

**AVISTA CORP.
RESPONSE TO REQUEST FOR INFORMATION**

JURISDICTION:	WASHINGTON	DATE PREPARED:	06/30/2021
CASE NO.:	200900-901 894	WITNESS:	Jason Thackston
REQUESTER:	UTC Staff	RESPONDER:	Steve Wenke
TYPE:	Data Request	DEPT:	GPSS
REQUEST NO.:	Staff – 170 Revised	TELEPHONE:	(509) 495-4197
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Re: Colstrip

REQUEST:

- a. Please provide the following documents filed in the pending U.S. District Court proceeding in Case No. 1:21-cv-00047-SPW-KLD (in which Avista is a party):
 1. Complaint, filed on May 4, 2021;
 2. First Amended Complaint, filed on May 19, 2021; and
 3. Answer of Defendant Northwestern Corporation to Plaintiff's First Amended Complaint, filed on June 2, 2021.

- b. Please provide the following documents filed in the pending U.S. District Court proceeding in Case No. 1:21-cv-00058-SPW-TJC (in which Avista is a party):
 1. First Amended Complaint for Declaratory Judgment and Petition to Compel Arbitration, filed on May 21, 2021;
 2. Answer of Defendant Northwestern Corporation to Plaintiff's Amended Complaint, filed on May 26, 2021;
 3. Defendant Avista Corporation's Answer, Affirmative Defences, and Counterclaims, filed on June 1, 2021;
 4. Defendant Pudget Sound Energy Inc.'s Answer, Affirmative Defences, and Counterclaims, filed on June 1, 2021;
 5. Defendant Pacificorp's Answer, Affirmative Defences, and Counterclaims, filed on June 1, 2021; and
 6. Defendant Portland General Electric Company's Answer, Affirmative Defences, and Counterclaims, filed on June 1, 2021.

- c. Please provide an explanation and summary of the status of the legal proceeding, which Avista is a party to, that is before the United States District Court in Case No. 2:21-cv-00163-RMP.

- d. In a letter dated February 9, 2021, NorthWestern provided notice to the other Parties that it was

█ Please confirm or deny whether any costs sought to be recovered in this current general rate case are subject to this arbitration. If confirmed, please identify these costs. Please also provide a summary of the status of this arbitration and when Avista believes it will be concluded.

RESPONSE:

- a. The documents requested are attached:
Staff-DR-170 Attachment a1 - 5-4-21 Federal Complaint re SB 265.pdf
Staff-DR-170 Attachment a2 - 5-19-21 Amended Complaint.pdf
Staff-DR-170 Attachment a3 - 6-2-21 NorthWestern Answer.pdf
- b. For Item 1 of this request, Avista does not have a document that matches that date. We are providing a May 5, 2021 document filed in Montana District Court that was subsequently removed to Federal Court. Avista believes this is responsive to the request.

For Item 2 of this request, Avista again does not have a document match the May 26 date listed in the request. The document Avista holds is dated June 2, not May 26 as indicated above. Avista believes this is responsive to the request.

The other documents are attached as well:

- Staff-DR-170 Attachment b1 - 5-5-21 Talen's First Amended Complaint.pdf*
Staff-DR-170 Attachment b2 - 6-2-21 NWE Answer.pdf
Staff-DR-170 Attachment b3 - 6-1-21 Avista Answer.pdf
Staff-DR-170 Attachment b4 - 6-1-21 PSE Answer.pdf
Staff-DR-170 Attachment b5 - 6-1-21 PacifiCorp Answer.pdf
Staff-DR-170 Attachment b6 - 6-1-21 PGE Answer.pdf
- c. On April 13, 2021, Avista Corporation, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. initiated this action in Spokane County Superior Court by filing a petition to compel arbitration in accordance with the O&O Agreement. On May 14, 2021, Talen Montana, LLC removed this proceeding to Federal District Court for the Eastern District of Washington. On May 21, 2021, Talen Montana filed a motion to transfer this proceeding to Federal District Court for the District of Montana or to dismiss this proceeding (Motion to Transfer or Dismiss). On June 4, 2021, Avista Corporation, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. filed a motion to remand (PNW Owners' Remand Motion) this proceeding back to Spokane County Superior Court. Talen's Motion to Transfer or dismiss and the PNW Owners' Remand Motion are both pending.
- d. Avista denies that it is seeking recovery of costs in this current filing that would be contingent on the outcome of the pending arbitration.

The parties have met to discuss the protocols for arbitration. To date, the parties have not agreed on arbitration protocols, which has been complicated by the enactment of Montana SB 265. Avista cannot speculate on when the arbitration will be concluded.

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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;
and TALEN MONTANA, LLC,**

Defendants.

Case No. _____

COMPLAINT

(DECLARATORY RELIEF)

INTRODUCTION

1. Article I, Section 10, Clause 1 to the United States Constitution provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]”

2. The State of Montana enacted a law that provides that: “An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act unless all parties agree in writing to a single arbitrator.” S.B. 265, 67th Leg., Reg. Sess. § 1 (Mont. 2021) (“SB 265”). SB 265 purports to be retroactive to January 1, 2021.

3. Plaintiffs and defendants NorthWestern Corporation (“NorthWestern”) and Talen Montana, LLC (“Talen”) (collectively, “the Parties”) are co-owners of two coal-fired steam electric generation units located in Colstrip, Montana (“Colstrip”). The two units are governed by an Ownership and Operation Agreement, dated May 6, 1981, which has been amended four times (“O&O Agreement”).

4. The O&O Agreement provides for arbitration to resolve any dispute concerning the O&O Agreement. Section 18 of the O&O Agreement provides for arbitration to occur in Spokane, Washington, before a single arbitrator in an arbitration held pursuant to Washington law.

5. SB 265 violates the federal Contracts clause because it substantially impairs plaintiffs' contractual rights under Section 18 and does not significantly advance any public purpose.

6. SB 265 violates the contracts clause of the Montana Constitution.

7. SB 265 is preempted by the Federal Arbitration Act.

8. NorthWestern initiated arbitration earlier this year under Section 18 of the O&O Agreement.

9. NorthWestern and Talen supported, in legislative hearings, passage of SB 265.

10. There is a current and ripe dispute because Talen has demanded that this arbitration take place in Montana, that the arbitration and the Parties to it are subject to Montana courts, and that the arbitration take place with three arbitrators.

PARTIES

11. Plaintiff Avista Corporation ("Avista") is an investor-owned utility based in Spokane, Washington, that serves customers in eastern Washington, northern Idaho, and eastern Oregon. Avista is a Washington corporation with its principal place of business in Washington.

12. Plaintiff PacifiCorp's business unit, Pacific Power, is a utility based in Oregon that serves customers in Oregon, northern California, and southeastern Washington. PacifiCorp's business unit, Rocky Mountain Power, is a utility based

in Utah that serves customers in Utah, Wyoming, and southeastern Idaho.

PacifiCorp is an Oregon corporation with its principal place of business in Oregon.

13. Plaintiff Portland General Electric Company (“PGE”) is an investor-owned utility based in Oregon that serves customers in Oregon. PGE is an Oregon corporation with its principal place of business in Oregon.

14. Plaintiff Puget Sound Energy, Inc. (“PSE”), is an investor-owned utility based in Washington state that serves customers primarily in western Washington. PSE is a Washington corporation with its principal place of business in Washington.

15. Defendant NorthWestern Corporation is an investor-owned utility based in South Dakota that serves customers in Montana, South Dakota, Nebraska, and Yellowstone National Park. NorthWestern is a Delaware corporation with its principal place of business in South Dakota.

16. Defendant Talen Montana, LLC is an independent power producer, not a regulated utility. Talen is the operator of Colstrip. Talen, a Delaware limited liability company, is a wholly owned subsidiary of Talen Energy Supply, LLC, which is a wholly owned subsidiary of Talen Energy Corporation, which is a Delaware corporation with its principal place of business in Texas.

VENUE AND JURISDICTION

17. Under 28 U.S.C. § 1391(b)(2), venue is proper in the Billings Division of the Montana federal district court because Colstrip Units 3 and 4 are located in Rosebud County, Montana.

18. The relief requested is authorized pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

FACTUAL ALLEGATIONS

19. Colstrip Units 3 and 4 are each 740 MW coal-fired electrical generation units and together they are called the “Project” as that term is defined in the O&O Agreement.

20. Colstrip is owned by Avista, NorthWestern, PacifiCorp, PGE, PSE, and Talen. Each Party’s respective ownership in Colstrip Units 3 and/or 4 is as follows:

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

21. The ownership and operation of Colstrip is governed by the O&O Agreement, which is an agreement between and among the Owners. The O&O Agreement was signed in 1981 and includes four subsequent amendments.

22. The O&O Agreement establishes a Committee “to facilitate effective cooperation, interchange of information and efficient management of the Project, on a prompt and orderly basis.” Pursuant to Amendment No. 1 to the O&O Agreement: “The Committee shall be composed of five (5) members.” Each Committee member must be a party to the O&O Agreement (or a successor or assignee).

23. The members of the Committee and their respective Project Shares for voting purposes are as follows:

Owner	Project Share for Voting Purposes
Avista	15%
PacifiCorp	10%
PGE	20%
PSE	25%
Talen	30%

24. Talen has entered into a vote sharing agreement with NorthWestern, which purports to allocate Talen’s vote to Talen or NorthWestern pursuant to the terms of that vote sharing agreement.

25. In a letter dated February 9, 2021, NorthWestern provided notice to the other Parties that it was initiating the 30-day negotiation period under

Section 18 to resolve disputes under the O&O Agreement and applicable law as to “what vote is required to close Units 3 and 4 and . . . the obligation of each co-owner to fund operations of the [Colstrip] plant.”

26. There is a dispute between plaintiffs and NorthWestern and, upon information and belief, there is the same dispute between plaintiffs and Talen concerning, among other things, the following: whether plaintiffs may terminate the Project by voting their combined 55% or greater ownership shares to do so; whether plaintiffs may close one unit by voting their combined 55% or greater ownership shares to do so; and whether plaintiffs are allowed to vote for or against budgets based on each plaintiff’s own analysis of the prudence of those budgets. The total annual budget under the O&O Agreement for the Project is in excess of \$1,000,000, and each plaintiff thus has more than \$75,000 per year at issue for its share of those budgets.

27. NorthWestern contends that a unanimous vote is required to close Colstrip. On information and belief, NorthWestern also contends that a unanimous vote is required to close just one of the two units at Colstrip.

28. On information and belief, Talen similarly contends that unanimity is required to close one unit or to close Colstrip.

29. Plaintiffs contend that, pursuant to Section 17(f) of the O&O Agreement, the Parties can close one unit or both units with a vote that obtains 55% of the Project Shares voting in favor of closure.

30. The Parties did not resolve the disputes within the 30-day negotiation window.

31. On March 12, 2021, NorthWestern served an Arbitration Demand on the other Parties, asserting claims for declaratory judgment related to the disputes.

32. NorthWestern served an Amended Arbitration Demand on April 2, 2021.

33. On April 20, 2021, Avista, PacifiCorp, PGE, and PSE each served their own arbitration demand and their answers to NorthWestern's demand.

34. Section 18 of the O&O Agreement provides, in part, as follows concerning resolution of disputes under the O&O Agreement:

Any controversies arising out of or relating to this Agreement which cannot be resolved through negotiations among the Project Users within thirty (30) days after inception of the matter in dispute shall, upon demand of any Project User involved in the controversy, be submitted to an Arbitrator having demonstrated expertise in the matter submitted. If the Project Users cannot mutually agree upon such Arbitrator, then upon petition of any Project User, such Arbitrator shall be appointed by the Superior Court of the State of Washington, in and for the County of Spokane. The arbitration shall be conducted in Spokane, Washington, pursuant to the Washington Arbitration Act, RCW

Chapter 7.04 as the same may be amended from time to time.

35. Since NorthWestern served its initial Arbitration Demand, counsel for the Parties have exchanged proposals for an arbitration protocol.

36. On March 29, 2021, and again on April 3, 2021, Talen proposed that (1) the arbitration be heard by a panel of three arbitrators, (2) the arbitration's venue be Montana, (3) Montana courts have exclusive jurisdiction over any lawsuits related to the arbitration, and (4) the Washington Uniform Arbitration Act would not apply (and, by implication, that the Montana Uniform Arbitration Act would apply).

37. Each of these proposals is contrary to the terms of Section 18 of the O&O Agreement, and thus there is an actual controversy as to the applicability of Section 18 of the O&O Agreement.

38. On April 13, 2021, plaintiffs here filed a petition to compel arbitration against Talen and NorthWestern in the Superior Court of the State of Washington for Spokane County.

39. On April 13, 2021, the Montana legislature passed SB 265. The "ENROLLED BILL – *Authorized Print Version*" is attached to this complaint and is incorporated herein.

40. On April 23, 2021, the Montana Legislature transmitted to Montana Governor Greg Gianforte SB 265. Governor Gianforte signed SB 265 into law on May 3, 2021.

41. SB 265 amends Section 27-5-323 of the Montana Code by adding the following:

(2)(a) An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the [Montana] Uniform Arbitration Act unless all parties agree in writing to a single arbitrator.

(b) For the purposes of this subsection, “electrical generation facility” has the meaning provided in 15-24-3001.”

....

[This act] applies retroactively, within the meaning of 1-2-109, to applications made on or after January 1, 2021.

42. SB 265 purports to invalidate parts or all of Section 18 of the O&O Agreement because Section 18 requires that the arbitration (1) take place in Spokane (2) before a single arbitrator (3) subject to the Washington Arbitration Act.

43. Talen has objected to proceeding in the current arbitration under the terms of the O&O Agreement and instead insists upon terms similar to those required by SB 265.

44. Because of Talen's objections, and because Talen testified in support of SB 265 before the Montana legislature, plaintiffs have a legitimate and reasonable concern that Talen will seek to invalidate parts or all of Section 18 of the O&O Agreement and not proceed with arbitration under Section 18 to resolve the current disputes.

45. Because NorthWestern testified in support of SB 265 before the Montana legislature and testified that if it became law the current arbitration would move to Montana, plaintiffs have a legitimate and reasonable concern that NorthWestern will seek to invalidate parts or all of Section 18 of the O&O Agreement and not proceed with arbitration under Section 18 to resolve the current disputes.

FIRST CLAIM FOR RELIEF

Declaratory Relief that SB 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the United States Constitution

(Against both Defendants)

46. SB 265 purports to make invalid any arbitration agreement, or the venue provision within an arbitration agreement, if the arbitration agreement does not provide for arbitration within Montana with three arbitrators selected under Montana's Uniform Arbitration Act.

47. The Parties' O&O Agreement, Section 18, provides that the Parties will resolve disputes in arbitration before a single arbitrator in an arbitration in Spokane, Washington, and that Washington's arbitration laws will apply to the arbitration procedure. Section 18 provides that the Parties will select the arbitrator and, if they cannot agree on a selection, the Superior Court in Spokane County will select the single arbitrator.

48. SB 265 is a substantial impairment of plaintiffs' rights because it purports either to invalidate the entirety of Section 18 of the O&O Agreement or to invalidate the part of Section 18 providing for venue in Spokane, because Section 18 does not provide that the arbitration will take place in Montana; Section 18 provides arbitration in Spokane, Washington.

49. SB 265 is a substantial impairment of plaintiffs' rights because it purports either to invalidate the entirety of Section 18 of the O&O Agreement or to invalidate the part of Section 18 providing for venue in Spokane, because Section 18 provides for a single arbitrator instead of three arbitrators.

50. SB 265 is a substantial impairment of plaintiffs' rights because it purports either to invalidate the entirety of Section 18 of the O&O Agreement or to invalidate the part of Section 18 providing for venue in Spokane, because Section 18 does not provide for a Montana judge to appoint the arbitrator(s) if the Parties cannot do so and for the appointment to be pursuant to Montana's Uniform

Arbitration Act; Section 18 of the O&O Agreement instead provides that a Spokane County Superior Court judge will appoint an arbitrator if the Parties do not agree on an arbitrator and that the arbitrator must have certain qualifications.

51. Invalidating the arbitration clause – which will result in state or federal court litigation to resolve disputes – is a substantial impairment of plaintiffs’ contract rights.

52. Invalidating just the Spokane, Washington venue provision is substantial impairment of plaintiffs’ contract rights because plaintiffs did not agree in the O&O Agreement to arbitration in Montana nor to arbitration under the Montana Uniform Arbitration Act.

53. Amending Section 18 of the O&O Agreement to comply with SB 265’s requirement of arbitration before three arbitrators is a substantial impairment as it would result in a tripling of costs, and will necessarily slow any arbitration due to the extra time required to find, qualify, and hire the two extra arbitrators, and due to the extra time required for scheduling any hearing or other procedure for three, instead of just one, arbitrator.

54. Amending Section 18 of the O&O Agreement to comply with SB 265 is a substantial impairment because the O&O Agreement provides that the disputes will “be submitted to an Arbitrator having demonstrated expertise in the matter submitted.” The Montana Uniform Arbitration Act has no such requirement and

amending Section 18 to comply with SB 265’s requirement that the arbitrator(s) be “selected under the Uniform Arbitration Act” negates that bargained-for contract right.

55. Amending Section 18 of the O&O Agreement to comply with SB 265 is a substantial impairment because the O&O Agreement provides that if the Parties could not agree upon an arbitrator, a judge in Spokane County Superior Court would select the arbitrator. Plaintiffs did not agree in Section 18 that a judge in Montana would make that selection.

56. SB 265 is not an appropriate or reasonable way to advance any significant and legitimate public purpose. No public purpose is served by changing the location, the number of arbitrators, the criteria for selecting the arbitrator (*i.e.*, removing the criteria that the arbitrator have “demonstrated expertise in the matter submitted”), and the state of the judge that selects the arbitrator. The bill is not coherently connected to a broad societal interest because it focuses on purely private rights, such as the location where the parties’ arbitration will take place and the rules under which their dispute will be arbitrated.

57. There is an actual and substantial controversy between plaintiffs and defendants having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

58. Plaintiffs are entitled to a declaration that SB 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1.

SECOND CLAIM FOR RELIEF

Declaratory Relief that SB 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the Constitution of the State of Montana

(Against both Defendants)

59. Plaintiffs re-allege the allegations above and incorporate them into this claim.

60. The Constitution of the State of Montana, Article II, Section 31, provides that: “No ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature.”

61. As alleged above, SB 265 would either invalidate Section 18 of the O&O Agreement and prevent the Parties from requiring that the Parties resolve their disputes in arbitration and, hence, would lead to state or federal court litigation to resolve their disputes, or it would invalidate the part of Section 18 providing for venue for the arbitration in Spokane, Washington.

62. As alleged above, SB 265 substantially impairs plaintiffs’ rights under Section 18.

63. As alleged above, SB 265 does not significantly advance any public purpose or societal rights because it focuses purely on private rights—the rules and location of an arbitration between private parties.

64. Further, SB 265’s adjustment of rights and responsibilities of the contracting Parties is not based upon reasonable conditions and is not appropriate to the public purpose justifying SB 265.

65. There is an actual and substantial controversy between plaintiffs and defendants having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

66. Plaintiffs are entitled to a declaration that SB 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31.

THIRD CLAIM FOR RELIEF

Declaratory Relief that SB 265 is preempted as applied to the O&O Agreement under Federal Arbitration Act

(Against both Defendants)

67. Plaintiffs re-allege the allegations above and incorporate them into this claim.

68. The Federal Arbitration Act (“FAA”) requires courts to treat arbitration agreements as “valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.

§ 2.

69. The FAA preempts state laws that are not generally applicable contract defenses.

70. SB 265 applies only to arbitration clauses and is not a general contract law defense. It applies only to venue clauses concerning arbitration agreements. It does not apply to venue clauses for non-arbitration agreements.

71. The FAA also preempts even generally applicable laws that apply to both arbitration and non-arbitration contracts if the state laws stand as an obstacle to the accomplishment of the FAA’s objectives. The Supreme Court of the United States has stated that the FAA’s principal purpose “is to ensure that private arbitration agreements are enforced *according to their terms.*” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (cleaned up) (emphasis added).

72. SB 265 would either invalidate Section 18 of the O&O Agreement and prevent the Parties from requiring that the Parties resolve their disputes in arbitration and, hence, would lead to state or federal court litigation to resolve their disputes, or it would invalidate the part of Section 18 providing for venue for the arbitration in Spokane, Washington.

73. SB 265 would prevent Section 18 of the O&O Agreement from being enforced according to its terms.

74. SB 265 would prevent plaintiffs from using the Parties' contractually agreed-upon rules to govern their own dispute.

75. There is an actual and substantial controversy between plaintiffs and defendants having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

76. Plaintiffs are entitled to a declaration that the FAA preempts the enforcement of SB 265 to Section 18 of the O&O Agreement.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court:

- A. Declare that SB 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- B. Declare that SB 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31;
- C. Declare that the FAA preempts the enforcement of SB 265 to Section 18 of the O&O Agreement; and
- D. Award such additional relief as justice may require.

RULE 5.1 NOTICE

Pursuant to Rule 5.1(a)(2) of the Federal Rules of Civil Procedure, plaintiffs certify that they will serve this complaint upon the Attorney General for the State of Montana after filing it with the Court.

DATED this 4th day of May, 2021.

UGRIN ALEXANDER ZADICK, P.C.

/s/ Gary M. Zadick

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1133264.4

67th Legislature

SB 265



AN ACT REQUIRING VENUES FOR ARBITRATION IN ELECTRICAL GENERATION DISPUTES THAT OCCUR WITHIN MONTANA; PROVIDING STANDARDS FOR ARBITRATION PANELS IN ELECTRICAL GENERATION DISPUTES; AMENDING SECTION 27-5-323, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

WHEREAS, electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers; and

WHEREAS, the Legislature, mindful of its constitutional obligations under Article II, section 16, of the Montana Constitution, enacted section 27-5-323, MCA, to ensure Montana residents have a right to arbitrate in Montana; and

WHEREAS, arbitration of disputes concerning Montana electrical generation facilities outside of Montana threatens Montana's laws, policies, and the interests of Montana in securing and maintaining a reliable source of electricity.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-5-323, MCA, is amended to read:

"27-5-323. Venue. (1) An initial application must be made to the court of the county in which the agreement provides the arbitration hearing must be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application must be made in the county where the adverse party resides or has a place of business or, if the adverse party does not have a residence or place of business in this state, to the court of any county. All subsequent applications must be made to the court hearing the initial application unless the court otherwise directs. An agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived



67th Legislature

SB 265

upon the advice of counsel as evidenced by counsel's signature on the agreement.

(2) (a) An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act unless all parties agree in writing to a single arbitrator.

(b) For the purposes of this subsection, "electrical generation facility" has the meaning provided in 15-24-3001."

Section 2. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 3. Effective date. [This act] is effective on passage and approval.

Section 4. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to applications made on or after January 1, 2021.

- END -



I hereby certify that the within bill,
SB 265, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2021.

Speaker of the House

Signed this _____ day
of _____, 2021.

Case 1:21-cv-00047-SPW-KLD Document 1-1 Filed 05/04/21 Page 4 of 4

SENATE BILL NO. 265

INTRODUCED BY S. FITZPATRICK, D. ANKNEY, J. SMALL

AN ACT REQUIRING VENUES FOR ARBITRATION IN ELECTRICAL GENERATION DISPUTES THAT OCCUR WITHIN MONTANA; PROVIDING STANDARDS FOR ARBITRATION PANELS IN ELECTRICAL GENERATION DISPUTES; AMENDING SECTION 27-5-323, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

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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

FIRST AMENDED COMPLAINT

INTRODUCTION

1. Plaintiffs Portland General Electric Company (“PGE”), Avista Corporation (“Avista”), PacifiCorp, and Puget Sound Energy, Inc. (“PSE”),

(collectively, the “Pacific Northwest Owners”) seek an injunction prohibiting Montana’s Attorney General—defendant Austin Knudsen—from enforcing Senate Bill 266 against them, as well as a declaration that Senate Bill 266 violates the Commerce, Contract, and Due Process Clauses of the United States Constitution.

2. Defendants Talen Montana, LLC (“Talen”), NorthWestern Corporation (“NorthWestern”), and the Pacific Northwest Owners jointly own two coal-fired electric generation units in Colstrip, Montana (“Colstrip”). The two units are governed by an Ownership and Operation Agreement, dated May 6, 1981, which has been amended four times (“O&O Agreement”).

