



## Wanting to avoid zombies, states act to regulate closing power plants

By Libby Ford, Bruce J. Baker

Five hundred and thirty-one coal-fired power plants retired in the United States between 2002 and 2016.<sup>1</sup> Many more are scheduled to close in the next five years. As we discussed on in [What Happens to a Coal-Fired Power Plant When it Stops Being a Power Plant?](#), these plants are typically not only major employers in their area, but also one of the largest property and school taxpayers in any area. In [Moving Former Coal-Fired Power Plants from Retirement to Demolition](#), we mentioned that while some of these properties will be repowered to natural gas, or converted to wind or solar generation farms, most of them do not have a future in power generation. Under current law in most states, there is no requirement to go beyond “last one out turn off the lights and lock the door” at these shuttered plants, although power plant owners generally do at least minimal upkeep on these properties. Recently however, several states have enacted legislation intended to accelerate and regulate the closing process. A prime example of this is legislation enacted earlier this year in Montana, which, along with legislation enacted in 2016 in the State of Washington, illustrates how states may drive power plants closure, including the timing and extent of decommissioning, abatement and remediation.

The Colstrip Power Plant, located in Montana, has six owners and supplies electricity to at least three different states. It has two older units and two relatively new units.<sup>2</sup> The two oldest units (Units 1 and 2), which came online in 1975 and 1976, are jointly owned (50% each) by Talen Energy and Puget Sound Energy (PSE).<sup>3</sup> Ownership of the newer Units (3 and 4) is split multiple ways between Talen Energy, PSE, Portland General Electric (PGE), Pacific Corp, Avista Corp and

---

<sup>1</sup> [Staff Report on Electricity Markets and Reliability](#), USDOE Chapter 3.

<sup>2</sup> “Multiple Owners Makes Saving Colstrip a Complicated Puzzle,” *Billings Gazette* 5/1/2016, available at [http://billingsgazette.com/news/state-and-regional/montana/multiple-owners-makes-saving-colstrip-a-complicated-puzzle/article\\_08232f50-5786-597e-b32d-bb686e13e0bf.html](http://billingsgazette.com/news/state-and-regional/montana/multiple-owners-makes-saving-colstrip-a-complicated-puzzle/article_08232f50-5786-597e-b32d-bb686e13e0bf.html).

<sup>3</sup> [Talen Energy](#) is an independent power producer (merchant) energy company while Puget Sound Energy is an integrated operator supplying energy to the Puget Sound Washington area. [According to its website](#), “PSE employs a strategy of energy generation, acquisition and integrated resource planning.”

Northwestern Energy.<sup>4</sup> The debate, [which we discussed in a 2015 Alert](#)<sup>5</sup>, as to when various units at Colstrip should close continued to take up lawmakers' time in both Washington and Montana in 2016 and 2017. However, the market and other external pressures inserted themselves and, by the end of the 2017 legislative sessions, both states had actively inserted themselves into the decision-making process.

## Colstrip Units 1 and 2

In July 2016, Talen Energy and Puget Sound Energy (PSE), owners of the older Units 1 and 2, announced that they had reached an agreement with environmental groups to shut down these units no later than July 2022.<sup>6</sup> The agreement settled a 2013 lawsuit brought by the Montana Environmental Information Center and the Sierra Club alleging violations of the Clean Air Act at Colstrip. PSE has estimated that the cost to close Units 1 and 2 to be between \$130 and \$200 million.<sup>7</sup> More recently, [Talen Energy has indicated](#) that it wants to exit its role as Colstrip's day-to-day operator by mid-2018. Unless a new owner/operator is found, it appears that these two units may close next year.

## Washington

During 2017, Washington seemingly reversed itself from its push for early closure of the Colstrip plant that we discussed in our [2015 Alert](#). In 2016, Washington established a pathway for the transition of "eligible coal units" by passing Senate Bill 6248,<sup>8</sup> allowing decommissioning costs to be recovered from Washington ratepayers, but only for coal plants that remain open for another five years. The bill set up a process through which an electric company can place amounts equal to one or more regulatory liabilities into a dedicated account to be used solely to cover decommissioning and remediation costs. The new law defines an "eligible coal plant" as one that had two or fewer generating units as of January 1980 and four units as of January 2016, clearly targeting Colstrip Units 1 and 2. As passed, it was clear that the Washington Legislature wanted to create an incentive to keep Colstrip in operation until the end of 2022 or beyond.

