

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10235 (LSS)

(Jointly Administered)

**Objection Deadline: March 14, 2024 at 4:00 p.m. (ET)**

**Hearing Date: March 25, 2024 at 11:00 a.m. (E.T)**

**DEBTORS' MOTION FOR ENTRY OF (A) AN ORDER (I) APPROVING BID  
PROCEDURES RELATING TO THE SALE OF ALL OR SUBSTANTIALLY ALL OF  
THE DEBTORS' ASSETS, (II) SCHEDULING A HEARING TO CONSIDER THE  
SALE, (III) APPROVING THE FORM AND MANNER OF NOTICE OF SALE BY  
AUCTION, (IV) ESTABLISHING PROCEDURES FOR THE ASSUMPTION AND/OR  
ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES AND  
APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND  
(V) GRANTING RELATED RELIEF; AND (B) AN ORDER (I) AUTHORIZING THE  
SALE OF ASSETS OUTSIDE THE ORDINARY COURSE OF BUSINESS,  
(II) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS,  
CLAIMS, ENCUMBRANCES AND INTERESTS, (III) AUTHORIZING THE  
ASSUMPTION AND/OR ASSUMPTION AND ASSIGNMENT OF CERTAIN  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES,  
AND (IV) 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"), hereby submit this motion (the "Motion") for entry of two (2) orders: (a) the first order, substantially in the form attached hereto as **Exhibit A** (the "Bid Procedures Order") (i) approving the procedures (the "Bid Procedures")<sup>2</sup> in connection with the solicitation and acceptance of bids with respect to the proposed sale (the "Sale") of substantially all of the Debtors' assets (the "Assets" and each Sale of Assets, a "Sale Transaction"); (ii) scheduling a hearing for approval of the Sale (the "Sale

<sup>1</sup> 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.

<sup>2</sup> A copy of the proposed Bid Procedures is attached as **Exhibit 1** to the Bid Procedures Order.

Hearing”) and setting objection deadlines with respect to the Sale; (iii) approving the form and manner of notice of the Sale (the “Sale Notice”)<sup>3</sup> and related auction (the “Auction”) for the Assets; (iv) establishing procedures to determine cure amounts (“Cure Amounts”) and deadlines for objections to the potential assumption and assignment of executory contracts and unexpired leases and approving the form and manner of notice with respect thereto; and (v) granting related relief; and (b) the second order (the “Sale Order”)<sup>4</sup> (i) authorizing the Sale outside of the Debtors’ ordinary course of business; (ii) authorizing the Sale free and clear of Encumbrances,<sup>5</sup> with all validly perfected Encumbrances to attach to the proceeds of the Sale (if any); (iii) authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale; and (iv) granting related relief. In support of this Motion, the Debtors respectfully state as follows:

### **JURISDICTION AND VENUE**

1. The Bankruptcy Court has jurisdiction to consider and determine this Motion 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 the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a), 363, 365, and 503 of title 11 of chapter 11 of the United States Code (as amended or modified, the “Bankruptcy Code”); Rules 2002, 6004, 6006, 9007 and 9008 of the Federal Rules of Bankruptcy

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<sup>3</sup> A copy of the proposed notice of Auction is attached as **Exhibit 2** to the Bid Procedures Order.

<sup>4</sup> The proposed Sale Order will be filed with the Bankruptcy Court prior to the objection deadline for the Sale Hearing.

<sup>5</sup> “Encumbrances” shall mean all claims, liens, interests, mortgages, charges or other encumbrances, purchase rights, options or rights of first refusal.

Procedure (the “Bankruptcy Rules”); and Rules 2002-1 and 6004-1 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 by the Bankruptcy Court in connection with this Motion if it is later determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

### **BACKGROUND**

#### **A. General**

##### ***(i) The Chapter 11 Cases***

4. 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 United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

5. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date of this Motion, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases.

6. Additional information regarding the circumstances leading to the commencement of these Chapter 11 Cases and information regarding the Debtors’ business and capital structure is set forth in detail in the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of*

*the Debtors' Chapter 11 Petitions and First Day Pleadings* (the "First Day Declaration"),<sup>6</sup> filed on the Petition Date and incorporated herein by reference.<sup>7</sup>

7. Additional information regarding the Sale and marketing process of the Debtors and their assets is set forth in detail in the *Declaration of J. Scott Victor in Support of the Motion of the Debtors for Approval of Bid Procedures and Related Relief* (the "Victor Bid Procedures Declaration"), filed contemporaneously with this Motion and incorporated herein by reference.

**(ii) Business Operations**

8. The Debtors comprise a renewable energy power company that owns and operates a 75-megawatt biomass-fueled power plant (the "Facility" and such business, the "Business") located on an approximately sixty-two (62) acre site in Berlin, New Hampshire (the "Facility Site"). Berlin owns the Facility and the Facility Site, and Burgess leases the Facility pursuant to a long-term lease described in more detail below and holds the necessary regulatory licenses for operation of the Facility.

9. The Facility consistently ranks among the most efficient and well-run biomass plants in the country. The Facility's capacity factor, which is a measurement of run time and efficiency, averages over 90 percent each year, significantly exceeding the industry average of around 58.1 percent. Each year, the Facility undergoes a comprehensive third-party evaluation of its management and operations. Those reports have repeatedly confirmed that the Facility's management team performs well above industry norms.

10. Burgess delivers more than 500,000 megawatt hours of sustainable and reliable baseload power to the New England power grid on an annual basis. The Facility is the fourth

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<sup>6</sup> Capitalized terms used but not defined herein shall have the same meanings given to such terms as in the Bid Procedures, and/or the First Day Declaration, as applicable.

<sup>7</sup> The First Day Declaration and other relevant case information are available on the following website maintained by the Debtors' claims and noticing agent, Epiq Corporate Restructuring, LLC: <https://dm.epiq11.com/Burgess>.

largest power generator in New Hampshire and is the only power generator of those four that uses regionally sourced fuel. 500,000 megawatt hours of energy is enough to power 67,000 homes, or about 10% of New Hampshire's total homes.