3. The Pacific Northwest Owners face governmental mandates to eliminate the use of coal-fired electricity in states where they serve customers, which become effective as soon as 2025. Their decisions on the future of Colstrip—and whether or when to close the coal-fired units—must take these restrictions into account. Talen and NorthWestern are not subject to the restrictions, and they currently want to keep Colstrip running far into the future. This disagreement has predictably led to contract disputes, which the six owners are currently set to arbitrate pursuant to the O&O Agreement.

4. Earlier this year, Talen and NorthWestern lobbied Montana’s legislature to pass targeted legislation to impair the parties’ rights under the O&O Agreement. Montana’s legislature obliged by passing Senate Bill 266, which was

signed by Montana's Governor on May 3, 2021. S.B. 265, 67th Leg., Reg. Sess. § 1 (Mont. 2021). Senate Bill 265 purports to be retroactive to January 1, 2021.

5. Senate Bill 266 impairs the parties' rights under the O&O Agreement and threatens \$100,000 per-day fines for violations of vaguely worded provisions in the Montana Consumer Protection Act. Senate Bill 266 impairs the Pacific Northwest Owners' contractual rights to close one or both units with less-than-unanimous consent and to propose and vote to close one or both units. The Pacific Northwest Owners also face the risk that the Attorney General will interpret the new statute broadly to request the levying of the excessively punitive fines if the Pacific Northwest Owners (1) exercise their contractual rights with regard to funding Colstrip, or (2) exercise their contractual rights to submit proposals to the Committee or vote on proposals that could result in closing either, or both, of Colstrip's units without Talen's and NorthWestern's consent.

6. Senate Bill 266 declares the exercise of these contract rights to be unfair and deceptive acts. The law empowers the Montana Department of Justice to seek injunctive relief and fines of up to \$100,000 per day for each day of any violations.

7. The sponsor of Senate Bill 266, Senator Steve Fitzpatrick, made clear the intent of the bill was to take more control over Colstrip at the expense of the Pacific Northwest Owners. Upon signing Senate Bill 266, Montana's Governor

made clear that the bill is a direct attack on the Pacific Northwest and the utilities that operate there, including the Pacific Northwest Owners. The Governor wrote: “Affordable power generated in Colstrip helped build Seattle’s big tech economy, but now woke, overzealous regulators in Washington State are punishing the people of Colstrip with their anti-coal agenda. Montana stands with Colstrip.”

8. This direct attack on out-of-state utilities violates the Commerce Clause because—in both purpose and effect—it favors a narrow interest of Montana in Colstrip at the expense of out-of-state utilities necessarily seeking to comply with certain governmental mandates to eliminate the use of coal-fired electricity.

9. Senate Bill 266 also violates the Contract Clause of the United States by substantially impairing Plaintiffs’ rights under the O&O Agreement for the benefit of a narrow class: Talen and NorthWestern.

10. Senate Bill 266 is also void for vagueness under the Fourteenth Amendment of the United States Constitution. The statute fails to provide fair notice of the conduct it proscribes and fails to provide explicit standards sufficient to avoid arbitrary and discriminatory enforcement.

11. The Pacific Northwest Owners also challenge another recently enacted Montana bill, Senate Bill 265, as applied to an arbitration clause in the O&O Agreement that requires disputes concerning the agreement to be resolved by

arbitration. Section 18 of the O&O Agreement provides for arbitration to occur in Spokane, Washington, before a single arbitrator in an arbitration held pursuant to Washington's arbitration act.

12. Senate Bill 265 provides that: "An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act unless all parties agree in writing to a single arbitrator." S.B. 265, 67th Leg., Reg. Sess. § 1 (Mont. 2021). Senate Bill 265 purports to be retroactive to January 1, 2021.

13. Senate Bill 265 violates the federal Contracts Clause and contracts clause of the Montana Constitution because it substantially impairs plaintiffs' contractual rights under Section 18 and does not significantly advance any public purpose.

14. Senate Bill 265 is also preempted by the Federal Arbitration Act.

15. NorthWestern and Talen supported, in legislative hearings, passage of Senate Bill 265.

16. NorthWestern initiated arbitration earlier this year under Section 18 of the O&O Agreement.

17. There is a current and ripe dispute because Talen has demanded that this arbitration take place in Montana, that the arbitration and the Parties to it are subject to Montana courts, and that the arbitration take place with three arbitrators.

PARTIES

18. Plaintiff Avista is a Washington corporation with its principal place of business in Washington. Avista is an investor-owned utility that serves customers in eastern Washington, northern Idaho, and parts of Oregon. Avista also serves a small number of electric customers in Montana.

19. Plaintiff PacifiCorp's business unit, Pacific Power, is a utility based in Oregon that serves customers in Oregon, northern California, and southeastern Washington. PacifiCorp's business unit, Rocky Mountain Power, is a utility based in Utah that serves customers in Utah, Wyoming, and southeastern Idaho. PacifiCorp is an Oregon corporation with its principal place of business in Oregon.

20. Plaintiff PGE is an investor-owned utility based in Oregon that serves residential and business customers in Oregon. PGE is an Oregon corporation with its principal place of business in Oregon.

21. Plaintiff PSE is an investor-owned utility based in Washington state that serves customers primarily in western Washington. PSE is a Washington corporation with its principal place of business in Washington.

22. Defendant NorthWestern is an investor-owned utility based in South Dakota that serves customers in Montana, South Dakota, Nebraska, and Yellowstone National Park. NorthWestern is a Delaware corporation with its principal place of business in South Dakota.

23. Defendant Talen is an independent power producer, not a regulated utility. Talen is the Operator of Colstrip, with duties defined in the O&O Agreement. Talen, a Delaware limited liability company, is a wholly owned subsidiary of Talen Montana Holdings, LLC, which is a wholly owned subsidiary of Talen Energy Supply, LLC, which is a wholly owned subsidiary of Talen Energy Corporation, which is a Delaware corporation with its principal place of business in Texas.

24. Defendant Austin Knudsen is the Attorney General of Montana. As Attorney General, Mr. Knudsen oversees Montana's Department of Justice. See Mont. Code Ann. § 2-15-2001. Montana's Department of Justice is, in turn, the sole agency with authority to enforce the provisions of Senate Bill 266. S.B 266 § 2(a). Mr. Knudsen is sued in his official capacity as Montana's Attorney General.

VENUE AND JURISDICTION

25. Under 28 U.S.C. § 1391(b)(2), venue is proper in the Billings Division of the Montana federal district court because Colstrip Units 3 and 4 are located in Rosebud County, Montana.

26. The relief requested is authorized pursuant to 42 U.S.C. § 1983, the All Writs Act, 28 U.S.C. § 1651(a), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

27. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1367(a).

FACTUAL ALLEGATIONS

The O&O Agreement

28. Colstrip Units 3 and 4 are each 740 MW coal-fired electrical generation units. Colstrip Units 3 and 4 as well as certain Common Facilities (as defined in the O&O Agreement), real property and property rights are called the “Project” as that term is defined in the O&O Agreement.

29. Colstrip is owned by Avista, NorthWestern, PacifiCorp, PGE, PSE, and Talen. Each Party’s respective ownership in Colstrip Units 3 and/or 4 is as follows:

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

30. The ownership and operation of Colstrip is governed by the O&O Agreement, which is an agreement between and among the Owners. The O&O Agreement was signed in 1981 and includes four subsequent amendments.

31. The O&O Agreement establishes a Committee “to facilitate effective cooperation, interchange of information and efficient management of the Project, on a prompt and orderly basis.” Pursuant to Amendment No. 1 to the O&O Agreement: “The Committee shall be composed of five (5) members.” Each Committee member must be a party to the O&O Agreement (or a successor or assignee).

32. The members of the Committee and their respective Project Shares for voting purposes are as follows:

Owner	Project Share for Voting Purposes
Avista	15%
PacifiCorp	10%
PGE	20%
PSE	25%
Talen	30%

33. Talen has entered into a vote sharing agreement with NorthWestern, which purports to allocate Talen’s vote to Talen or NorthWestern pursuant to the terms of that vote sharing agreement.

34. The O&O Agreement establishes how Committee members may use their Project Shares to vote on matters pertaining to Colstrip.

35. For most matters, the Committee may act if certain quorum requirements are satisfied and Committee members representing at least 55% of all Project Shares agree on the action. These matters include (1) “[a]ny proposal made by two Committee members appointed by Project Users other than Operator except as provided in Sections 17(j) [proposals relating to Elective Capital Additions] and 17(k) [proposals relating to the substitution or replacement of the Operator],” (§ 17(f)(i)); (2) “[c]onstruction and operating budgets and changes therein except as provided in Section 17(j)” (§ 17(f)(ii)); (3) “[e]stimate of cost of repair or damage to the Project if in excess of \$2,000,000, recommendation whether to repair in whole or in part or to remove from service, and construction budget for repair of Project” (§ 17(f)(vi)); and (4) “[a]ny other action required to be taken by the Committee pursuant to this Agreement for which a procedure or voting percentage for reaching approval is not otherwise specifically provided” (§ 17(f)(xi)).

36. A decision to close one or both units falls within broad categories of Committee votes requiring approval by Committee members representing at least 55% of the total Project Shares, including sections 17(f)(i), 17(f)(xi), and 17(i).

37. Under section 10 of the O&O Agreement, proposals for Colstrip’s operating budget “shall be subject to approval by the Committee[,] which approval shall not unreasonably be withheld.”

38. In contrast to section 10, section 7 of the O&O Agreement does not constrain Committee members when they are deciding whether to disapprove of the construction budget, which includes the budget for, among other things, “Capital Additions.”

State Restrictions on Coal-Fired Electricity and the Future of Colstrip

39. Some states have enacted laws in recent years restricting the use of fossil fuels, including laws that restrict the ability to use electricity produced by coal-fired electrical generating resources.

40. Washington is one such state. In 2019, Washington passed a law requiring that “each electric utility . . . eliminate coal-fired resources from its allocation of electricity” by December 31, 2025. Wash. Rev. Code § 19.405.030(1)(a). Thus, by December 31, 2025, PSE, Avista, and PacifiCorp will no longer be able to use Colstrip to serve Washington customers (without paying substantial penalties designed to make that option economically irrational).

41. Oregon similarly passed a law in 2016 requiring that “electric compan[ies] . . . eliminate coal-fired resources from [their] allocation of electricity” by January 1, 2030. (Senate Bill 1547, 78th Oregon Legislative Session, codified at Or. Rev. Stat. 757.518.) Thus, by January 1, 2030, PGE and PacifiCorp will no longer be able to use Colstrip to serve Oregon customers.

42. The legislation in Washington and Oregon effectively eliminates the Pacific Northwest Owners' ability to utilize Colstrip in the near future to serve their load in Washington and Oregon.

43. Transitioning from sources of electricity is a complex and costly process that requires long-term planning to ensure utilities have sufficient generation for their customer load. To comply with the Washington and Oregon statutes, the Pacific Northwest Owners must act now to plan for and transition from Colstrip.

44. Talen is not a public utility but rather an independent power producer. Talen sells most of its share of electricity generated at Colstrip on the wholesale market and does not have retail customers in Washington or Oregon. At a recent committee hearing of the Montana legislature, a Talen representative said Talen wants to keep Colstrip running as long as it is economically viable and that Talen supports keeping Colstrip open until 2042.

45. NorthWestern is a public utility, but it is not subject to the Washington and Oregon statutes. NorthWestern has said publicly that it wants Colstrip to continue operating through at least 2042.

46. The divergent interests of the Pacific Northwest Owners and Talen and NorthWestern have led to disputes.

Colstrip Owners' Pending Arbitration

47. In a letter dated February 9, 2021, NorthWestern provided notice to the other Parties that it was initiating the 30-day negotiation period under Section 18 to resolve disputes under the O&O Agreement and applicable law as to “what vote is required to close Units 3 and 4 and . . . the obligation of each co-owner to fund operations of the [Colstrip] plant.”

48. On March 12, 2021, NorthWestern sent a demand for arbitration to PSE, Avista, PGE, PacifiCorp, and Talen. In its demand, NorthWestern asserted certain claims for declaratory relief, including that (1) Colstrip “cannot be shut down except upon a unanimous vote of the Owners”; (2) “[a]ny future action by any Owner that may have the effect of causing closure of the Project before the Owners vote unanimously to shut down the Project is an action in breach of the terms and conditions of the O&O Agreement”; (3) the phrase “[g]overnmental agencies having jurisdiction” in the O&O Agreement refers to the federal and Montana state and local agencies but not the agencies of any other state; (4) “[t]he resource planning or other requirements that may be imposed by any governmental entity upon an Owner as a regulated utility does not provide grounds for such Owner to avoid or fail to fulfill any of its obligations under the O&O Agreement”; and (5) “[b]y refusing to approve the proposed 2021 Operating Budget and insisting the Project be operated in a manner to accommodate their exit from the

Project by 2025, the Pacific Northwest Owners improperly withheld their approval of the annual operating budget.”

49. The total annual budget under the O&O Agreement for the Project is in excess of \$1,000,000, and each plaintiff thus has more than \$75,000 per year at issue for its share of those budgets.

50. On March 22, 2021, the Committee members unanimously approved the 2021 operating budget (the capital budget had been approved earlier).

51. In response to the budget-approval vote, on April 2, 2021, NorthWestern amended its demand for arbitration, revising its claims related to Colstrip budgets and asking an arbitrator to declare that, for future budget disputes, “[a]ny 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.”

52. On April 20, 2021, PSE, Avista, and PGE served their responses to NorthWestern’s amended arbitration demand and their own demands for arbitration, while PacifiCorp did the same on April 22, 2021. The Pacific Northwest Owners denied that NorthWestern is entitled to its requested declaratory relief, and they asserted counterclaims against NorthWestern. PacifiCorp, PGE and PSE also asserted cross-claims against Talen.

53. Talen responded by letter to NorthWestern’s Amended Arbitration on April 23, 2021. Talen did not respond substantively to NorthWestern’s claims, but Talen is aligned with NorthWestern on its primary claims, as evident from the parties’ joint lobbying in support of Senate Bill 266, as discussed below.

54. In short, the dispute to be resolved in arbitration is whether the O&O Agreement provides that a single minority owner of Colstrip, such as NorthWestern and/or Talen, can force the Pacific Northwest Owners to keep both Colstrip units open and to fund a 70% share of operating costs in perpetuity.

55. An arbitrator has not yet been appointed.

Senate Bill 266

56. After NorthWestern served its demand for arbitration and its amended demand for arbitration, and while Colstrip’s owners were preparing to arbitrate their disputes, the Montana legislature—with lobbying in support by Talen and NorthWestern—was considering Senate Bill 266. The Senate Bill penalizes Colstrip owners for exercising their rights under the O&O Agreement, by providing that any “[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 is an unfair or deceptive act or practice.”

57. Talen and NorthWestern lobbied Montana’s legislature to pass Senate Bill 266. For example, Talen and NorthWestern spoke in favor of the bill before the Montana Senate Committee on Business, Labor, and Economic Affairs on February 23, 2021, and before the Montana House Energy, Technology, and Federal Relations Committee on March 24, 2021. On information and belief, Talen and NorthWestern engaged in other communications and interactions with members of the Montana legislature to encourage members of the Montana legislature to pass Senate Bill 266.

58. The “ENROLLED BILL – *Authorized Print Version*” of Senate Bill 266 is attached to this complaint as Exhibit A and is incorporated herein.

59. Talen and NorthWestern, and the other supporters of Senate Bill 266, urged the legislature to prohibit entities from exercising the very contractual rights that the Pacific Northwest Owners are seeking to invoke.

60. Talen’s and NorthWestern’s lobbying efforts succeeded. The Montana Senate passed Senate Bill 266 on February 27, 2021; the Montana House passed it on April 23, 2021; and Montana’s Governor signed the bill into law on May 3, 2021. It purports to be retroactive to January 1, 2021.

61. As enacted, Senate Bill 266 amends Montana’s Consumer Protection Act to allow the Montana Attorney General to bring an action and request that fines of up to \$100,000 per day be levied upon “an owner of a jointly owned

electrical generation facility in the state”—*e.g.*, Colstrip—based upon two vaguely worded conditions.

62. The first condition, under section 2(1)(a) of Senate Bill 266, is that the Attorney General can request fines for “[t]he 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” The bill defines “operating costs” to include *both* “the costs to construct, operate, and maintain the electrical generation facility in accordance with prudent utility practices,” as well as “expenditures for capital improvements or replacements.” *Id.* §§ 1(4)(a)–(b).

63. The statute does not define the word “fund.” Although plaintiffs contend that the plain words of this statute authorize a fine only if an owner does not pay (i.e., “fund”) an invoice that is due and payable and that is for a cost authorized under an approved budget or as otherwise authorized under the O&O Agreement, plaintiffs are concerned that the Attorney General will interpret this new statute to authorize him to bring an action and seek fines for an owner voting “no” on a proposed budget.

64. In these respects, Senate Bill 266 would punish Colstrip owners for exercising their rights under the O&O Agreement and in effect require the Pacific Northwest Owners to continue funding Colstrip.

65. Senate Bill 266 also punishes owners of “jointly owned electrical generation facilit[ies]”—e.g., Colstrip—for “conduct” that may bring about the closure of one or more units of a facility unless they first seek and receive unanimous consent to do so, which impairs their rights under the terms of the O&O Agreement to close one or both units with less-than-unanimous consent and to propose and vote to close one or both units. Under section 2(1)(b) of Senate Bill 266, “[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 is an unfair or deceptive act or practice.” The word “conduct” is not defined. This statute impairs the Pacific Northwest Owners’ contractual rights under the O&O Agreement.

66. Senate Bill 266 empowers Montana’s Department of Justice to enforce the bill’s prohibitions and prevent the owners from exercising their rights under the O&O Agreement. Under section 2(2)(a), “as an exclusive remedy for a violation of this section, whenever the department has reason to believe that a person is using, has used, or is about to knowingly use any . . . practice provided for in subsection (1) as an unfair or deceptive act or practice . . . and that the proceeding would be in the public interest, the department may bring an action . . . against the person to restrain . . . the unlawful . . . practice.”

67. Senate Bill 266 also imposes severe penalties against those who violate its prohibitions. Under section 2(b), “if a court finds that a person is willfully using or has willfully used a method, act, or practice declared unlawful by this section, the department may . . . recover . . . a civil fine of not more than \$100,000 for each violation. Each day of a continuing violation constitutes a separate offense.”

68. Committee hearings on Senate Bill 266 focused almost exclusively on Colstrip, and the target of the bill was obvious:

- “This is an important piece of legislation because it allows us to have greater control over the Colstrip facility.” Senator Steve Fitzpatrick, bill sponsor, before Senate Committee, February 23, 2021.
- “I think everybody knows what’s going on here. We know that out in Colstrip there has been a really big push by the West Coast utilities to get out of Colstrip. And they are being pushed by their regulators in Washington and Oregon.” Senator Fitzpatrick before House Committee, March 24, 2021.
- “We consider Colstrip a Montana asset that should be owned and operated by parties that have Montana's best interests in mind. . . . [The NorthWestern-initiated] arbitration is really

based upon the subject matter of this bill” NorthWestern’s lobbyist before Senate Committee, February 23, 2021.

69. Upon signing Senate Bill 266, Montana’s governor confirmed that the bill is aimed at Colstrip and a direct attack on the Pacific Northwest and the utilities that operate there. The governor wrote: “Affordable power generated in Colstrip helped build Seattle’s big tech economy, but now woke, overzealous regulators in Washington State are punishing the people of Colstrip with their anti-coal agenda. Montana stands with Colstrip.”

70. Senate Bill 266 is designed to—and unless it is declared unlawful will—deter the Pacific Northwest Owners from exercising their rights with respect to closing the Colstrip units and exercising their rights regarding their funding obligations. The threat of \$100,000 fines per day for exercising those rights effectively prevents their exercise. Ultimately, Senate Bill 266 will—unless it is declared unlawful—impair the Pacific Northwest Owners’ contractual rights and force the Pacific Northwest Owners and their customers to subsidize NorthWestern’s and Talen’s continued use of Colstrip.

Arbitration Agreement

71. The NorthWestern-initiated arbitration is subject to Section 18 of the O&O Agreement, which provides, in part, as follows:

Any controversies arising out of or relating to this Agreement which cannot be resolved through

negotiations among the Project Users within thirty (30) days after inception of the matter in dispute shall, upon demand of any Project User involved in the controversy, be submitted to an Arbitrator having demonstrated expertise in the matter submitted. If the Project Users cannot mutually agree upon such Arbitrator, then upon petition of any Project User, such Arbitrator shall be appointed by the Superior Court of the State of Washington, in and for the County of Spokane. The arbitration shall be conducted in Spokane, Washington, pursuant to the Washington Arbitration Act, RCW Chapter 7.04 as the same may be amended from time to time.

72. Since NorthWestern served its initial Arbitration Demand, counsel for the Parties have exchanged proposals for an arbitration protocol.

73. On March 29, 2021, and again on April 3, 2021, Talen proposed that (1) the arbitration be heard by a panel of three arbitrators, (2) the arbitration's venue be Montana, (3) Montana courts have exclusive jurisdiction over any lawsuits related to the arbitration, and (4) the Washington Uniform Arbitration Act would not apply (and, by implication, that the Montana Uniform Arbitration Act would apply).

74. Each of these proposals is contrary to the terms of Section 18 of the O&O Agreement, and thus there is an actual controversy as to the applicability of Section 18 of the O&O Agreement.

75. On April 13, 2021, plaintiffs here filed a petition to compel arbitration against Talen and NorthWestern in the Superior Court of the State of Washington

for Spokane County. Talen filed a notice of removal to federal court on May 14, 2021.

76. On May 4, 2021, Talen filed a complaint for declaratory judgment and petition to compel arbitration in Montana District Court for Yellowstone County. Relying on the provisions of Senate Bill 265 (discussed below), Talen seeks a declaration that Sections 18 and 34(c) (requiring application of Washington’s arbitration act) are invalid and requests an order to conditionally compel arbitration consistent with the terms of Senate Bill 265. The Pacific Northwest Owners removed the case to this Court on May 17, 2021.

Senate Bill 265

77. On April 13, 2021, the Montana legislature passed Senate Bill 265. The “ENROLLED BILL – *Authorized Print Version*” of Senate Bill 265 is attached as Exhibit B to this complaint and is incorporated herein.

78. On April 23, 2021, the Montana Legislature transmitted to Montana Governor Greg Gianforte Senate Bill 265. Governor Gianforte signed Senate Bill 265 into law on May 3, 2021.

79. Senate Bill 265 amends Section 27-5-323 of the Montana Code by adding the following:

(2)(a) An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators

selected under the [Montana] Uniform Arbitration Act unless all parties agree in writing to a single arbitrator.

(b) For the purposes of this subsection, “electrical generation facility” has the meaning provided in 15-24-3001.”

....

[This act] applies retroactively, within the meaning of 1-2-109, to applications made on or after January 1, 2021.

80. Senate Bill 265 purports to invalidate parts or all of Section 18 of the O&O Agreement because Section 18 requires that the arbitration (1) take place in Spokane (2) before a single arbitrator (3) subject to the Washington Arbitration Act.

81. Talen has objected to proceeding in the current arbitration under the terms of the O&O Agreement and instead insists upon terms similar to those required by Senate Bill 265.

82. Because of Talen’s objections, and because Talen testified in support of Senate Bill 265 before the Montana legislature, plaintiffs initiated this action because they had a legitimate and reasonable concern that Talen would seek to invalidate parts or all of Section 18 of the O&O Agreement and not proceed with arbitration under Section 18 to resolve the current disputes. That concern proved well founded, as Talen proved in filing its complaint on May 4, 2021 in Montana District Court for Yellowstone County.

83. Because NorthWestern testified in support of Senate Bill 265 before the Montana legislature and testified that if it became law the current arbitration would move to Montana, plaintiffs have a legitimate and reasonable concern that NorthWestern will seek to invalidate parts or all of Section 18 of the O&O Agreement and not proceed with arbitration under Section 18 to resolve the current disputes.

FIRST CLAIM FOR RELIEF

Declaratory Relief that Senate Bill 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the United States Constitution

(Against Defendants Talen and NorthWestern)

84. Senate Bill 265 purports to make invalid any arbitration agreement, or the venue provision within an arbitration agreement, if the arbitration agreement does not provide for arbitration within Montana with three arbitrators selected under Montana's Uniform Arbitration Act.

