding potential terms and conditions of an agreement for proceeding with arbitration of existing disputes relating to the Project and and for staying or dismissing the three pending cases;

WHEREAS the Parties wish to enter into this Agreement to document the terms and conditions they mutually accept;



**DRAFT: For Discussion Only**

**June 25, 2021 2:27 MT**

NOW, THEREFORE, in consideration of the Parties' mutual promises and other good and valuable consideration, the receipt and sufficiency of which they each acknowledge, the Parties agree to the following terms and conditions:

1. The Parties will select one arbitrator, who will be neutral and independent, to resolve existing disputes relating to the Project (the "Disputes") under Section 18 of the O&O Agreement, as modified by this Agreement (the "Hearing Arbitrator"). To qualify for selection as the Hearing Arbitrator, an arbitrator-candidate must be (a) listed on the Energy & Utilities roster of JAMS neutrals, the Institute for Energy Law Energy Arbitrators List, or the American Arbitration Association National Energy Panel and be (b) either (i) a retired federal magistrate or district judge or (ii) a practicing lawyer with at least 15 years of experience in complex commercial litigation and some experience in litigation relating to fossil-fuel power generation (the "Selection Criteria").
2. Within 3 business days after the Effective Date, the Pacific Northwest Parties as a group, NorthWestern, and Talen Montana will each email to the other Parties a list of up to 5 arbitrator-candidates who meet the Selection Criteria in rank order. Each list must disclose as to each arbitrator-candidate all relationships and circumstances that reasonably suggest probable bias for or against a Party, a Party's position in the arbitration, a law firm, or a lawyer representing a Party. The Parties will not inform any arbitrator-candidate on any of the lists that they are being considered to serve as an arbitrator either before or after the lists are emailed.
3. Within 10 business days after the Effective Date, the Pacific Northwest Parties as a group, NorthWestern, and Talen Montana may each move to strike arbitrator-candidates on grounds of probable bias for or against a Party, a Party's position in the arbitration, or a law firm or a lawyer representing a Party or a failure to qualify under the Selection Criteria. Counsel must email any motions to strike to counsel for all Parties and must include in the email a brief explanation of the ground or grounds for each strike.
4. Each of NorthWestern, the Pacific Northwest Parties as a group, and Talen Montana may strike without cause no more than a total of 2 arbitrator-candidates at any time before they accept appointment as the Selecting Arbitrator or are offered appointment as the Hearing Arbitrator. To be effective, any without-cause strike must be timely emailed to counsel for the non-striking Parties.
5. If the the Pacific Northwest Parties as a group, NorthWestern, and Talen Montana agree on a Hearing Arbitrator within 10 business days after the Effective Date, the Parties will jointly request the agreed-upon arbitrator-candidate to serve as the Hearing Arbitrator. Upon accepting appointment, the arbitrator-candidate will become the Hearing Arbitrator and will be authorized to preside over the arbitration and hear and decide the Disputes in accordance with applicable law.
6. If the Parties do not agree on a Hearing Arbitrator within 10 business days after the Effective Date or the agreed-upon arbitrator-candidate is for any reason not appointed, the

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Parties will randomly select 1 of the 3 remaining (after any timely exercise of a without-cause strike) arbitrator-candidates who were ranked highest on the lists, respectively, of NorthWestern, the Pacific Northwest Parties as a group, and Talen Montana to choose the Hearing Arbitrator from among the remaining arbitrator-candidates (the “Selecting Arbitrator”). If the randomly-selected arbitrator-candidate declines to serve, is subject to a motion to strike for cause, or before accepting appointment as the Selecting Arbitrator is struck without cause, the Parties will repeat the random-selection process until the Selecting Arbitrator is chosen and accepts appointment.

5. The Selecting Arbitrator must resolve the Parties’ for-cause strikes of arbitrator-candidates within 10 business days after accepting appointment. After the Parties exercise any remaining without-cause strikes they may have, the Selecting Arbitrator will select from among the remaining arbitrator-candidates the one who, in the Selecting Arbitrator’s judgment, is best suited to serve as the Hearing Arbitrator. If for any reason the arbitrator-candidate selected by the Selecting Arbitrator is not appointed, the Selecting Arbitrator will select the arbitrator-candidate who, in the Selecting Arbitrator’s judgment, is the next best suited to serve as the Hearing Arbitrator and will repeat the process if and to the extent necessary.
7. Within 7 calendar days after the Hearing Arbitrator accepts appointment, the Parties will (a) move to dismiss the Spokane County Case, the Montana Federal Case, and the Yellowstone County Case without prejudice, each Party to bear its own costs, and (b) exchange proposals for the rules, protocols, and procedures to govern the arbitration, including a schedule for discovery, motion practice, and the final hearing. If the Parties do not reach agreement regarding the rules, protocols, and procedures to govern the arbitration within 14 calendar days after the Hearing Arbitrator accepts appointment, any Party may request the Hearing Arbitrator to adopt specific rules, protocols, or procedures to govern the arbitration or a schedule for discovery, motion practice, and the final hearing.
8. Live arbitration proceedings will take place in Denver, Colorado, unless all Parties agree otherwise.
9. Montana law will govern this Agreement and the arbitration.
10. The Hearing Arbitrator must issue a reasoned, written award within 30 days of the conclusion of the arbitration proceedings.
11. The Hearing Arbitrator’s award may be appealed pursuant to the JAMS Optional Appeal Procedure.
12. The courts of Montana will have exclusive jurisdiction over any effort to enforce this Agreement and to confirm, modify, challenge, or set aside the arbitral award.