Exhibit H

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ATTORNEYS FOR PROPOSED RESPONDENT-INTERVENOR

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENE COAL MINERS ASSOCIATION, Respondents, and TALEN MONTANA LLC, Proposed Respondent-Intervenor,	Case No. DV-19-34 Judge: Hon. Katherine M. Bidegaray **REPLY IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENT** (Mont. R. Civ. P. 24)

INTRODUCTION

The parties in this case have now squarely placed Talen Montana, LLC ("Talen Montana") at the center of their present remedy dispute. All parties—including the Petitioners who oppose Talen Montana's intervention—have now speculated about whether and how the Colstrip Steam Electric Station ("CSES") Units 3&4, and by extension the power grid in Montana, would be affected by vacatur of the AM4 permit. Further, the Petitioners have now raised a new remedy (specifically, deferred vacatur of the AM4 permit until April 2022) which has never before been the subject of briefing before this Court—and have speculated about the impact of deferred vacatur specifically on Talen Montana's operation of CSES Units 3&4.

Accordingly, it is perfectly clear that Talen Montana has significant legal interests related to the subject matter currently being litigated in this action: potential vacatur of the AM4 permit. Talen Montana seeks intervention to address the appropriateness of the remedy proposals in this case and to present the Court with an accurate record on the real-world impact that Petitioners' preferred approach would have on CSES Units 3&4 and the power grid. Specifically, Talen Montana intends to explain why a four-month deferral will not solve the identified problems and would still result in the same harms to CSES Units 3&4 (and the power grid) that Petitioners concede the Court should avoid. Moreover, Talen Montana may raise independent legal arguments related to remedy; for instance, since there was never any development of facts or briefing on remedy before the Board of Environmental Review ("BER") or this Court, Talen Montana may argue that it is inappropriate to address remedy issues at all while this Court sits in an appellate

posture without an evidentiary hearing on remedy impacts and/or remand to the BER as the fact-finder in the first instance.[1]

Talen Montana's intervention is crucial, and all of the parties appear to agree—based on their briefing—that the issues Talen Montana will speak to are essential. Before these issues of great importance to Talen Montana and Montana residents are decided, the Court should have the benefit of briefing from Talen Montana. Petitioners' attempts to prevent this Court from even *hearing* from Talen Montana on this issue should be rejected. Under Rule 24 of the Montana Rules of Civil Procedure, Talen Montana's motion should be granted because (1) it has a right to intervene, and (2) the common questions of law and fact in the present remedy dispute are focused almost exclusively on Talen Montana—as evidenced by Petitioners' own briefing to the Court.

ARGUMENT

I. The recent briefing on remedy underscores that intervention is needed here.

The remedy briefing already before the Court conclusively demonstrates why Talen Montana must be given an opportunity to be heard to protect its interests and ensure this Court's

[1] Petitioners agree that this Court sits in an appellate posture. *See* Resp. on Intervention (Dkt. No. 93) at 5, 11 ("petition for judicial review to the district court is analogous to an appeal") (citing *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469, 474 (1996)). Because this Court sits in an appellate posture and the Petitioners never before raised remedy in briefing—which would have elicited facts and other equitable arguments related to remedy—it may be more appropriate for the Court to remand the issue of remedy to the BER, or alternatively, at least hold an evidentiary hearing to assess the facts related to remedy which so far have been presented to the Court exclusively through competing declarations. *See Gould Ranch Cattle Co. v. Irish Black Cattle Ass'n*, 2018 MT 80N, ¶ 7, 392 Mont. 551, 414 P.3d 1248 (agreeing that appellate courts "should not, in the first instance, determine the merits of the preliminary injunction" and remanding the issue for the trier of fact to make "findings of fact and conclusions of law" addressing the application for an injunction); *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 43, 341 Mont. 368, 382, 178 P.3d 696, 706 ("'It is for the trier of fact, and not this Court, to assess the credibility of witnesses and weigh the evidence; we will not second-guess a district court's determinations regarding the strength and weight of conflicting testimony.'") (quoting *Point Serv. Corp. v. Myers*, 2005 MT 322, ¶ 28, 329 Mont. 502, 125 P.3d 1107).

remedy decision is based on an accurate record and a full review of the legal issues regarding whether the Court should even make new factual findings that were not made before the BER. All of the parties' recent filings on remedy have addressed impacts to Talen Montana's CSES Units 3&4 in the context of opining on the suitability of different remedies. In the case of Petitioners' most recent brief on remedy, Resp. on Remedy (Dkt. No. 89) at 1-4, 12-13, Petitioners speculate in significant but unsupported detail about the capability of Talen Montana to overhaul its established CSES Units 3&4 practices for the sourcing, transportation, and storage of coal, and further speculate as to the impact of Petitioners' newly proposed four-month stay of vacatur on Units 3&4 operations and compliance obligations. But Talen Montana, which co-owns and operates Units 3&4, is the only proposed participant in this case actually responsible for their operations and compliance, and is therefore the only party that could adequately brief the Court on the operational capabilities of Units 3&4. *See generally* Second Declaration of Shannon Brown ("Second Brown Decl.") (attached as Exhibit A). Accordingly, Talen Montana must be allowed to respond to the Petitioners' assertions, which are at odds with Talen Montana's experience. Examples of factual errors Petitioners made are discussed below.

a. Both DEQ and Westmoreland made assertions about impact of remedy on Talen Montana, prompting the motion to intervene.

On November 5, 2021, DEQ filed a motion for clarification and brief in support that questioned whether this Court's Order required shutting down operations at the AM4 permit area. In doing so, DEQ pointed out that "the Rosebud Mine is the sole source for coal combusted at the Colstrip Steam Electric Station," which is "used to generate electricity for Montanans and people in other northwestern states. DEQ Br. (Dkt. No. 81) at 2 (emphasis added). DEQ cited the declaration of Martin Van Oort, a Hydrologist for the DEQ Coal Section, who swore to these facts under oath. *See* Van Oort Decl. (Dkt. No. 82) at ¶10 ("the coal from the Rosebud Mine is used at

the Colstrip Steam Electric Station, where it is used to generate electricity for Montanans and people in other northwestern states. Currently the Rosebud Mine is the sole source for coal combusted at the Colstrip Steam Electric Station.") (emphasis added).