11. The Facility is also an important part of the renewable energy resource portfolio in New England. It presently helps New Hampshire achieve the statutory mandates set forth in the renewable portfolio standards, NH RSA § 362-F, which require that approximately 25 percent of the state's electricity come from renewable resources. Additionally, the Facility contributes over \$2 million annually directly to the City of Berlin through taxes, fees and revenue sharing.

12. Berlin's predecessor acquired the Facility Site in 2008 for approximately \$100 million. At that time, the Facility Site housed a pulp and paper mill, which shuttered in 2006 after a long decline in the paper industry. The Facility was built between 2011 and 2013 by Berlin, and became operational on November 25, 2013.

13. As described in further detail in the First Day Declaration, in September 2011, Berlin closed on \$275 million of financing – including approximately \$200 million for construction and equipment costs – to retrofit the former paper mill and construct an innovative, environmentally-friendly biomass power plant. The Facility was retrofitted into a renewable energy facility between 2011 and 2013 using state of the art technology to convert it into its current operations. The Facility produces electricity by blowing air and shooting biomass fuel<sup>8</sup> through hot bubbling beds of sand. As the biomass fuel burns, steam is created to turn a 75-megawatt turbine, generating electricity. The electricity generated by the Facility is delivered to the New England power grid via an interconnection site located in Berlin, New Hampshire.

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<sup>8</sup> Biomass fuel is a renewable, organic material that can come from plants and animals. The Facility uses woody biomass, which refers to untreated, plant-derived materials such as brush, stumps, lumber ends and trimmings, wood pallets, bark, wood chips or pellets, shavings, sawdust and slash, and agricultural crops. One benefit of the Facility's using woody biomass fuel is that such fuel has limited other uses due to its low-grade quality.

14. The Debtors do not have any employees and neither operate nor manage the Facility on a day-to-day basis. Instead, the Debtors contract with CS Operations, Inc. (“CS Operations”) and CS Berlin Ops, Inc. (“CS Berlin Ops”), non-debtor affiliates, for the supply of personnel and services needed to operate and maintain the Facility, produce and sell energy and other products the Facility generates, manage the Facility and Facility Site, collect revenue, provide back office and overhead support, and otherwise manage and run the Debtors’ business.

15. The Facility has been running for over a decade, supplying power to Public Service Company of New Hampshire, which now does business as Eversource Energy (“Eversource”), pursuant to that certain Power Purchase Agreement entered into by and between Berlin and Eversource, dated as of May 18, 2011 and amended on November 19, 2019 and on August 18, 2022 (as amended, the “PPA”).

16. As discussed in the First Day Declaration, the Debtors terminated the PPA prior to the Petition Date due to Eversource’s material breach. The Debtors also filed a motion [D.I. 22] on the Petition Date seeking to reject the PPA in the event the termination is determined not to have been effective. On February 28, 2024, the Bankruptcy Court entered an order [D.I. 203] approving the Debtors’ rejection of the PPA.

**(iii) *Restructuring Support Agreement***

17. As discussed in the First Day Declaration, on February 8, 2024, (i) the Debtors, (ii) the Senior Secured Lenders,<sup>9</sup> (iii) CS Operations, Inc. (“CSO”) and CS Berlin Ops, Inc. (“CS Berlin,” and together with CSO, the “Operator Entities”),<sup>10</sup> (iv) Jean R. Hallé, in his individual

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<sup>9</sup> Reference to “Senior Secured Lenders” in this Motion, the Proposed Order and the Bid Procedures shall mean the Senior Secured Noteholders (as defined in the First Day Declaration) and the lenders to the DIP Facility (as defined in the First Day Declaration) (the “DIP Lenders”), in each or both capacities.

<sup>10</sup> As set forth in the First Day Declaration, the Debtors do not have any employees and neither operate nor manage the Facility on a day-to-day basis. Instead, the Debtors contract with the Operator Entities, which are nondebtor affiliates, for the supply of personnel and services needed to operate and maintain the Facility, produce and sell energy

capacity (“Hallé”); and BBP Finance LLC and Berlin BioPower Investment Fund, LLC (collectively, “Affiliated Lenders”) entered into that certain Restructuring Support Agreement, attached to the First Day Declaration as Exhibit M. The principal terms of the RSA are summarized below:

- a. The RSA incorporates by reference the Plan, which contains as its key feature a “toggle,” which envisions either a sale transaction either to a third-party purchaser or to the Senior Secured Lenders (the “Sale Transaction”) or a debt-for-equity swap pursuant to which the Senior Secured Lenders become the postpetition owners of the Reorganized Debtors (the “Stand-Alone Restructuring Scenario”). The Plan provides for payment in full of all Allowed Administrative Expense Claims and Allowed Priority Claims, and any Allowed Secured Claims.
- b. The Debtors agree to implement the Restructuring in accordance with certain case milestones (the “Milestones”), including:
  - (i) the filing of a motion to approve a Disclosure Statement for the Plan (“Disclosure Statement”) with related materials no later than March 11, 2024;
  - (ii) Commencing a sale process no later than the day after the first-day hearing in these Chapter 11 Cases;
  - (iii) Obtaining an order approving Bid Procedures no later than March 25, 2024;
  - (iv) Obtaining an order approving a Disclosure Statement no later than April 15, 2024; and
  - (v) Having a confirmation hearing for the Plan commence no later than May 21, 2024.<sup>11</sup>
- c. The Debtors and Operator Entities agree to comply with certain obligations, including:
  - (i) Using commercially reasonable efforts to pursue the Restructuring on the terms of the RSA and in accordance with the Milestones;
  - (ii) Using commercially reasonable efforts to obtain required regulatory approvals and provide required notices in connection with any sale and/or plan process;

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and other products the Facility generates, manage the Facility and the Facility Site, collect revenue, provide back office and overhead support, and otherwise manage and run the Debtors’ business.

<sup>11</sup> The Milestones are all set forth in Section 5 of the RSA.

