

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
	:	
BURGESS BIOPOWER, LLC, <i>et al.</i> , ¹	:	Case No. 24-10235 (LSS)
	:	(Jointly Administered)
Debtors.	:	
	:	Re: D.I. 22 & 110
	:	Hearing Date: February 21, 2024 at 9:30 a.m. (ET)

**MOTION OF THE DEBTORS FOR LEAVE TO FILE
DEBTORS’ REPLY IN SUPPORT OF MOTION OF THE DEBTORS FOR
ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS TO REJECT THE
POWER PURCHASE AGREEMENT AND OPTION AGREEMENT WITH PUBLIC
SERVICE COMPANY OF NEW HAMPSHIRE (d/b/a EVERSOURCE ENERGY) NUNC
PRO TUNC TO THE PETITION DATE AND (II) GRANTING RELATED RELIEF**

The debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), by and through their counsel, submit this motion (the “Motion for Leave”) for entry of an order, substantially in the form attached hereto as **Exhibit 1**, granting the Debtors leave to file a reply (the “Reply”) in support of the *Motion of the Debtors for Entry of an Order (I) Authorizing the Debtors to Reject the Power Purchase Agreement and Option Agreement with Public Service Company of New Hampshire (d/b/a Eversource Energy) Nunc Pro Tunc to the Petition Date and (II) Granting Related Relief [D.I. 22]* (the “Motion”) and in response to the *Objection of Public Service Company of New Hampshire to Motion of the Debtors for Entry of an Order (I) Authorizing the Debtors to Reject the Power Purchase Agreement and Option Agreement with Public Service Company of New Hampshire (D/B/A Eversource Energy) Nunc Pro Tunc to the Petition Date and (II) Granting Related Relief [D.I. 110]* (the “Objection”). A copy of the

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors’ corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

Reply is attached hereto as **Exhibit 2**. In support of the Motion for Leave, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider and determine the Motion for Leave pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”), and Rule 9006-1(d) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

3. Pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final order or judgment with respect to the Motion for Leave if it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

BACKGROUND

1. On February 9, 2024, (the “Petition Date”), the Debtors commenced the above-captioned chapter 11 cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Court.

2. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession, pursuant to Bankruptcy Code sections 1107(a) and 1108. As

of the date of the Motion for Leave, no trustee, examiner, or statutory committee has been appointed in the Chapter 11 Cases.

3. The Debtors filed the Motion on the Petition Date.

4. On February 13, 2024, the Court held a hearing (the “First Day Hearing”) on the motions that the Debtors filed on the Petition Date (the “First Day Motions”). At the First Day Hearing, the Court set a further hearing (the “Hearing”) on the First Day Motions, the Motion, as well as the *Motion of Public Service Company of New Hampshire, Pursuant to 28 U.S.C. § 1412 and Federal Rule of Bankruptcy Procedure 1014(a), To Transfer Venue of Bankruptcy Proceedings to United States Bankruptcy Court for the District of New Hampshire* [D.I. 39] (the “Venue Motion”) filed by Eversource for February 21, 2024 at 9:30 a.m. (ET) and established an objection deadline for the First Day Motions, the Motion and the Venue Motion as February 20, 2024 at 12:00 p.m. (ET).

5. On February 20, 2024, Public Service Company of New Hampshire, doing business as Eversource Energy (“Eversource”) filed the Objection.

RELIEF REQUESTED AND BASIS FOR RELIEF

6. By this Motion for Leave, the Debtors respectfully Request entry of the Proposed Order granting the Debtors leave to file a late Reply in support of the Motion and in response to the Objection on or before February 20, 2024 at 2:30 p.m. (ET).

7. Local Rule 9029-3 provides that “Delaware Counsel shall file the agenda in the bankruptcy case . . . with the Bankruptcy Court on or before 12:00 p.m. prevailing Eastern Time two (2) business days before the date of the hearing.” Due to the intervening Federal holiday, the deadline to file the agenda for the Hearing was Friday, February 16, 2024, at 12:00 p.m. (ET).