On November 8, 2021, Intervenor-Respondents (including Westmoreland and collectively referred to as "Westmoreland" herein) filed a similar brief that devoted an entire section to "The Mine and the Colstrip Power Station," Westmoreland Br. on Remedy (Dkt. No. 84) at 3-4. Intervenor-Respondents argued that vacatur would result in Westmoreland being "unable to provide the Colstrip Power Station with enough coal to meet the Colstrip Power Station's fuel demands" and would "jeopardize the generation of reliable electricity." *Id.* at 4 (emphasis added); *see also id.* at 10 ("Westmoreland's inventory is large enough to last only approximately one month, after which Westmoreland will likely be unable to provide sufficient quantities of coal to meet its contractual obligations to the Colstrip Power Station.") (emphasis added); 11 ("cessation of operations in the AM4 Area would also impair Westmoreland's ability to supply the Colstrip Power Station with coal of sufficient quality to meet contractual specifications, which are, in turn, designed to satisfy air quality standards imposed on the Colstrip Power Station" and "the disruption of Westmoreland's ability to provide coal of sufficient quantity and quality would jeopardize the Colstrip Power Station's ability to generate enough electricity to meet its customers' demands") (emphasis added); *id.* at 12 ("The people of the Mountain West and Montana depend on electrical generation from the Colstrip Power Station, which in turn depends on the Mine.") (emphasis added); *id.* at 17 ("because the Colstrip Power Station depends exclusively on the Mine as its source of coal, a cessation of AM4 Area operations could jeopardize the Power Station's ability to satisfy its fuel demands, thereby potentially causing widespread impacts to consumers of electricity") (emphasis added). Westmoreland cited the declaration of Russel Batie, the

Environmental and Engineering Manager at the Rosebud Mine, who also swore to these facts under oath. *See, e.g.*, First Batie Decl. (Dkt. No. 84, Ex. A) at ¶ 5 ("A cessation of operations in the AM4 Area would greatly jeopardize Westmoreland's ability to provide the Colstrip Power Station with coal of sufficient quantity and quality to meet the Power Station's fuel demands.") (emphasis added); *id.* at ¶ 8 ("[I]mpairment of Westmoreland's ability to provide coal of sufficient quantity and quality would jeopardize the Colstrip Power Station's ability to generate enough electricity to meet the demands of its customers. This risk is particularly grave given the coming winter months, when electricity is typically in high demand in order to generate heat.") (emphasis added).

Following these two filings, which specifically referenced how the outcome of those motions could potentially harm operations at CSES Units 3&4 and highlighted potential downstream consequences on power supply in Montana, Talen Montana sought intervention to address these issues for the Court. Petitioners opposed intervention despite the significant recent briefing about impacts of remedy in this case on Talen Montana and CSES Units 3&4. Talen Montana filed the motion to intervene on November 12, 2021—days after DEQ and Westmoreland's initial motions.

b. Petitioners' subsequent assertions and errors about CSES Unit 3&4 operations confirm the need for Talen Montana to intervene.

Petitioners' substantive response to DEQ's and Westmoreland's motions leave no doubt that intervention is necessary. At a minimum, intervention is now necessary to correct the record on Petitioners' arguments about the impacts of their preferred remedy on Talen Montana, which are riddled with speculation and factual errors. On November 22, 2021, ten days after Talen Montana swiftly filed its motion to intervene, Petitioners filed their response to DEQ and Westmoreland's motions. Despite opposing Talen Montana's effort to respond to the representations made by DEQ and Westmoreland, the Petitioners made their own assertions about

the operations of—and impacts of this litigation to—CSES Units 3&4. Petitioners proposed a new hybrid remedy, that the Court should "defer" vacatur until April 2022, never previously briefed before the Court. Then, Petitioners argued that CSES Units 3&4 operations would not be harmed by deferred vacatur in any way. Talen Montana must be allowed to intervene to respond to these bold assertions.

In support of this newly proposed remedy, Petitioners dismissed "hypothetical threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant" raised by DEQ and Westmoreland, Resp. on Remedy (Dkt. No. 89) at 1, and made (among others) the following assertions about CSES Units 3&4:

- Energy from CSES Units 3&4 "is unneeded" "in the spring," *id.* at 1-2;
- "[I]t is possible to shut down own [sic] of the two [Colstrip] units during this 'shoulder' season without negatively affecting energy supplies or energy costs," *id.* at 3-4, in part because "Colstrip Unit 3 and Unit 4 have each been shut down for two-and-one half month outages in the spring and fall 'shoulder seasons' in 2020 and 2021," Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 7;
- The "concerns about coal and electricity supply are highly speculative" because CSES Units 3&4 could utilize coal from other "active mine areas" besides the AM4 Area, Resp. on Remedy (Dkt. No. 89) at 12;
- "[C]oal stockpiles at the mine and [Colstrip] power plant…are sufficient to keep at least one of the two Colstrip units operating for four months…which is sufficient to meet reduced spring electricity demands," *id.* at 12; Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 8 ("there is enough stockpiled coal at the mine and power plant to operate both units for approximately two months or one unit for approximately four months if coal supply from the Rosebud Mine is 'completely halted'")), ¶ 19 ("the power plant would still have sufficient coal stockpiles to keep at least one unit operating for all four months");[2]
- "If any stoppage of mining in AM4 is deferred until April 2022, it is highly likely that coal stockpiles at the mine and power plant will be sufficient to keep both or at

[2] He even made suggestions about what Talen Montana "should" do in the interim, though he did not opine on the technical feasibility or cost associated with his suggestions. *Id.* at ¶ 16 ("Talen should increase their inventories of coal before any shutdown of mining in the AM4 area.") (emphasis added).

least one power plant operating during the entire time, which would prevent any harm to state or regional power supplies," Resp. on Remedy (Dkt. No. 89) at 10;

- Talen Montana can "increase [its'] inventories of coal before any shutdown of mining in the AM4 area" and that "would protect against the negative effects hypothesized by WRM and Talen," Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 16; and

- "As it is, for Montana ratepayers, Colstrip is the most expensive resource in the portfolio of the Montana utility owner of Colstrip, Northwestern Energy," *id*. at ¶ 17.