- (iii) Operating the Facility in the ordinary course of business in a reasonable manner that is consistent with the RSA and past practices;
  - (iv) As to the Debtors, (i) stipulating the allowance and amounts of claims of the holders of the Senior Note Documents (as such term is defined in the First Day Declaration) (the “Senior Note Claims”) and to the validity of the liens securing such Senior Note Claims; and (ii) timely filing a formal objection to any motion challenging the Senior Note Claims and/or the right of the Senior Secured Lenders to receive or retain proceeds or distributions in any sale and/or plan process; and
  - (v) Cooperating and consulting with the Senior Secured Lenders with respect to the development and adoption of the Debtors’ business plan, including any business plan contemplated by the Plan.<sup>12</sup>
- d. Up until the termination of the RSA, each Senior Secured Lender agrees to perform and comply with certain obligations, including:
- (i) Using commercially reasonable efforts to support the Restructuring on the terms of the RSA;
  - (ii) Cooperating with the Debtors in obtaining the necessary regulatory approvals and using commercially reasonable efforts to provide any information necessary to obtain required regulatory approvals and provide required notices in connection with any sale and/or plan process; and
  - (iii) Forbearing from exercising, directly or indirectly, any rights or remedies or from asserting or bringing any claims under or with respect to the Senior Note Documents against the Debtors or any of their respective assets, to the extent such exercise is inconsistent with the RSA.<sup>13</sup>
- e. Up until the termination of the RSA, Halle and the Affiliated Lenders agree to perform or comply with certain obligations, including:
- (i) Using commercially reasonable efforts to pursue the Restructuring on the terms of the RSA and in accordance with the Milestones;
  - (ii) Not changing any material tax election, tax practice or procedure, or tax accounting method with respect to the Debtors; and
  - (iii) Not challenging the validity, enforceability, perfection or priority of, or seek avoidance, disallowance or subordination of, any portion of the Senior Note Claims or the liens securing such Senior Note Claims.<sup>14</sup>

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<sup>12</sup> The Debtors’ obligations are set forth in Section 6.1 of the RSA.

<sup>13</sup> The Senior Secured Lenders’ obligations are set forth in Section 6.3 of the RSA.

<sup>14</sup> The obligations of Halle and the Affiliated Lenders are set forth in Section 6.4 of the RSA.



- f. The RSA is terminable by the Senior Secured Lenders under certain circumstances, including:
- (i) Any breach of the RSA, or any obligation, representation, or warranty by the parties thereto;
  - (ii) The issuance of any order or revocation of any license, qualification or permit, or denial of any approvals that would preclude the Debtors from operating the Facility, or that impairs the Facility and/or the Debtors' lease in connection with the Plan or a Sale Transaction;
  - (iii) The failure of the Debtors to meet any Milestone, which has not been waived or extended with the consent of the Senior Secured Lenders;
  - (iv) The rejection or termination of certain material agreements, including the O&M Agreement, the Project Management Agreement, the Debtors' lease, the Biomass Supply Agreement and/or the Water Supply Agreement;
  - (v) Any material impact on any of the security agreements that Burgess and/or Berlin entered into in connection with the Senior Notes Documents; and
  - (vi) Any defaults under the DIP Agreement.<sup>15</sup>

18. In short, the proposed chapter 11 plan provides for a “toggle” between a Stand-Alone Restructuring Scenario and, if a superior offer emerges as determined by the Debtors with the consent of the Senior Secured Lenders, a Sale Scenario. The Bid Procedures are set forth herein in furtherance of that Sale Scenario.

**B. Sale and Marketing Process**

19. Pursuant to an engagement letter executed on October 9, 2023 as amended on February 7, 2024, the Debtors retained SSG Advisors, LLC (“SSG”) as exclusive investment banker to the Debtors to (i) advise regarding a possible restructuring of existing claims and equity and/or (ii) assist with the sale, assignment, license, or other disposition of all or substantially all of the assets of the Debtors.

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<sup>15</sup> The termination events are set forth in in Section 10.1 of the RSA.

20. As set forth in the Victor Bid Procedures Declaration, SSG has created a “teaser” and confidential informational memorandum (“CIM”) that are to be used to market the Debtors’ assets as well as a form non-disclosure agreement (“NDA”).

21. To facilitate the diligence process, SSG worked with the Debtors to create an electronic data room that is to provide information about the Debtors and their operations to potential purchasers.

22. The Debtors, in conjunction with SSG and their other advisors, have also drafted a form asset purchase agreement to be used in any Sale.

23. SSG, with the assistance of the Debtors and in consultation with the Senior Secured Lenders, has prepared a targeted buyer universe of over 140 parties including strategic and financial acquirers. The buyer universe may be supplemented during the marketing process as additional interested parties are identified. Each party will be contacted and provided with a copy of the Debtors’ teaser. Interested parties will receive diligence materials, including the CIM and access to the electronic data room, upon execution of the Debtors’ form NDA.

**C. Proposed Bid Procedures**

24. The Debtors seek to conduct an open and transparent Sale process pursuant to which the Successful Bidder (defined below) will enter into an asset purchase agreement for the purchase of all or substantially all of the Debtors’ assets free and clear of all Encumbrances, with all validly perfected Encumbrances attaching to any proceeds of the Sale.

25. The Bid Procedures, as summarized below, were developed by the Debtors and their advisors, in consultation with the Senior Secured Lenders, and are consistent with the Debtors’ needs to proceed with an expeditious sale process to maximize the value of the Debtors’ assets and promote active bidding that will result in the highest and/or otherwise best offer for such assets. The Bid Procedures reflect the Debtors’ objective of conducting the Auction in a

controlled, fair and open fashion that promotes interest in the Debtors' assets by financially capable, motivated bidders who are likely to close the Sale on the timetable necessitated in these Chapter 11 Cases.