8. Pursuant to Local Rule 9006-1(d), “reply papers . . . may be filed and, if filed, shall be served so as to be received by 4:00 p.m. prevailing Eastern Time the day prior to the deadline for filing the agenda.” Accordingly, pursuant to Local Rule 9006-1(d), the deadline for the Debtors to file a Reply (the “Reply Deadline”) was 4:00 p.m. on Thursday, February 15, 2024, two days after the First Day Hearing.

9. The Debtors have expended a significant amount of time and resources, working to respond to the Objection, the Venue Motion and other objections filed by Eversource. The Debtors also have worked extensively and cooperatively with its lenders and other parties in interest to address various concerns and requests made on an informal basis to certain of the First Day Motions.

10. The Debtors seek to submit the Reply in support of the Motion and in response to various factual and legal arguments asserted in the Objection. Among other things, the Reply sets forth the reasons why the Objection, to the extent it remains unresolved by the hearing, should be overruled and the Motion should be granted. Accordingly, the Debtors submit that the Reply will assist the Court in its consideration of the Motion and the Objection and no parties will be prejudiced by the filing of a late Reply.

NOTICE

11. Notice of the Motion has been provided to (a) the U.S. Trustee (Attn: Jane M. Leamy); (b) the holders of the twenty (20) largest unsecured claims against each Debtor; (c) counsel to Deutsche Bank Trust Company Americas in its capacity as Collateral Agent, Hogan Lovells LLP; (d) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP; (e) Berlin Biopower Investment Fund, LLC, with a copy to Murray Plumb & Murray; (f) Greenline CDF Subfund XVIII LLC, with a copy to Kutak Rock LLP, U.S. Bancorp

Community Development Corporation and Leverage Law Group, LLC; (g) Public Service of New Hampshire d/b/a Eversource Energy, with a copy to Hunton Andrews Kurth LLP; (h) the United States Attorney's Office for the District of Delaware; (i) the United States Attorney's Office for the District of New Hampshire; (j) the United States Environmental Protection Agency; (k) the Nuclear Regulatory Commission; (l) the United States Department of Energy; (m) the Federal Energy Regulatory Commission; (n) New Hampshire Department of Environmental Services; (o) New Hampshire Public Utilities Commission; (p) New Hampshire Site Evaluation Committee; (q) New Hampshire Department of Energy; (r) City of Berlin; (s) ISO New England, Inc.; (t) the United States Securities and Exchange Commission; (u) the Internal Revenue Service; (v) CS Operations; (w) CS Berlin Ops; and (y) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors respectfully submit that no further notice of this Motion for Leave need be provided.

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Order, substantially in the form attached hereto as **Exhibit 1**, granting the Debtors leave and permission to file the Reply after the Reply Deadline and such other and further relief as the Court deems just and proper.

Dated: February 20, 2024

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
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BURGESS BIOPOWER, LLC, <i>et al.</i> , ¹	:	Case No. 24-10235 (LSS)
	:	(Jointly Administered)
Debtors.	:	
	:	Re: D.I. 22, 110 & __
	:	

**ORDER GRANTING THE DEBTORS LEAVE TO FILE DEBTORS’ REPLY
IN SUPPORT OF MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I)
AUTHORIZING THE DEBTORS TO REJECT THE POWER PURCHASE
AGREEMENT AND OPTION AGREEMENT WITH PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE (d/b/a EVERSOURCE ENERGY) *NUNC PRO TUNC* TO THE
PETITION DATE AND (II) GRANTING RELATED RELIEF**

Upon the *Motion of the Debtors for Leave to File Debtors’ Reply in Response to the Objection of Public Service Company of New Hampshire to Motion of the Debtors for Entry of an Order (I) Authorizing the Debtors to Reject the Power Purchase Agreement and Option Agreement with Public Service Company of New Hampshire (d/b/a Eversource Energy) Nunc Pro Tunc to the Petition Date and (II) Granting Related Relief* (the “Motion for Leave”);² and due and proper notice of the Motion for Leave having been given; and it appearing that no other or further notice of the Motion for Leave is required; and it appearing that this Court has jurisdiction to consider the Motion for Leave in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion for Leave is proper

