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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; AUSTIN
KNUDSEN, in his official capacity as
Attorney General for the State of
Montana,**

Defendants.

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

**DEFENDANT
NORTHWESTERN
CORPORATION'S RESPONSE
TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT REGARDING
THEIR FOURTH AND FIFTH
CLAIMS FOR RELIEF**

Defendant NorthWestern Corporation ("NorthWestern") is one of six owners of Colstrip Units 3 and 4 Steam Electric Generating Project and related

facilities, located in Colstrip, Montana (the “Project”), under the terms of the Colstrip Units 3 and 4 Ownership and Operation Agreement, dated May 6, 1981 (along with each of its four Amendments, the “O&O Agreement”). The other five owners are the other non-governmental parties to this lawsuit.

The O&O Agreement sets forth the obligations and rights of the Owners. The original Owners created the O&O Agreement “to establish the terms and conditions relating to their ownership, as tenants in common, and the planning, financing, acquisition, construction, operation and maintenance of the Colstrip Units #3 and #4 Steam Electric Generating Project and related facilities.” O&O Agreement first Whereas clause.

A dispute arose between the Parties about the ongoing operation of the Project beyond the year 2025. Plaintiffs have insisted on and threatened to take actions that would cause the closure of the Project by 2025, claiming a majority of the co-owners can close the Project. NorthWestern contends a unanimous vote of the owners is required to close the Project.

NorthWestern depends upon the Project to meet the demand for electricity from its customers in Montana. Given the lengthy lead time for NorthWestern to plan for, locate, possibly construct, and obtain regulatory approval for new sources of electrical generation to replace the Project were it closed prematurely, any delay

in obtaining a final decision regarding whether the O&O Agreement requires unanimity or a majority to close the Project would severely damage NorthWestern and create potential electricity shortfalls for NorthWestern's customers in Montana.

Because an actual and substantial controversy exists between NorthWestern and the other Parties regarding their respective rights and duties arising out of or in connection with the O&O Agreement, NorthWestern, acting under O&O Agreement Section 18, commenced an arbitration proceeding. NorthWestern served its demand for arbitration on March 12, 2021, which it amended and served on April 2, 2021.

After NorthWestern served its amended demand for arbitration, on April 13, 2021, the Montana Legislature passed Senate Bills 265¹ and 266. Montana Governor Gianforte signed them into law on May 3, 2021. Sections 2(1)(a) and (b) of Senate Bill 266 amended the Montana Unfair Trade Practices and Consumer Protection Act to create two new unfair or deceptive acts or practices: (1) "failure or refusal of an owner of a jointly owned electrical generation facility in the state

¹ Plaintiffs filed a motion for partial summary judgment on their first, second, and third claims for relief arguing that SB 265 is unenforceable as applied to the O&O Agreement and unconstitutional under the Contract Clauses of the United States and the Montana constitutions. Doc. 88. The Court's order on Plaintiffs' motion is pending.

to fund its share of operating costs” and (2) “[c]onduct 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[.]”² The law authorizes the Montana Department of Justice to pursue injunctive relief and request a court to impose a civil fine of up to “\$100,000 for each violation,” with “[e]ach day of a continuing violation” counting as “a separate offense.” MCA § 30-14-2702(2)(a)-(b).

Plaintiffs moved for a preliminary injunction to enjoin the Montana Attorney General from enforcing Senate Bill 266. Doc. 37. This Court granted Plaintiffs’ Motion for a Preliminary Injunction on October 13, 2021. Doc. 100.

Plaintiffs now move for partial summary judgment seeking an order declaring Senate Bill 266 unconstitutional. In support of their motion, Plaintiffs often rely on the belief they may close the Project by either a majority vote of the owners or by cutting the budget for operation and maintenance of the Project, the effect of which would be to cause the Project’s early closure. Both matters—the

² Senate Bill 266 is codified as Montana Code § 30-14-2702, and sections 2(1)(A) and 2(1)(B) of Senate Bill 266 are codified as Montana Code § 30-14-2702(1)(a) and (b).

vote required to close the Project and closure by budget—are the subject of the arbitration NorthWestern commenced.

In NorthWestern’s Amended Demand for Arbitration, NorthWestern seeks an award declaring, in pertinent part,

1. 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.
2. Unless all the Owners vote unanimously to shut down the Project, all Owners and the Operator are bound by section 32 of the O&O Agreement to act reasonably and in good faith to ensure for the continued operation of the Project as long as “the Project or any part thereof as originally constructed, reconstructed or added to is, or can be made, capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction”

* * *

5. 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.