Petitioners' support for all this is largely the declaration of David Schlissel—a Seattle resident with no experience working at CSES—who declared that it was his opinion that it was "extremely unlikely" that vacatur would "threaten the energy supply or cost of energy in Montana or the Pacific Northwest" because CSES had two outages in 2020 and 2021. Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 7; *see also id.* at ¶ 19 ("In [the] worst case scenario, it is still extremely unlikely that energy supplies or energy costs in the Montana or the Pacific Northwest would be negatively affected."). He also based his allegations about CSES Units 3&4 operations based on excerpts of declarations from Westmoreland and DEQ (rather than the most direct source of the information, which is Talen Montana itself). In a couple of instances, both Petitioners and Schlissel actually relied on or responded to statements made by Talen Montana without citing to Talen Montana's brief or declaration.[3]

In making these assertions, Petitioners have proved why intervention is needed. In addition to—or perhaps because of—being based on the speculative opinion of someone with no experience

[3] Resp. on Remedy (Dkt. No. 89) at 12 ("coal stockpiles at the mine and power plant, identified by WRM and Talen, are sufficient") (emphasis added); Schlissel Decl. (Dkt No. 89, Ex. 2) at ¶ 16 ("…Talen should increase their inventories of coal before any shutdown of mining in the AM4 Area. This would protect against the negative effects hypothesized by WRM and Talen.") (emphasis added).

of working at CSES Units 3&4, Petitioners' allegations are riddled with errors. As just a few examples:

- Energy from Units 3&4 is "needed" year-round, and energy demand surges again in the summer months—a fact Petitioners appear to ignore, but Mr. Schlissel's own graph demonstrates. Second Brown Decl. at ¶¶ 24-32.

- Outages do not occur every year and are extremely complicated to plan—CSES cannot simply shut off one unit and run the other indefinitely, or shut off both and turn one or both back on quickly when demand arises. Second Brown Decl. at ¶¶ 22-23. No outage is currently planned for Spring 2022. *Id.*

- Talen Montana cannot stockpile more than one month of coal due to physical constraints. Second Brown Decl. at ¶ 14 ("The amount of coal Units 3&4 can store on the dead pile is physically constrained based on the size of the storage area. Accordingly, Units 3&4 does not have the ability to stockpile additional coal to accommodate a near-term loss of AM4 coal supply between now and April 2022").

- Talen Montana cannot simply swap AM4 coal for coal from other Rosebud Mine areas sources. Second Brown Decl. at ¶ 19 ("it is unclear if Units 3&4 could burn coal from other areas of Rosebud Mine if that coal does not meet the contract specifications. Coal that does not meet contract specifications may disrupt boiler operations and threaten compliance with various permitting obligations. Blending coal from different mine areas is one way Rosebud Mine maintains the coal quality, but if the coal from other mine areas cannot be mined and blended with coal from AM4, the resulting coal blend may not be of sufficient quality for Units 3&4"), ¶ 20 ("Area B coal cannot replace AM4 coal because it must be blended with higher quality coal to meet Westmoreland's contractual obligations to Units 3&4 related to coal quality" . . . "According to Westmoreland, other areas of the mine are not suitable to replace the AM4 coal supply"). Petitioners initially acknowledge (but then ignore) that coal quality issues would prevent using alternative coal sources. *See, e.g.*, Resp. on Intervention (Dkt. No. 93) at 2 ("Much, but not all, of the coal in the other mine areas is of lower quality, containing higher levels of ash, sodium, and mercury, which could, in turn, cause violations of air pollution standards at the power plant.").

- Talen Montana's ability to obtain replacement coal from non-Rosebud Mine sources is extremely limited by a host of logistical and permit compliance issues and cannot be accomplished in four months if at all. Second Brown Decl. at ¶¶ 15-18. For instance, it could take years to build and permit rail unloading facilities (which Talen Montana does not currently have), *id.* at ¶ 16, and trucking all coal to CSES would require 724 deliveries per day (one truck every two minutes), *id.* at ¶ 17. Further, bringing in coal from other sources also would likely require test burns and an amendment to the air permit. *Id.* at ¶¶ 16-17. In any event, it is unlikely there are material volumes of additional coal that Talen Montana could contract to

buy and deliver "prior to the end of 2022," much less in four months. *Id.* at ¶ 18 (emphasis added).

- Petitioners' assertion that CSES "is the most expensive resource in the portfolio" of Northwestern Energy is a "misleading and incomplete" statement at best, and removing Unit 3 and/or Unit 4 from the energy supply market would most likely result in further increase in energy prices beyond the significant increase that already occurred in 2021. Second Brown Decl. at ¶¶ 32-37. "If Units 3&4 are unable to operate and supply power to the wholesale markets, to the extent replacement power is available, it will be more expensive and result in increased prices to consumers." *Id.* at ¶ 37 (emphasis added).

Thus, Petitioners' unequivocal statement that there was "no probability" of harm related to "coal and energy supplies" if vacatur is deferred to April 2022 is fundamentally flawed. Resp. on Remedy (Dkt. No. 89) at 22. To the contrary: "even if there is reduced energy demand in the spring and no unforeseen significant weather events that create a demand surge in the spring months, Montana may still face an energy shortage if the AM4 area cannot be mined further beginning April 2022." Second Brown Decl. at ¶ 29 (emphasis in original). "This is due to the surge in demand in summer months, the lack of readily available replacement coal, the lack of readily available replacement energy, and the continuing drought limiting the supply of hydroelectric generation." *Id*. Moreover, Petitioner's "worst case" scenario—that CSES Units 3&4 would be able to operate one unit for four months before finding replacement coal—is not based in reality; it could take Talen Montana *years* to obtain replacement fuel for Units 3&4. *Id.* at ¶ 30 ("2023 or even later). Given Petitioners' implicit concession that there is some risk of harm to Talen Montana and the supply of energy justifying deferral, it is critical that the Court (or the BER, as appropriate) have the benefit of an accurate and full record on this issue before ruling on remedy.

In sum, Petitioners are asking this Court to bless a "compromise" approach—one which relies on speculation and factual errors about the operational capabilities at CSES Units 3&4—

without hearing from Talen Montana on whether this approach is based in reality. Given that all parties here agree that the impact to Colstrip is highly material to the outcome of these motions, there is simply no good reason why this Court should not hear directly from Talen Montana on this issue. It is understandable that Petitioners would not want substantive briefing pointing out errors in their preferred remedy proposal, but in the end Petitioners' attempt to keep this Court in the dark speaks more to the weakness of their arguments than to the propriety of Talen Montana's intervention. At bottom, the Court should be allowed to hear briefing from those who actually know about CSES Units 3&4 before ruling on the present motions.