26. The following paragraphs summarize key provisions of the Bid Procedures and are qualified in their entirety by reference to the actual Bid Procedures:

- a. Access to Due Diligence Materials. The Debtors, in consultation with the Senior Secured Lenders, will post copies of all material documents related to the Debtors' assets to the Debtors' confidential electronic data room (the "Data Room"). To access the Data Room, a party must submit to the Debtors' advisors:
  - i. an executed NDA (unless such party is already a party to an existing confidentiality agreement with the Debtors that is acceptable to the Debtors for this due diligence process, in which case such agreement shall govern); and
  - ii. sufficient information, as reasonably requested by the Debtors and the Senior Secured Lenders, to allow the Debtors to determine that the interested party (i) has the financial wherewithal to consummate a Sale Transaction, and (ii) intends to access the Data Room for the purpose consistent with the Bid Procedures.
- b. Qualified Bidder. An interested party that meets the aforementioned requirements shall be a "Potential Bidder." A "Bid" is a signed document from a Potential Bidder received by the Bid Deadline (as defined in subparagraph d herein) that identifies the purchaser by its legal name and any other party that will be participating in connection with the Bid, and includes the material terms of the offer to purchase substantially all of the Debtors' assets. To constitute a "Qualified Bid" a Bid must include, at a minimum, the following:
  - i. Acquired Assets. Each Bid must clearly identify, in writing and as applicable, the particular assets the Potential Bidder seeks to acquire from the Debtors, including any contracts and leases of the Debtors that would be assumed and assigned in connection with a proposed Sale Transaction, subject to subparagraph vi below.
  - ii. Purchase Price; Form of Consideration; Cash Requirements; Assumed Liabilities; Credit Bid. Each Bid must clearly set forth, as applicable:

- (A) Purchase Price. Each Bid must clearly identify the purchase price to be paid (the “Purchase Price”) and whether the Bid is based on an all-cash offer or consists of certain non-cash components, including, without limitation, a Credit Bid (defined below) and/or the assumption of liabilities;
  - (B) Assumed Liabilities. Each Bid must clearly identify, in writing and as applicable, the particular liabilities, if any, such as, for example, executory contracts, the Potential Bidder seeks to assume. For the avoidance of doubt, a Qualified Bid may include a bid for less than all or substantially all of the Debtors’ liabilities; and
  - (C) Credit Bid. Persons or entities holding a perfected security interest in the assets specified in the Bid may seek to submit a credit bid (a “Credit Bid”), to the extent permitted by applicable law, including, without limitation, 11 U.S.C. § 363(k). Without limiting the foregoing, the Senior Secured Lenders shall have the right to credit bid any and all of the obligations owing under the Senior Notes Documents and/or the DIP Facility and the Bankruptcy Court orders approving the DIP Facility.
- iii. Proposed APA. Each Bid must include an executed asset purchase agreement (the “Proposed APA”) for the assets included in such Bid, together with a redline comparing the Proposed APA to the form APA attached to the Bid Procedures as **Exhibit A**.
  - iv. Unconditional Offer. A statement that the Bid is formal, binding, and unconditional, is not subject to any further due diligence or financing contingency, and is irrevocable until the Debtors, with the consent of the Senior Secured Lenders, notify the Potential Bidder that such Bid is not a Successful Bid (as defined below) or a Back-Up Bid (as defined below), or until the first business day after the close of a Sale Transaction.
  - v. Proof of Financial Ability to Perform. Each Bid must contain such financial and other information that allows the Debtors, upon consultation with the Senior Secured Lenders, to make a reasonable determination as to the Potential Bidder’s financial and other capabilities to consummate a Sale Transaction including, without limitation, such financial and other information setting forth adequate assurance of future performance in satisfaction of the requirements under section 365(f)(2)(B) of the Bankruptcy Code and the Potential Bidder’s willingness to perform under any contracts that are assumed and assigned to such party. Without limiting the foregoing, such information must include current financial statements or similar

financial information certified to be true and correct as of the date thereof, proof of financing commitments, if needed, to consummate the transaction (not subject to, in the Debtors' discretion and upon consultation with the Senior Secured Lenders, any unreasonable conditions), contact information for verification of such information, including any financing sources, and any other information reasonably requested by the Debtors to demonstrate that such Potential Bidder has the ability to consummate a Sale Transaction in a timely manner.

- vi. Designation of Contracts and Leases. Each Bid must identify, with particularity, each and every executory contract and unexpired lease, the assumption and assignment of which is a condition to closing a Sale Transaction (the "Closing"); **provided, however,** that the Bid may allow for the Potential Bidder to remove executory contracts and unexpired leases from the list of contracts to be assumed and assigned any time prior to the Closing; **provided, further, however,** that to the extent the Debtors identify any additional executory contracts or unexpired leases after the Bid is submitted, the Bid may allow for the Potential Bidder to add such executory contracts and unexpired leases to the list of contracts to be assumed and assigned any time from and after the Bid is submitted until the Closing of the proposed Sale Transaction.
- vii. Required FERC Authorizations. Each Bid must include a statement or evidence of the Potential Bidder's plan or ability to obtain all authorizations and certifications required by the Federal Energy Regulatory Commission ("FERC") (1) for the Potential Bidder and the Debtors to consummate the contemplated Sale Transaction, and (2) for the Potential Bidder, following consummation of the contemplated Sale Transaction to own and operate the Facility and sell electricity, capacity, and ancillary services at market-based rates (together, the "FERC Authorizations").
- viii. Other Required Approvals. In addition to a statement or evidence of the Potential Bidder's plan or ability to obtain the FERC Authorizations, each Bid must include a statement or evidence (1) of the Potential Bidder's plan and ability to obtain all other requisite governmental, regulatory, or other third-party approvals to consummate the contemplated Sale Transaction ("Other Required Approvals"); and (2) that the Bid is reasonably likely to be consummated, if selected as the Successful Bid, within a time frame required by the Bid Procedures Order and otherwise acceptable to the Debtors.
- ix. Authorization. Each Bid must include evidence of corporate authorization and approval from the Potential Bidder's board of

directors (or comparable governing body) with respect to the submission, execution, and delivery of a Bid, participation in the Auction, and closing of the transactions contemplated by the Potential Bidder's Proposed APA in accordance with the terms of the Bid and the Bid Procedures.