85. The Parties' O&O Agreement, Section 18, provides that the Parties will resolve disputes in arbitration before a single arbitrator in an arbitration in Spokane, Washington, and that Washington's arbitration laws will apply to the arbitration procedure. Section 18 provides that the Parties will select the arbitrator and, if they cannot agree on a selection, the Superior Court in Spokane County will select the single arbitrator.

86. Senate Bill 265 is a substantial impairment of plaintiffs' rights because it purports either to invalidate the entirety of Section 18 of the O&O Agreement or to invalidate the part of Section 18 providing for venue in Spokane, because Section 18 does not provide that the arbitration will take place in Montana; Section 18 provides arbitration in Spokane, Washington.

87. Senate Bill 265 is a substantial impairment of plaintiffs' rights because it purports either to invalidate the entirety of Section 18 of the O&O Agreement or to invalidate the part of Section 18 providing for venue in Spokane, because Section 18 provides for a single arbitrator instead of three arbitrators.

88. Senate Bill 265 is a substantial impairment of plaintiffs' rights because it purports either to invalidate the entirety of Section 18 of the O&O Agreement or to invalidate the part of Section 18 providing for venue in Spokane, because Section 18 does not provide for a Montana judge to appoint the arbitrator(s) if the Parties cannot do so and for the appointment to be pursuant to Montana's Uniform Arbitration Act; Section 18 of the O&O Agreement instead provides that a Spokane County Superior Court judge will appoint an arbitrator if the Parties do not agree on an arbitrator and that the arbitrator must have certain qualifications.

89. Invalidating the arbitration clause – which will result in state or federal court litigation to resolve disputes – is a substantial impairment of plaintiffs' contract rights.

90. Invalidating just the Spokane, Washington venue provision is substantial impairment of plaintiffs' contract rights because plaintiffs did not agree in the O&O Agreement to arbitration in Montana nor to arbitration under the Montana Uniform Arbitration Act.

91. Amending Section 18 of the O&O Agreement to comply with Senate Bill 265's requirement of arbitration before three arbitrators is a substantial impairment as it would result in a tripling of costs, and will necessarily slow any arbitration due to the extra time required to find, qualify, and hire the two extra arbitrators, and due to the extra time required for scheduling any hearing or other procedure for three, instead of just one, arbitrator.

92. Amending Section 18 of the O&O Agreement to comply with Senate Bill 265 is a substantial impairment because the O&O Agreement provides that the disputes will "be submitted to an Arbitrator having demonstrated expertise in the matter submitted." The Montana Uniform Arbitration Act has no such requirement and amending Section 18 to comply with Senate Bill 265's requirement that the arbitrator(s) be "selected under the Uniform Arbitration Act" negates that bargained-for contract right.

93. Amending Section 18 of the O&O Agreement to comply with Senate Bill 265 is a substantial impairment because the O&O Agreement provides that if the Parties could not agree upon an arbitrator, a judge in Spokane County Superior

Court would select the arbitrator. Plaintiffs did not agree in Section 18 that a judge in Montana would make that selection.

94. Senate Bill 265 is not an appropriate or reasonable way to advance any significant and legitimate public purpose. No public purpose is served by changing the location, the number of arbitrators, the criteria for selecting the arbitrator (*i.e.*, removing the criteria that the arbitrator have “demonstrated expertise in the matter submitted”), and the state of the judge that selects the arbitrator. The bill is not coherently connected to a broad societal interest because it focuses on purely private rights, such as the location where the parties’ arbitration will take place and the rules under which their dispute will be arbitrated.

95. There is an actual and substantial controversy between plaintiffs and defendants having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

96. Plaintiffs are entitled to a declaration that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1.

SECOND CLAIM FOR RELIEF

Declaratory Relief that Senate Bill 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the Constitution of the State of Montana

(Against Defendants Talen and NorthWestern)

97. Plaintiffs re-allege the allegations above and incorporate them into this claim.

98. The Constitution of the State of Montana, Article II, Section 31, provides that: “No ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature.”

99. As alleged above, Senate Bill 265 would either invalidate Section 18 of the O&O Agreement and prevent the Parties from requiring that the Parties resolve their disputes in arbitration and, hence, would lead to state or federal court litigation to resolve their disputes, or it would invalidate the part of Section 18 providing for venue for the arbitration in Spokane, Washington.

100. As alleged above, Senate Bill 265 substantially impairs plaintiffs’ rights under Section 18.

101. As alleged above, Senate Bill 265 does not significantly advance any public purpose or societal rights because it focuses purely on private rights—the rules and location of an arbitration between private parties.

102. Further, Senate Bill 265’s adjustment of rights and responsibilities of the contracting Parties is not based upon reasonable conditions and is not appropriate to the public purpose justifying Senate Bill 265.

103. There is an actual and substantial controversy between plaintiffs and defendants having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

104. Plaintiffs are entitled to a declaration that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31.

THIRD CLAIM FOR RELIEF

Declaratory Relief that Senate Bill 265 is preempted as applied to the O&O Agreement under Federal Arbitration Act

(Against Defendants Talen and NorthWestern)

105. Plaintiffs re-allege the allegations above and incorporate them into this claim.

106. The Federal Arbitration Act (“FAA”) requires courts to treat arbitration agreements as “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

107. The FAA preempts state laws that are not generally applicable contract defenses.

108. Senate Bill 265 applies only to arbitration clauses and is not a general contract law defense. It applies only to venue clauses concerning arbitration agreements. It does not apply to venue clauses for non-arbitration agreements.

109. The FAA also preempts even generally applicable laws that apply to both arbitration and non-arbitration contracts if the state laws stand as an obstacle to the accomplishment of the FAA's objectives. The Supreme Court of the United States has stated that the FAA's principal purpose "is to ensure that private arbitration agreements are enforced *according to their terms.*" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (cleaned up) (emphasis added).

110. Senate Bill 265 would either invalidate Section 18 of the O&O Agreement and prevent the Parties from requiring that the Parties resolve their disputes in arbitration and, hence, would lead to state or federal court litigation to resolve their disputes, or it would invalidate the part of Section 18 providing for venue for the arbitration in Spokane, Washington.

111. Senate Bill 265 would prevent Section 18 of the O&O Agreement from being enforced according to its terms.

112. Senate Bill 265 would prevent plaintiffs from using the Parties' contractually agreed-upon rules to govern their own dispute.

113. There is an actual and substantial controversy between plaintiffs and defendants having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

114. Plaintiffs are entitled to a declaration that the FAA preempts the enforcement of Senate Bill 265 to Section 18 of the O&O Agreement.

FOURTH CLAIM FOR RELIEF

42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Senate Bill 266 Violates the Commerce Clause

(Against Defendant Austin Knudsen)

115. Plaintiffs reallege and incorporate by reference the allegations set forth above.

116. The Commerce Clause, set forth in Article I, Section 8, Clause 3 of the United States Constitution, grants exclusively to Congress the power “[t]o regulate Commerce . . . among the several States.”

117. “One of the fundamental purposes of the [Commerce] Clause ‘was to insure . . . against discriminating State legislation.’” *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (quoting *Welton v. Missouri*, 91 U.S. 275, 280 (1876)). For this reason, the Supreme Court has “long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.” *Utd. Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

118. Under this “negative command, known as the dormant Commerce Clause,” *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), the Constitution “prohibit[s] state or municipal laws whose object is local economic protectionism,” *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). “A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose or discriminatory effect.” *Bacchus*, 468 U.S. at 270.

119. There is no need to “guess at the legislature’s motivation” here. *Bacchus*, 468 U.S. at 271. The bill sponsor, Senator Steve Fitzpatrick, made clear that the intent of the Senate Bill 266 was to exercise more control over Colstrip for the benefit of Montana in response to regulatory mandates in Oregon and Washington. Montana’s governor confirmed the same in his signing statement that Senate Bill 266 was designed to ensure “[a]ffordable power generated in Colstrip”—based in Montana—and to punish “woke, overzealous regulators in Washington State” (and thereby the Pacific Northwest Owners). Talen made this point in its testimony supporting the bill, emphasizing the importance of Colstrip to “the future of energy in Montana.”

120. By threat of harsh penalties in a vaguely worded statute, Senate Bill 266 prevents the Pacific Northwest Owners from exercising their contractual rights to vote to close the Colstrip units with less-than-unanimous consent and to

propose and vote to close one or both units. And the bill presents the Pacific Northwest Owners with the risk of substantial fines if the Attorney General reads the statute expansively to require their approval of Colstrip budgets designed to extend the useful life of units they will not be able to use in Washington and Oregon. In this respect, the effect of the statute is just as discriminatory as its intent: Despite legislative mandates to eliminate coal-fired resources from their allocation of electricity in Oregon and/or Washington, the Pacific Northwest Owners are forced to continue investing in a Montana power source for the benefit of NorthWestern and Talen, against the interests of their customers and their own economic interests.

121. Yet even if Senate Bill 266 could somehow be considered “even-handed,” and as imposing only “incidental” burdens on interstate commerce, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), it nonetheless would contravene the Commerce Clause. Under *Pike*, even a state law that applies “even-handedly” is unconstitutional where “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Id.*

122. Significantly, the “local benefits” that can be considered under *Pike* do not include a state’s narrow interests. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (“protecting a major local industry” not a legitimate interest).

123. There is no ascertainable interest for Montana in this statute other than keeping Colstrip open. Montana's interests in jobs for its citizens and reliable power in the future, while laudable in the abstract, are as applied here narrow interests that cannot support Senate Bill 266. The burdens on the Pacific Northwest Owners, by contrast, are great. And Senate Bill 266 is not even necessary to keep Colstrip open: under the O&O Agreement, after a vote to remove one or both units from service, the Operator can sell the units removed from service as complete units to a new owner that wants to continue to operate them.

124. The Pacific Northwest Owners are entitled to an injunction under 42 U.S.C. § 1983 to stop Defendant Knudsen from enforcing Senate Bill 266 and impairing their rights protected by the Commerce Clause of the United States Constitution.

125. There is an actual and substantial controversy between Plaintiffs and Defendant Knudsen having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

126. Plaintiffs are entitled to a declaration that Senate Bill 266, as applied to the O&O Agreement, violates the Commerce Clause of the United States.

FIFTH CLAIM FOR RELIEF

42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Contract Clause of United States Constitution

(Against Defendant Austin Knudsen)

127. Article I, Section 10, Clause 1 of the United States Constitution prohibits Montana from substantially and unreasonably impairing Plaintiffs' contractual rights.

128. Senate Bill 266 substantially and unreasonably impairs Plaintiffs' rights in at least three distinct ways.

129. First, the O&O Agreement gives each Committee member the right to not approve the budget for Colstrip's operating costs so long as the Committee member does not "unreasonably" withhold its approval of the budget. Thus, in deciding whether to approve the budget for operating costs, a Committee member may consider a variety of factors, such as Colstrip's long-term viability or any regulatory requirements imposed on an owner.

130. Senate Bill 266 substantially impairs that right by prohibiting, via the threat of \$100,000 per-day fines, Committee members from ever, under any circumstances, "fail[ing] or refus[ing] . . . to fund its share of operating costs." S.B. 266 § 2(1)(a). Plaintiffs contend that "fund" means paying approved costs, and does not include voting for a budget that approves costs, but because Senate Bill 266 is vaguely worded, the Montana Attorney General may wrongly construe

the statute to authorize substantial daily fines for voting against a proposed operating or capital budget. Thus, due to the vagueness in the statute and the harsh penalties, Senate Bill 266 impairs Committee members from exercising their contract rights when deciding whether to approve the budget for the Project's operating costs.

131. If so construed, the requirement that Committee members always fund Colstrip's operating costs does not advance a significant and legitimate public purpose. Instead, the requirement substantially impairs the Committee members' private rights for the benefit of a narrow class: Talen and NorthWestern.

132. Second, the O&O Agreement gives Committee members the right to withhold approval for Capital Additions and Elective Capital Additions for any reason.

133. Senate Bill 266 substantially impairs that right by prohibiting, via the threat of \$100,000 per-day fines, Committee members from ever, under any circumstances, "fail[ing] or refus[ing] . . . to fund its share of operating costs," which include "capital improvements or replacements." S.B. 266 §§ 1(4)(b), 2(1)(a).

134. If so construed, Senate Bill 266's requirement that Committee members always fund capital improvements or replacements does not advance a

significant and legitimate public purpose. Instead, the requirement substantially impairs the Committee members' private rights for the benefit of a narrow class.

135. The O&O Agreement already contains provisions that address disputes about operating costs and capital costs that Senate Bill 266 impairs for the benefit of Talen and NorthWestern.

136. Senate Bill 266 substantially impairs the Pacific Northwest Owners' contract rights and gives Talen and NorthWestern immense leverage in future disputes about operating costs and capital costs. For example, if Talen as Operator proposes an unreasonably high budget for operating costs and capital costs, the Pacific Northwest Owners will be forced to accept the budget (and request authorization to pass along those costs to customers, just as NorthWestern will pass along those costs to its Montana customers) or risk a \$100,000 per-day fine if the Attorney General brings an action based on an expansive reading of the statute. *See* S.B. 266 § 2(2)(b).

137. Anytime the Pacific Northwest Owners reject the Operator's proposed budget, they face the risk that the Attorney General will try to enforce an expansive reading of the statute and bring an action for fines of \$100,000 per day or seek injunctive relief to force the Pacific Northwest Owners to vote for a budget that they would otherwise reject.

138. Third, the O&O Agreement gives the Committee the right to close Unit 3, Unit 4, or both if certain quorum requirements are satisfied and Committee members with a total of 55% of the Project Shares vote to close the units.

139. Senate Bill 266 substantially impairs that right by prohibiting, via a threat of imposing \$100,000 per day in fines, Committee members from engaging in “[c]onduct . . . to bring about permanent closure of a generating unit of a facility without seeking and obtaining the consent of all co-owners.” S.B. 266 § 2(1)(b). Senate Bill 266 therefore impairs the contract right to close a unit with 55% of Project Shares by requiring a vote of 100% of Project Shares.

140. Senate Bill 266’s unanimous consent requirement does not advance a significant and legitimate public purpose. Instead, the requirement impairs the Committee members’ contract rights for the benefit of a narrow class.

141. Absent Senate Bill 266’s unanimous consent requirement, the Pacific Northwest Owners, which own 70% of Project Shares, could vote to close one or both of Units 3 and 4.

142. If the Pacific Northwest Owners were to submit a proposal to the Committee and could vote to close Units 3 or 4 notwithstanding Senate Bill 266’s unanimous consent requirement, Defendant Knudsen would presumably bring a civil action against the Pacific Northwest Owners and request fines. Thus, the Pacific Northwest Owners must choose between exercising their contractual rights

under the O&O agreement to seek closure of Unit 3 and/or Unit 4, on the one hand, and risk a potential \$100,000 per-day fine, on the other. *See* S.B. 266 § 2(1)(b).

143. Plaintiffs are entitled to an injunction under 42 U.S.C. § 1983 to stop Defendant Knudsen from enforcing Senate Bill 266 and impairing Plaintiffs' rights protected by the Contract Clause of the United States constitution.

144. There is an actual and substantial controversy between Plaintiffs and Defendant Knudsen having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

145. Plaintiffs are entitled to a declaration that Senate Bill 266, as applied to the O&O Agreement, violates the Contract Clause of the United States Constitution.

SIXTH CLAIM FOR RELIEF

42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Due Process Clause of United States Constitution

(Against Defendant Austin Knudsen)

146. Plaintiffs reallege and incorporate by reference the allegations set forth above.

147. Under the Fourteenth Amendment to the United States Constitution, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

148. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

149. Senate Bill 266 is void for vagueness for two independent reasons: It fails to provide fair notice of the conduct it proscribes and fails to provide explicit standards sufficient to avoid arbitrary and discriminatory enforcement.

150. For example, the phrase “conduct to bring about” could be construed so broadly that it captures *any* action, no matter how preliminary or remote, that could conceivably cause Colstrip to close at some point in the future. Or the phrase could be interpreted to apply to decisions to close a generating unit, such as a non-unanimous vote by the Committee to close Colstrip. Or the phrase could be limited to actions to implement closure of a unit after a non-unanimous Committee vote to close it. Because a reasonable person of ordinary intelligence cannot discern which of these or other meanings the legislature intended, Senate Bill 266 fails to give people a fair opportunity to know what conduct runs afoul of the bill.

151. The same language also fails to provide explicit standards and invites arbitrary and discriminatory enforcement by Defendant Knudsen and the Montana Department of Justice, potentially exposing Plaintiffs to fines of up to \$100,000 per day for each day of any violations.

152. Likewise, the provision in Senate Bill 266 making unlawful “[t]he failure or refusal of an owner . . . to fund its share of operating costs associated with a jointly owned electrical generation facility” fails to provide fair notice. The word “fund” is not defined and the words “fund its share” should mean that the statute penalizes only an owner that does not pay its proportional share of a cost that is already approved via the O&O Agreement’s budget process. The provision should not penalize any owner for votes taken on proposed budgets. But, to the extent that the Montana Attorney General contends that the word “fund” also applies to votes for or against a proposed budget, the statute is vague.

153. If Senate Bill 266 is interpreted to prohibit a vote against a proposed budget, Senate Bill 266 provides no standards and invites arbitrary and discriminatory enforcement concerning what budgets are acceptable under the statute. The statute offers no guidance as to the appropriate level of operating costs (which are defined to also include capital costs) and whether an owner is funding “its share of operating costs.” This lack of guidance is particularly problematic in the context of a facility where owners propose, evaluate, approve, and disapprove proposed budgets based on their consideration of many factors, extensive data, and analyses.

154. The same language also fails to provide explicit standards and invites arbitrary and discriminatory enforcement by Defendant Knudsen and the Montana

Department of Justice, potentially exposing Plaintiffs to fines of up to \$100,000 per day for each day of any violations.

155. Plaintiffs are entitled to an injunction under 42 U.S.C. § 1983 to stop Defendant Knudsen from enforcing Senate Bill 266 because it is void for vagueness and violates the Due Process Clause of the Fourteenth Amendment.

156. There is an actual and substantial controversy between Plaintiffs and Defendant Knudsen having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

157. Plaintiffs are entitled to a declaration that Senate Bill 266 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court:

- A. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- B. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause

of the Constitution of the State of Montana, Article II, Section 31;

- C. Declare that the FAA preempts the enforcement of Senate Bill 265 to Section 18 of the O&O Agreement;
- D. Issue an injunction prohibiting Defendant Knudsen from enforcing, or seeking to enforce, Senate Bill 266 because that state law violates the Commerce Clause of the United States Constitution;
- E. Declare that Senate Bill 266 violates the Commerce Clause of the United States Constitution;
- F. Issue an injunction prohibiting Defendant Knudsen from enforcing, or seeking to enforce, Senate Bill 266 because that state law is unconstitutional as applied to the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- G. Declare that Senate Bill 266 is unconstitutional as applied to the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- H. Issue an injunction prohibiting Defendant Knudsen from enforcing, or seeking to enforce, Senate Bill 266 because that state law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

- I. Declare that Senate Bill 266 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;
- J. Award attorneys' fees under 42 U.S.C. § 1988; and
- K. Award such additional relief as justice may require.

DATED this 19th day of May, 2021.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Charles E. Hansberry

Charles E. Hansberry
Jenny M. Jourdonnais

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2021, a copy of the foregoing document was served on the following persons:

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/s/ Charles E. Hansberry
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Attorneys for Plaintiffs



AN ACT REVISING UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN THE CONDUCT OF TRADE OR COMMERCE TO INCLUDE CERTAIN ACTIONS RELATED TO THE OPERATION AND MAINTENANCE OF AN ELECTRICAL GENERATION FACILITY; PROVIDING THE DEPARTMENT OF JUSTICE WITH THE AUTHORITY TO TAKE ACTION IN RESPONSE TO CERTAIN ACTS; PROVIDING DEFINITIONS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

WHEREAS, electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers; and

WHEREAS, closure of electrical generation facilities without the unanimous consent of all co-owners threatens the reliable supply of electricity for Montanans; and

WHEREAS, failure or refusal to fund operations of Montana electrical generation facilities by facility owners without the consent of all 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; and

WHEREAS, electrical generation facility owners who fail to fund their share of operating costs without the unanimous consent of all co-owners or seek closure of an electrical generation facility without the unanimous consent of all co-owners of the facility place on Montana local government units and Montana electricity consumers the burdens of disruption in facility operations or closure of the facility; and

WHEREAS, Montana statute prohibits unfair or deceptive acts or practices in the conduct of trade or commerce in accordance with section 30-14-103, MCA, and provides for civil action by the Department of Justice to enforce compliance with statute and for temporary, preliminary, and permanent injunctive relief and civil fine.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. As used in [section 2] and this section, unless the context clearly indicates otherwise, the following definitions apply:

- (1) "Department" means the department of justice.
- (2) "Electrical generation facility" has the meaning provided for in 15-24-3001.
- (3) "Generating unit" means an individual unit of an electrical generation facility located in the state.
- (4) (a) "Operating costs" means the costs to construct, operate, and maintain the electrical generation facility in accordance with prudent utility practices.

(b) The term includes, without limitation, expenditures for capital improvements or replacements, maintenance activities, operations activities, environmental remediation, and pension and other employee benefits.
- (5) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.
- (6) (a) "Prudent utility practice" means, at any particular time, any of the practices, methods, and acts engaged in or approved by a significant portion of the electrical utility industry prior to practice or approval, or any of the practices, methods, or acts, which, in the exercise of reasonable judgement in the light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety, and expedition.

(b) The term is not limited to the optimum practice, method, or act, to the exclusion of all others, but rather to be a spectrum of possible practices, methods, or acts.

(c) The term also includes those practices, methods, and acts that are required in accordance with applicable laws, final orders, or regulations by regulatory agencies with jurisdiction.

Section 2. Unfair or deceptive acts or practices -- ownership agreement. (1) (a) 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.

- (b) 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.

(2) (a) As an exclusive remedy for a violation of this section, whenever the department has reason to believe that a person is using, has used, or is about to knowingly use any method, act, or practice provided for in subsection (1) as an unfair or deceptive act or practice in the conduct of trade or commerce within the meaning of 30-14-103 and that proceeding would be in the public interest, the department may bring an action in the name of the state against the person to restrain by temporary or permanent injunction or temporary restraining order the unlawful method, act, or practice after giving appropriate notice to that person.

(b) In an action brought under this section, if the court finds that a person is willfully using or has willfully used a method, act, or practice declared unlawful by this section, the department may, on petition to the court, recover on behalf of the state a civil fine of not more than \$100,000 for each violation. Each day of a continuing violation constitutes a separate offense.

(3) There is no implied private right of action for a violation of this section, either under this section or in law.

(4) All legal actions under this section must be brought in the county in which the electrical generation facility is located.

Section 3. Codification instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 30, chapter 14, part 1, and the provisions of Title 30, chapter 14, part 1, apply to [sections 1 and 2].

Section 4. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 5. Effective date. [This act] is effective on passage and approval.

Section 6. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109,

to actions taken by an owner on or after January 1, 2021.

- END -

I hereby certify that the within bill,
SB 266, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2021.

Speaker of the House

Signed this _____ day
of _____, 2021.

Case 1:21-cv-00047-SPW-KLD Document 32-1 Filed 05/19/21 Page 6 of 6

SENATE BILL NO. 266

INTRODUCED BY S. FITZPATRICK, J. ELLSWORTH

AN ACT REVISING UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN THE CONDUCT OF TRADE OR COMMERCE TO INCLUDE CERTAIN ACTIONS RELATED TO THE OPERATION AND MAINTENANCE OF AN ELECTRICAL GENERATION FACILITY; PROVIDING THE DEPARTMENT OF JUSTICE WITH THE AUTHORITY TO TAKE ACTION IN RESPONSE TO CERTAIN ACTS; PROVIDING DEFINITIONS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.