II. Talen Montana satisfies the test for intervention of right.

As discussed in Talen Montana's initial brief, Talen Montana satisfies the four-part test for intervention of right. Petitioner's arguments to the contrary ignore the fundamental principle that intervention is construed broadly in favor of the applicant. *See, e.g.*, *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Ct., Sheridan Cty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 193, 40 P.3d 400, 402 ("Montana's rule is essentially identical to the federal rule which is interpreted liberally.") (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)); *Scotts Valley Band of Pomo Indians Of The Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926 (9th Cir. 1990) (reversing denial of a motion for intervention and holding "Rule 24(a) is construed broadly, in favor of the applicants for intervention") (citing *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988) and *Wash. Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982)). When considered in the context of the present motions before the Court, Talen Montana's intervention request to participate in newly raised remedy issues is appropriate and should be granted.

a. Talen Montana has protectable interests that would be harmed by Petitioners' proposed remedy.

Talen Montana has several "direct, substantial, legally protectable interest[s]" related to the proceedings. *Sportsmen for I-143*, ¶ 9 (quotation omitted). *See* Mem. In Support of Mot. to Intervene (Dkt. No. 86) at 12-16 (listing several).[4] It is black-letter law that the intervening party's interest must be "related" to that subject-matter, not identical to it. *See* Mont. R. Civ. P. 24(a)(2) (intervention as of right requires a claim of an "interest relating to the property or transaction which is the subject of the action") (emphasis added).

Petitioners only have one response to all of Talen Montana's "significant economical and contractual" interests: these interests would not be harmed if the Court deferred vacatur by four months. Resp. on Intervention (Dkt. No. 93) at 14-16. In effect, Petitioners have conceded that Talen Montana has an interest that is related to this litigation—it is just the view of Petitioners that Talen Montana's interests would only be harmed by immediate vacatur of the AM4 permit. As discussed above, Petitioners conclusions on this are based entirely on their own speculation and factual errors.

Critically, Talen Montana's interests in continued operation of CSES Units 3&4 are implicated whether Petitioners seek "immediate" vacatur, or a four-month deferral. As discussed in the attached declaration of Mr. Brown and above in Section I.b, four months is nowhere near

[4] These interests, which were identified in Talen Montana's opening brief, include Talen Montana's "economic interest in the continued operation of CSES Units 3&4," its contractual obligations to "provide electricity to its affiliates and ultimately to the market," its economic interest in avoiding "prohibitively expensive" construction of a rail unloading facilities or other last-minute options for the transportation of alternative coal, its permit obligations and the potential need to conduct "test burns to determine whether the replacement coal could even be reliably burned and/or if it would require blending," and the severe corresponding impacts to Talen Montana's 250 employees and the people of Montana, including "downstream issues, such as fluctuations in energy prices or more severe issues like grid reliability and blackouts" if CSES Units 3&4 "are forced to significantly curtail or shut down operations due to a lack of available fuel." Br. at 14-16.

enough time for Talen Montana to obtain coal from a source other than Rosebud Mine, and it is not certain that suitable alternative coal could ever be obtained. *See supra at* pp. 7-9; Second Brown Decl. at ¶¶ 15-20, 29-30. Meanwhile, Westmoreland has indicated that four months is likely not enough time for it to overhaul its operations and continue to provide Talen Montana with coal of sufficient quality. Second Batie Decl (Dkt. No. 94, Ex. A) at ¶ 10 ("the only available long-term replacement for the approximately 180,000-200,000 tons of coal mined from AM4 each month are in the portion of Area B that has significant engineering challenges and could be available (if at all) no earlier than 6-8 months, and in undeveloped parts of Area F that would also require substantial preparatory work and would not produce coal for electrical generation for at least 8-10 months") (emphasis added); First Batie Decl. (Dkt. No. 84, Ex. A) at ¶ 7 ("A cessation of mining in the AM4 Area would force Westmoreland to use a higher ration of lower quality coal from other Mine areas, which would disrupt the blending process and impair Westmoreland's ability to meet specifications designed to satisfy air quality standards at the Colstrip Power Station."). Accordingly, if the Court orders vacatur of the permit – now or in four months - CSES's sole source of coal will be cutoff, and Talen Montana's operations will be significantly harmed or impaired.

b. Talen Montana's interests are not adequately represented by anyone else.

As noted previously, Rule 24 requires only that the intervenor's interests "may be" inadequately represented, "and the burden of making this showing is minimal." *Sportsmen for I-143*, 2002 MT 18, ¶ 14 (citing *Sagebrush Rebellion*, 713 F.2d at 527). Among the factors in assessing whether representation "may be" inadequate is whether an existing party is "capable of and willing to make" all of the intervenor's arguments, and "whether the intervenors offers a necessary element to the proceedings that would be neglected." *Sagebrush Rebellion*, 713 F.2d at

528. Additionally, the adequacy of representation is determined "primarily by comparing the interests of the proposed intervenor with the interests of the current parties to the action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (citing *Planned Parenthood of Minn. v. Citizens for Community Action*, 558 F.2d 861, 870 (8th Cir. 1977)). Here, it is already apparent that the other parties are not positioned to protect Talen Montana's interests or provide all relevant factual support for why vacatur (immediate or deferred) would impair those interests. And many, if not all, of Talen Montana's interests related to the subject matter of this litigation—*e.g.*, its contractual obligations with corporate affiliates and customers and compliance with its operating permit—are not shared by any of the parties here.

For instance, Petitioners have made several factual allegations specific to the operations at CSES Units 3&4, Talen Montana's ability to shut down Units 3&4 without affecting energy prices or availability, or Talen Montana's its ability to utilize alternative sources of lower quality coal and maintain its operations consistent with its permit obligations and customer demands. *See* Resp. on Intervention (Dkt. No. 93) at 2-3, 15-17. No current participant to the litigation (including the Petitioners or the current Respondents) has any basis to opine these issues—only Talen Montana can speak to how and whether its units can be shutdown, or the impact that Petitioners' preferred remedy would have on its operations, permit and contract obligations, customers, and corporate affiliates. As discussed in Section I.b, *supra*, Petitioners made numerous errors in its assertions about CSES Unit 3&4 operations. And Westmoreland, who filed its reply on remedy on December 6, 2021, did not—indeed *could* not—explain why those assertions about Units 3&4 were incorrect. Rather, its focus was (properly) on why Petitioners' proposed remedy was unworkable from the standpoint of the Mine. *See* Reply on Remedy (Dkt. No. 94) at 10-12 (explaining why a four-month deferral would still result in the Rosebud mine not being able to

meet its contractual and permit obligations). It is therefore undeniable that Westmoreland cannot make Talen Montana's arguments, so intervention is appropriate. *Sagebrush Rebellion*, 713 F.2d at 528; *see also Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999) ("proposed intervenors have articulated specific relevant defenses that the University may not present and, as a consequence, have established the possibility of inadequate representation") (emphasis added).