As passed, the bill included a provision that funds placed into this new account could not be authorized for use in decommissioning and remediating units placed into operation before 1980 if those units closed prior to the end of 2022, unless it is proven that continued operation is (a) economically or technologically unfeasible, (b) requires a capital investment that is demonstrated to be non-prudent or (c) the plant has reached the end of its useful life. This attempt to incentivize keeping the Colstrip Units 1 and 2 open was thwarted when the clause limiting when the dedicated funds could be used was vetoed by the governor who stated that "this section inappropriately changes the long-standing definition of how the [Utilities and Transportation Commission (UTC)]

---

<sup>4</sup> All three of the other owners of Units 3 and/or 4 are integrated energy generation, transmission and delivery companies. [Portland General Electric](#) serves most of the Portland, Oregon, area. [Avista Corp](#) serves electrical customers in eastern Washington and northern Idaho. [Northwestern](#) serves the northwest United States.

<sup>5</sup> In 2015, Montana came very close to passing a "poison pill" bill that would have penalized the owners of this plant if they had closed any of the Colstrip units "prematurely." That approach triggered a war of words between Washington and Montana, leading to the penalty-based approach being dropped.

<sup>6</sup> See, [Colstrip Units 1 and 2 Will Shut Down by 2022](#), POWER, 7/1X, 2016.

<sup>7</sup> See footnote 2.

<sup>8</sup> Chapter 220 of the Washington Laws of 2016, codified as Washington State Title 80 RCW 80.84.010 and 80.84.0120 (dealing with the Transition of Eligible Coal Units).

determines whether utility investments and expenses are prudent.” According to a news report,<sup>9</sup> with this veto, Puget Sound Energy, the Washington-based owner of half the two older Colstrip units, can both put money aside for the future decommissioning and remediation of the older units and then only have to go through the typical prudency review process to get UTC permission to use the reserved monies whenever it decides to close these units.

## Montana

During 2017, Montana, recognizing that some or all of Colstrip was likely to close within the next five years, passed a series of bills aimed at trying to make sure that closed power plants were properly and promptly decommissioned and remediated, that it had a say in how Washington ratepayers contributed to these costs and to set up a mechanism to make loans to municipalities impacted by the closure of a coal-fired power plant. In brief, these bills, all of which were passed and were signed into law, specified:

### **House Bill (HB) 22<sup>10</sup>**

- Funded the Montana Department of Justice to intervene in Washington’s 2017 rate case for Puget Sound Energy (partial owners of Colstrip Units 1 and 2) to advocate for:
  - “proper” decommissioning and remediation,
  - long-term power replacement investments to be made in Montana and
  - recovery of appropriate “social costs.”

### **Senate Bill (SB) 339<sup>11</sup>—“Coal-fired Generating Unit & Remediation Act”**

- Owners must submit a proposed remediation plan no later than three months after a coal-fired plant is retired and no earlier than five years before a unit’s planned retirement. Among other things, the proposed plan must include:
  - reasonably anticipated future uses of the property;
  - a list of studies, reports etc. on remediation and status of remediation underway or completed; and
  - how the planned remediation will meet the required level of remediation. The remediation plan must attain a degree of cleanup consistent with, but no more stringent than, applicable legal obligations based on reasonably anticipated future uses of the property.
- Within 120 days of receiving a proposed remediation plan, the Montana Department of Environmental Quality (MTDEQ) must provide a public notice of the proposed plan and provide at least a 45-day comment period.
- After noticing the proposed plan, MTDEQ must either:
  - approve the plan if it determines it meets the requirement of this Bill, or
  - modify the plan, including re-noticing the proposed modification.

---

<sup>9</sup> [Colstrip Power Plant Could Close Before 2022](#)—the Salt Lake Tribune, first published 1/17/2017, updated 2/7/2017.

<sup>10</sup> HB 22 was signed 4/14/2017, effective that same day and became Chapter 200 of the Montana Laws of 2017.

<sup>11</sup> SB 339 was signed on 5/4/2017 and became Chapter 320 of the Montana Laws of 2017.

- The MTDEQ decision can be appealed within specified timeframes.
- MTDEQ may recover its actual costs, including its administrative costs, for reviewing the plan and for monitoring, inspection and enforcement activities related to overseeing the implementation of the plan.
- Enforcement of the approved plan will be first through an administrative order, which, in turn, can be enforced through a judicial action.
  - Administrative orders can include a penalty set by MTDEQ for each day of violation. The amount of any penalty will be based on the penalty factors listed in the new law.
- Monies from the state’s Environmental Quality Protection Fund (EQPF) can be used to investigate, negotiate and take legal action to identify liable persons to obtain their participation and financial contribution for a remedial action. Recovered monies will be returned to the EQPF to fund similar work at other sites.

**SB 140<sup>12</sup>**

- Authorizes the state to make a loan to local governments impacted by the closure of a coal-fired generating unit to secure and maintain existing infrastructure including water, wastewater, stormwater, roads, bridges, etc.