- x. No Entitlement to Expense Reimbursement or Other Amounts. Each Bid must expressly state that the Bid does not entitle the Potential Bidder to any break-up fee, termination fee, expense reimbursement or similar type of payment or reimbursement, and a waiver of any substantial contribution administrative expense claims under section 503(b) of the Bankruptcy Code related to the bidding process; provided, however, that the foregoing restriction on reimbursement of expenses does not apply to the Senior Secured Lenders in the event the Senior Secured Lenders submit a Bid.
- xi. Joint Bids. The Debtors may, with the consent of the Senior Secured Lenders, approve joint Bids in their reasonable discretion on a case-by-case basis.
- xii. Representations and Warranties. Each Bid must include the following representations and warranties:
  - (A) a statement that the Potential Bidder has had an opportunity to conduct any and all due diligence regarding the applicable assets prior to submitting its Bid;
  - (B) a statement that the Potential Bidder has relied solely upon its own independent review, investigation, and/or inspection of any relevant documents and the assets in making its Bid and did not rely on any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the assets or the completeness of any information provided in connection therewith, except as expressly stated in the representations and warranties contained in the Potential Bidder's Proposed APA if ultimately accepted and executed by the Debtors;
  - (C) a statement that the Potential Bidder agrees to serve as Back-Up Bidder if its Bid is selected as the next highest or next best bid after the Successful Bid with respect to the applicable assets;
  - (D) a statement that if selected as Back-Up Bidder, the Potential Bidder will continue to cooperate with the Debtors to obtain

the FERC Authorizations and Other Required Approvals until the Back-Up Bid Expiration Date (as defined herein);

- (E) a statement that the Potential Bidder has not engaged in any collusion with respect to the submission of its Bid; and
- (F) a statement that the Potential Bidder agrees to be bound by the terms of the Bid Procedures.

xiii. A Potential Bidder must also accompany its Bid with:

- (A) a cash deposit in the amount of ten percent (10%) of the Purchase Price (a “Good Faith Deposit”); provided that, a Potential Bidder submitting a Credit Bid will not be required to accompany its Bid with a Good Faith Deposit for any portion of the Purchase Price that is a Credit Bid, but shall be required to provide a Good Faith Deposit for any portion of its Bid that is not a Credit Bid; provided, however, that the foregoing shall not apply to the Senior Secured Lenders in the event the Senior Secured Lenders submit a Bid;
- (B) the contact information of the specific person(s) whom the Debtors or their advisors should contact in the event that the Debtors have any questions or wish to discuss the Bid submitted by the Potential Bidder;
- (C) a covenant to cooperate with the Debtors to provide pertinent factual information regarding the Potential Bidder’s operations reasonably required to analyze issues arising with respect to any applicable regulatory requirements; and
- (D) if the value of a Bid includes additional non-cash components, a detailed analysis of the value of any additional non-cash component of the Bid and back-up documentation to support such value.

- c. Good Faith Deposit. To the extent applicable, a Good Faith Deposit must be deposited, prior to the Bid Deadline, with an escrow agent selected by the Debtors (the “Escrow Agent”) pursuant to an escrow agreement to be provided by the Debtors. To the extent a Qualified Bid is modified before, during, or after the Auction, the Debtors reserve the right to require that such Qualified Bidder adjust the amount of its Good Faith Deposit so that it equals ten percent (10%) of the Purchase Price. If a Qualified Bidder is required to adjust its Good Faith Deposit, its status as a Qualified Bidder shall be suspended pending satisfaction of such adjustment.

- d. Bid Deadline. The deadline for a Potential Bidder to submit a Bid shall be **May 6, 2024 at 4:00 p.m. (ET)** (the “Bid Deadline”). No Bid received after the Bid Deadline shall be considered a Qualified Bid.

The Debtors, in consultation with the Senior Secured Lenders and any official committee of unsecured creditors appointed in the Chapter 11 Cases (the “Committee”), will evaluate Bids that are timely submitted and may engage in negotiations with Potential Bidders who submitted Bids as the Debtors deem appropriate in the exercise of their business judgment, based upon the Debtors’ evaluation of the content of each Bid.

A Bid received for assets that is determined by the Debtors, after consultation with any Committee and with the consent of the Senior Secured Lenders, to meet the requirements set forth herein will be considered a “Qualified Bid” and any bidder that submits a Qualified Bid will be considered a “Qualified Bidder.”

By no later than **May 9, 2024** (the “Qualified Bid Deadline”), the Debtors shall determine, in their reasonable judgment, after consultation with any Committee and with the consent of the Senior Secured Lenders, which of the Bids received by the Bid Deadline qualify as a Qualified Bid. The Debtors shall notify each Potential Bidder who submits a Qualified Bid of its status as a Qualified Bidder by the Qualified Bid Deadline.

- e. Auction. If the Debtors receive two or more Qualified Bids for substantially the same assets, the Debtors may, in their business judgment and upon consultation with the Senior Secured Lenders and any Committee, conduct the Auction in person or by remote audio and video link on **May 13, 2024** beginning at 10:00 a.m. (ET) at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, New York, NY 10019. Only a Qualified Bidder, its professionals and/or other representatives of the Qualified Bidder will be eligible to participate at the Auction, subject to such limitations as the Debtors, with the consent of the Senior Secured Lenders, may impose in good faith. In addition, professionals and/or other representatives of the Debtors, any Committee, the Senior Secured Lenders, and any creditors or equity holders of the Debtors, shall be permitted to attend and observe the Auction. Each Qualified Bidder shall be required to confirm, both before and after the Auction, that it has not engaged in any collusion with respect to the submission of any Bid or the Auction.