Further, the fact that Westmoreland might share a broad opposition to Petitioners' remedy is insufficient reason to deny intervention. That argument "operates at too high a level of generality," because an intervenor "must intervene on one side of the 'v.'" and will always have "the same general goal as the party on that side." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). In *Driftless*, the Seventh Circuit reversed the district court's denial of a request by public utilities companies to intervene in a challenge to a permit authorizing the construction of transmission lines after the permitting agency had already filed a motion to dismiss. The district court denied the motion because the utilities companies had the same "goal" as the permitting agency—dismissal of the suit—and therefore the same interest. The Circuit disagreed, explaining how their interests were independent and different in "several important respects," including that the utilities "own, finance, and will operate the transmission line in question," "have obligations to their investors in connection with its construction and operation," had "substantial sunk and anticipated future investments in the power line," and "[a]s public utilities, they have a legal obligation to maintain the power grid and provide adequate and reliable electricity services to the public." *Id.* at 748. Because all of those interests were "materially different" than the agency's, and because they established that the agency's representation "may be" inadequate, they had a right to intervene. *Id.* at 749. It was irrelevant that the agency would

still "mount a vigorous defense" because they had "different defenses" and "very real differences in the interests at stake." *Id.*

The same is true here between Westmoreland and Talen Montana. While Talen Montana does not doubt Westmoreland has mounted a "vigorous defense" of its own interests, and the companies both generally oppose vacatur, the truth is that there are very real differences in the interests at stake, which include contractual obligations to Talen Montana's customers and corporate affiliates, economic interests in the units that Talen Montana owns and operates, as well as Talen Montana's contribution of electricity for the power grid—none of which are shared by Westmoreland. Indeed, in arguing that intervention would prejudice them, Petitioners concede that Talen Montana offers "a whole new suite of arguments about the power grid," that Westmoreland does not share. Resp. on Intervention (Dkt. No. 93) at 18.[5] The parties all agree that these facts are a necessary element to the remedy proceedings.[6] The development of those essential facts would be neglected if Talen Montana cannot intervene, so intervention should be granted. *Sagebrush Rebellion*, 713 F.2d at 528. Similarly, because Talen Montana will present specific defenses that that the existing parties may not, have not, and cannot present themselves, Talen Montana's interests are not adequately represented.

c. The motion is timely.

Talen Montana's motion is timely for the reasons set out in its original brief. Mem. In Support of Mot. to Intervene (Dkt. No. 86) at 9-12. Petitioners ignore the majority of Talen

[5] Petitioners consider this prejudicial, but that is nonsensical because Petitioners preferred remedy arguments are premised on their own argument that their remedy would avoid harm to the power grid. It is therefore apparent that Petitioners are able and willing to make arguments about impacts to the power grid.

[6] As noted above, if Talen Montana's motion to intervene is granted, Talen Montana may argue remedy proceedings below before the BER as the original finder of fact rather than this Court, which sits in an appellate posture.

Montana's arguments on timeliness, and do not address the Montana Supreme Court's four-factor test on timeliness at all.[7] Rather, they focus exclusively on the fact that Talen Montana did not intervene *before the BER*. Resp. on Intervention (Dkt. No. 93) at 10-11 (emphasizing the "six-year delay"). But Petitioners effectively ignore that the remedy issue has never been briefed before this Court, and, as a result of the parties *very recent* briefing, this case is essentially entering a new remedy phase. Because Talen Montana's motion to intervene came *days* after that briefing—indeed, before Petitioners even filed their substantive response to DEQ and Westmoreland's motions on remedy—the motion to intervene is timely and should be granted.

Petitioners' sole argument on timeliness is that Talen Montana's motion came after this Court's Order, and Talen Montana should have intervened earlier. Resp. on Intervention (Dkt. No. 93) at 9-13. First, this is more than a bit disingenuous, as Petitioners suggest that had Talen Montana tried to intervene at the outset of this case in this Court in 2019, they would have opposed it then too. *Id.* at 10-11 (noting the BER's intervention deadline and the limits for intervention "on appeal"). But even Petitioners' own cited cases demonstrate that post-judgment intervention is appropriate when—as here—the intervenor's interests are not represented. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 1, 21, 33-35, 356 Mont. 41, 230 P.3d 808; *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co*., 407 F.3d 1091, 1103 (10th Cir. 2005) ("Because, at this stage in the litigation, neither party has an interest in contesting subject matter jurisdiction, [third party's]

[7] As discussed in Talen Montana's opening brief, courts must consider "(1) the length of time the intervenor knew or should have known of its interest in the case before moving to intervene; (2) the prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay in making its application to intervene; (3) the prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely." *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 24, 305 Mont. 22, 30, 22 P.3d 646, 651 (citing *Stallworth v. Monsanto*, 558 F.2d 257, 264-66 (5th Cir. 1977)). No single factor is dispositive. *Id.*

interest may be harmed if [third party] is not permitted to intervene on appeal.") (citing Fed. R. Civ. P. 24(a)) (cited in *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017)).

As set forth in Section II.b, *supra*, Talen Montana's interests are not adequately represented by the other parties in this case. Further, courts have long allowed intervention at the start of a new phase of a case.[8] This is effectively now the "remedy" phase of the case, which began when DEQ filed their motion for clarification of the Court's Order on November 5, 2021, or, at earliest, when the Court issued its Order on October 28, 2021.

Petitioners question how Talen Montana's interests could have been implicated by the recent filings, since 1) Petitioners requested vacatur before the BER in 2016, and 2) Westmoreland's motions opposed (not sought) vacatur.[9] Petitioners never sought a preliminary injunction on mining operations at AM4 once during the last six years, and the parties have never

[8] *See, e.g.*, *United States v. State of Or.*, 745 F.2d 550, 552 (9th Cir. 1984) (reversing the denial of intervention where a new "phase" of litigation and negotiations began, which justified the State of Idaho's intervention over a decade after the case had commenced, and holding "[m]ere lapse of time alone is not determinative") (citing 7A C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972)) (emphasis added); *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129 (D.C. Cir. 1972) (reversing the denial of a request to intervene where applicants sought to participate in the remedial and appellate phases and holding "[t]imeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved") (emphasis added) (citations omitted); *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 293 (3d Cir. 1982) (reversing the denial of intervention to "'participate in an upcoming ... phase of the litigation'") (quoting *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977)).

