

Stephen D. Bell, Esq.
Dorsey & Whitney LLP
Millennium Building
125 Bank Street, Suite 600
Missoula, Montana 59802-4407
Telephone: (406) 329-5590
Email: bell.steve@dorsey.com

J Jackson, Esq. (*Pro Hac Vice*)
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2760
Email: jackson.j@dorsey.com

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; 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' STATEMENT
OF UNDISPUTED FACTS**

Under Rule 56 of the Federal Rules of Civil Procedure and Local Rules,
Defendant NorthWestern Corporation submits this Response to Plaintiffs'

Statement of Undisputed Facts.

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: NorthWestern does not have an ownership interest in Colstrip Unit 3. Roberts Decl. ¶ 9, Doc. 39-2.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment; the four amendments speak for themselves.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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 for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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: NorthWestern disputes the use of the term “complained” to characterize comments made by Senator Fitzpatrick. Senator Fitzpatrick’s testimony speaks for itself. See Ex. A to Jeffrey M. Hanson’s Decl., Doc 39-6.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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 for purposes of the PNW Owners’ motion for partial summary judgment.

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 for purposes of the PNW Owners’ motion for partial summary judgment.

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/rates-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 electric rate schedules speak for themselves.

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: NorthWestern lacks sufficient knowledge or information about the PNW Owners’ intentions, concerns, or the possible future behavior of the State of Montana. NorthWestern would only be speculating as to the basis for these statements and therefore disputes them.

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.)

Disputed: PNW Owners filed a motion for preliminary injunction. On October 13, 2021, the Court granted PNW Owners’ Motion for Preliminary Injunction. Doc. 100.

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: In compliance with O & O Agreement Section 10, on September 1, 2020, Talen provided the Owners with the proposed 2021 Colstrip Units 3 & 4 Operating Budget and the corresponding documents. *See* Roberts Decl. ¶¶ 26-29, Doc. 39-2. During the August Owners meeting, the PNW Owners discussed their desire to cut the operational costs and hold the 2020 budget levels. *See* Ex. 1 to Second Tabaracci Decl., Doc. 123-1. In response, Talen provided an Alternative Budget, which assumed Unit 3 would be in a planned outage and not operate during Q2 of each year. *Id.*

After multiple correspondence and discussions, on January 7, 2021, the PNW Owners stated they “cannot support any work that is to be performed to extend the life of Colstrip Unit 3 beyond the end of 2025.” *See* Ex. 3 to Second Tabaracci Decl., Doc. 123-1. The PNW Owners identified the projects associated with the Unit 3 overhaul, which they approved, required reduced scope or further justification, or did not approve. The PNW Owners asked Talen to provide additional information by January 22, 2021, specifying they were “not prepared at this time to approve any of the other work that Talen proposes to be performed during the Unit 3 Overhaul,” and “each of the [PNW Owners] object to any work proposed for the Unit 3 Overhaul not otherwise approved above and will vote ‘no’ at this time for such work.” *Id.*

Talen provided the requested information on January 18, 2021, acceding to the Pacific Northwest Owners line item approvals, reductions in scope and disapprovals. *See* Ex. 4 to Second Tabaracci Decl., Doc. 123-1.

Talen asked the Pacific Northwest owners to let Talen know of any concerns at the “Project Committee meeting on January 20, 2021, but in any case, no later than January 22nd, 2021.” *Id.* No concerns were voiced by the PNW Owners at the January 20, 2021 Project Committee meeting.

On March 11, 2021, Talen, as Operator, submitted another revised 2021 Budget. *See* Ex. B to Roberts’ Decl. On March 22, 2021, the Project Committee approved the March 11 revised budget. *See* Roberts’ Decl. ¶ 34, Doc. 39-2; Ex. B to Roberts’ Decl.

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.)

Undisputed for purposes of the PNW Owners’ motion for partial summary judgment.

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: NorthWestern would only be speculating about the possible future behavior of the Attorney General.

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: NorthWestern lacks sufficient knowledge or information concerning the PNW Owners’ intentions, concerns, or possible future

behavior of the State of Montana. NorthWestern would only be speculating as the threat of enforcement and uncertainty the PNW Owners feel.

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: NorthWestern lacks sufficient knowledge or information concerning these statements.

DATED this 3rd day of December 2021.

DORSEY & WHITNEY LLP

By: /s/ J Jackson
Stephen D. Bell, Esq.
Millennium Building
125 Bank Street, Suite 600
Missoula, Montana 59802-4407
Telephone: (406) 329-5590
Email: bell.steve@dorsey.com

J Jackson, Esq. (*pro hac vice*)
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2760

Email: jackson.j@dorsey.com

*Counsel for Defendant NorthWestern
Corporation*