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² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion for Leave.

pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion for Leave and provided for herein is in the best interest of the Debtors, their estates and creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Pursuant to Local Rule 9006-1(d), the Debtors are granted leave and permission to file the Reply, and the Reply is deemed timely filed and a matter of record in these bankruptcy cases.
3. This Court shall retain jurisdiction to interpret and enforce this Order.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

BURGESS BIOPOWER, LLC, *et al.*¹

Debtors.

Chapter 11

Case No. 24-10235 (LSS)
(Jointly Administered)

Re: D.I. 22 & 110

**Hearing Date: February 21, 2024, at 9:30
a.m. (ET)**

**DEBTORS' REPLY IN SUPPORT OF MOTION OF THE DEBTORS FOR ENTRY OF
AN ORDER (I) AUTHORIZING THE DEBTORS TO REJECT THE POWER
PURCHASE AGREEMENT AND OPTION AGREEMENT WITH PUBLIC SERVICE
COMPANY OF NEW HAMPSHIRE (d/b/a EVERSOURCE ENERGY) NUNC PRO
TUNC TO THE PETITION DATE AND (II) GRANTING RELATED RELIEF**

Burgess BioPower, LLC ("Burgess") and Berlin Station, LLC ("Berlin"), the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), submit this reply in response to the *Objection of Public Service Company of New Hampshire to Motion of the Debtors for Entry of an Order (I) Authorizing the Debtors to Reject the Power Purchase Agreement and Option Agreement with Public Service Company of New Hampshire (D/B/A Eversource Energy) Nunc Pro Tunc to the Petition Date and (II) Granting Related Relief* [D.I. 110] (the "Objection"), and in further support of the *Motion of the Debtors for Entry of an Order (I) Authorizing the Debtors to Reject the Power Purchase Agreement and Option Agreement with Public Service Company of New Hampshire (d/b/a Eversource Energy) Nunc Pro Tunc to the Petition Date and (II) Granting Related Relief* [D.I. 22] (the "Rejection Motion"). The Debtors respectfully state as follows:

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors' corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

ARGUMENT

I. Rejection Will Benefit the Estates and Should Be Affirmed

1. The Rejection Motion established the Debtors' entitlement, pursuant to Section 365(a) of the Bankruptcy Code, to reject the PPA and Option Agreement *nunc pro tunc* to the Petition Date.

2. The business judgment standard applies to the Debtors' rejection of the PPA and the Option Agreement. "A debtor's decision to reject an executory contract must be summarily affirmed unless it is the product of 'bad faith, or whim or caprice.'" *In re Extraction Oil & Gas*, 622 B.R. 608, 615 (Bankr. D. Del. 2020) (quoting *In re TWA*, 261 B.R. 103, 121 (Bankr. D. Del. 2003)).

3. The Debtors have established, and Eversource does not dispute, that it is in the best interests of their business, the bankruptcy estates, and the creditors to reject the PPA and the Option Agreement, to the extent those agreements were not already terminated by the Debtors. Put simply, the PPA's CRF provision starves the Debtors of revenue for their primary product—electric energy—and, left unrejected, will cause the Facility to close its doors. And the Option Agreement will severely hamper the Debtors' ability to find a new buyer and/or achieve a successful reorganization.

II. No Heightened Standard Applies

4. Recognizing that the business judgment standard is clearly met here, Eversource asserts instead that, because FERC has jurisdiction over the rates charged in the PPA, the Court must apply an out-of-circuit heightened standard to the Rejection Motion, contained in the Fifth Circuit's decision in *Mirant Corp. v. Potomac Elec. Power Co. (In re Mirant Corp.)*, 378 F.3d 511, 525 (5th Cir. 2004). The Third Circuit has not adopted any such heightened standard, and in any event it does not apply here.