[9] Petitioners note that no one seeks "immediate" vacatur. Talen Montana agrees that an equitable remedy is needed here, but Petitioners' four-month deferral is insufficient. Rather, the Court (and/or the BER) should remand without vacatur, consistent with similar cases concerning risks to the power grid. *See Cal. Cmties. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) (declining to vacate because of the "severe consequences" that would result to a "much needed power plant," including the risk of blackouts—"if saving a snail warrants judicial restraint, so does saving the power supply") (internal citation omitted); *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 101 (D.D.C. 2019) (vacatur was not warranted, notwithstanding the serious defects by the agency, who failed to conduct an environmental impact study, because the plant was a "crucial source of electricity in the area," and shutdown would result in unreliable energy supply, potential blackouts, and significant waste).

briefed the Court on vacatur. Indeed, operations have continued uninterrupted since Petitioners filed their BER action. Further, BER rejected Petitioners' contested case, and Petitioners then *appealed* that decision to the District Court, where the Court serves in an appellate role pursuant to the Montana Administrative Procedure Act ("MAPA").[10] In light of Petitioners' own failure to brief injunctive relief at any time, and the appellate posture in this Court—where adjudicating injunctive relief in the first instance may be inappropriate anyway for the reasons discussed above—Talen Montana did not believe it had a compelling reason to intervene.[11] But now, after Petitioners have devoted so much of their remedy briefing to the proposition that their proposed remedy will not harm CSES Units 3&4 or the power grid, Talen Montana must be allowed to respond. And, though it opposed vacatur, Westmoreland did so by making explicit reference to Talen Montana and CSES's operational capabilities at Units 3&4, and Petitioners did the same. It was *those* collective filings, and their overt reliance on third-party statements about what would and would not cause harm to Talen Montana and CSES Units 3&4, that triggered Talen Montana's intervention interests. *That* is why intervention is appropriate here.

Second, by failing to address them, Petitioners effectively concede that the other three factors favor finding Talen Montana's motion timely. Petitioners offer no argument that the

[10] As noted in footnote 1, *supra*, Petitioners agree that this Court sits in an appellate posture. This may explain why they never sought to shutdown mining operations in this Court, and never briefed the Court on vacating the permits. But after the instant motions raised the issue of remedy, they quickly changed tack and are now advocating that this Court find, in the first instance, that the mine should be shut down by April 2022.

[11] Petitioners' rank speculation that Talen Montana decided not to intervene in 2016 due to financial problems is baseless and nonsensical, given the economic interests Talen Montana has outlined here. Resp. on Intervention (Dkt. No. 93) at 12, n.5. Oddly, Petitioners cite an article with a quote from Talen Montana's CEO, arguing that it is "an admission of a party opponent," *id.* at 4, n.3, despite opposing Talen Montana's efforts to become a party.

original parties would suffer prejudice resulting from any delay in intervention.[12] Indeed, they cannot because 1) Petitioners are the only ones to oppose, 2) *all* the original parties here put the impacts to Talen Montana at center stage in the first place, and 3) Talen Montana filed its motion almost immediately thereafter.

Petitioners also offer no argument against the common sense position that Talen Montana would be prejudiced if it is denied the ability to participate, aside from the unserious claim that Westmoreland's status as supplier of coal to CSES means it adequately represents Talen Montana's interests in maintaining CSES Units 3&4 operations in compliance with Talen Montana's separate contractual obligations and permits. As noted in Section II.a, *supra*, Talen Montana's interests in CSES Units 3&4 and the power supply is a distinct and essential issue, as the recent filings all make clear. Further, Talen Montana has another unique interest here: correcting Petitioners' speculative arguments about Talen Montana and CSES Units 3&4 before the Court.

Finally, Petitioners ignore the unusual circumstances here—where the parties requested clarification on a remedy that had not been briefed, and that the Court did not order, and after which Petitioners offered a new hybrid remedy and justified it by making specific assertions about how its newly proposed remedy would not harm Talen Montana (all while opposing Talen Montana's attempts to be heard). Petitioners' position that Talen Montana should not be allowed to respond borders on the absurd; Talen Montana's motion to intervene, which was filed days after

[12] While they do argue that the Petitioners would be prejudiced by having to respond to power grid arguments, they did so under their permissive joinder section. Critically, they make no attempt to link that supposed prejudice to the supposed delay in seeking intervention, which is the correct standard for the purposes of intervention of right.

the parties recent filings kicked off a new remedy phase, was timely, and all of the relevant factors point to allowing Talen Montana's intervention here.

III. Talen Montana satisfies the test for permissive intervention.

The Court should alternatively grant permissive intervention here because it is undeniable that Talen Montana has claims or defenses to Petitioners' preferred remedy that "shares with the main action a common question of law or fact." Mont. R. Civ. P. 24(b)(1)(B). As noted above, every participating party in this case has referenced the importance of determining whether (and how much) CSES Units 3&4 would be impacted by the remedy here. Indeed, Petitioners' preferred remedy concedes the importance of avoiding harms to CSES and the power grid—one of the few issues on which Talen Montana and Petitioners agree. However, Petitioners are wrong that their preferred remedy would accomplish that goal. Though Petitioners do not want Talen Montana to explain to the Court exactly why that is, the Court can and should grant intervention here so that it may consider a full and accurate record before deciding on this common question of law and fact.

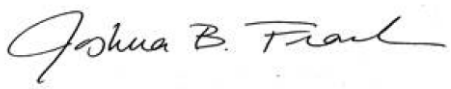
IV. The conditions Petitioners would put on Talen's intervention are nonsensical.

Finally, Petitioners suggest that, to avoid any prejudice to Petitioners (or perhaps to the Court), Talen Montana should be required to file joint briefs with Westmoreland. Resp. on Intervention (Dkt. No. 93) at 19. This makes no sense given the stage of the proceedings. DEQ, Westmoreland, and Petitioners have completed their briefing on the remedy motions. There was no opportunity to consolidate briefing because Petitioners opposed Talen Montana's intervention (and expedited consideration of the motion). There is only one substantive brief missing from pending motions: Talen Montana's. Petitioners presumably will have the opportunity to respond to that brief, should the Court grant intervention here, as is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Talen Montana's Motion to Intervene. Talen Montana qualifies both for intervention as of right under Rule 24(a) and for permissive intervention under Rule 24(b).