AN ACT REQUIRING VENUES FOR ARBITRATION IN ELECTRICAL GENERATION DISPUTES THAT OCCUR WITHIN MONTANA; PROVIDING STANDARDS FOR ARBITRATION PANELS IN ELECTRICAL GENERATION DISPUTES; AMENDING SECTION 27-5-323, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

WHEREAS, electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers; and

WHEREAS, the Legislature, mindful of its constitutional obligations under Article II, section 16, of the Montana Constitution, enacted section 27-5-323, MCA, to ensure Montana residents have a right to arbitrate in Montana; and

WHEREAS, arbitration of disputes concerning Montana electrical generation facilities outside of Montana threatens Montana's laws, policies, and the interests of Montana in securing and maintaining a reliable source of electricity.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-5-323, MCA, is amended to read:

"27-5-323. Venue. (1) An initial application must be made to the court of the county in which the agreement provides the arbitration hearing must be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application must be made in the county where the adverse party resides or has a place of business or, if the adverse party does not have a residence or place of business in this state, to the court of any county. All subsequent applications must be made to the court hearing the initial application unless the court otherwise directs. An agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived

upon the advice of counsel as evidenced by counsel's signature on the agreement.

(2) (a) An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act unless all parties agree in writing to a single arbitrator.

(b) For the purposes of this subsection, "electrical generation facility" has the meaning provided in 15-24-3001."

Section 2. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 3. Effective date. [This act] is effective on passage and approval.

Section 4. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to applications made on or after January 1, 2021.

- END -

I hereby certify that the within bill,
SB 265, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2021.

Speaker of the House

Signed this _____ day
of _____, 2021.

Case 1:21-cv-00047-SPW-KLD Document 32-2 Filed 05/19/21 Page 4 of 4

SENATE BILL NO. 265

INTRODUCED BY S. FITZPATRICK, D. ANKNEY, J. SMALL

AN ACT REQUIRING VENUES FOR ARBITRATION IN ELECTRICAL GENERATION DISPUTES THAT OCCUR WITHIN MONTANA; PROVIDING STANDARDS FOR ARBITRATION PANELS IN ELECTRICAL GENERATION DISPUTES; AMENDING SECTION 27-5-323, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

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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 PUGENT SOUND ENERGY,
INC.**

Plaintiffs,

v.

**NORTHWESTERN
CORPORATION; and TALEN
MONTANA, LLC,**

Defendants.

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

**ANSWER OF DEFENDANT
NORTHWESTERN
CORPORATION TO PLAINTIFFS'
FIRST AMENDED COMPLAINT**

NorthWestern Corporation (“NorthWestern”), for its answer and affirmative defenses to Plaintiffs’ First Amended Complaint (“Amended Complaint”) states and alleges as follows:

“INTRODUCTION”

1. Paragraph 1 of the Amended Complaint contains allegations of law to which no response is required.

2. NorthWestern admits the allegations contained in paragraph 2 of the Amended Complaint.

3. With respect to the allegations contained in paragraph 3 of the Amended Complaint, NorthWestern admits Washington has enacted RCW Chapter 19-405 and Oregon has enacted ORS 757.518(2), which apply to electric public utilities operating within those states. NorthWestern further admits that RCW Chapter 19-405 and ORS 757.518(2) do not apply to NorthWestern or Talen. NorthWestern also admits there is a dispute between the parties as to the number of votes necessary to shut down Colstrip coal fired Units 3 and 4 (the “Colstrip Facility”). NorthWestern alleges the remaining allegations of paragraph 3 contain allegations of law to which no response is required.

4. NorthWestern denies the allegations contained in paragraph 4 of the Amended Complaint as pled. NorthWestern further alleges Montana Senate Bills 265 and 266 speak for themselves.

5. Paragraph 5 of the Amended Complaint contains allegations of law to which no response is required, except that NorthWestern denies the Pacific Northwest Owners have contractual rights “to close one or both [Units 3 and 4 of

the Colstrip Facility] with less-than-unanimous consent and to propose and vote to close one or both units.”

6. With respect to the allegations contained in paragraph 6 of the Amended Complaint, NorthWestern alleges that the terms of Senate Bill 266 speak for themselves.

7. With respect to the allegations contained in paragraph 7 of the Amended Complaint, NorthWestern alleges that statements made by Senator Steve Fitzpatrick and Montana’s Governor speak for themselves.

8. Paragraph 8 of the Amended Complaint contains allegations of law to which no response is required.

9. Paragraph 9 of the Amended Complaint contains allegations of law to which no response is required.

10. Paragraph 10 of the Amended Complaint contains allegations of law to which no response is required.

11. Paragraph 11 of the Amended Complaint contains allegations of law to which no response is required.

12. With respect to the allegations contained in paragraph 12 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

13. Paragraph 13 of the Amended Complaint contains allegations of law

to which no response is required.

14. Paragraph 14 of the Amended Complaint contains allegations of law to which no response is required.

15. With respect to the allegations contained in paragraph 15 of the Amended Complaint, NorthWestern alleges that a corporate representative testified in legislative hearings addressing Senate Bill 265.

16. NorthWestern admits the allegations contained in paragraph 16 of the Amended Complaint.

17. With respect to the allegations contained in paragraph 17 of the Amended Complaint, NorthWestern admits there “is a current and ripe dispute” between the parties.

“PARTIES”

18. NorthWestern admits the allegations contained in paragraph 18 of the Amended Complaint on information and belief.

19. NorthWestern admits the allegations contained in paragraph 19 of the Amended Complaint on information and belief.

20. NorthWestern admits the allegations contained in paragraph 20 of the Amended Complaint on information and belief.

21. NorthWestern admits the allegations contained in paragraph 21 of the Complaint on information and belief.

22. NorthWestern admits the allegations contained in paragraph 22 of the Amended Complaint.

23. NorthWestern admits the allegations contained in paragraph 23 of the Amended Complaint on information and belief.

24. With respect to the allegations contained in paragraph 24 of the Complaint, NorthWestern admits Austin Knudsen is the Attorney General of the State of Montana, but alleges the remaining allegations of paragraph 24 of the Complaint contain allegations of law to which no response is required.

“VENUE AND JURISDICTION”

25. With respect to the allegations contained in paragraph 25 of the Amended Complaint, NorthWestern admits venue is proper in this District.

26. Paragraph 26 of the Amended Complaint contains allegations of law to which no response is required.

27. With respect to the allegations contained in paragraph 27 of the Amended Complaint, NorthWestern admits this Court has subject matter jurisdiction.

“FACTUAL ALLEGATIONS”

“The O&O Agreement”

28. NorthWestern admits the allegations contained in paragraph 28 of the Amended Complaint.

29. NorthWestern admits the allegations contained in paragraph 29 of the Amended Complaint.

30. NorthWestern admits the allegations contained in paragraph 30 of the Amended Complaint.

31. With respect to the allegations contained in paragraph 31 of the Amended Complaint, NorthWestern alleges the O&O Agreement and its Amendment No. 1 speak for themselves.

32. NorthWestern denies the allegations contained in paragraph 32 of the Amended Complaint as pled, and NorthWestern alleges the terms of the Amended and Restated Project Committee Vote Sharing Agreement speak for themselves.

33. NorthWestern denies the allegations contained in paragraph 33 of the Amended Complaint as pled, and NorthWestern alleges the terms of the Amended and Restated Project Committee Vote Sharing Agreement speak for themselves.

34. With respect to the allegations contained in paragraph 34 of the Amended Complaint, NorthWestern alleges the terms of the O&O Agreement speak for themselves.

35. NorthWestern denies the allegations contained in paragraph 35 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

36. NorthWestern denies the allegations contained in paragraph 36 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

37. NorthWestern denies the allegations contained in paragraph 37 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

38. NorthWestern denies the allegations contained in paragraph 38 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

“State Restrictions on Coal-Fired Electricity and the Future of Colstrip”

39. With respect to the allegations contained in paragraph 39 of the Amended Complaint, NorthWestern Admits some states have passed laws addressing the use of fossil fuels the terms of which speak for themselves.

40. With respect to the allegations contained in paragraph 40 of the Amended Complaint, NorthWestern admits Washington has enacted RCW Chapter 19-405 the terms of which speak for themselves.

41. With respect to the allegations contained in paragraph 41 of the

Amended Complaint, NorthWestern admits Oregon has enacted ORS 757.518(2) the terms of which speak for themselves.

42. Paragraph 42 of the Amended Complaint contains allegations of law to which no response is required.

43. With respect to the allegations contained in paragraph 43 of the Amended Complaint, NorthWestern admits that “[t]ransitioning from sources of electricity is a complex and costly process that requires long-term planning to ensure utilities have sufficient generation for their customer load.” NorthWestern alleges it lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 43 and therefore denies them.

44. NorthWestern admits the allegations contained in paragraph 44 of the Amended Complaint on information and belief.

45. NorthWestern admits the allegations contained in paragraph 45 of the Amended Complaint.

46. NorthWestern admits the allegations contained in paragraph 46 of the Amended Complaint.

“Colstrip Owners’ Pending Arbitration”

47. NorthWestern admits the allegations contained in paragraph 47 of the Amended Complaint.

48. NorthWestern admits the allegations contained in paragraph 48 of the

Amended Complaint.

49. NorthWestern admits the allegations contained in paragraph 49 of the Amended Complaint.

50. NorthWestern admits the allegations contained in paragraph 50 of the Amended Complaint.

51. NorthWestern admits the allegations contained in paragraph 51 of the Amended Complaint.

52. With respect to the allegations contained in paragraph 52 of the Amended Complaint, NorthWestern alleges the arbitration answers of Avista, PacifiCorp, PGE, and PSE speak for themselves.

53. With respect to the allegations contained in paragraph 53 of the Amended Complaint, NorthWestern admits Talen responded by letter to NorthWestern's Amended Arbitration on April 23, 2021, and Talen did not respond substantively to NorthWestern's claims. NorthWestern denies the remaining allegations contained in paragraph 53.

54. NorthWestern denies the allegations contained in paragraph 54 of the Amended Complaint as pled, and alleges NorthWestern's Amended Demand for Arbitration speaks for itself.

55. NorthWestern admits the allegations contained in paragraph 55 of the Amended Complaint.

“Senate Bill 266”

56. NorthWestern denies the allegations contained in paragraph 56 of the Amended Complaint as pled, and alleges the terms of Senate Bill 266 speak for themselves.

57. NorthWestern admits the allegations contained in the first two sentences of paragraph 57 of the Amended Complaint, but it denies the third sentence of paragraph 57.

58. With respect to the allegations contained in paragraph 58 of the Amended Complaint, NorthWestern admits the enrolled bill version of Senate Bill 266 is attached to the Amended Complaint.

59. NorthWestern denies the allegations contained in paragraph 59 of the Amended Complaint as pled.

60. With respect to the allegations contained in paragraph 60 of the Amended Complaint, NorthWestern admits the Montana Legislature passed Senate Bill 266 and the Montana Governor signed the bill into law, but it denies the remaining allegations of paragraph 60.

61. With respect to the allegations contained in paragraph 61 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

62. With respect to the allegations contained in paragraph 62 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

63. With respect to the allegations contained in paragraph 63 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves, and alleges it lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding plaintiffs' concerns and therefore denies those allegations.

64. Paragraph 64 of the Amended Complaint contains allegations of law to which no response is required.

65. With respect to the allegations contained in paragraph 65 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

66. With respect to the allegations contained in paragraph 66 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

67. With respect to the allegations contained in paragraph 67 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

68. With respect to the allegations contained in paragraph 68 of the

Amended Complaint, NorthWestern alleges the comments made at committee hearings for Senate Bill 266 speak for themselves.

69. With respect to the allegations contained in paragraph 69 of the Amended Complaint, NorthWestern alleges the comments made by Montana’s Governor concerning Senate Bill 266 speak for themselves.

70. Paragraph 70 of the Amended Complaint contains allegations of law to which no response is required.

“Arbitration Agreement”

71. With respect to the allegations contained in paragraph 71 of the Amended Complaint, NorthWestern alleges the O&O Agreement section 18 speaks for itself.

72. NorthWestern admits the allegations contained in paragraph 72 of the Amended Complaint.

73. With respect to the allegations contained in paragraph 73 of the Amended Complaint, NorthWestern admits Talen made arbitration protocol proposals, including those set forth in paragraph 73.

74. With respect to the allegations contained in paragraph 74 of the Amended Complaint, NorthWestern admits some of Talen’s proposals contradict section 18 of the O&O Agreement.

75. NorthWestern admits the allegations contained in paragraph 75 of the

Amended Complaint.

76. With respect to the allegations contained in paragraph 76 of the Amended Complaint, NorthWestern admits Talen filed a complaint in the Yellowstone County District Court, the terms of which speak for themselves, and admits the plaintiffs removed that case to this court on May 17, 2021.

“Senate Bill 265”

77. With respect to the allegations contained in paragraph 77 of the Amended Complaint, NorthWestern admits the enrolled bill version of Senate Bill 265, which the Montana Legislature passed, is attached to the Amended Complaint.

78. NorthWestern admits the allegations contained in paragraph 78 of the Amended Complaint.

79. With respect to the allegations contained in paragraph 79 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

80. With respect to the allegations contained in paragraph 80 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

81. NorthWestern admits the allegations contained in paragraph 81 of the Amended Complaint.

82. Paragraph 82 of the Amended Complaint contains allegations of law to which no response is required, except NorthWestern admits Talen filed a complaint in the Yellowstone County District Court on May 4, 2021.

83. With respect to the allegations contained in paragraph 83 of the Amended Complaint, NorthWestern admits a representative testified in favor of Senate Bill 265, but it alleges that it lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations of paragraph 83 and therefore denies them.

“FIRST CLAIM FOR RELIEF”

“Declaratory Relief that SB 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the United States Constitution”

“(Against Defendants Talen and NorthWestern)”

84. With respect to the allegations contained in paragraph 84 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

85. With respect to the allegations contained in paragraph 85 of the Amended Complaint, NorthWestern alleges O&O Agreement section 18 speaks for itself.

86. With respect to the allegations contained in paragraph 86 of the Amended Complaint, NorthWestern admits Senate Bill 265 and O&O Agreement section 18 contain contradictory provisions.

87. With respect to the allegations contained in paragraph 87 of the Amended Complaint, NorthWestern admits Senate Bill 265 and O&O Agreement section 18 contain contradictory provisions.

88. With respect to the allegations contained in paragraph 88 of the Amended Complaint, NorthWestern admits Senate Bill 265 and O&O Agreement section 18 contain contradictory provisions.

89. Paragraph 89 of the Amended Complaint contains allegations of law to which no response is required.

90. Paragraph 90 of the Amended Complaint contains allegations of law to which no response is required.

91. Paragraph 91 of the Amended Complaint contains allegations of law to which no response is required.

92. Paragraph 92 of the Amended Complaint contains allegations of law to which no response is required.

93. Paragraph 93 of the Amended Complaint contains allegations of law to which no response is required.

94. Paragraph 94 of the Amended Complaint contains allegations of law to which no response is required.

95. With respect to the allegations contained in paragraph 95 of the Amended Complaint, NorthWestern admits an actual, ripe, and substantial

controversy exists.

96. Paragraph 96 of the Amended Complaint contains allegations of law to which no response is required.

“SECOND CLAIM FOR RELIEF”

“Declaratory Relief that SB 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the Constitution of the State of Montana”

“(Against Defendants Talen and NorthWestern)”

97. With respect to the allegations contained in paragraph 97 of the Amended Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-96 of the Answer.

98. With respect to the allegations contained in paragraph 98 of the Amended Complaint, NorthWestern alleges the provisions of the Montana Constitution speak for themselves.

99. Paragraph 99 of the Amended Complaint contains allegations of law to which no response is required.

100. Paragraph 100 of the Amended Complaint contains allegations of law to which no response is required.

101. Paragraph 101 of the Amended Complaint contains allegations of law to which no response is required.

102. Paragraph 102 of the Amended Complaint contains allegations of law

to which no response is required.

103. With respect to the allegations contained in paragraph 103 of the Amended Complaint, NorthWestern admits an actual, ripe, and substantial controversy exists.

104. Paragraph 104 of the Amended Complaint contains allegations of law to which no response is required.

“THIRD CLAIM FOR RELIEF”

“Declaratory Relief that SB 265 is preempted as applied to the O&O Agreement under the Federal Arbitration Act”

“(Against Defendants Talen and NorthWestern)”

105. With respect to the allegations contained in paragraph 105 of the Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-104 of the Answer.

106. With respect to the allegations contained in paragraph 106 of the Amended Complaint, NorthWestern alleges the provisions of the Federal Arbitration Act speak for themselves.

107. Paragraph 107 of the Amended Complaint contains allegations of law to which no response is required.

108. Paragraph 108 of the Amended Complaint contains allegations of law to which no response is required.

109. Paragraph 109 of the Amended Complaint contains allegations of law

to which no response is required.

110. Paragraph 110 of the Amended Complaint contains allegations of law to which no response is required.

111. Paragraph 111 of the Amended Complaint contains allegations of law to which no response is required.

112. Paragraph 112 of the Amended Complaint contains allegations of law to which no response is required.

113. With respect to the allegations contained in paragraph 113 of the Amended Complaint, NorthWestern admits an actual, ripe, and substantial controversy exists.

114. Paragraph 114 of the Amended Complaint contains allegations of law to which no response is required.

“FOURTH CLAIM FOR RELIEF”

“42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Senate Bill 266 Violates the Commerce Clause”

“(Against Defendant Austen Knudsen)”

115. With respect to the allegations contained in paragraph 115 of the Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-114 of the Answer.

116. Paragraph 116 of the Amended Complaint contains allegations of law

to which no response is required.

117. Paragraph 117 of the Amended Complaint contains allegations of law to which no response is required.

118. Paragraph 118 of the Amended Complaint contains allegations of law to which no response is required.

119. Paragraph 119 of the Amended Complaint contains allegations of law to which no response is required.

120. Paragraph 120 of the Amended Complaint contains allegations of law to which no response is required.

121. Paragraph 121 of the Amended Complaint contains allegations of law to which no response is required.

122. Paragraph 122 of the Amended Complaint contains allegations of law to which no response is required.

123. Paragraph 123 of the Amended Complaint contains allegations of law to which no response is required.

124. Paragraph 124 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

125. Paragraph 125 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

126. Paragraph 126 of the Amended Complaint is not directed at

NorthWestern and thus no response is required.

“FIFTH CLAIM FOR RELIEF”

“42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Contract Clause of the United States Constitution”

“(Against Defendant Austen Knudsen)”

127. Paragraph 127 of the Amended Complaint contains allegations of law to which no response is required.

128. Paragraph 128 of the Amended Complaint contains allegations of law to which no response is required.

129. With respect to the allegations contained in paragraph 129 of the Amended Complaint, NorthWestern alleges the provisions of the O &O Agreement speak for themselves and alleges the matters asserted in paragraph 129 are the subject of the arbitration NorthWestern has commenced.

130. Paragraph 130 of the Amended Complaint contains allegations of law to which no response is required.

131. Paragraph 131 of the Amended Complaint contains allegations of law to which no response is required.

132. With respect to the allegations contained in paragraph 132 of the Amended Complaint, NorthWestern alleges the provisions of the O &O Agreement speak for themselves and alleges the matters asserted in paragraph 132 are the

subject of the arbitration NorthWestern has commenced.

133. Paragraph 133 of the Amended Complaint contains allegations of law to which no response is required.

134. Paragraph 134 of the Amended Complaint contains allegations of law to which no response is required.

135. Paragraph 135 of the Amended Complaint contains allegations of law to which no response is required.

136. Paragraph 136 of the Amended Complaint contains allegations of law to which no response is required.

137. Paragraph 137 of the Amended Complaint contains allegations of law to which no response is required.

138. With respect to the allegations contained in paragraph 138 of the Amended Complaint, NorthWestern alleges the provisions of the O &O Agreement speak for themselves and alleges the matters asserted in paragraph 138 are the subject of the arbitration NorthWestern has commenced.

139. Paragraph 139 of the Amended Complaint contains allegations of law to which no response is required.

140. Paragraph 140 of the Amended Complaint contains allegations of law to which no response is required.

141. NorthWestern denies the allegations contained in paragraph 141 of the

Amended Complaint and alleges the matters asserted in paragraph 141 are the subject of the arbitration NorthWestern has commenced.

142. Paragraph 142 of the Amended Complaint contains allegations of law to which no response is required.

143. Paragraph 143 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

144. Paragraph 144 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

145. Paragraph 145 of the Amended Complaint contains allegations of law to which no response is required.

“SIXTH CLAIM FOR RELIEF”

“42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Due Process Clause of the United States Constitution”

“(Against Defendant Austen Knudsen)”

146. With respect to the allegations contained in paragraph 146 of the Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-145 of the Answer.

147. Paragraph 147 of the Amended Complaint contains allegations of law to which no response is required.

148. Paragraph 148 of the Amended Complaint contains allegations of law

to which no response is required.

149. Paragraph 149 of the Amended Complaint contains allegations of law to which no response is required.

150. Paragraph 150 of the Amended Complaint contains allegations of law to which no response is required.

151. Paragraph 151 of the Amended Complaint contains allegations of law to which no response is required.

152. Paragraph 152 of the Amended Complaint contains allegations of law to which no response is required.

153. Paragraph 153 of the Amended Complaint contains allegations of law to which no response is required.

154. Paragraph 154 of the Amended Complaint contains allegations of law to which no response is required.

155. Paragraph 155 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

156. Paragraph 156 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

157. Paragraph 157 of the Amended Complaint contains allegations of law

to which no response is required.

AFFIRMATIVE DEFENSES

Without making any admissions of any kind, and without prejudice to NorthWestern's right to plead additional defenses as discovery into the facts of this matter warrant, NorthWestern sets forth the following affirmative defenses. By raising the matters below as affirmative defenses, NorthWestern does not thereby assume the burden of proof regarding such matters to the extent they are not affirmative defenses but rather an element of the Plaintiffs' claims.

1. NorthWestern denies each and every allegation of the Amended Complaint to the extent not admitted or otherwise expressly addressed herein.
2. The Amended Complaint fails to state a claim against NorthWestern upon which relief can be granted.
3. NorthWestern will suffer significant damages if the arbitration it commenced on March 12, 2021, does not proceed promptly to hearing and an award. The issues raised in the Amended Complaint need to be resolved promptly to protect NorthWestern's substantial interests.
4. The plaintiffs' interpretation of RCW Chapter 19-405 and ORS 757.518(2) as requiring them to act to close the Colstrip Facility before 2025 contradicts the express language of those statutes.
5. If RCW Chapter 19-405 and ORS 757.518(2) were interpreted as

alleged in the Amended Complaint, it would impair NorthWestern's substantial rights and run afoul of the Constitution of the United States, in particular the Commerce Clause.

6. Defendant Talen Montana, LLC commenced a lawsuit in Yellowstone County District Court, Cause No. DV 21-0511, a few hours after Plaintiffs commenced this lawsuit. In that lawsuit, Talen seeks a declaratory injunction requiring compliance with SB 265. On May 17, 2021, Plaintiffs filed a notice of removal removing the Yellowstone County District Court lawsuit to this Court, which removed action bears Case No. 1:21-cv-00058-SPW-TJC. This Court should consolidate Case No. 1:21-cv-00058-SPW-TJC with this lawsuit.

PRAYER FOR RELIEF

WHEREFORE, Defendant NorthWestern Corporation prays that the Court consolidate this matter with newly-removed Case No. 1:21-cv-00058-SPW-TJC and enter a judgment requiring the parties to move promptly to arbitration to resolve the issues raised in NorthWestern's Amended Demand for Arbitration.

DATED: June 2, 2021

Respectfully submitted,

DORSEY & WHITNEY LLP

By: /s/ J David Jackson

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Attorneys for Plaintiff Talen Montana, LLC
Additional Attorneys listed in signature block

CLERK OF THE
DISTRICT COURT
TERRY HALPIN
2021 MAY -5 A 11: 47
FILED
BY _____
DEPUTY

Montana Thirteenth Judicial District Court
Yellowstone County

Talen Montana, LLC, Plaintiff, v. Avista Corporation; North Western Corporation; PacifiCorp; Portland General Electric Company; and Puget Sound Energy, Inc., Defendants.
--

Cause No. DV-21-0511

Judge: Ashley Harada

First Amended Complaint for Declaratory
Judgment and Petition to Compel Arbitration

Plaintiff Talen Montana, LLC ("Talen Montana") respectfully states the following:

Necessity of Action

1. Since the 1980s, the people of the State of Montana and the City of Colstrip have relied on the Colstrip Steam Electric Station for jobs, power, and prosperity. Now mandates by the States of Washington and Oregon have put Colstrip's future at risk. Four of Colstrip's co-

owners—Avista Corporation, PacifiCorp, Portland General Electric Company, and Puget Sound Energy—are attempting to force Colstrip to close by the end of 2025, in obedience to Washington’s ban on the sale of electricity from Colstrip and other plants that generate power from coal. They are also trying to compel arbitration of Colstrip’s fate in Washington by a single arbitrator to be chosen by a Washington court, in disobedience to controlling Montana law requiring arbitration in Montana before three arbitrators. As the Operator and a co-owner of Colstrip, Talen Montana brings this action for declaratory and injunctive relief, including a declaration that the arbitration over its and Montana’s future must be held in Montana before a panel of three arbitrators applying Montana law. *See* Mont. Code § 27-5-323.