The Debtors, with the consent of the Senior Secured Lenders, may adopt rules for the Auction at any time that the Debtors reasonably determine to be appropriate to promote a value-maximizing auction. Any rules developed by the Debtors, with the consent of the Senior Secured Lenders, will provide that all bids in the Auction will be made and received on an open basis, and all bidders participating in the Auction will be entitled to be present for all bidding with the understanding that the true identity of each



bidder placing a bid at the Auction will be fully disclosed to all other bidders participating in the Auction and that all material terms of a bid submitted in response to any successive bids made at the Auction will be disclosed to all other bidders. Each Qualified Bidder will be permitted what the Debtors, with the consent of the Senior Secured Lenders, reasonably determine to be an appropriate amount of time to respond to the previous bid at the Auction. The Auction will be conducted openly and shall be transcribed or recorded.

The Debtors may, in their discretion and in consultation with any Committee and with the consent of the Senior Secured Lenders, identify the highest or otherwise best Qualified Bid as the successful bid (a “Successful Bid” and the bidder submitting such bid, a “Successful Bidder”). The Debtors, with the consent of the Senior Secured Lenders, may also identify a Qualified Bidder that submitted the next highest or otherwise best Qualified Bid as a back-up bid (a “Back-Up Bid” and the bidder submitting such bid, a “Back-Up Bidder”). A Back-Up Bid shall remain open and irrevocable until the earliest to occur of (i) consummation of a Sale Transaction with the Successful Bidder and (ii) the release of such Back-Up Bid by the Debtors in writing (such date, the “Back-Up Bid Expiration Date”). The Back-Up Bidder will continue to cooperate with the Debtors to obtain the FERC Authorizations up until the Back-Up Bid Expiration Date. If a Sale Transaction with a Successful Bidder is terminated prior to the Back-Up Bid Expiration Date, the Back-Up Bidder shall be deemed a Successful Bidder and shall be obligated to consummate the Back-Up Bid as if it were a Successful Bid, **provided, however**, that the Debtors are not required to accept any Bid or designate a Successful Bidder or Back-Up Bidder.

Within two (2) business days after the Auction, a Successful Bidder shall submit to the Debtors fully executed documentation memorializing the terms of a Successful Bid. A Successful Bid may not be assigned to any party without the consent of the Debtors and the Senior Secured Lenders.

At any time before entry of an order approving an applicable Sale Transaction envisioned by a Qualified Bid, the Debtors reserve the right to and may reject such Qualified Bid if such Qualified Bid, in the Debtors’ judgment, after consultation with any Committee and with the consent of the Senior Secured Lenders, is: (i) inadequate or insufficient; (ii) not in conformity with the requirements of the Bankruptcy Code, the Bid Procedures, or the terms and conditions of the applicable Sale Transaction; or (iii) contrary to the best interests of the Debtors and their estates.

- f. **Post-Auction Process.** By no later than **12:00 p.m. (ET) on May 14, 2024** (following the closure of any Auction), the Debtors shall file with the Bankruptcy Court a notice of a Successful Bid, Successful Bidder, Back-Up Bid, and Back-Up Bidder. The Debtors shall not consider any Bids submitted after the conclusion of the Auction.

Within seven (7) days after the Auction, the Debtors shall direct the Escrow Agent to return the Good Faith Deposit of any Potential Bidder or Qualified Bidder, as applicable, who is not declared a Successful Bidder or Back-Up Bidder. Within seven (7) days after the Back-Up Bid Expiration Date, the Debtors shall direct the Escrow Agent to return the Good Faith Deposit of a Back-Up Bidder. Upon the authorized return of any such deposit, the Bid of such Potential Bidder, Qualified Bidder or Back-Up Bidder, as applicable, shall be deemed revoked and no longer enforceable.

A Successful Bidder's Good Faith Deposit shall be applied against the cash portion of the Purchase Price of such bidder's Successful Bid upon the consummation of a Sale Transaction. In addition to the foregoing, the Good Faith Deposit of a Qualified Bidder will be forfeited to the Debtors if (i) the Qualified Bidder attempts to modify, amend, or withdraw its Qualified Bid, except as permitted herein, during the time the Qualified Bid remains binding and irrevocable or (ii) the Qualified Bidder is selected as a Successful Bidder or Back-Up Bidder and refuses or fails to enter into the required definitive documentation or to consummate a Sale Transaction according to the Bid Procedures.

- g. Sale Hearing. If the Debtors, with the consent of the Senior Secured Lenders, elect to proceed with a Sale Transaction, the Debtors will seek the entry of an order authorizing and approving the Sale Transaction at a hearing before the Bankruptcy Court on **May 16, 2024** (or such other date as the Bankruptcy Court may determine) (the "Sale Hearing"). The Sale Hearing shall be scheduled to occur on the same date as the hearing to consider confirmation of the Debtors' plan (or Berlin's plan, as applicable). The Debtors, in the exercise of their business judgment, with the consent of the Senior Secured Lenders, may adjourn the Sale Hearing without notice or with limited and shortened notice to parties, including by (i) an announcement of such adjournment at the Sale Hearing or at the Auction or (ii) the filing of a notice of adjournment with the Bankruptcy Court prior to the commencement of the Sale Hearing.

Objections to a Sale Transaction, including any objection to the sale of the Debtors' assets free and clear of liens, claims, encumbrances, and other interests pursuant to section 363(f) of the Bankruptcy Code (each, a "Sale Objection"), shall (i) be in writing; (ii) state the name and address of the objecting party and the amount and nature of the claim or interest of such party; (iii) state with particularity the basis and nature of the Sale Objection, and provide proposed language that, if accepted and incorporated by the Debtors, would obviate such objection; (iv) conform to the Bankruptcy Rules and the Local Rules; (v) be filed with the Bankruptcy Court; and (vi) be served upon the Sale Notice Parties (as defined in the in the Bid Procedures Order) by **May 14, 2024 at 4:00 p.m. (ET)** (the "Sale Objection Deadline"); provided that, the Debtors, with the consent of the Senior Secured Lenders, may extend the Sale Objection Deadline, as the Debtors

deem appropriate in the exercise of their reasonable business judgment. If a timely Sale Objection cannot otherwise be resolved by the parties, such objection shall be heard by the Bankruptcy Court at the Sale Hearing.