Respectfully submitted, this 20th day of December, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, a true and accurate copy of the foregoing document for DV 2019-34 was mailed by electronic mail, addressed as follows:

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ATTORNEYS FOR PROPOSED RESPONDENT-INTERVENOR

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents, and TALEN MONTANA, LLC, Proposed Respondent-Intervenor.	Case No. DV-19-34 Judge: Hon. Katherine M. Bidegaray **DECLARATION OF SHANNON BROWN**

I, Shannon Brown, declare under penalty of perjury as follows:

1. I am over 18 years of age.

2. I reside in Montgomery County, Texas.

3. I make this Declaration in support of Talen Montana, LLC's ("Talen Montana") Reply Brief in Support of Motion to Intervene as Respondent.

4. I make this Declaration based upon personal knowledge. The basis of my personal knowledge is as follows: Since May 2018, I have served as senior director of asset management at Talen Energy Supply, LLC ("Talen"), an indirect corporate parent of Talen Montana. In that capacity, I have represented Talen Montana on various committees relating to Units 3 and 4 of the Colstrip Steam Electric Station ("Units 3&4"), including committees providing oversight for the supply of coal to Units 3&4 and the operation of Units 3&4. My responsibilities related to coal supply include profit and loss of the power generation, coal supply contract negotiations, managing commercial and contractual issues arising under Talen Montana's coal supply agreement, approving invoices, and otherwise administering the coal supply agreement between Talen Montana and Westmoreland Rosebud Mining, LLC ("Westmoreland"). Through my role, I have gained extensive knowledge and experience regarding Unit 3&4's coal needs and the supply of coal from Rosebud Mine to Units 3&4.

5. I have reviewed the November 18, 2021 declaration of Mr. David Alan Schlissel and identified numerous errors in it with respect to Units 3&4. Select errors are discussed herein. Mr. Schlissel has never been employed at Units 3&4 or conducted any work at the Colstrip Steam Electric Station ("CSES").

Units 3&4 Background

6. CSES is a coal-fired power plant in Colstrip, Montana that depends on coal to generate power. CSES Units 1&2 were retired in early 2020. Units 3&4 are the remaining active coal-fired units, and they each have a net generating capacity of approximately 740 MW. Units 3&4's current capacity is therefore approximately 1,480 MW.

7. Talen Montana is the operator and a co-owner of Units 3&4. Talen Montana's ownership interest is 30% of Unit 3.

8. As operator of Units 3&4, Talen Montana is responsible for day-to-day operations and power generation activities, long-term scheduling and planning, compliance with permits, management of environmental liabilities, and otherwise acting on behalf of the Units 3&4 co-owners.

9. NorthWestern Corporation (d/b/a NorthWestern Energy) is another co-owner of Units 3&4.

10. A significant amount of Talen Montana's and NorthWestern Energy's power generated by Units 3&4 is supplied to Montana customers, including homeowners, commercial and industrial facilities, municipalities, and other customers. As noted above, Units 3&4 collectively can produce 1480 MW, of which approximately 375 to 450 MW are supplied to Montana customers. This is based on my belief that most, if not all, of NorthWestern Energy's share of the energy generated by Units 3&4 is supplied to Montana customers, in addition to the distribution of energy within Montana by Talen Montana's affiliates.

Current Coal Supply and Usage by Units 3&4

11. Rosebud Mine has been and is currently the exclusive supplier of coal to Units 3&4. Units 3&4 typically burn 500,000 to 600,000 tons of coal per month, and during most years is forecasted to burn around 7 million tons of coal per year (Units 3&4 will typically burn less during years with planned outages for maintenance).

12. With respect to Talen Montana's ownership interest in Units 3&4 specifically, Talen Montana and Westmoreland currently have a contract in place through 2025 requiring Westmoreland to supply coal from Rosebud Mine to Units 3&4. The contract is a full requirements contract obligating Westmoreland to supply all coal required by Talen Montana for its interest in Units 3&4. Talen Montana is obligated to purchase from Westmoreland all coal for its interest in Units 3&4, with a limited exception for test burns of coal from other mines.

Impacts of Vacatur of AM4 Permit on Ability to Fuel Units 3&4

13. Without sufficient coal supply of adequate quality from Rosebud Mine to CSES, Units 3&4 will be unable to run at full capacity (or potentially at all). If the coal supply from Rosebud Mine is completely halted, Units 3&4 has only about 25-30 days of coal stored on-site, meaning that Unit 3&4 operations could cease in a month or less.

14. Contrary to Mr. Schlissel's speculation, Talen Montana does not have the ability to materially expand Units 3&4 on-site storage of coal beyond the current supply of 25-30 days. The coal is in a "dead pile" that is covered in a concrete-like crust to prevent release of dust from the coal. The dead pile, which has not been significantly used since 2008, is used for emergency situations only. The amount of coal Units 3&4 can store on the dead pile is physically constrained

based on the size of the storage area. Accordingly, Units 3&4 does not have the ability to stockpile additional coal to accommodate a near-term loss of AM4 coal supply between now and April 2022.

15. Talen Montana's ability to obtain replacement coal for Units 3&4 is extremely limited, and it is very unlikely Talen Montana would be able to obtain any replacement coal even by the end of 2022. Accordingly, merely delaying vacatur of the AM4 permit by four months provides Talen Montana with no additional options to replace its coal supply.

16. First, Talen Montana does not have rail unloading facilities that would enable transport of coal to CSES by rail, and any construction of such facilities would take significant time and would be extremely expensive. Building new rail unloading facilities would take substantially longer than four months; it could take years to get such facilities permitted and constructed. For instance, construction of new facilities and burning of new coal would likely require an amendment to the air permit for Units 3&4, which could also take significant time (again, longer than four months) to obtain. Further, Talen Montana would likely need to do test burns for any new alternative coal source to assess its viability for combustion at Units 3&4.

17. Second, trucking coal to CSES presents other logistical challenges related to transporting large volumes of coal over long distances. In 2019 when Talen Montana was exploring alternative coal sources, Talen Montana calculated that approximately 724 truck trips per day would be required to supply Units 3&4 with coal entirely by truck (i.e., one truck every two minutes). Additionally, as with transporting new coal by rail, transporting new coal by truck would likely require test burns and an amendment to the air permit.

18. Third, contracts for coal and rail deliveries are typically negotiated at least a year or more in advance. Based on my current knowledge of the coal market and railroad capacities

currently, I do not believe there are material volumes for additional coal that Talen Montana could contract to buy and deliver prior to the end of 2022.