The Parties

2. Plaintiff Talen Montana is a Delaware limited liability company with its principal place of business in The Woodlands, Texas. Talen Montana is the Operator of and a co-owner of Colstrip.

3. Defendant Avista Corporation (“Avista”) is a Washington investor-owned utility with its principal place of business in Spokane, Washington. Avista serves customers in Idaho, Montana, Oregon, and Washington. Avista is a co-owner of Colstrip.

4. Defendant NorthWestern Corporation (“NorthWestern”) is a Delaware corporation with its principal place of business in Sioux Falls, South Dakota. NorthWestern is an investor-owned utility that serves customers in Montana, Nebraska, South Dakota, and Yellowstone National Park. NorthWestern is a co-owner of Colstrip.

5. Defendant PacifiCorp is a wholly-owned subsidiary of Berkshire Hathaway Energy with two business units: Pacific Power and Rocky Mountain Power. Pacific Power is a regulated electric utility based in Portland, Oregon that provides services to customers in

California, Oregon, and Washington. Rocky Mountain Power is a regulated electric utility based in Salt Lake City, Utah that provides services to customers in Idaho, Utah, and Wyoming. PacifiCorp is a co-owner of Colstrip.

6. Defendant Portland General Electric Company (“Portland”) is an investor-owned Oregon utility with its principal place of business in Portland, Oregon. Portland serves customers in Oregon. Portland is a co-owner of Colstrip.

7. Defendant Puget Sound Energy, Inc. (“Puget”) is a Washington investor-owned utility with its principal place of business in Bellevue, Washington. Puget serves customers in Washington. Puget is a co-owner of Colstrip.

Jurisdiction and Venue

8. This Court has original jurisdiction over the subject matter of this action, Mont. Code § 3-5-302(1)(b), and has personal jurisdiction over Defendants, Mont. R. Civ. P. 4(b)(1)(A), 4(b)(1)(C).

9. Venue is proper in this Court under Montana Code § 27-5-323. NorthWestern has a place of business in Yellowstone County, including a customer service office in Billings, Montana. In addition, Colstrip’s transmission line runs through Yellowstone County.

Additional Allegations Common to all Counts

A. Colstrip’s Importance to Montana

10. Montanans rely on Colstrip for both electricity generation and economic opportunity. It is particularly important to the City of Colstrip.

11. As of the 2020 census, the City of Colstrip is home to 2,196 people, many of whom work directly at Colstrip or for local businesses that support it.

12. Colstrip has two active, coal-fired generating units—Units 3 and 4—which are together capable of producing up to 1,480 Megawatts of electricity. Unit 3 became active in

1983, and Unit 4 followed in 1985. (Units 1 and 2 were built much earlier and were retired in 2020.)

13. Colstrip is vital to Montana's economy. In 2018, the University of Montana's Bureau of Business and Economic Research examined how a hypothetical 2027 retirement of Colstrip would impact jobs, income, population, and economic output throughout Montana. The study concluded that the negative economic effects would be dramatic and felt throughout the state:

- a. Approximately 3,300 jobs would be lost;
- b. Household income in Montana would fall by between \$250 million and \$350 million per year;
- c. Montana's population would decline by approximately 7,000 as people left the state in search of better opportunities; and
- d. Montana would lose more than \$1.2 billion in tax and nontax revenues, not including additional losses to local governments from declining property tax revenue and coal gross proceeds taxes.

14. The consequences would be felt throughout the state. Jobs in the service industry, retail, and construction would evaporate. Declining tax revenues would force cuts in government services. Even seemingly unrelated industries, such as health care, would suffer due to reduced incomes and populations.

15. The consequences of shuttering Colstrip are dire and there is no good reason to do so because it is producing electricity consistent with prudent utility practice or "PUP."

B. Avista, PacifiCorp, Portland, and Puget Try to Close Colstrip Prematurely

16. Avista, PacifiCorp, and Puget want Colstrip closed, not because it is broken, but because their market for Colstrip-produced electricity will shrink in 2026 when a new Washington law will prevent them from using this electricity to serve customers in Washington. See RCW Chapter 19-405. Similarly, Portland exports electricity exclusively to Oregon, which

will not accept coal-generated electricity after 2029 (and may accelerate that timeline). *See* ORS 757.518(2).

17. During the 2021 budgeting cycle, Avista, PacifiCorp, Portland, and Puget took the idiosyncratic and self-interested position that Talen Montana must operate Units 3 and 4 as if they are being retired before January 1, 2026, when they lose a portion of their market for Colstrip-produced electricity.

18. As Operator, Talen Montana is guided by the parties' Ownership & Operation Agreement ("O&O Agreement"), which provides that Colstrip should continue to operate as long as it is capable of producing electricity consistent with PUP and not at an arbitrary date determined by factors peculiar to a particular co-owner or group of co-owners.

19. Section 32 of the O&O Agreement confirms the parties' intent to run Colstrip for so long as it can produce electricity consistent with PUP. It does so by providing that the O&O Agreement (and the parties' obligations under it, including the obligation to submit and approve operating budgets) "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."

20. No one disputes that Colstrip is currently producing electricity consistent with PUP. Nor has anyone claimed that Colstrip will become incapable of producing electricity consistent with PUP after 2025. The focus of some co-owners on a 2025 retirement appears to rest entirely on the inability to sell Colstrip-produced electricity to Washington customers after 2025 and to Oregon customers after 2029.

21. NorthWestern likewise has rejected the efforts of Avista, PacifiCorp, Portland, and Puget to close Colstrip. It recently initiated 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.”

22. Talen Montana, as Operator and a co-owner, looks forward to proving that Colstrip need not be retired merely because some co-owners have a desire driven by circumstances peculiar to them and external to Colstrip to abandon Colstrip and avoid their obligations to fund their share of costs by 2025.

C. Avista, PacifiCorp, Portland, and Puget’s Invalid Petition to Compel Arbitration in Washington

23. On February 9, 2021, NorthWestern provided notice that it intended to initiate an arbitration within thirty days to resolve the dispute over whether Avista, PacifiCorp, Portland, or Puget could force Colstrip to close in 2025.

24. On March 12, 2021, NorthWestern served an arbitration demand, which it amended on April 2, 2021.

25. The co-owners engaged in preliminary negotiations about rules and procedures for a potential arbitration, including during an introductory telephone call on March 30, 2021.

26. Talen Montana proposed a comprehensive agreement regarding a potential arbitration and included in it a proposal that the parties agree to venue in Montana before a panel of three arbitrators, which is what Montana law requires. A panel of three arbitrators is also more likely to reach a well-reasoned decision consistent with the law and the governing contract than a single arbitrator.

27. By contrast, the other co-owners proposed that arbitration occur in Washington, before a single arbitrator, and cited an arbitration provision in the O&O Agreement.

28. During the March 30 introductory call, the parties discussed the venue and panel makeup proposals and scheduled a follow-up discussion for April 28, 2021.

29. On April 14, 2021—two weeks before the parties’ scheduled meeting to discuss proposals regarding arbitration venue and procedures—Avista, PacifiCorp, Portland, and Puget filed a lawsuit in the Superior Court of the State of Washington for Spokane County, seeking an order compelling the co-owners to arbitrate in Washington under the Washington Uniform Arbitration Act before a single arbitrator.

30. The filing came on the same day Avista, PacifiCorp, Portland, and Puget failed in their aggressive lobbying effort to defeat Montana Senate Bill 265, which provides that “[a]n agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act.” Senate Bill 265 is now law and invalidates the arbitration provisions relied on by Avista, PacifiCorp, Portland, and Puget in the Washington lawsuit.

D. The Court Should Enjoin the Parties to Comply with Montana Law

31. The attempt to compel the co-owners to arbitrate in Washington is invalid for a number of reasons.

32. First, the O&O Agreement’s venue provisions allowing for arbitration in Washington, § 18, and interpreting § 18 based on Washington law, § 34(c), are not enforceable as a matter of law.

33. Montana Code § 27-5-323 provides that an “agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act.” S.B. 265, 67th Leg. (Mont. 2021). The amendment became effective upon passage and approval and applies retroactively to petitions to compel arbitration made on or after January 1, 2021.

34. The Montana Legislature declared a legislative purpose that “electrical generation facilities located in Montana have significant implications for the economy, environment, and health and welfare of Montana consumers;” and that “arbitration of disputes concerning Montana electrical generation facilities outside of Montana threatens Montana’s laws, policies, and the interests of Montana in securing and maintaining a reliable source of electricity.” This is particularly true for Colstrip, which thousands of Montanans rely on for both power and economic opportunity.

35. Montana law therefore requires that this arbitration be venued in Montana (not Washington), held before a panel of three arbitrators (not one), and governed by the Montana Uniform Arbitration Act (not the Washington Uniform Arbitration Act).

36. Second, the Washington petition is premature under Section 18 of the O&O Agreement. Even if it were valid, which it is not, O&O Agreement § 18 would allow a co-owner to ask a Washington court to appoint an arbitrator only after it is clear that the co-owners “cannot mutually agree upon [an] Arbitrator.” O&O Agreement § 18 (“If the Project Users cannot mutually agree upon such Arbitrator, then upon petition of any Project User, such Arbitrator shall be appointed by the Superior Court of the State of Washington, in and for the County of Spokane.”).

37. No party has even proposed an arbitrator; so there cannot possibly be an impasse in negotiations that would allow for the Washington lawsuit. The parties merely exchanged proposals about the procedures for the arbitration, including the number of arbitrators, and then agreed to table those discussions until after responsive pleadings were filed in the arbitration.

38. In their Washington petition, the Avista, PacifiCorp, Portland, and Puget did not allege that the parties “cannot mutually agree” on selecting an arbitrator. Nor could they. As

their petition correctly acknowledges, Talen Montana “*proposed* that” the arbitration occur in Montana before a panel of three arbitrators.

39. Third, the Washington court does not have jurisdiction over this dispute.

40. That is because Talen Montana is not subject to personal jurisdiction in Washington, there is not a sufficient case or controversy to support subject matter jurisdiction, and potential disagreements in the future over budgeting decisions under the O&O Agreement are neither sufficiently concrete nor properly resolved by an arbitrator before the decisions have been timely presented and made.

Count 1: Declaratory Judgment

41. Talen Montana re-alleges ¶¶ 1-40.

42. There is a dispute among the parties regarding venue for the arbitration that NorthWestern has demanded.

43. Montana Code § 27-5-323 provides that “An agreement concerning venue involving an electrical generation facility in this state is not valid unless the agreement requires that arbitration occur within the state before a panel of three arbitrators selected under the Uniform Arbitration Act.”

44. Colstrip is an electrical generation facility located in Montana.

45. Under Montana law, the arbitration venue clauses of the O&O Agreement, providing for arbitration in Washington State under the Washington Uniform Arbitration Act, are invalid.

46. Any person interested under a written contract may have determined any question of validity arising under the contract. Mont. Code § 27-8-202.

47. Talen Montana therefore seeks an order declaring that Sections 18 and 34(c) of the O&O Agreement are invalid under Montana Code § 27-5-323 insofar as they (1) require that any arbitration be conducted in Washington; (2) permit a Washington court to appoint an arbitrator; (3) require that any arbitration be governed by the Washington Uniform Arbitration Act; (4) allow for arbitration by one rather than three arbitrators; or (5) otherwise allow the laws or courts of Washington to influence where and how the arbitration proceeds.

Count 2: Conditional Petition to Compel Arbitration

48. Talen Montana re-alleges ¶¶ 1-47.

49. It is too early to reasonably predict whether Colstrip will be capable of producing electricity consistent with PUP after 2025. That determination will turn on various factors, including the price of power, the price of coal, and the condition of the units, none of which can be assessed this far in advance.

50. It is also too early to assess whether any potential decision to retire Colstrip at any particular time is a correct or incorrect one. There is no formal proposal to close Colstrip and therefore any dispute over such a proposal or decision has not yet been sufficiently defined to permit adjudication.

51. Nevertheless, Section 18 of the O&O Agreement provides: “Any controversies arising out of or relating to this Agreement which cannot be resolved through negotiations among the Project Users within thirty (30) days after inception of the matter in dispute shall, upon demand of any Project User involved in the controversy, be submitted to an Arbitrator having demonstrated expertise in the matter submitted.”

52. NorthWestern has served a Demand for Arbitration to resolve a dispute that it contends is within the scope of that binding arbitration provision.

53. Montana Code § 27-5-323 requires that an arbitration be held in Montana before a panel of three arbitrators selected under the Montana Uniform Arbitration Act.

54. Avista, PacifiCorp, Portland, and Puget are refusing to arbitrate in accordance with Montana Code § 27-5-323. Instead, they filed a lawsuit in Washington seeking to compel the owners to arbitrate in Washington under the Washington Uniform Arbitration Act. Their petition asks a Washington court to enforce contractual venue provisions that are invalid under Montana law.

55. Under the Montana Uniform Arbitration Act, on the application of a party showing an agreement to arbitrate and the opposing party's refusal to arbitrate, "the district court shall order the parties to proceed with arbitration" Mont. Code § 27-5-115(1).

56. Talen Montana is entitled to an order conditionally compelling arbitration in accordance with Montana Code § 27-5-323 and the Uniform Arbitration Act if and to the extent the arbitration provisions in the O&O Agreement may survive enactment of Montana Code § 27-5-323 and there is a sufficiently ripe and concrete dispute that is properly resolved at this time by arbitration under the O&O Agreement. Mont. Code § 27-5-115.

Prayer for Relief

Talen Montana respectfully requests the following relief:

1. A declaration that Sections 18 and 34(c) of the O&O Agreement are invalid insofar as they (1) require that any arbitration be conducted in Washington; (2) permit a Washington court to appoint an arbitrator; (3) require that any arbitration be governed by the Washington Uniform Arbitration Act; (4) allow for arbitration by one rather than three arbitrators; or (5) otherwise allow the laws or courts of Washington to influence where and how the arbitration proceeds.

2. An order enjoining Defendants to comply with, and conditionally compelling them to arbitrate in accordance with the O&O Agreement as modified by, Montana Code § 27-5-323.
3. For such of its costs, fees, and expenses as may be awardable at law or in equity.
4. For such other and further relief as the Court deems just, equitable, and proper.

Dated: May 5, 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 PUGENT SOUND ENERGY,
INC.**

Plaintiffs,

v.

**NORTHWESTERN
CORPORATION; and TALEN
MONTANA, LLC,**

Defendants.

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

**ANSWER OF DEFENDANT
NORTHWESTERN
CORPORATION TO PLAINTIFFS'
FIRST AMENDED COMPLAINT**

NorthWestern Corporation (“NorthWestern”), for its answer and affirmative defenses to Plaintiffs’ First Amended Complaint (“Amended Complaint”) states and alleges as follows:

“INTRODUCTION”

1. Paragraph 1 of the Amended Complaint contains allegations of law to which no response is required.

2. NorthWestern admits the allegations contained in paragraph 2 of the Amended Complaint.

3. With respect to the allegations contained in paragraph 3 of the Amended Complaint, NorthWestern admits Washington has enacted RCW Chapter 19-405 and Oregon has enacted ORS 757.518(2), which apply to electric public utilities operating within those states. NorthWestern further admits that RCW Chapter 19-405 and ORS 757.518(2) do not apply to NorthWestern or Talen. NorthWestern also admits there is a dispute between the parties as to the number of votes necessary to shut down Colstrip coal fired Units 3 and 4 (the “Colstrip Facility”). NorthWestern alleges the remaining allegations of paragraph 3 contain allegations of law to which no response is required.

4. NorthWestern denies the allegations contained in paragraph 4 of the Amended Complaint as pled. NorthWestern further alleges Montana Senate Bills 265 and 266 speak for themselves.

5. Paragraph 5 of the Amended Complaint contains allegations of law to which no response is required, except that NorthWestern denies the Pacific Northwest Owners have contractual rights “to close one or both [Units 3 and 4 of

the Colstrip Facility] with less-than-unanimous consent and to propose and vote to close one or both units.”

6. With respect to the allegations contained in paragraph 6 of the Amended Complaint, NorthWestern alleges that the terms of Senate Bill 266 speak for themselves.

7. With respect to the allegations contained in paragraph 7 of the Amended Complaint, NorthWestern alleges that statements made by Senator Steve Fitzpatrick and Montana’s Governor speak for themselves.

8. Paragraph 8 of the Amended Complaint contains allegations of law to which no response is required.

9. Paragraph 9 of the Amended Complaint contains allegations of law to which no response is required.

10. Paragraph 10 of the Amended Complaint contains allegations of law to which no response is required.

11. Paragraph 11 of the Amended Complaint contains allegations of law to which no response is required.

12. With respect to the allegations contained in paragraph 12 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

13. Paragraph 13 of the Amended Complaint contains allegations of law

to which no response is required.

14. Paragraph 14 of the Amended Complaint contains allegations of law to which no response is required.

15. With respect to the allegations contained in paragraph 15 of the Amended Complaint, NorthWestern alleges that a corporate representative testified in legislative hearings addressing Senate Bill 265.

16. NorthWestern admits the allegations contained in paragraph 16 of the Amended Complaint.

17. With respect to the allegations contained in paragraph 17 of the Amended Complaint, NorthWestern admits there “is a current and ripe dispute” between the parties.

“PARTIES”

18. NorthWestern admits the allegations contained in paragraph 18 of the Amended Complaint on information and belief.

19. NorthWestern admits the allegations contained in paragraph 19 of the Amended Complaint on information and belief.

20. NorthWestern admits the allegations contained in paragraph 20 of the Amended Complaint on information and belief.

21. NorthWestern admits the allegations contained in paragraph 21 of the Complaint on information and belief.

22. NorthWestern admits the allegations contained in paragraph 22 of the Amended Complaint.

23. NorthWestern admits the allegations contained in paragraph 23 of the Amended Complaint on information and belief.

24. With respect to the allegations contained in paragraph 24 of the Complaint, NorthWestern admits Austin Knudsen is the Attorney General of the State of Montana, but alleges the remaining allegations of paragraph 24 of the Complaint contain allegations of law to which no response is required.

“VENUE AND JURISDICTION”

25. With respect to the allegations contained in paragraph 25 of the Amended Complaint, NorthWestern admits venue is proper in this District.

26. Paragraph 26 of the Amended Complaint contains allegations of law to which no response is required.

27. With respect to the allegations contained in paragraph 27 of the Amended Complaint, NorthWestern admits this Court has subject matter jurisdiction.

“FACTUAL ALLEGATIONS”

“The O&O Agreement”

28. NorthWestern admits the allegations contained in paragraph 28 of the Amended Complaint.

29. NorthWestern admits the allegations contained in paragraph 29 of the Amended Complaint.

30. NorthWestern admits the allegations contained in paragraph 30 of the Amended Complaint.

31. With respect to the allegations contained in paragraph 31 of the Amended Complaint, NorthWestern alleges the O&O Agreement and its Amendment No. 1 speak for themselves.

32. NorthWestern denies the allegations contained in paragraph 32 of the Amended Complaint as pled, and NorthWestern alleges the terms of the Amended and Restated Project Committee Vote Sharing Agreement speak for themselves.

33. NorthWestern denies the allegations contained in paragraph 33 of the Amended Complaint as pled, and NorthWestern alleges the terms of the Amended and Restated Project Committee Vote Sharing Agreement speak for themselves.

34. With respect to the allegations contained in paragraph 34 of the Amended Complaint, NorthWestern alleges the terms of the O&O Agreement speak for themselves.

35. NorthWestern denies the allegations contained in paragraph 35 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

36. NorthWestern denies the allegations contained in paragraph 36 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

37. NorthWestern denies the allegations contained in paragraph 37 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

38. NorthWestern denies the allegations contained in paragraph 38 of the Amended Complaint as pled, and NorthWestern alleges the interpretation of the O&O Agreement is the subject of the arbitration it commenced pursuant to section 18 of the O&O Agreement.

“State Restrictions on Coal-Fired Electricity and the Future of Colstrip”

39. With respect to the allegations contained in paragraph 39 of the Amended Complaint, NorthWestern Admits some states have passed laws addressing the use of fossil fuels the terms of which speak for themselves.

40. With respect to the allegations contained in paragraph 40 of the Amended Complaint, NorthWestern admits Washington has enacted RCW Chapter 19-405 the terms of which speak for themselves.

41. With respect to the allegations contained in paragraph 41 of the

Amended Complaint, NorthWestern admits Oregon has enacted ORS 757.518(2) the terms of which speak for themselves.

42. Paragraph 42 of the Amended Complaint contains allegations of law to which no response is required.

43. With respect to the allegations contained in paragraph 43 of the Amended Complaint, NorthWestern admits that “[t]ransitioning from sources of electricity is a complex and costly process that requires long-term planning to ensure utilities have sufficient generation for their customer load.” NorthWestern alleges it lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 43 and therefore denies them.

44. NorthWestern admits the allegations contained in paragraph 44 of the Amended Complaint on information and belief.

45. NorthWestern admits the allegations contained in paragraph 45 of the Amended Complaint.

46. NorthWestern admits the allegations contained in paragraph 46 of the Amended Complaint.

“Colstrip Owners’ Pending Arbitration”

47. NorthWestern admits the allegations contained in paragraph 47 of the Amended Complaint.

48. NorthWestern admits the allegations contained in paragraph 48 of the

Amended Complaint.

49. NorthWestern admits the allegations contained in paragraph 49 of the Amended Complaint.

50. NorthWestern admits the allegations contained in paragraph 50 of the Amended Complaint.

51. NorthWestern admits the allegations contained in paragraph 51 of the Amended Complaint.

52. With respect to the allegations contained in paragraph 52 of the Amended Complaint, NorthWestern alleges the arbitration answers of Avista, PacifiCorp, PGE, and PSE speak for themselves.

53. With respect to the allegations contained in paragraph 53 of the Amended Complaint, NorthWestern admits Talen responded by letter to NorthWestern's Amended Arbitration on April 23, 2021, and Talen did not respond substantively to NorthWestern's claims. NorthWestern denies the remaining allegations contained in paragraph 53.

54. NorthWestern denies the allegations contained in paragraph 54 of the Amended Complaint as pled, and alleges NorthWestern's Amended Demand for Arbitration speaks for itself.

55. NorthWestern admits the allegations contained in paragraph 55 of the Amended Complaint.

“Senate Bill 266”

56. NorthWestern denies the allegations contained in paragraph 56 of the Amended Complaint as pled, and alleges the terms of Senate Bill 266 speak for themselves.

57. NorthWestern admits the allegations contained in the first two sentences of paragraph 57 of the Amended Complaint, but it denies the third sentence of paragraph 57.

58. With respect to the allegations contained in paragraph 58 of the Amended Complaint, NorthWestern admits the enrolled bill version of Senate Bill 266 is attached to the Amended Complaint.

59. NorthWestern denies the allegations contained in paragraph 59 of the Amended Complaint as pled.

60. With respect to the allegations contained in paragraph 60 of the Amended Complaint, NorthWestern admits the Montana Legislature passed Senate Bill 266 and the Montana Governor signed the bill into law, but it denies the remaining allegations of paragraph 60.

61. With respect to the allegations contained in paragraph 61 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

62. With respect to the allegations contained in paragraph 62 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

63. With respect to the allegations contained in paragraph 63 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves, and alleges it lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding plaintiffs' concerns and therefore denies those allegations.

64. Paragraph 64 of the Amended Complaint contains allegations of law to which no response is required.

65. With respect to the allegations contained in paragraph 65 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

66. With respect to the allegations contained in paragraph 66 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

67. With respect to the allegations contained in paragraph 67 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 266 speak for themselves.

68. With respect to the allegations contained in paragraph 68 of the

Amended Complaint, NorthWestern alleges the comments made at committee hearings for Senate Bill 266 speak for themselves.

69. With respect to the allegations contained in paragraph 69 of the Amended Complaint, NorthWestern alleges the comments made by Montana’s Governor concerning Senate Bill 266 speak for themselves.