- h. Consent to Jurisdiction. All bidders that participate in the bidding process shall be deemed to have (i) consented to the core jurisdiction of the Bankruptcy Court to enter any order or orders, which shall be binding in all respects, in any way related to the Bid Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to an applicable Sale Transaction; (ii) waived any right to a jury trial in connection with any disputes relating to the Bid Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to an applicable Sale Transaction; and (iii) consented to the entry of a final order or judgment in any way related to the Bid Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to an applicable Sale Transaction if it is determined that the Bankruptcy Court would lack Article III jurisdiction to enter such a final order or judgment absent the consent of the parties.
- i. No Bids; Severance of Burgess from Plan. In the event the Debtors' proposed chapter 11 plan as to Burgess is withdrawn and goes forward solely as to Berlin (either before or after the Bid Deadline), then the Senior Secured Lenders (or their designees) shall be deemed a Qualified Bidder and may, in their sole discretion, submit a Bid for the purchase of some or all of Burgess's assets, which Bid shall be deemed a Qualified Bid.

27. Pursuant to Local Rule 6004-1: (i) each Qualified Bidder participating at the Auction will be required to make a non-collusion representation (a "Non-Collusion Representation"); (ii) the Auction will be conducted openly and may be attended by the Debtors, their professionals, any Committee, and its professionals and the Auction participants; (iii) the only persons or entities who will be permitted to bid at the Auction are the authorized representatives of each Qualified Bidder; and (iv) the Auction will be transcribed.

28. Other than as expressly set forth in the Bid Procedures, the Debtors reserve the right to: (a) impose additional terms and conditions with respect to any or all Potential Bidders or Qualified Bidders, as applicable; (b) extend the deadlines set forth herein or the date for the Auction; (c) cancel or extend the sale of the Assets and/or Sale Hearing in open court; and/or (d)

amend the Bid Procedures, in each case, so long as the exercise of any such right is subject to the consent of the Senior Secured Lenders.

29. The Debtors are not requesting authority to designate one or more bidders as the bidders with the initial bid for all or substantially all of the Debtors' assets; or to provide stalking horse bidder protections.

**D. Key Terms of Proposed APA**

30. For reference, the material terms of the Proposed APA required to be highlighted pursuant to Local Rule 6004-1 are as follows:<sup>16</sup>

<b>Purchaser</b>	To be determined
<b>Sellers</b>	Burgess BioPower, LLC and Berlin Station, LLC
<b>Purchased Assets</b>	Purchaser will purchase all of the direct or indirect right, title and interest of the Estates or the Sellers in, to and under the assets held for use in, or related to, the Energy Station wherever situated, whether or not carried or reflected on the books and records of the Estates or the Sellers, and of whatever kind and nature, real or personal, in each case as of the Closing (but excluding, in all instances, the Excluded Assets).
<b>Excluded Assets</b>	<p>The following assets are excluded from the Purchased Assets under the Sale:</p> <ul style="list-style-type: none"> <li>(i) all bank or other accounts of the Sellers or the Estates, including those in connection with the Energy Station Assets;</li> <li>(ii) all Closing Cash and the Purchase Price;</li> <li>(iii) all securities, whether capital stock or debt, and other ownership interests issued by any of the Sellers;</li> <li>(iv) all rights and Claims to deposits (including deposits in transit, customer deposits or prepayments, and any cash collateral for any obligation of the Sellers and all post-Petition deposits made by the Sellers), credits, security deposits, prepaid amounts, charges and</li> </ul>

<sup>16</sup> The following summary and terms defined herein are qualified in their entirety by reference to the provisions of the Proposed APA. In the event of any inconsistencies between the provisions of the Proposed APA and the terms herein, the terms of the Proposed APA shall govern. Capitalized terms used in this section of the Motion and not otherwise defined shall have the meanings ascribed thereto in the Proposed APA.

expenses (including, without limitation, as to Taxes), refunds, reimbursements, vendor and other rebates, set-offs and similar rights and claims of the Sellers and the Estates, including, without limitation, any of the foregoing relating to any Contract other than the Assumed Contracts;

(v) all Leases and Contracts listed on Schedule Error! Reference source not found. of the Disclosure Schedules of the APA, in each case, other than the Assumed Contracts (such Leases, the “Excluded Leases” and such Contracts, the “Excluded Contracts”), including any refund, rebate, credit or payment due to the Sellers thereunder;

(vi) all Permits listed on Schedule Error! Reference source not found. of the Disclosure Schedules other than the Assumed Permits;

(vii) all other assets agreed to be listed on Schedule 1.D(vii) by the Buyer and the Sellers and delivered to the Sellers prior to the Closing;

(viii) a copy of all Records (and the Buyer will provide all such Records to the Sellers at no charge);

(ix) the rights, defenses, claims and causes of action of the Sellers and the Estates under this Agreement and the other Related Agreements and all consideration payable or deliverable under this Agreement;

(x) all proceeds, reserves, benefits, rights or claims under any Insurance Policies relating to the Energy Station,

(xi) any premium refunds (including, without limitation, any prepaid premiums) of the Sellers arising from any Insurance Policies on account of reduction in workforce, liability coverage, and the like;

(xii) all proceeds, reserves, benefits, rights or claims under any Insurance Policy (1) to the extent not relating to the operation of the Energy Station or (2) concerning fiduciary, directors’ or officers’ liability, including under any tail Insurance Policies (i.e., such as advancement of expenses and liability coverage with respect to claims made against such officers and directors);

(xiii) all rights, privileges, defenses, claims and causes of action (and proceeds thereof) of any and every kind or nature whatsoever, including those relating to, arising out of, or in