Plaintiffs’ motion for partial summary judgment often ignores the boundaries between the issues that must be arbitrated under O&O Agreement section 18 and their claims of entitlement under the O&O Agreement as they interpret them. The purpose of this response is to make clear the parties’ rights to

obtain closure of the Project are subject to the arbitration NorthWestern commenced over eight months ago. NorthWestern is eager for that arbitration to be resolved.

ARGUMENT

No party disputes the O&O Agreement governs the ongoing operation and maintenance of the Project. The Owners, however, do dispute what is necessary to shut down the Project and the Owners' obligations until then. That dispute is the subject of the arbitration proceeding NorthWestern commenced.

Should the arbitrator agree with Plaintiffs'—the Pacific Northwest Owners'—contention that a majority vote is all that is required to close the Project, Senate Bill 266 may be said to modify the terms of the O&O Agreement. Plaintiffs commenced this lawsuit in part to contest the legality of Senate Bill 266 and its impact on their rights as owners under the O&O Agreement, claiming it is unconstitutional. Their supporting arguments vary between claims that Senate Bill 266 chills their ability to pursue their views on closure, preventing them from even arguing their position, and claims that Senate Bill 266 disallows their interpretation the O&O Agreement permits a majority vote to close the Project.

For example, in footnote 9 of Plaintiffs' supporting Memorandum (Doc. 104), Plaintiffs correctly state, "The PNW Owners are not asking this Court to rule

whether the Agreement provides that a less than unanimous vote can close one or both units of Colstrip or whether it requires a unanimous vote; this is a question for the arbitrator.” This is a fair argument, whether or not it carries the day, for Plaintiffs have the right to pursue their claims and defenses in arbitration.

However, the PNW Owners focus their argument on issues that are subject to arbitration and irrelevant to their motion for partial summary judgment: specifically, their interpretation of various sections of the O&O Agreement and their characterization of their contractual right to close the Project with a simple majority vote. For example, Plaintiffs argue Senate Bill 266 “Limits the PNW Owners’ right to vote to close the plant . . . and their right to vote against a Talen-proposed budget.” Plts.’ Mem., Doc 104, at p. 5. They also claim Senate Bill 266 was meant to “limit . . . their right to vote against a Talen-proposed budget”³—apparently even if doing so will cause the closure of the plant.⁴ And they later argue that Senate Bill 266 section 2(1)(a) “impairs several contract rights . . .

³ Quoting Senator Fitzpatrick during the House Committee Hearing.

⁴ During the current budget discussions, which began on or about September 1 with Talen’s proposed \$100 million budget for 2022, Plaintiffs insisted on a \$25 million reduction, the impact of which could be devastating to the Project’s ongoing viability.

[including] [o]ne of the most fundamental contractual rights . . . under [O&O Agreement] Section 17(f)(ii) to vote ‘no’ on an annual budget.” *Id.* at p. 16.⁵

Arguments based on Plaintiffs’ interpretation of the O&O Agreement should have no place in this discussion. Under section 18 of the O&O Agreement, interpretation of the relevant O&O Agreement provisions are to be decided in the arbitration NorthWestern commenced in March 2021—about eight months ago. *See, e.g., AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643, 650 (1986); *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013); *Comedy Club, Inc. v. Improv. W. Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009). *See also Ratchye v. Lucas*, 288 Mont. 345, 353, 957 P.2d 1128, 1133 (1998); *Vukasin v. D.A. Davidson & Co.* (1990), 241 Mont. 126, 128-29, 785 P.2d 713, 715; *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wash. 2d 885, 892, 16 P.3d 617, 620 (2001).⁶ Issues addressing the vote necessary to close the Project and budgeting process approval are at the very core of NorthWestern’s arbitration and must be addressed there.

⁵ In making this argument, Plaintiffs fail to mention that O&O Agreement section 10(a) provides that budget approval “shall not unreasonably be withheld.”

⁶ Plaintiffs concede this point in their Amended Complaint. Doc. 32, ¶ 71.

CONCLUSION

For these reasons, NorthWestern urges the Court to ignore Plaintiffs' arguments based on their interpretation of the O&O Agreement (which should be left to the arbitrator) and decide their motion based solely on the impact Senate Bill 266 will have on the parties' rights while in arbitration. NorthWestern also urges the Court to issue an order compelling arbitration so the parties may resolve the underlying dispute.

DATED this 3rd day of December 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that NorthWestern's Response to Plaintiffs' Motion for Partial Summary Judgment Regarding Their Fourth and Fifth Claims for Relief 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 1,705 words.

By: /s/ J Jackson
J Jackson, Esq. (*pro hac vice*)