70. Paragraph 70 of the Amended Complaint contains allegations of law to which no response is required.

“Arbitration Agreement”

71. With respect to the allegations contained in paragraph 71 of the Amended Complaint, NorthWestern alleges the O&O Agreement section 18 speaks for itself.

72. NorthWestern admits the allegations contained in paragraph 72 of the Amended Complaint.

73. With respect to the allegations contained in paragraph 73 of the Amended Complaint, NorthWestern admits Talen made arbitration protocol proposals, including those set forth in paragraph 73.

74. With respect to the allegations contained in paragraph 74 of the Amended Complaint, NorthWestern admits some of Talen’s proposals contradict section 18 of the O&O Agreement.

75. NorthWestern admits the allegations contained in paragraph 75 of the

Amended Complaint.

76. With respect to the allegations contained in paragraph 76 of the Amended Complaint, NorthWestern admits Talen filed a complaint in the Yellowstone County District Court, the terms of which speak for themselves, and admits the plaintiffs removed that case to this court on May 17, 2021.

“Senate Bill 265”

77. With respect to the allegations contained in paragraph 77 of the Amended Complaint, NorthWestern admits the enrolled bill version of Senate Bill 265, which the Montana Legislature passed, is attached to the Amended Complaint.

78. NorthWestern admits the allegations contained in paragraph 78 of the Amended Complaint.

79. With respect to the allegations contained in paragraph 79 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

80. With respect to the allegations contained in paragraph 80 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

81. NorthWestern admits the allegations contained in paragraph 81 of the Amended Complaint.

82. Paragraph 82 of the Amended Complaint contains allegations of law to which no response is required, except NorthWestern admits Talen filed a complaint in the Yellowstone County District Court on May 4, 2021.

83. With respect to the allegations contained in paragraph 83 of the Amended Complaint, NorthWestern admits a representative testified in favor of Senate Bill 265, but it alleges that it lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations of paragraph 83 and therefore denies them.

“FIRST CLAIM FOR RELIEF”

“Declaratory Relief that SB 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the United States Constitution”

“(Against Defendants Talen and NorthWestern)”

84. With respect to the allegations contained in paragraph 84 of the Amended Complaint, NorthWestern alleges the terms of Senate Bill 265 speak for themselves.

85. With respect to the allegations contained in paragraph 85 of the Amended Complaint, NorthWestern alleges O&O Agreement section 18 speaks for itself.

86. With respect to the allegations contained in paragraph 86 of the Amended Complaint, NorthWestern admits Senate Bill 265 and O&O Agreement section 18 contain contradictory provisions.

87. With respect to the allegations contained in paragraph 87 of the Amended Complaint, NorthWestern admits Senate Bill 265 and O&O Agreement section 18 contain contradictory provisions.

88. With respect to the allegations contained in paragraph 88 of the Amended Complaint, NorthWestern admits Senate Bill 265 and O&O Agreement section 18 contain contradictory provisions.

89. Paragraph 89 of the Amended Complaint contains allegations of law to which no response is required.

90. Paragraph 90 of the Amended Complaint contains allegations of law to which no response is required.

91. Paragraph 91 of the Amended Complaint contains allegations of law to which no response is required.

92. Paragraph 92 of the Amended Complaint contains allegations of law to which no response is required.

93. Paragraph 93 of the Amended Complaint contains allegations of law to which no response is required.

94. Paragraph 94 of the Amended Complaint contains allegations of law to which no response is required.

95. With respect to the allegations contained in paragraph 95 of the Amended Complaint, NorthWestern admits an actual, ripe, and substantial

controversy exists.

96. Paragraph 96 of the Amended Complaint contains allegations of law to which no response is required.

“SECOND CLAIM FOR RELIEF”

“Declaratory Relief that SB 265 is unconstitutional as applied to the O&O Agreement under the Contracts Clause of the Constitution of the State of Montana”

“(Against Defendants Talen and NorthWestern)”

97. With respect to the allegations contained in paragraph 97 of the Amended Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-96 of the Answer.

98. With respect to the allegations contained in paragraph 98 of the Amended Complaint, NorthWestern alleges the provisions of the Montana Constitution speak for themselves.

99. Paragraph 99 of the Amended Complaint contains allegations of law to which no response is required.

100. Paragraph 100 of the Amended Complaint contains allegations of law to which no response is required.

101. Paragraph 101 of the Amended Complaint contains allegations of law to which no response is required.

102. Paragraph 102 of the Amended Complaint contains allegations of law

to which no response is required.

103. With respect to the allegations contained in paragraph 103 of the Amended Complaint, NorthWestern admits an actual, ripe, and substantial controversy exists.

104. Paragraph 104 of the Amended Complaint contains allegations of law to which no response is required.

“THIRD CLAIM FOR RELIEF”

“Declaratory Relief that SB 265 is preempted as applied to the O&O Agreement under the Federal Arbitration Act”

“(Against Defendants Talen and NorthWestern)”

105. With respect to the allegations contained in paragraph 105 of the Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-104 of the Answer.

106. With respect to the allegations contained in paragraph 106 of the Amended Complaint, NorthWestern alleges the provisions of the Federal Arbitration Act speak for themselves.

107. Paragraph 107 of the Amended Complaint contains allegations of law to which no response is required.

108. Paragraph 108 of the Amended Complaint contains allegations of law to which no response is required.

109. Paragraph 109 of the Amended Complaint contains allegations of law

to which no response is required.

110. Paragraph 110 of the Amended Complaint contains allegations of law to which no response is required.

111. Paragraph 111 of the Amended Complaint contains allegations of law to which no response is required.

112. Paragraph 112 of the Amended Complaint contains allegations of law to which no response is required.

113. With respect to the allegations contained in paragraph 113 of the Amended Complaint, NorthWestern admits an actual, ripe, and substantial controversy exists.

114. Paragraph 114 of the Amended Complaint contains allegations of law to which no response is required.

“FOURTH CLAIM FOR RELIEF”

“42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Senate Bill 266 Violates the Commerce Clause”

“(Against Defendant Austen Knudsen)”

115. With respect to the allegations contained in paragraph 115 of the Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-114 of the Answer.

116. Paragraph 116 of the Amended Complaint contains allegations of law

to which no response is required.

117. Paragraph 117 of the Amended Complaint contains allegations of law to which no response is required.

118. Paragraph 118 of the Amended Complaint contains allegations of law to which no response is required.

119. Paragraph 119 of the Amended Complaint contains allegations of law to which no response is required.

120. Paragraph 120 of the Amended Complaint contains allegations of law to which no response is required.

121. Paragraph 121 of the Amended Complaint contains allegations of law to which no response is required.

122. Paragraph 122 of the Amended Complaint contains allegations of law to which no response is required.

123. Paragraph 123 of the Amended Complaint contains allegations of law to which no response is required.

124. Paragraph 124 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

125. Paragraph 125 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

126. Paragraph 126 of the Amended Complaint is not directed at

NorthWestern and thus no response is required.

“FIFTH CLAIM FOR RELIEF”

“42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Contract Clause of the United States Constitution”

“(Against Defendant Austen Knudsen)”

127. Paragraph 127 of the Amended Complaint contains allegations of law to which no response is required.

128. Paragraph 128 of the Amended Complaint contains allegations of law to which no response is required.

129. With respect to the allegations contained in paragraph 129 of the Amended Complaint, NorthWestern alleges the provisions of the O &O Agreement speak for themselves and alleges the matters asserted in paragraph 129 are the subject of the arbitration NorthWestern has commenced.

130. Paragraph 130 of the Amended Complaint contains allegations of law to which no response is required.

131. Paragraph 131 of the Amended Complaint contains allegations of law to which no response is required.

132. With respect to the allegations contained in paragraph 132 of the Amended Complaint, NorthWestern alleges the provisions of the O &O Agreement speak for themselves and alleges the matters asserted in paragraph 132 are the

subject of the arbitration NorthWestern has commenced.

133. Paragraph 133 of the Amended Complaint contains allegations of law to which no response is required.

134. Paragraph 134 of the Amended Complaint contains allegations of law to which no response is required.

135. Paragraph 135 of the Amended Complaint contains allegations of law to which no response is required.

136. Paragraph 136 of the Amended Complaint contains allegations of law to which no response is required.

137. Paragraph 137 of the Amended Complaint contains allegations of law to which no response is required.

138. With respect to the allegations contained in paragraph 138 of the Amended Complaint, NorthWestern alleges the provisions of the O &O Agreement speak for themselves and alleges the matters asserted in paragraph 138 are the subject of the arbitration NorthWestern has commenced.

139. Paragraph 139 of the Amended Complaint contains allegations of law to which no response is required.

140. Paragraph 140 of the Amended Complaint contains allegations of law to which no response is required.

141. NorthWestern denies the allegations contained in paragraph 141 of the

Amended Complaint and alleges the matters asserted in paragraph 141 are the subject of the arbitration NorthWestern has commenced.

142. Paragraph 142 of the Amended Complaint contains allegations of law to which no response is required.

143. Paragraph 143 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

144. Paragraph 144 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

145. Paragraph 145 of the Amended Complaint contains allegations of law to which no response is required.

“SIXTH CLAIM FOR RELIEF”

“42 U.S.C. § 1983 (Declaratory and Injunctive Relief): Due Process Clause of the United States Constitution”

“(Against Defendant Austen Knudsen)”

146. With respect to the allegations contained in paragraph 146 of the Complaint, NorthWestern realleges and incorporates by reference the responses contained in paragraphs 1-145 of the Answer.

147. Paragraph 147 of the Amended Complaint contains allegations of law to which no response is required.

148. Paragraph 148 of the Amended Complaint contains allegations of law

to which no response is required.

149. Paragraph 149 of the Amended Complaint contains allegations of law to which no response is required.

150. Paragraph 150 of the Amended Complaint contains allegations of law to which no response is required.

151. Paragraph 151 of the Amended Complaint contains allegations of law to which no response is required.

152. Paragraph 152 of the Amended Complaint contains allegations of law to which no response is required.

153. Paragraph 153 of the Amended Complaint contains allegations of law to which no response is required.

154. Paragraph 154 of the Amended Complaint contains allegations of law to which no response is required.

155. Paragraph 155 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

156. Paragraph 156 of the Amended Complaint is not directed at NorthWestern and thus no response is required.

157. Paragraph 157 of the Amended Complaint contains allegations of law

to which no response is required.

AFFIRMATIVE DEFENSES

Without making any admissions of any kind, and without prejudice to NorthWestern's right to plead additional defenses as discovery into the facts of this matter warrant, NorthWestern sets forth the following affirmative defenses. By raising the matters below as affirmative defenses, NorthWestern does not thereby assume the burden of proof regarding such matters to the extent they are not affirmative defenses but rather an element of the Plaintiffs' claims.

1. NorthWestern denies each and every allegation of the Amended Complaint to the extent not admitted or otherwise expressly addressed herein.
2. The Amended Complaint fails to state a claim against NorthWestern upon which relief can be granted.
3. NorthWestern will suffer significant damages if the arbitration it commenced on March 12, 2021, does not proceed promptly to hearing and an award. The issues raised in the Amended Complaint need to be resolved promptly to protect NorthWestern's substantial interests.
4. The plaintiffs' interpretation of RCW Chapter 19-405 and ORS 757.518(2) as requiring them to act to close the Colstrip Facility before 2025 contradicts the express language of those statutes.
5. If RCW Chapter 19-405 and ORS 757.518(2) were interpreted as

alleged in the Amended Complaint, it would impair NorthWestern's substantial rights and run afoul of the Constitution of the United States, in particular the Commerce Clause.

6. Defendant Talen Montana, LLC commenced a lawsuit in Yellowstone County District Court, Cause No. DV 21-0511, a few hours after Plaintiffs commenced this lawsuit. In that lawsuit, Talen seeks a declaratory injunction requiring compliance with SB 265. On May 17, 2021, Plaintiffs filed a notice of removal removing the Yellowstone County District Court lawsuit to this Court, which removed action bears Case No. 1:21-cv-00058-SPW-TJC. This Court should consolidate Case No. 1:21-cv-00058-SPW-TJC with this lawsuit.

PRAYER FOR RELIEF

WHEREFORE, Defendant NorthWestern Corporation prays that the Court consolidate this matter with newly-removed Case No. 1:21-cv-00058-SPW-TJC and enter a judgment requiring the parties to move promptly to arbitration to resolve the issues raised in NorthWestern's Amended Demand for Arbitration.

DATED: June 2, 2021

Respectfully submitted,

DORSEY & WHITNEY LLP

By: /s/ J David Jackson

Stephen D. Bell, Esq.
Millennium Building
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Case 1:21-cv-00047-SPW-KLD Document 40 Filed 06/02/21 Page 26 of 26

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

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

TALEN MONTANA, LLC,

Plaintiff,

v.

AVISTA CORPORATION;
NORTHWESTERN CORPORATION;
PACIFICORP; PORTLAND
GENERAL ELECTRIC COMPANY;
and PUGET SOUND ENERGY, INC.,

Defendants.

Case No. 1:21-cv-00058-SPW-TJC

DEFENDANT AVISTA
CORPORATION'S ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIMS

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS – 1

ANSWER TO FIRST AMENDED COMPLAINT

Defendant Avista Corporation (“Avista”) responds to Plaintiff Talen Montana, LLC’s (“Plaintiff”) First Amended Complaint for Declaratory Judgment and Petition to Compel Arbitration (“Complaint”) as follows:

1.

Avista denies each and every material allegation of the Complaint not expressly admitted herein.

2.

With regard to paragraph 1 of the Complaint, Avista admits that Plaintiff is the Operator and a co-owner of Colstrip Units #3 and #4 (“Colstrip”). With regard to the remaining allegations in paragraph 1 of the Complaint, Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies those allegations, or such allegations contain opinion, argument or legal conclusions for which no response is required.

3.

Upon information and belief, Avista admits the allegations in paragraphs 2 through 7 of the Complaint.

4.

The allegations in paragraph 8 of the Complaint contain legal conclusions for which no response is required.

DEFENDANT AVISTA CORPORATION’S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS – 2

5.

Avista admits that the Colstrip transmission line runs through Yellowstone County and that Defendant NorthWestern Corporation has an office in Yellowstone County. The remaining allegations in paragraph 9 of the Complaint contain legal conclusions for which no response is required.

6.

Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Complaint and, therefore, denies those allegations.

7.

Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Complaint and, therefore, denies those allegations.

8.

Avista admits the allegations in paragraph 12 of the Complaint.

9.

The allegations in paragraphs 13-14 of the Complaint contain opinions for which no response is required. Avista lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraphs 13-14 of the Complaint and, therefore, denies those allegations.

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS – 3

10.

The allegations in paragraph 15 of the Complaint contain opinions or legal conclusions for which no response is required. To the extent, if any, that paragraph 15 of the Complaint does not contain opinions or legal conclusions, Avista denies the allegations in paragraph 15 of the Complaint.

11.

With regard to the allegations in paragraph 16 of the Complaint, Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies those allegations, or such allegations contain opinions or legal conclusions for which no response is required.

12.

Avista denies the allegations in paragraph 17 of the Complaint.

13.

In response to paragraph 18 of the Complaint, Avista admits that Talen is the Operator of Colstrip. The Ownership and Operating Agreement speaks for itself and, therefore, Avista neither admits nor denies these allegations. Avista denies the remaining allegations in paragraph 18 of the Complaint.

14.

In response to paragraph 19 of the Complaint, the Ownership and Operating Agreement speaks for itself and, therefore, Avista neither admits nor denies these allegations.

15.

With regard to the allegations in paragraph 20 of the Complaint, Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies those allegations.

16.

With regard to the allegations in paragraph 21 of the Complaint, NorthWestern's statements speak for themselves and, therefore, Avista neither admits nor denies these allegations. Avista denies that it has made any effort to close Colstrip. Avista lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 21 of the Complaint, and therefore denies those allegations.

17.

Avista admits that Talen Montana is the Operator and a co-owner of Colstrip. The remaining allegations in paragraph 22 contain opinion for which no response is required or Avista lacks knowledge or information sufficient to form a

belief as to the truth of the remaining allegations in paragraph 22 of the Complaint, and therefore denies those allegations.

18.

In response to paragraph 23 of the Complaint, Avista admits that, on February 9, 2021, NorthWestern sent the other co-owners of Colstrip a letter (“February 9 Letter”) and NorthWestern’s February 9 Letter speaks for itself and, therefore, Avista neither admits nor denies these allegations.

19.

In response to paragraph 24 of the Complaint, Avista admits that NorthWestern sent Avista an arbitration demand on or about March 12, 2021 and that NorthWestern sent Avista an amended arbitration demand on or about April 2, 2021. Avista denies the remaining allegations in paragraph 24 of the Complaint.

20.

Avista admits the allegations in paragraph 25 of the Complaint.

21.

In response to paragraph 26 of the Complaint, Avista admits that Plaintiff has proposed venue in Montana before a panel of three arbitrators. Avista denies that a panel of three arbitrators is more likely to reach a well-reasoned decision consistent with the law and the governing contract than a single arbitrator. The

remaining allegations in paragraph 26 of Plaintiff's Complaint contain opinion or legal conclusions for which no response is required.

22.

Avista admits the allegations in paragraphs 27-29 of the Complaint.

23.

The allegations in paragraph 30 of the Complaint contain legal conclusions for which no response is required and Senate Bill 265 speaks for itself and, therefore, Avista neither admits nor denies these allegations. To the extent, if any, that paragraph 30 of the Complaint does not contain legal conclusions, Avista denies the allegations in paragraph 30 of the Complaint.

24.

The allegations in paragraphs 31-32 of the Complaint contain opinion and legal conclusions for which no response is required.

25.

The allegations in paragraph 33 of the Complaint contain legal conclusions for which no response is required and Montana Code § 27-5-323, as recently amended by S.B. 265, speaks for itself and, therefore, Avista neither admits nor denies these allegations.

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS – 7

24.

In response to paragraph 34 of the Complaint, the Montana Legislature's statements speak for themselves. Avista lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 34 of the Complaint, and therefore denies those allegations.

25.

The allegations in paragraph 35 of the Complaint contain opinions legal conclusions for which no response is required.

26.

The allegations in paragraph 36 of the Complaint contain legal conclusions for which no response is required and the O&O Agreement speaks for itself and, therefore, Avista neither admits nor denies these allegations.

27.

Avista admits the allegation that: "No party has even proposed an arbitrator". The remaining allegations contain opinion for which no response is required. To the extent a response is required, Avista denies the remaining allegations in paragraph 37 of the Complaint.

28.

In response to paragraph 38 of the Complaint, the pleadings filed in Washington Superior Court speak for themselves. Avista denies the remaining allegations in paragraph 38 of the Complaint.

29.

The allegations in paragraphs 39-40 of the Complaint contain opinion or legal conclusions for which no response is required.

30.

In response to paragraph 41 of the Complaint, Avista reasserts its responses in Paragraphs 1 through 40 as though fully set forth herein.

31.

Avista admits the allegations in paragraph 42 of the Complaint.

32.

The allegations in paragraph 43 of the Complaint contain legal conclusions for which no response is required and Montana Code § 27-5-323, as recently amended by S.B. 265, speaks for itself and, therefore, Avista neither admits nor denies these allegations.

33.

Avista admits the allegations in paragraph 44 of the Complaint.

34.

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS – 9

The allegations in paragraphs 45-47 of the Complaint contain opinions and legal conclusions for which no response is required. To the extent a response is required, Avista denies the allegations in paragraphs 45-47 of the Complaint.

35.

In response to paragraph 48 of the Complaint, Avista reasserts its responses in paragraphs 1 through 47 as though fully set forth herein.

36.

Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49 of the Complaint, and therefore denies those allegations.

37.

With regard to the allegations in paragraph 50 of the Complaint, Avista lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies those allegations, or such allegations contain legal conclusions for which no response is required.

39.

In response to paragraph 51 of the Complaint, the O&O Agreement speaks for itself and, therefore, Avista neither admits nor denies these allegations.

40.

In response to paragraph 52 of the Complaint, NorthWestern's Demand for Arbitration speaks for itself and, therefore, Avista neither admits nor denies these allegations.

41.

The allegations in paragraph 53 of the Complaint contain legal conclusions for which no response is required and Montana Code § 27-5-323 speaks for itself and, therefore, Avista neither admits nor denies these allegations.

42.

In response to paragraph 54 of the Complaint, Avista admits that Avista, PacifiCorp, Portland, and Puget filed a lawsuit in Washington seeking to compel the owners to arbitrate in Washington under the Washington Uniform Arbitration Act. The remaining allegations in paragraph 54 of the Complaint contain opinion and legal conclusions for which no response is required.

43.

In response to paragraph 55 of the Complaint, the Montana Uniform Arbitration Act speaks for itself and, therefore, Avista neither admits nor denies these allegations.

44.

The allegations in paragraphs 56 of the Complaint contain legal conclusions for which no response is required.

Facts Common to the Affirmative Defenses and Counterclaims

1.

Attached to this Answer is a true and correct copy of the First Amended Complaint (“Amended Complaint”), Docket #32, in *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD.

2.

Avista incorporates into this pleading the following paragraphs from the Amended Complaint as if stated and fully alleged in these Affirmative Defenses and Counterclaims: paragraphs 2, 3, 11 to 23, 25, 28 to 55, and 71 to 83.

DEFENSES AND AFFIRMATIVE DEFENSES

To the extent the evidence shows, and without assuming any burden of proof it would not otherwise bear, Avista asserts the following defenses and affirmative defenses:

DEFENDANT AVISTA CORPORATION’S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS – 12

First Defense – Failure to State a Claim

3.

Both of Talen’s counts in its Complaint fail to state a claim upon which relief can be granted.

4.

Talen’s claims are predicated upon Montana Code § 27-5-323, as recently amended by Senate Bill 265.

5.

That statute is unconstitutional and invalid under the federal Constitution’s Contracts Clause, Article I, Section 10, Clause 1 of the United States Constitution.

6.

That statute is unconstitutional and invalid under the Contracts Clause, Article II, Section 31 of the Constitution of the State of Montana.

7.

That statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

Second Defense – Failure to State a Claim as to Count 2

8.

Talen’s second count in its Complaint seeks a conditional order compelling arbitration “in accordance with Montana Code § 27-5-323” as recently amended by Senate Bill 265. (Complaint at ¶ 56.) Avista has not agreed to arbitrate “in accordance with” that statute. Further, that statute purports to invalidate a venue clause in arbitration agreements that do not comply with certain conditions stated in Senate Bill 265, it does not compel arbitration under its terms.

9.

Because there is no contract and no statute compelling Avista to arbitrate disputes concerning Colstrip in Montana pursuant to the Montana Uniform Arbitration Act before a panel of three arbitrators, Talen’s count 2 fails to state a claim upon which relief can be granted.

Third Defense – First-to-File Rule

10.

Talen’s two claims are predicated upon the validity of Senate Bill 265.

11.

The validity of Senate Bill 265 is currently at issue with these same parties in a federal case that Avista Corporation, Portland General Electric Company, PacifiCorp, and Puget Sound Energy, Inc., filed before Talen filed its action in Yellowstone County District Court for the State of Montana. That federal case is *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD (the “First Federal Filed Case”).

12.

The Ninth Circuit generally favors application of” the first-to-file rule, *Horne v. Nissan N. Am., Inc.*, No. 2:17-CV-00436-MCE-DB, 2018 WL 746467, at *3 (E.D. Cal. Feb. 6, 2018), which allows a district court to transfer or stay a case when “a similar case with substantially similar issues and parties was previously filed in another district court,” *Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015).

13.

The First Federal Filed Case was filed on May 4, 2021, several hours before Talen filed this action in Montana State Court in Yellowstone County.

DEFENDANT AVISTA CORPORATION’S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS – 15

14.

The action initiated by Talen’s Complaint should be transferred to and consolidated with the First Federal Filed Case or, in the alternative, stayed pending the outcome of the First Federal Filed Case.

Fourth Defense – Improper Venue

15.

Talen’s claims in its Complaint concern Section 18 of the Colstrip Units #3 and #4 Ownership & Operating Agreement of 1981, as amended (“O&O Agreement”).

16.

1. Section 18 of the O&O Agreement includes a mandatory forum-selection clause designating the Superior Court for Spokane County, Washington for disputes related to the appointment of an arbitrator in connection with controversies arising out of or relating to the O&O Agreement. The O&O Agreement also provides that arbitration will be before a single arbitrator, that the arbitration will be conducted in Spokane, Washington, and that it will be conducted pursuant to the Washington Arbitration Act.