**HB 647<sup>13</sup>**

- Recognizing the significant financial “hit” that the local school districts serving the area around the Colstrip Power Plant will be taking, this bill established a *Coal-Fired Generating Unit Closure Mitigation Block Grant* to be awarded to each school district with a fiscal year 2017 taxable valuation that includes a coal-fired generating unit with a generating capacity that is greater than or equal to 200 megawatts that was placed in service prior to 1980 and is retiring or planned for retirement on or before July 1, 2022.
- If the owner of the retiring coal-fired generating unit makes a payment in accordance with a retirement plan approved by the MTDEQ or a transition agreement with the governor and attorney general for the purpose of decommissioning requirements and a portion of the payment is allocated to a school district for the purposes of school funding cost shifts, then the block grant must be repaid to the State General Fund on a sliding scale (100% if the plant is closed in 2018 down to 60% if the plant is closed in 2022).

**Units 3 and 4**

These newer units have both longer planned life expectancies, with at least one of the minor owners of these units estimating that these plants will last until 2046.<sup>14</sup> While there is some uncertainty that Colstrip Units 1 and 2 will be retired sometime between 2018 and 2022, there is still significant debate ongoing about when the newer units will be closed. In addition to the new Washington law and most of the new Montana laws, which will also apply to the eventual retirement of Units 3 and 4, Oregon also weighed in.

---

<sup>12</sup> Signed 5/22/2017 and became Chapter 419 of the Montana Laws of 2017, amending Sections 17-6-302 and d 17-6-308 MCA.

<sup>13</sup> Signed 5/4/2017 and became Chapter 336 of the Montana Laws of 2017.

<sup>14</sup> “Multiple Owners Makes Saving Colstrip a Complicated Puzzle,” *Billings Gazette* 5/1/2016, available at [http://billingsgazette.com/news/state-and-regional/montana/multiple-owners-makes-saving-colstrip-a-complicated-puzzle/article\\_08232f50-5786-597e-b32d-bb686e13e0bf.html](http://billingsgazette.com/news/state-and-regional/montana/multiple-owners-makes-saving-colstrip-a-complicated-puzzle/article_08232f50-5786-597e-b32d-bb686e13e0bf.html).

In 2016, Oregon continued to push for an end to coal-fired electricity by amending its Renewable Portfolio Standard<sup>15</sup> to, in essence, force the “*Elimination of Coal from Electricity Supply*.” The law was focused mainly on the Colstrip Power Plant Units 3 and 4, which, while located in Montana, also supplies electricity to Oregon through both Portland General and PacifiCorp. This bill requires Portland General and PacifiCorp to no longer have coal in their Oregon resource mix by January 1, 2030. An industry news account indicates that this legislation also sends a strong signal to other Oregon utilities that “coal is not welcome in the state.”<sup>16</sup> The new law forces the state’s “Electric Companies,” entities that *distribute* electricity (excluding entities that are owned by consumers), to eliminate electricity generated from coal from their “allocation” by 2030. In order to allow this to be done in an orderly fiscal fashion, it directs the State Public Utility Commission to approve any requested modified schedule of depreciation for a large<sup>17</sup> electric company’s coal-fired resources, as long as the plants are fully depreciated by the end of 2030. As a carrot to closing early, decommissioning and remediating coal-fired power plants, it allows electric companies

*to include in the company’s allocation of electricity the costs and benefits associated with the coal-fired resource ... [if] the owners of the coal-fired resource agree to close the coal-fired resource on or before five years after the date the coal-fired resource is fully depreciated. [...Further] “this section does not prevent the full recovery of prudently incurred costs related to the decommissioning or remediation of a coal-fired resource or the closure of a coal-fired resource, at the time those costs are incurred.*

Thus, even if the coal-fired power plant is owned by an entity other than an “electric company,” the electric company can pass along “prudent” decommissioning and remediation charges to its ratepayers, but only for decommissioning and remediation work that is done within five years of when the plant is fully depreciated.

## Summary and Conclusion

Because it is unlikely that there will be a broad-based federal program to address coal-fired power plant closures in the near term, a number of states are moving ahead with their own legislative and regulatory initiatives to address the issues presented by the legacy plants within their borders. While it is too early to tell if the approach taken by states like Washington and Montana will become templates for other states, these legislative initiatives bear watching.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Libby Ford, QEP Sr. Env. Health Engineer, 585-263-1606, [lford@nixonpeabody.com](mailto:lford@nixonpeabody.com)
- Bruce J. Baker, Esq., 585-263-1232, [bbaker@nixonpeabody.com](mailto:bbaker@nixonpeabody.com)

---

<sup>15</sup> Oregon Senate Bill 1547, which became [Chapter 028 of the Oregon Laws of 2016](#).

<sup>16</sup> [Elimination of Coal from Electricity Supply](#), Energy GPS LLC, 3/7/2016.

<sup>17</sup> The mandatory depreciation provisions only apply to electric companies that have 800,000 retail customers or more.