5. “There is no prohibition on or limitation against rejecting a FERC approved contract.” *In re Extraction Oil & Gas*, 622 B.R. 608, 614 (Bankr. D. Del. 2020). “Section 365 of the Bankruptcy Code does not mandate that the Court consider public policy or public interest[,]” which are “irrelevant for Section 365’s purposes.” *Id.* at 627. That is because contract rejection does not result in any change to filed energy rates. *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 684 (5th Cir. 2022) (explaining that “[r]ejection is just a breach of contract [that] transforms the debtor’s future performance into an unsecured claim for damages” and that such “claim is valued at the filed rate”). Because rejection does not result in a change to the filed rate, the public interest standard—used by FERC to assess the reasonableness of a rate change in a wholesale energy contract—is inapplicable. *In re Extraction Oil & Gas*, 622 B.R. at 627.

6. The focus of the court in considering a rejection motion should be ensuring the viability of the reorganization. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 527-28 (1984) (“The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.... The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”) (citing H.R. Rep. No. 95-595, p. 220 (1977)).

III. Even if Applicable, Rejection of the PPA Would Satisfy a Heightened Standard

7. Even though the public interest is not a factor relevant to the Court’s adjudication of the Rejection Motion, the public interest favors rejection.

8. If the Court does not find that the PPA and the Option Agreement were terminated by the Debtors and does not allow the Debtors to reject those agreements, it is undisputed that the Debtors’ business cannot survive. Eversource argues that forcing specific performance of the PPA

in order to continue offsetting the CRF Excess² would benefit New Hampshire ratepayers. But that argument rests on a faulty premise: absent rejection (or confirmation that the Debtors validly terminated the PPA as a result of Eversource's material breach), the Facility will close and Eversource will be unable to continue offsetting the CRF Excess and receiving the Debtors' power for free. "The reality is that the Debtors cannot continue to perform under these contracts." *In re Extraction Oil & Gas*, 622 B.R. at 630.³

9. "In fact, allowing rejection in order for companies in bankruptcy to reorganize *is in the public interest.*" *In re Extraction Oil & Gas*, 622 B.R. at 627 (emphasis in original). That is because "[o]n balance, the public will benefit from the Debtors' continued production, their workers remaining employed, and potentially additional jobs and contracts from the Debtors" in the future. *Id.* at 630.

10. Moreover, and as explained in the Rejection Motion and in the First Day Declaration, the shuttering of the Facility will have adverse economic and environmental impacts. The people who work at the Facility will lose their jobs, the communities where those people live and work will suffer, and the Debtors' vendors, especially their fuel supplier, will be without a business partner going forward. Nor will the Debtors be able to produce electricity for the grid. Thus, to the extent the public interest is relevant to the rejection determination, the public interest is served by giving the Debtors a chance to continue operating and successfully reorganize.

² Capitalized terms not defined herein shall have the meaning assigned them in the Rejection Motion.

³ Furthermore, even if the Debtors were able to continue performing under the PPA (they are not), it is far from clear that doing so would benefit ratepayers. See, for example, the Transcript of February 14, 2024 NHPUC Proceedings, wherein the NHPUC Chairman stated: "What I would say is, it's an interesting analysis, because, currently the PPA provides a price of about \$145 a megawatt-hour, where the current Eversource price, if I'm not wrong, is closer to \$80 a megawatt-hour. So, if ratepayers were getting the \$80 a megawatt-hour, as opposed to paying back at a rate of 145, we might find that ratepayers are actually better off to sever the [PPA]." [D.I. 120-7, at 15:12-21.]

CONCLUSION

11. For the reasons set forth in the Rejection Motion and herein, as well as in any evidence to be adduced at the hearing, the Debtors respectfully request that this Court overrule the Objection and grant the relief sought in the Rejection Motion.

Dated: February 20, 2024

/s/ Katharina Earle

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