COUNTERCLAIMS

17.

The relief requested in Avista's counterclaims is authorized under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

18.

This Court has jurisdiction over the counterclaims pursuant to 28 U.S.C. § 1332(a)(1) and 28 U.S.C. § 1367(a).

First Counterclaim

Declaratory Relief that Senate Bill 265 is Unconstitutional As Applied to the O&O Agreement under the Contracts Clause of the United States Constitution

(Against Counterclaim Defendants Talen and NorthWestern)

19.

Avista realleges all the preceding paragraphs of this pleading, including the paragraphs from the Amended Complaint incorporated by reference in paragraph 2 above.

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS – 17

20.

Avista incorporates into this pleading the following paragraphs from the Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 84 to 96.

Second Counterclaim

Declaratory Relief that Senate Bill 265 is Unconstitutional As Applied to the O&O Agreement under the Contracts Clause of the Constitution of the State of Montana

(Against Counterclaim Defendants Talen and NorthWestern)

21.

Avista realleges all the preceding paragraphs of this pleading, including the paragraphs from the Amended Complaint incorporated by reference in paragraph 2 above.

22.

Avista incorporates into this pleading the following paragraphs from the Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 98 to 104.

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS – 18

Third Counterclaim

Declaratory Relief that Senate Bill 265, As Applied to the O&O Agreement, is Preempted by the Federal Arbitration Act (Against Counterclaim Defendants Talen and NorthWestern)

23.

Avista realleges all the preceding paragraphs of this pleading, including the paragraphs from the Amended Complaint incorporated by reference in paragraph 2 above.

24.

Avista incorporates into this pleading the following paragraphs from the Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 106 to 114.

WHEREFORE, Avista prays for the following relief:

- A. That Plaintiff receive none of the affirmative relief prayed for it in its Complaint and the same be dismissed with prejudice;
- B. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS – 19

Case 1:21-cv-00058-SPW-TJC Document 11 Filed 06/01/21 Page 20 of 22

- C. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31;
- D. Declare that the Federal Arbitration Act preempts the enforcement of Senate Bill 265 as applied to Section 18 of the O&O Agreement;
- E. That Avista be awarded its fees and costs where allowed by law; and
- F. Such other further and equitable relief that the Court deems just and proper.

Dated this 1st day of June, 2021.

HANSBERRY & JOURDONNAIS, PLLC

By: /s/ Charles E. Hansberry
Charles E. Hansberry
Jenny M. Jourdonnais

*Attorneys for Defendant Avista
Corporation*

DEFENDANT AVISTA CORPORATION'S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS – 20

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a copy of the foregoing document was served on the following persons by the following methods:

1. Via ECF

2. Via ECF and Email

1.	<p>J. David Jackson DORSEY & WHITNEY 50 South Sixth Street Suite 1500 Minneapolis, MN 55402-1498 612-340-2600 Fax: 340-2868 Email: jackson.j@dorsey.com PRO HAC VICE</p> <p>Stephen D. Bell DORSEY & WHITNEY LLP - MISSOULA 125 Bank Street Millennium Building, Suite 600 Missoula, MT 59802-4407 406-721-6025 Fax: 406-513-0863 Email: bell.steve@dorsey.com</p> <p><i>Attorneys for NorthWestern Corporation</i></p>
1, 2	<p>Robert L Sterup Brown Law Firm, P.C. 315 North 24th Street Billings, Montana 59101 Email: rsterup@brownfirm.com</p> <p>Barry Barnett Adam Carlis</p>

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--

/s/ Charles E. Hansberry

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Case 1:21-cv-00058-SPW-TJC Document 14 Filed 06/01/21 Page 1 of 18

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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

TALEN MONTANA, LLC,

Plaintiff,

v.

AVISTA CORPORATION;
NORTHWESTERN CORPORATION;
PACIFICORP; PORTLAND
GENERAL ELECTRIC COMPANY;
and PUGET SOUND ENERGY, INC.,

Defendants.

Case No. 1:21-cv-00058-SPW-TJC

**DEFENDANT PUGET SOUND
ENERGY, INC.’S ANSWER,
AFFIRMATIVE DEFENSES,
AND COUNTERCLAIMS**

Defendant Puget Sound Energy, Inc. (“PSE”) answers below the First
Amended Complaint (“Amended Complaint”) filed by Plaintiff Talen Montana,

DEFENDANT PUGET SOUND ENERGY, INC.’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 1

LLC (“Talen”), in paragraphs numbered below to correspond to the paragraph numbers in the Amended Complaint.

1. PSE admits that it is a co-owner of two coal-fired electric generation units in Colstrip, Montana (“Units 3 and 4” or “Colstrip”). PSE further admits that Avista Corporation (“Avista”), PacifiCorp, Portland General Electric Company (“PGE”), and Talen are among the other co-owners of Units 3 and 4. PSE also admits that it is a plaintiff in a proceeding currently in the United States District Court for the Eastern District of Washington (removed by Talen to that court from Spokane County Superior Court) to compel Talen and NorthWestern Corporation (“NorthWestern”) to arbitrate current disputes among the owners consistent with the terms of the Ownership and Operation Agreement (“O&O Agreement”) governing Units 3 and 4. PSE also admits that Talen is the Operator of Units 3 and 4 under the O&O Agreement and that Talen seeks declaratory and injunctive relief. The rest of paragraph 1 is opinion and argument to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the remainder of paragraph 1.

2. PSE admits the allegations in paragraph 2.
3. PSE admits the allegations in paragraph 3.
4. PSE admits the allegations in paragraph 4.
5. PSE admits the allegations in paragraph 5.

DEFENDANT PUGET SOUND ENERGY, INC.’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 2

Case 1:21-cv-00058-SPW-TJC Document 14 Filed 06/01/21 Page 3 of 18

6. PSE admits the allegations in paragraph 6.
7. PSE admits the allegations in paragraph 7.
8. Paragraph 8 asserts legal conclusions, to which no response is required.
9. PSE admits that NorthWestern has a place of business in Yellowstone County and that Colstrip's transmission line runs through Yellowstone County. PSE lacks sufficient information about NorthWestern's alleged customer service office, and thus PSE denies the allegation. The rest of paragraph 9 asserts legal conclusions, to which no response is required. To the extent a further response is required, and except as expressly admitted, PSE denies the allegations in paragraph 9.
10. PSE admits that some of the electricity generated from Units 3 and 4 is used to serve Montana residents. The rest of paragraph 10 contains statements of opinion, not allegations of fact, to which no response is required. To the extent a further response is required, and except as expressly admitted, PSE denies the allegations in paragraph 10.
11. PSE admits that some Colstrip residents work for Colstrip Units 3 and 4 or other businesses in the City of Colstrip. PSE lacks sufficient information to answer the remaining allegations in paragraph 11, and thus PSE denies the

DEFENDANT PUGET SOUND ENERGY, INC.'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 3

allegations. Except as expressly admitted, PSE denies the allegations in paragraph 11.

12. PSE admits the allegations in paragraph 12.

13. The first sentence of paragraph 13 is a statement of opinion, not allegations of fact, to which no response is required. PSE lacks sufficient information to answer the remaining allegations in paragraph 13, and thus PSE denies the allegations. To the extent a further response is required, PSE denies the allegations in paragraph 13.

14. Paragraph 14 asserts statements of opinion, not allegations of fact, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 14.

15. Paragraph 15 asserts statements of opinion, not allegations of fact, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 15.

16. PSE admits that Washington and Oregon have passed laws restricting the use of coal-fired resources to serve customers in future years. The rest of paragraph 16 asserts statements of opinion or legal conclusions, not allegations of fact, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 16.

17. PSE denies the allegations in paragraph 17.

18. PSE admits that the O&O Agreement defines Talen's obligations as Operator of Units 3 and 4. The rest of paragraph 18 asserts statements of opinion or legal conclusions, not allegations of fact, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 18.

19. PSE admits that the quoted language is in Section 32 of the O&O Agreement. The rest of paragraph 19 asserts statements of opinion or legal conclusions, not allegations of fact, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 19.

20. PSE denies the allegations in paragraph 20.

21. PSE admits that NorthWestern has initiated arbitration seeking relief consistent with the quoted statement. Except as expressly admitted, PSE denies the allegations in paragraph 21.

22. Paragraph 22 asserts statements of opinion and intent, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 22.

23. PSE admits that on February 9, 2021, NorthWestern provided notice of an intent to arbitrate certain disputes regarding Units 3 and 4. Except as expressly admitted, PSE denies the allegations in paragraph 23.

Case 1:21-cv-00058-SPW-TJC Document 14 Filed 06/01/21 Page 6 of 18

24. PSE admits the allegations in paragraph 24.

25. PSE admits the allegations in paragraph 25.

26. PSE admits that Talen proposed that the arbitration be before three arbitrators, with venue in Montana. Except as expressly admitted, PSE denies the allegations in paragraph 26.

27. PSE admits the allegations in paragraph 27.

28. PSE admits the allegations in paragraph 28.

29. PSE admits the allegations in paragraph 29.

30. PSE admits that Senate Bill 265 contains the quoted text. The rest of paragraph 30 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 30.

31. Paragraph 31 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 31.

32. Paragraph 32 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 32.

33. PSE admits that Montana Code § 27-5-323, as amended by Senate Bill 265, contains the quoted language, and that the bill purports to be effective

DEFENDANT PUGET SOUND ENERGY, INC.'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 6

upon passage and approval, and the bill purports to apply retroactively to January 1, 2021. Except as expressly admitted, PSE denies the allegations in paragraph 33.

34. PSE admits paragraph 34 quotes part of the text of Senate Bill 265 and that some of the electricity generated from Units 3 and 4 is used by Montana residents. Except as expressly admitted, PSE denies the allegations in paragraph 34.

35. PSE denies the allegations in paragraph 35.

36. PSE admits that paragraph 36 quotes part of the text of section 18 of the O&O Agreement. Except as expressly admitted, PSE denies the allegations in paragraph 36.

37. PSE admits the allegation that “[n]o party has even proposed an arbitrator” and that the parties exchanged proposals about the procedures for arbitration. The rest of paragraph 37 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 37.

38. PSE denies the allegations in paragraph 38.

39. PSE denies the allegations in paragraph 39.

40. PSE denies the allegations in paragraph 40.

Count I: Declaratory Judgment

41. In response to paragraph 41, PSE realleges its response to paragraphs 1–40.

42. PSE admits the allegations in paragraph 42.

43. PSE admits that Montana Code § 27-5-323, as amended by Senate Bill 265, contains the quoted language. Except as expressly admitted, PSE denies the allegations in paragraph 43.

44. PSE admits the allegations in paragraph 44.

45. Paragraph 45 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 45.

46. Paragraph 46 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 46.

47. PSE denies that Talen is entitled to the relief it requests in paragraph 47.

Count 2: Conditional Petition to Compel Arbitration

48. In response to paragraph 48, PSE realleges its response to paragraphs 1–47.

49. Paragraph 49 asserts statements of opinion, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 49.

50. PSE admits that “there is no formal proposal to close Colstrip.” The rest of paragraph 50 consists of statements of opinion, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 50.

51. PSE admits that paragraph 51 quotes parts of section 18 of the O&O Agreement. Except as expressly admitted, PSE denies the allegations in paragraph 51.

52. PSE admits the allegations in paragraph 52.

53. Paragraph 53 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, PSE denies the allegations in paragraph 53.

54. PSE admits that Avista, PacifiCorp, PGE, and PSE filed a petition in Washington to compel the owners to arbitrate their dispute in Washington under the Washington Uniform Arbitration Act. The rest of paragraph 54 asserts statements of opinion or legal conclusions, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 54.

55. PSE admits that paragraph 55 quotes part of Montana Code § 27-5-115(1). The rest of paragraph 55 asserts statements of legal conclusions, to which no response is required. To the extent a response is required, and except as expressly admitted, PSE denies the allegations in paragraph 55.

56. PSE denies that Talen is entitled to the relief it requests in paragraph 56.

FACTS COMMON TO AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

1. Attached to this Answer is a true and correct copy of the First Amended Complaint (“PGE Amended Complaint”), Docket #32, in *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD.

2. PSE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in these Affirmative Defenses and Counterclaims: paragraphs 2, 3, 11 to 23, 25, 28 to 55, and 71 to 83.

DEFENSES AND AFFIRMATIVE DEFENSES

To the extent the evidence shows, and without assuming any burden of proof it would not otherwise bear, PSE asserts the following defenses and affirmative defenses:

DEFENDANT PUGET SOUND ENERGY, INC.’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 10

First Defense – Failure to State a Claim

3. Both of Talen’s counts in its Amended Complaint fail to state a claim upon which relief can be granted.

4. Talen’s claims are predicated upon Montana Code § 27-5-323, as recently amended by Senate Bill 265.

5. That statute is unconstitutional and invalid under the Contracts Clause, Article I, Section 10, Clause 1 of the United States Constitution.

6. That statute is unconstitutional and invalid under the Contracts Clause, Article II, Section 31 of the Constitution of the State of Montana.

7. That statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

Second Defense – Failure to State a Claim as to Count 2

8. Talen’s second count in its Amended Complaint seeks a conditional order compelling arbitration “in accordance with Montana Code § 27-5-323” as recently amended by Senate Bill 265. (Amended Complaint at ¶ 56.) PSE has not agreed to arbitrate “in accordance with” that statute. Further, that statute does not compel arbitration under its terms; it merely purports to invalidate a venue clause in arbitration agreements that do not comply with certain conditions stated in Senate Bill 265. It does not compel arbitration under its terms.

9. Because there is no contract and no statute compelling PSE to arbitrate disputes concerning Colstrip in Montana pursuant to the Montana

Uniform Arbitration Act before a panel of three arbitrators, Talen's count 2 fails to state a claim upon which relief can be granted.

Third Defense – First-to-File Rule

10. Talen's two claims are predicated upon the validity of Senate Bill 265.

11. The validity of Senate Bill 265 is currently at issue with these same parties in a federal case that Avista, PGE, PacifiCorp, and PSE, filed before Talen filed its action in Yellowstone County District Court for the State of Montana. That federal case is *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD (the "First Federal Filed Case").

12. The Ninth Circuit generally favors application of" the first-to-file rule, *Horne v. Nissan N. Am., Inc.*, No. 2:17-CV-00436-MCE-DB, 2018 WL 746467, at *3 (E.D. Cal. Feb. 6, 2018), which allows a district court to transfer or stay a case when "a similar case with substantially similar issues and parties was previously filed in another district court," *Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015).

13. The First Federal Filed Case was filed on May 4, 2021, several hours before Talen filed this action in Montana State Court in Yellowstone County.

14. The action initiated by Talen’s Amended Complaint should be transferred to and consolidated with the First Federal Filed Case or, in the alternative, stayed pending the outcome of the First Federal Filed Case.

Fourth Defense – Improper Venue

15. Talen’s claims in its Amended Complaint concern Section 18 of the Colstrip Units #3 and #4 Ownership & Operating Agreement of 1981, as amended (“O&O Agreement”).

16. Section 18 of the O&O Agreement includes a mandatory forum-selection clause designating the Superior Court for Spokane County, Washington for disputes related to the appointment of an arbitrator in connection with controversies arising out of or relating to the O&O Agreement. The O&O Agreement also provides that arbitration will be before a single arbitrator, that the arbitration would occur in Spokane, Washington, and that it will be conducted pursuant to the Washington Arbitration Act.

COUNTERCLAIMS

17. The relief requested in PSE’s counterclaims is authorized under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

18. This Court has jurisdiction over the counterclaims pursuant to 28 U.S.C. § 1332(a)(1) and 28 U.S.C. § 1367(a).

First Counterclaim

**Declaratory Relief that Senate Bill 265 is Unconstitutional
As Applied to the O&O Agreement under the
Contracts Clause of the United States Constitution
(Against Counterclaim Defendants Talen and NorthWestern)**

19. PSE realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference in paragraph 2 above.

20. PSE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 84 to 96.

Second Counterclaim

**Declaratory Relief that Senate Bill 265 is Unconstitutional
As Applied to the O&O Agreement under the
Contracts Clause of the Constitution of the State of Montana
(Against Counterclaim Defendants Talen and NorthWestern)**

21. PSE realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference in paragraph 2 above.

22. PSE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 98 to 104.

Third Counterclaim

Declaratory Relief that Senate Bill 265, As Applied to the O&O Agreement, is Preempted by the Federal Arbitration Act (Against Counterclaim Defendants Talen and NorthWestern)

23. PSE realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference in paragraph 2 above.

24. PSE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 106 to 114.

PRAYER FOR RELIEF

WHEREFORE, PSE prays for the following relief:

- A. That Talen receive none of the affirmative relief prayed for it in its Amended Complaint and the same be dismissed with prejudice;
- B. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- C. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31;

Case 1:21-cv-00058-SPW-TJC Document 14 Filed 06/01/21 Page 16 of 18

- D. Declare that the Federal Arbitration Act preempts the enforcement of Senate Bill 265 as applied to Section 18 of the O&O Agreement;
- E. That PSE be awarded its fees and costs where allowed by law; and
- F. Such other further and equitable relief that the Court deems just and proper.

Dated this 1st day of June, 2021.

HANSBERRY & JOURDONNAIS, PLLC

By: /s/Charles E. Hansberry

Charles E. Hansberry
Jenny M. Jourdonnais

*Attorneys for Defendant Puget Sound
Energy, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a copy of the foregoing document was served on the following persons by the following methods:

1. Via ECF

2. Via ECF and Email

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DEFENDANT PUGET SOUND ENERGY, INC.'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 17

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Case 1:21-cv-00058-SPW-TJC Document 12 Filed 06/01/21 Page 1 of 22

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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

TALEN MONTANA, LLC,

Plaintiff,

v.

AVISTA CORPORATION;
NORTHWESTERN CORPORATION;
PACIFICORP; PORTLAND
GENERAL ELECTRIC COMPANY;
and PUGET SOUND ENERGY, INC.,

Defendants.

Case No. 1:21-cv-00058-SPW-TJC

**DEFENDANT PACIFICORP'S
ANSWER, AFFIRMATIVE
DEFENSES, AND
COUNTERCLAIMS**

In response to Plaintiff Talen Montana, LLC's ("Talen") First Amended
Complaint for Declaratory Judgment and Petition to Compel Arbitration ("First

Amended Complaint”), Defendant PacifiCorp (“PacifiCorp”) admits, denies and alleges as follows:

1.

In response to the allegations contained in paragraph 1, PacifiCorp admits that it is one of the co-owners of Colstrip Units #3 and #4 (“Colstrip”). PacifiCorp further admits that Talen is the Operator and a co-owner of Colstrip. Finally, PacifiCorp admits that it is a plaintiff in a proceeding currently pending in the United States District Court for the Eastern District of Washington (removed by Talen to that court from Spokane County Superior Court) to compel Talen and NorthWestern Corporation (“NorthWestern”) to arbitrate current disputes among the co-owners in accordance with the terms of the Colstrip Units #3 and #4 Ownership and Operation Agreement (“O&O Agreement”). The remainder of paragraph 1 is comprised of opinion, argument or legal conclusions for which no response is required. To any extent paragraph 1 contains any further allegations for which a response is required those allegation are denied.

2.

Upon information and belief, PacifiCorp admits the allegations in paragraphs 2 through 4. PacifiCorp admits the allegations contained in paragraph 5. Upon information and belief, PacifiCorp admits the allegations in paragraphs 6 and 7.

3.

Paragraph 8 is comprised of legal conclusions for which no response is required.

4.

PacifiCorp admits that the Colstrip transmission line runs through Yellowstone County and that NorthWestern has an office in Yellowstone County. PacifiCorp lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding NorthWestern's customer service office and, therefore, must deny those allegations. The remainder of paragraph 9 is comprised of legal conclusions for which no response is required.

5.

PacifiCorp admits that some of the electricity generated from Colstrip is used to serve Montana residents. PacifiCorp lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 10 and, therefore, denies those allegations.

6.

PacifiCorp admits that some residents of the City of Colstrip work at Colstrip or for related local businesses. On information and belief, PacifiCorp admits that the population of the City of Colstrip is approximately 2,196. PacifiCorp lacks knowledge or information sufficient to form a belief as to the

truth of the remaining allegations in paragraph 11 and, therefore, denies those allegations.

7.

PacifiCorp admits the allegations in paragraph 12.

8.

Paragraphs 13-14 are largely comprised of opinion and legal conclusions for which no response is required. PacifiCorp lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraphs 13-14 and, therefore, denies those allegations.

9.

Paragraph 15 is comprised of opinion and legal conclusions for which no response is required. To any extent that paragraph 15 includes allegations that require a response those allegations are denied.

10.

PacifiCorp admits that Washington and Oregon have passed laws restricting the use of coal-fired resources to serve customers in future years. With regard to the remaining allegations in paragraph 16, PacifiCorp lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies those allegations, or such allegations contain opinion or legal conclusions for which no response is required.

11.

PacifiCorp denies the allegations in paragraph 17.

12.

In response to paragraph 18, PacifiCorp admits that Talen is the Operator of Colstrip. The O&O Agreement speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations. PacifiCorp denies the remaining allegations in paragraph 18.

13.

In response to paragraph 19, the O&O Agreement speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations.

14.

With regard to the allegations in paragraph 20, PacifiCorp lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies those allegations.

15.

PacifiCorp admits that NorthWestern initiated arbitration. PacifiCorp denies that it has made any effort to close Colstrip. NorthWestern's statements speak for themselves and, therefore, PacifiCorp neither admits nor denies those allegations. PacifiCorp lacks knowledge or information sufficient to form a belief as to the

truth of the remaining allegations in paragraph 21 and, therefore, denies those allegations.

16.

PacifiCorp admits that Talen Montana is the Operator and a co-owner of Colstrip. The remainder of paragraph 22 is comprised of statements of intent or opinion for which no response is required. To any extent the remainder of paragraph 22 includes allegations requiring a response those allegations are denied.

17.

In response to paragraph 23, PacifiCorp admits that, on February 9, 2021, NorthWestern sent the other co-owners of Colstrip a letter providing notice of intent to initiate arbitration. That letter speaks for itself and, therefore, PacifiCorp neither admits nor denies the remaining allegations in paragraph 23.

18.

In response to paragraph 24, PacifiCorp admits that NorthWestern sent PacifiCorp an arbitration demand on or about March 12, 2021 and that NorthWestern sent PacifiCorp an amended arbitration demand on or about April 2, 2021.

19.

PacifiCorp admits the allegations in paragraph 25.

20.

In response to paragraph 26, PacifiCorp admits that Talen proposed venue in Montana before a panel of three arbitrators. PacifiCorp denies that a panel of three arbitrators is more likely to reach a well-reasoned decision consistent with the law and the governing contract than a single arbitrator. The remainder of paragraph 26 is comprised of opinion or legal conclusions for which no response is required.

21.

PacifiCorp admits the allegations in paragraphs 27-29.

22.

PacifiCorp admits that Senate Bill 265 contains the quoted text. The remainder of paragraph 30 is comprised of opinion or legal conclusions for which no response is required. To any extent the remainder of paragraph 30 contains allegations requiring a response those allegations are denied.

23.

The allegations in paragraphs 31-32 are denied.

24.

The allegations in paragraph 33 contain legal conclusions for which no response is required. Montana Code § 27-5-323, as recently amended by S.B. 265, speaks for itself and, therefore, PacifiCorp neither admits nor denies those

allegations. To any extent that paragraph 33 contains allegations requiring a response those allegations are denied.

25.

In response to paragraph 34, the Montana Legislature's statements speak for themselves and, therefore, PacifiCorp neither admits nor denies those allegations. PacifiCorp lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 34 and, therefore, denies those allegations.

26.

The allegations in paragraph 35 contain opinion and legal conclusions for which no response is required.

27.

The allegations in paragraph 36 contain legal conclusions for which no response is required. The O&O Agreement speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations. To any extent that paragraph 36 contains allegations requiring a response those allegations are denied.

28.

PacifiCorp admits the allegation that: "No party has even proposed an arbitrator". Additionally, PacifiCorp admits that the parties exchanged proposals regarding arbitration procedures. The remaining allegations contained in paragraph

37 are comprised of opinion for which no response is required. To any extent paragraph 37 contains further allegations requiring a response those allegations are denied.

29.