19. With respect to coal from other areas of Rosebud Mine, the coal within Rosebud Mine is not interchangeable. Even if Westmoreland is able to relocate its mining operations to other areas of Rosebud Mine (which is questionable for the reasons outlined in the December 6, 2021 Declaration of Russell Batie), it is unclear if Units 3&4 could burn coal from other areas of Rosebud Mine if that coal does not meet the contract specifications. Coal that does not meet contract specifications may disrupt boiler operations and threaten compliance with various permitting obligations. Blending coal from different mine areas is one way Rosebud Mine maintains the coal quality, but if the coal from AM4 cannot be mined and blended with coal from other areas, the resulting coal blend may not be of sufficient quality for Units 3&4.

20. For instance, Westmoreland's Environmental and Engineering Manager Russell Batie has stated that "AM4 is important to the Mine's production because it is a high-quality coal that can be blended with other coal." Batie December 6 Declaration ¶ 11. Area B coal cannot replace AM4 coal because it must be blended with higher quality coal to meet Westmoreland's contractual obligations to Units 3&4 related to coal quality. *See* Batie December 6 Declaration ¶ 9.2. According to Westmoreland, other areas of the mine are not suitable to replace the AM4 coal supply because Westmoreland already planned to mine those areas in the near future in addition to the AM4 area and potentially because mining activities in some of the other areas are also subject to ongoing legal challenges. *See* Batie December 6 Declaration ¶¶ 9.3, 9.4, 10. Thus, without AM4 it is unclear if Westmoreland will be able to supply coal that Units 3&4 can use to operate.

Impacts on Energy Supply if Units 3&4 Cannot Run at Full Capacity

21. As discussed in my prior declaration, there are significant potential impacts to the supply of energy to Montana and the region if Units 3&4 cannot run at full capacity due to a lack of fuel supply. These impacts remain a threat even if the supply of coal from AM4 is not cut off until April 2022.

22. Planned maintenance outages at Units 3&4 do not occur annually and do not occur every spring. Planned maintenance outages are carefully scheduled based on current energy market supply and the need to conduct certain maintenance and construction activities while units are offline. Additionally, Units 3&4 are almost never scheduled for outage at the same time (i.e., their outages are staggered so that one unit remains online at all times). No outage for either unit is currently planned for Spring or Fall 2022. The next planned outage is Unit 4 scheduled for 2024.

23. A "forced" unplanned outage in Spring 2022 due to lack of fuel supply would impact both energy supply and prices in potentially unpredictable ways. Even taking one unit offline in the spring could cause issues due to the 2021 drought that continues to affect the supply of hydropower. Once offline, the Colstrip unit may take at least a full day to come back online. If both units are offline, it may take several days to get both units online.

24. Likewise, although energy demand is typically reduced in the spring as compared to the winter, energy demand surges again in the summer months – as shown by Mr. Schlissel's own Chart 1. It is crucial for both Units 3&4 to be online during the summer months to meet that demand surge.

25. Units 3&4 are important dispatchable energy sources for this energy usage in Montana specifically and the northwest region more generally for all seasons. A dispatchable energy source is one that can be dispatched up and down to meet energy demand.

26. Non-dispatchable energy sources are those like wind and solar, which cannot be turned on and off to meet demand. Their power generation is dependent on external environmental factors. Hydropower is likewise partially dependent on external environmental factors; for instance, droughts will limit the supply of available hydropower.

27. Mr. Schlissel's graph showing the availability of hydropower, notably, shows 2020 rather than 2021. A significant drought in 2021 limited the availability of hydropower in the west and is expected to have impacts on the available supply of hydropower for at least the next year.

28. Solar power currently only supplies a very limited amount of energy within Montana (approximately 17 MW), and is unlikely to be a suitable replacement in the short-term for the approximately 375-450 MW supplied by Units 3&4 within the state of Montana. Transmitting solar power from California, as Mr. Schlissel suggests, may be theoretically possible, but it would be extremely costly and inefficient to move that power.

29. Accordingly, even if there is reduced energy demand in the spring and no unforeseen significant weather events that create a demand surge in the spring months, Montana may still face an energy shortage if the AM4 area cannot be mined further beginning April 2022. This is due to the surge in demand in summer months, the lack of readily available replacement coal, the lack of readily available replacement energy, and the continuing drought limiting the supply of hydroelectric generation.

30. Mr. Schlissel's hypothetical "worst case" scenario – that Talen Montana could operate just one unit for four months and then rely on coal from a new area of the Rosebud Mine

– is therefore not the worst-case scenario. The worst-case scenario is that Units 3&4 don't run all, especially if Westmoreland is not able to supply Units 3&4 with coal of sufficient quantity for significantly longer than four months because it cannot use or blend AM4 coal, and Talen Montana is not able to obtain replacement fuel for Units 3&4 until sometime in 2023 or even later.

31. Further, Mr. Schlissel understates the energy supply impacts of his own "worst case" scenario. Operating just one unit into the summer months – when energy demand increases – may very well be insufficient to meet energy demand in Montana.

Impacts on Price if Units 3&4 Cannot Run at Full Capacity

32. Mr. Schlissel's statement that "Colstrip is the most expensive resource in the portfolio . . . Northwestern Energy" is misleading and incomplete at best.

33. Talen Montana participates in wholesale energy markets where it sells power based on its variable cost to produce power. The variable cost to produce power is based on the current operational cost.

34. The dispatch of power to consumers in the region through the wholesale energy markets is based on the variable costs that power producers bid, with the daily market price determined by supply-demand fundamentals.

35. The variable cost to produce power at Units 3&4 is extremely low – around $20 per megawatt hour (MWh). For comparison, a typical natural gas peaking generation unit with a typical natural gas cost has the variable cost to produce around $45 per MWh. Natural gas generation is a dispatchable resource with more than double the cost of Units 3&4.

36. As a result, Units 3&4 are among the first to get dispatched to meet energy demand, generally running around the clock, and are among the cheapest sources of energy to consumers sold through the wholesale markets.

37. Current 2022 average on-peak power prices in the northwest are almost $60/MWh. Per MWh power prices in the region have already doubled in the past 12 months and are among the highest prices seen in the region in the past 10 years. If Units 3&4 are unable to operate and supply power to the wholesale markets, to the extent replacement power is available, it will be more expensive and result in increased prices to consumers.

Executed this 20th day of December, 2021.

Shannon Brown