In response to paragraph 38, the pleadings filed in Washington Superior Court speak for themselves. PacifiCorp denies the remaining allegations in paragraph 38.

30.

PacifiCorp denies the allegations contained in paragraphs 39-40.

31.

In response to paragraph 41, PacifiCorp reasserts its responses to the allegations contained in paragraphs 1–40, as set forth above.

32.

PacifiCorp admits the allegations in paragraph 42.

33.

The allegations in paragraph 43 contain legal conclusions for which no response is required. Montana Code § 27-5-323, as recently amended by S.B. 265, speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations. To any extent paragraph 43 contains further allegations requiring a response those allegations are denied.

34.

PacifiCorp admits the allegations in paragraph 44.

35.

The allegations in paragraphs 45-47 contain opinion and legal conclusions for which no response is required. PacifiCorp denies that Talen is entitled to any requested relief. To any extent paragraphs 45-47 contain factual allegations for which a response is required PacifiCorp denies those allegations.

36.

In response to paragraph 48, PacifiCorp reasserts its responses to the allegations contained in paragraphs 1–47, as set forth above.

37.

Paragraph 49 consists of opinion, for which no response is required. To any extent paragraph 49 contains allegations for which a response is required PacifiCorp denies those allegations.

38.

PacifiCorp admits that there is no formal proposal to close Colstrip. The remainder of paragraph 50 is comprised of opinion or legal conclusions for which no response is required. To any extent paragraph 50 contains further allegations for which a response is required PacifiCorp denies those allegations.

39.

In response to paragraph 51, the O&O Agreement speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations.

40.

In response to paragraph 52, NorthWestern's Demand for Arbitration speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations.

41.

The allegations in paragraph 53 contain opinion or legal conclusions for which no response is required. Montana Code § 27-5-323 speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations.

42.

In response to paragraph 54, PacifiCorp admits that PacifiCorp, Avista Corporation ("Avista"), Portland General Electric Company ("PGE") and Puget Sound Energy, Inc. ("PSE") filed a lawsuit in Washington seeking to compel the owners to arbitrate in Washington under the Washington Uniform Arbitration Act, as mandated under the governing O&O Agreement. The remaining allegations in paragraph 54 contain opinion and legal conclusions for which no response is required.

43.

In response to paragraph 55, the Montana Uniform Arbitration Act speaks for itself and, therefore, PacifiCorp neither admits nor denies those allegations.

44.

PacifiCorp denies that Talen is entitled to the relief requested in paragraph 56.

45.

Except as expressly admitted above, PacifiCorp denies each and every allegation set forth in Talen's First Amended Complaint.

Facts Common to the Affirmative Defenses and Counterclaims

46.

Attached to this Answer is a true and correct copy of the First Amended Complaint ("PGE Amended Complaint"), Docket #32, in *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD.

47.

PacifiCorp incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in these Affirmative Defenses and Counterclaims: paragraphs 2, 3, 11 to 23, 25, 28 to 55, and 71 to 83.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof it would not otherwise bear,
PacifiCorp asserts the following affirmative defenses:

First Affirmative Defense – Failure to State a Claim

48.

Both counts set forth in Talen’s First Amended Complaint fail to state a claim upon which relief can be granted.

49.

Talen’s claims are predicated upon Montana Code § 27-5-323, as recently amended by Senate Bill 265.

50.

That statute is unconstitutional and invalid under the federal Constitution’s Contracts Clause, Article I, Section 10, Clause 1 to the United States Constitution.

51.

That statute is unconstitutional and invalid under the Montana Constitution’s Contracts Clause, Article II, Section 31 of the Constitution of the State of Montana.

52.

That statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

Second Affirmative Defense – Failure to State a Claim as to Count 2

53.

The second count in Talen’s First Amended Complaint seeks a conditional order compelling arbitration “in accordance with Montana Code § 27-5-323” as recently amended by Senate Bill 265. (First Amended Complaint, ¶ 56.)

PacifiCorp has not agreed to arbitrate “in accordance with” that statute. Further, that statute does not compel arbitration under its terms; it merely purports to invalidate venue clauses in arbitration agreements that do not comply with certain conditions stated in Senate Bill 265.

54.

Because there is no contract and no statute compelling PacifiCorp to arbitrate disputes concerning Colstrip in Montana pursuant to the Montana Uniform Arbitration Act before a panel of three arbitrators, Talen’s count 2 fails to state a claim upon which relief can be granted.

Third Affirmative Defense – First-to-File Rule

55.

Talen’s two claims are predicated upon the validity of Senate Bill 265.

56.

The validity of Senate Bill 265 is currently at issue with these same parties in a federal case that PacifiCorp, Avista, PGE and PSE filed before Talen filed its action in Yellowstone County District Court for the State of Montana. That federal case is *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD (the “First Federal Filed Case”).

57.

The Ninth Circuit generally favors application of” the first-to-file rule, *Horne v. Nissan N. Am., Inc.*, No. 2:17-CV-00436-MCE-DB, 2018 WL 746467, at *3 (E.D. Cal. Feb. 6, 2018), which allows a district court to transfer or stay a case when “a similar case with substantially similar issues and parties was previously filed in another district court,” *Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015).

58.

The first federal filed case was filed on May 4, 2021, several hours before Talen filed this action in Yellowstone County state court.

59.

The action initiated by Talen’s Complaint should be transferred to and

consolidated with the First Federal Filed Case or, in the alternative, stayed pending the outcome of the First Federal Filed Case.

Fourth Affirmative Defense – Improper Venue

60.

Talen's claims concern Section 18 of the O&O Agreement.

61.

Section 18 of the O&O Agreement includes a mandatory forum-selection clause designating the Superior Court for Spokane County, Washington for disputes related to the appointment of an arbitrator in connection with controversies arising out of or relating to the O&O Agreement. The O&O Agreement also provides that arbitration will be before a single arbitrator, that the arbitration would occur in Spokane, Washington, and that it will be conducted pursuant to the Washington Arbitration Act.

COUNTERCLAIMS

62.

The relief requested in PacifiCorp's counterclaims is authorized under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

63.

This Court has jurisdiction over the counterclaims pursuant to 28 U.S.C. § 1332(a)(1) and 28 U.S.C. § 1367(a).

First Counterclaim

Declaratory Relief that Senate Bill 265 is Unconstitutional as Applied to the O&O Agreement under the Contracts Clause of the United States Constitution

(Against Counterclaim Defendants Talen and NorthWestern)

64.

PacifiCorp realleges all of the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference listed in paragraph 47 above.

65.

PacifiCorp incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 84 to 96.

Second Counterclaim

Declaratory Relief that Senate Bill 265 is Unconstitutional as Applied to the O&O Agreement under the Contracts Clause of the Constitution of the State of Montana

(Against Counterclaim Defendants Talen and NorthWestern)

66.

PacifiCorp realleges all of the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference listed in paragraph 47 above.

67.

PacifiCorp incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 98 to 104.

Third Counterclaim

Declaratory Relief that Senate Bill 265, As Applied to the O&O Agreement, is Preempted by the Federal Arbitration Act

(Against Defendants Talen and NorthWestern)

68.

PacifiCorp realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference listed in paragraph 47 above.

69.

PacifiCorp incorporates into this pleading the following paragraphs from the Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 106 to 114.

PRAYER FOR RELIEF

WHEREFORE, PacifiCorp prays for the following relief:

- A. That Talen receive none of the affirmative relief prayed for it in its First Amended Complaint and the same be dismissed with prejudice;
- B. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- C. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31;

Case 1:21-cv-00058-SPW-TJC Document 12 Filed 06/01/21 Page 20 of 22

- D. Declare that the Federal Arbitration Act preempts the enforcement of Senate Bill 265 as applied to Section 18 of the O&O Agreement;
- E. That PacifiCorp be awarded its fees and costs as allowed by law; and
- F. Such other further and equitable relief that the Court deems just and proper.

Dated this 1st day of June, 2021.

HANSBERRY & JOURDONNAIS, PLLC

By: /s/ Charles E. Hansberry

Charles E. Hansberry
Jenny M. Jourdonnais

Attorneys for Defendant PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a copy of the foregoing document was served on the following persons by the following methods:

1. Via ECF

2. Via ECF and Email

1.	<p>J. David Jackson DORSEY & WHITNEY 50 South Sixth Street Suite 1500 Minneapolis, MN 55402-1498 612-340-2600 Fax: 340-2868 Email: jackson.j@dorsey.com PRO HAC VICE</p> <p>Stephen D. Bell DORSEY & WHITNEY LLP - MISSOULA 125 Bank Street Millennium Building, Suite 600 Missoula, MT 59802-4407 406-721-6025 Fax: 406-513-0863 Email: bell.steve@dorsey.com</p> <p><i>Attorneys for NorthWestern Corporation</i></p>
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--

/s/ Charles E. Hansberry
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Case 1:21-cv-00058-SPW-TJC Document 15 Filed 06/01/21 Page 1 of 23

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Company, and Puget Sound Energy,
Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

TALEN MONTANA, LLC,

Plaintiff,

v.

AVISTA CORPORATION;
NORTHWESTERN CORPORATION;
PACIFICORP; PORTLAND
GENERAL ELECTRIC COMPANY;
and PUGET SOUND ENERGY, INC.,

Defendants.

Case No. 1:21-cv-00058-SPW-TJC

**DEFENDANT PORTLAND
GENERAL ELECTRIC
COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES,
AND COUNTERCLAIMS**

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 1

Answer to Talen’s First Amended Complaint

Defendant Portland General Electric Company (“PGE”) responds to Plaintiff Talen Montana, LLC’s (“Plaintiff”) First Amended Complaint for Declaratory Judgment and Petition to Compel Arbitration (“Talen’s Amended Complaint”) as follows:

1.

Concerning paragraph 1 of Talen’s Amended Complaint, PGE admits that it is a party to a proceeding in the federal district court for the Eastern District of Washington (removed to that court by Talen Montana LLC (“Talen”) from Spokane County Superior Court) to compel Talen into arbitration under the terms of the Colstrip Units #3 and #4 Ownership and Operation Agreement (“O&O Agreement”). PGE admits that Talen is the Operator of Colstrip Units #3 and #4 and that Talen is a co-owner of Unit #3. The remainder of paragraph 1 is opinion and argument and, as such, a response is not required. To the extent a response is required, PGE denies the remainder of that paragraph.

2.

PGE admits the allegations in paragraphs 2 through 7.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 2

3.

Paragraph 8 is a conclusion of law, not an allegation of fact, and thus no responsive pleading is required.

4.

Concerning paragraph 9, PGE admits that Colstrip's transmission line runs through Yellowstone County and that Defendant NorthWestern Corporation has an office in Yellowstone County. PGE lacks sufficient information about NorthWestern's alleged customer service office, and thus PGE denies the allegation. The remainder of paragraph 9 asserts conclusions of law and no responsive pleading is required.

5.

Paragraph 10 is a statement of opinion, not an allegation of fact, and thus no responsive pleading is required. If one is required, PGE lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and, therefore, denies those allegations.

6.

Concerning paragraph 11, PGE admits that some people in the City of Colstrip work directly at Colstrip Units #1, #2, #3, #4, or for more than one of them, or for local businesses that support the Colstrip units. PGE admits that the

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 3

population of Colstrip is approximately 2,196 people. PGE lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 11 and, therefore, denies those allegations.

7.

PGE admits the allegations in paragraph 12.

8.

Concerning paragraph 13, the first sentence is an opinion and no response is required, and PGE denies that allegation if a response is required. PGE admits that the University of Montana Bureau of Business and Economic Research produced a report concerning Colstrip in June 2018 with the title “The Economic Impact of Early Retirement of Colstrip Units 3 & 4.” The remainder of paragraph 13 are incomplete and out-of-context characterizations of the opinions expressed in the study and, as such, PGE denies the remaining allegations in that paragraph.

9.

The allegations in paragraph 14 are opinions and predictions, not allegations of fact, and no response is required. If a response is required, PGE denies those allegations.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 4

10.

The allegations in paragraph 15 are opinion, not allegations of fact, to which no response is required. To the extent a response is required, PGE denies the allegations in paragraph.

11.

Concerning the first sentence of paragraph 16, PGE lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies those allegations, or such allegations contain opinions or legal conclusions for which no response is required. To the extent a response is required, PGE denies the allegations. Concerning the second sentence of paragraph 16, ORS 757.518(2) speaks for itself and PGE admits the remaining allegations in that sentence.

12.

PGE denies the allegations in paragraph 17.

13.

Concerning paragraph 18, PGE admits that Talen is the Operator of Colstrip and that the O&O Agreement contains provisions that apply to Talen as the Operator. PGE denies the remaining allegations in that paragraph.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 5

14.

Concerning paragraph 19, PGE admits that Talen quotes some, but not all, of the text of Section 32 of the O&O Agreement. The remaining allegations in paragraph 19 are opinions and conclusions of law and no responsive pleading is required. To the extent that a response is required, PGE denies the allegations in paragraph 19.

15.

PGE denies the allegations in paragraph 20.

16.

PGE denies the allegation in the first sentence of paragraph 21 that PGE has made efforts to close Colstrip, particularly as that allegation is vague as to when such closure would occur and is vague as to what “efforts . . . to close Colstrip” means. The allegation as to NorthWestern’s acts is similarly vague and as such PGE is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies them. PGE admits the allegation in the second sentence of that paragraph.

17.

Except that Talen is the Operator and a co-owner of Colstrip, which PGE admits, paragraph 22 is a statement of intent and opinion, not an allegation of fact,

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 6

and thus no responsive pleading is required. If one is required, PGE denies those allegations.

18.

PGE admits that on or about February 9, 2021, NorthWestern provided a notice of its intent to initiate arbitration about certain disputes regarding Units 3 and 4. PGE denies the remainder of paragraph 23.

19.

PGE admits the allegations in paragraphs 24 and 25.

20.

Concerning paragraph 26, PGE admits that Talen made a proposal concerning arbitration procedures that included a proposal for employing three arbitrators with venue in Montana but denies the remaining allegations in paragraph 26. PGE denies any other allegations in that paragraph.

21.

PGE admits the allegations in paragraphs 27, 28 and 29.

22.

PGE admits that in paragraph 30 Talen has accurately quoted part, but not all, of the text of Senate Bill 265. The other allegations in paragraph 30 are

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 7

opinion and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

23.

The allegations in paragraphs 31 and 32 are opinion and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

24.

Concerning paragraph 33, PGE admits that Talen has accurately quoted part, but not all, of the text of Montana Code § 27-5-323 as recently amended by Senate Bill 265, and that Senate Bill 265 states that it became effective upon passage and approval, and that it purports to be retroactive to January 1, 2021. The remainder of the allegations in that paragraph are conclusions of law to which no response is required and, if one is required, PGE denies those allegations.

25.

Concerning paragraph 34, PGE admits that Talen has accurately quoted part of the text of Senate Bill 265 and that some of the electricity generated from Units 3 and 4 is used by Montana residents. PGE lacks knowledge or information sufficient to form a belief as to the accuracy of the remaining allegations in that paragraph 34, and therefore denies those allegations.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 8

26.

The allegations in paragraph 35 are legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

27.

PGE admits that Talen, in paragraph 36, has accurately quoted parts of Section 18 of the O&O Agreement. Other than that, the allegations in paragraph 36 are opinion and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

28.

PGE admits the allegation in paragraph 37 that “no party has even proposed an arbitrator[.]” Other than that, the allegations in paragraph 37 are opinions and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

29.

In response to paragraph 38, the pleadings filed in Washington Superior Court speak for themselves. PGE denies the remaining allegations in paragraph 38.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 9

30.

The allegations in paragraphs 39 and 40 are opinions and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

Answer to Count 1

31.

In response to paragraph 41, PGE re-alleges the preceding paragraphs.

32.

PGE admits the allegations in paragraph 42.

33.

Concerning paragraph 43, PGE admits that Talen Montana has accurately quoted parts, but not all, of Montana Code § 27-5-323 a recently amended by Senate Bill 265.

34.

PGE admits the allegations in paragraph 44.

35.

The allegations in paragraphs 45, 46, and 47 are opinions, legal conclusions, and a prayer for relief, instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations and

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 10

denies that Talen is entitled to the relief it requests in paragraph 47.

Answer to Count 2

36.

In response to paragraph 48, PGE re-alleges the preceding paragraphs.

37.

The allegations in paragraph 49 are opinions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE lacks knowledge or information sufficient to form a belief as to the accuracy of those allegations and therefore denies them.

38.

In response to paragraph 50, PGE admits that “there is no formal proposal to close Colstrip[.]” The remaining allegations in paragraph 50 are opinions and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

39.

PGE admits that Talen, in paragraph 51, has accurately quoted parts, but not all, of Section 18 of the O&O Agreement. PGE denies any other allegations in that paragraph.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 11

40.

PGE admits the allegations in paragraph 52.

41.

The allegations in paragraph 53 are opinions and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

42.

In response to paragraph 54, PGE admits that it “filed a lawsuit in Washington seeking to compel the owners to arbitrate in Washington under the Washington Uniform Arbitration Act.” Other than that, the allegations in paragraph 54 are opinions and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

43.

In response to paragraph 55, PGE admits that Talen has accurately quoted part, but not all, of Montana Code section 27-5-115(1). Other than that, the allegations in paragraph 55 are opinions and legal conclusions instead of allegations of fact and, thus, a response is not required. To the extent a response is required, PGE denies those allegations.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 12

44.

PGE denies that Talen is entitled to the relief it requests in paragraph 56.

45.

PGE denies that Talen Montana is entitled to any of the relief it requests in its prayer for relief.

46.

PGE denies each and every material allegation of Talen's Amended Complaint not expressly admitted above.

**FACTS COMMON TO THE AFFIRMATIVE DEFENSES,
DEFENSES, AND COUNTERCLAIMS.**

47.

Attached to this Answer as Attachment A is a true and correct copy of the First Amended Complaint ("PGE Amended Complaint"), Docket #32, in *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD.

48.

PGE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in these Affirmative Defenses, Defenses, and Counterclaims: paragraphs 2, 3, 11 to 23, 25, 28 to 55, and 71 to 83.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 13

AFFIRMATIVE DEFENSES AND DEFENSES

Without assuming any burden of proof it would not otherwise bear, PGE asserts the following defenses and affirmative defenses:

First Defense – Failure to State a Claim

49.

Both counts in Talen’s Amended Complaint fail to state a claim upon which relief can be granted.

50.

Talen’s claims are predicated upon Montana Code § 27-5-323, as recently amended by Senate Bill 265.

51.

That statute is unconstitutional and invalid under the Contracts Clause, Article I, Section 10, Clause 1 to the United States Constitution.

52.

That statute is unconstitutional and invalid under the Contracts Clause, Article II, Section 31 of the Constitution of the State of Montana.

53.

That statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 14

Second Defense – Failure to State a Claim as to Count 2

54.

The second count in Talen’s Amended Complaint seeks a conditional order compelling arbitration “in accordance with Montana Code § 27-5-323” as recently amended by Senate Bill 265. (Am. Compl. ¶ 56.) PGE did not agree to arbitrate “in accordance with” that statute. Further, that statute does not compel arbitration under its terms; it merely purports to invalidate venue clauses in arbitration agreements that do not comply with certain conditions stated in Senate Bill 265.

55.

Because there is no contract and no statute compelling PGE to arbitrate disputes concerning Colstrip in Montana pursuant to the Montana Uniform Arbitration Act before a panel of three arbitrators, Talen’s count 2 fails to state a claim upon which relief can be granted.

Third Affirmative Defense – First-to-File Rule

56.

Talen’s two claims are predicated upon the validity of Senate Bill 265.

57.

The validity of Senate Bill 265 is currently at issue with these same parties in a federal case that PGE, Avista Corp., PacifiCorp, and Puget Sound Energy,

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 15

Inc., filed before Talen filed its action in Yellowstone County District Court for the State of Montana. That federal case is *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, filed in the U.S. District Court for Montana (Billings Div.), Case No. 1:21-cv-00047-SPW-KLD (the “First Federal Filed Case”).

58.

The Ninth Circuit generally favors application of the first-to-file rule, *Horne v. Nissan N. Am., Inc.*, No. 2:17-CV-00436-MCE-DB, 2018 WL 746467, at *3 (E.D. Cal. Feb. 6, 2018), which allows a district court to transfer or stay a case when “a similar case with substantially similar issues and parties was previously filed in another district court,” *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015).

59.

The First Federal Filed Case was filed on May 4, 2021, several hours before Talen filed this action in Yellowstone County state court.

60.

The action initiated by Talen’s Amended Complaint should be transferred to and consolidated with the First Federal Filed Case or, in the alternative, stayed pending the outcome of the First Federal Filed Case.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 16

Fourth Affirmative Defense – Improper Venue

61.

Talen's claims concern Section 18 of the O&O Agreement.

62.

Section 18 of the O&O Agreement includes a mandatory forum-selection clause designating the Superior Court for Spokane County, Washington for disputes related to the appointment of an arbitrator in connection with controversies arising out of or relating to the O&O Agreement. The O&O Agreement also provides that arbitration will be before a single arbitrator, that the arbitration would occur in Spokane, Washington, and that it will be conducted pursuant to the Washington Arbitration Act.

COUNTERCLAIMS

63.

The relief requested in PGE's counterclaims is authorized under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

64.

This Court has jurisdiction over the counterclaims pursuant to 28 U.S.C. § 1332(a)(1) and 28 U.S.C. § 1367(a).

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 17

First Counterclaim

**Declaratory Relief that Senate Bill 265 is unconstitutional as applied to the
O&O Agreement under the Contracts Clause of the United States
Constitution**

(Against Counterclaim-Defendants Talen and NorthWestern)

65.

PGE realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference listed above.

66.

PGE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 84 to 96.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 18

Second Counterclaim

**Declaratory Relief that Senate Bill 265 is unconstitutional as applied to the
O&O Agreement under the Contracts Clause of the
Constitution of the State of Montana**

(Against Counterclaim-Defendants Talen and NorthWestern)

67.

PGE realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference listed above.

68.

PGE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 98 to 104.

Third Counterclaim

**Declaratory Relief that Senate Bill 265, as applied to the
O&O Agreement, is preempted by the Federal Arbitration Act**

(Against Counterclaim-Defendants Talen and NorthWestern)

69.

PGE realleges all the preceding paragraphs of this pleading, including the paragraphs from the PGE Amended Complaint incorporated by reference listed above.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 19

70.

PGE incorporates into this pleading the following paragraphs from the PGE Amended Complaint as if stated and fully alleged in this Counterclaim: paragraphs 106 to 114.

PRAYER FOR RELIEF

WHEREFORE, PGE prays for the following relief:

- A. That Plaintiff receive none of the affirmative relief prayed for it in its Amended Complaint and the same be dismissed with prejudice;
- B. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the United States, Article I, Section 10, Clause 1;
- C. Declare that Senate Bill 265 is unconstitutional as applied to Section 18 of the O&O Agreement, due to the Contracts Clause of the Constitution of the State of Montana, Article II, Section 31;
- D. Declare that the Federal Arbitration Act preempts the enforcement of Senate Bill 265 as applied to Section 18 of the O&O Agreement;
- E. That PGE be awarded its fees and costs where allowed by law; and
- F. Such other further and equitable relief that the Court deems just and proper.

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 20

Dated this 1st day of June, 2021.

HANSBERRY & JOURDONNAIS, PLLC

By: /s/Charles E. Hansberry

Charles E. Hansberry

Jenny M. Jourdonnais

*Attorneys for Defendant Portland
General Electric Company*

DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 21

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a copy of the foregoing document was served on the following persons by the following methods:

1. Via ECF

2. Via ECF and Email

1.	<p>J. David Jackson DORSEY & WHITNEY 50 South Sixth Street Suite 1500 Minneapolis, MN 55402-1498 612-340-2600 Fax: 340-2868 Email: jackson.j@dorsey.com PRO HAC VICE</p> <p>Stephen D. Bell DORSEY & WHITNEY LLP - MISSOULA 125 Bank Street Millennium Building, Suite 600 Missoula, MT 59802-4407 406-721-6025 Fax: 406-513-0863 Email: bell.steve@dorsey.com</p> <p><i>Attorneys for NorthWestern Corporation</i></p>
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DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 22

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/s/ Charles E. Hansberry
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DEFENDANT PORTLAND GENERAL ELECTRIC COMPANY'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS - 23