	<p>connection with or under Chapter 5 of the Bankruptcy Code or similar state laws;</p> <p>(xiv) all intercompany claims (including any related rights and security interests) by any Seller against any other Seller or any Subsidiary or Affiliate of any Seller;</p> <p>(xv) all losses, loss carry forwards and rights to receive refunds or credits with respect to any and all Taxes of the Sellers incurred or accrued on or before the Closing Date;</p> <p>(xvi) all Excluded Actions;</p> <p>(xvii) all company seals, minute books, organizational documents, limited liability company interest record books, original Tax and financial records and such other files, books and records of the Sellers that the Sellers are required by Law to retain or that exclusively relate to the Excluded Assets or the Excluded Liabilities; provided, however, that the Sellers shall provide the Buyer with reasonable access to and copies of any such materials;</p> <p>(xviii) all Avoidance Actions related to Purchased Assets or Assumed Contracts;</p> <p>(xix) all Accounts Receivable from PSNH (the “<u>Excluded Accounts Receivable</u>”) and all rights privileges, defenses, claims and causes of action (and proceeds thereof) against PSNH; and</p> <p>(xx) all other assets that do not expressly constitute Purchased Assets.</p>
<b>Assumed Liabilities</b>	<p>The following liabilities will be assumed by the Purchaser at Closing: (a) 503(b)(9) claims, subject to reconciliation; (b) all cure costs associated with Assumed Contracts and all obligations under such Assumed Contracts from and after the Closing Date:</p> <p>(i) all Liabilities under any of the Assumed Contracts only to the extent such Liabilities (i) arise and accrue from and after the Closing Date and (ii) do not arise from or relate to any fact, circumstance, actual or alleged breach of contract, breach of warranty, violation of law, tort, infringement, failure to perform improper performance, default or any Litigation, in each case, with respect to this clause (ii), arising as of, or related to the period prior to, Closing;</p> <p>(ii) Liabilities and Taxes arising out of or related to the Purchased Assets or the Energy Station, in each case, first arising and</p>

	<p>accruing from and after the Closing Date, including the Taxes payable by the Buyer;</p> <p>(iii) Cure Amounts;</p> <p>(iv) all Liabilities under any of the Assumed Permits only to the extent such Liabilities (i) arise and accrue from and after the Closing Date and (ii) do not arise from or relate to any fact, circumstance, actual or alleged breach of contract, breach of warranty, violation of law, tort, infringement, failure to perform improper performance, default or any Litigation, in each case, with respect to this clause (ii), arising as of, or related to the period prior to, Closing;</p> <p>(v) all Liabilities of the Sellers for accrued sales, use and similar Taxes as of the Closing;</p> <p>(vi) Transfer Taxes and any Taxes or Liabilities arising or imposed under any Tax-related bulk transfer Laws of any jurisdiction that are not exempted from payment pursuant to the terms of the Sale Order; and</p> <p>(vii) all Liabilities related to Environmental Laws first arising after the Closing Date under federal, state and local law relating to or arising out of or in connection with the Purchased Assets</p>
<b>Excluded Liabilities</b>	<p>The following liabilities are excluded from the Sale: Buyer shall not assume, be obligated to pay, perform or otherwise discharge or in any other manner be liable or responsible for any liabilities of Sellers, whether existing on the Closing Date or arising thereafter, other than the Assumed Liabilities:</p> <p>(i) Claims arising under Section 503(b)(9) of the Bankruptcy Code;</p> <p>(ii) any of the Sellers' professional costs or expenses incurred in connection with, or related to, this Agreement, the consummation of the Contemplated Transaction or the administration of the Chapter 11 Cases, including, without limitation, any accrued professional fees and expenses of attorneys, accountants, financial advisors and other professional advisors related to the Chapter 11 Cases;</p> <p>(iii) any Liabilities to any broker, finder, agent or similar intermediary for any broker's fee, finder's fee or similar fee or commission relating to the Contemplated Transaction for which any Seller or its Affiliates are responsible including any transaction fee</p>

	<p>payable to the Sellers' investment banker pursuant to <u>Error! Reference source not found.</u> of the APA;</p> <p>(iv) any Liabilities with respect to the Purchase Option Agreement or the DB-PSNH Subordination Agreement; and</p> <p>(v) all Liabilities with respect to the operation of the Business which arises under or related to any Environmental Laws (including without limitation any relating to exposure to any Hazardous Substances) other than those specified in <u>1.D(vii)U</u></p>
<b>Sale to Insider</b>  <b>Local Rule 6004-1(b)(iv)(A)</b>	Not applicable; insiders may bid.
<b>Agreements with Management</b>  <b>Local Rule 6004-1(b)(iv)(B)</b>	Not applicable.
<b>Releases and Waivers</b>  <b>Local Rule 6004-1(b)(iv)(C)</b>  <b>(APA, Section 7)</b>	The Proposed APA contemplates that a Potential Bidder expressly waives any and all rights or remedies against the Debtors, including any statutory or common law right of contribution, (i) with respect to any immaterial defect, deficiency or other title matter with respect to the Acquired Assets (subject to the Potential Bidders' right to receive title to the Assets free and clear of all Encumbrances (other than Permitted Encumbrances) and all Liabilities (including Excluded Liabilities, but free and clear of Assumed Liabilities)) upon the terms and subject to the conditions of the Sale Order, and (ii) with respect to any circumstance with respect to the Acquired Assets relating to environmental laws, the release of substances or hazardous materials into the environment or protection of the environment or public health.
<b>Competitive Bidding/Auction</b>  <b>Local Rule 6004-1(b)(iv)(D)</b>  <b>(See Bid Procedures)</b>	The Bid Procedures contemplate an open bidding and sale process, not a private sale, which will include an Auction if the Debtors receive multiple Qualified Bids.



<b>Closing and Other Deadlines</b>  <b>Local Rule 6004-1(b)(iv)(E)</b>	Not applicable.
<b>Good Faith Deposit</b>  <b>Local Rule 6004-1(b)(iv)(F)</b>  <b>(See Bid Procedures and APA, Section 2.2)</b>	<p>With its Bid, a Potential Bidder must deposit a cash deposit in the amount of ten percent (10%) of the Purchase Price (a “<u>Good Faith Deposit</u>”); provided that, a Potential Bidder submitting a Credit Bid will not be required to accompany its Bid with a Good Faith Deposit for any portion of the Purchase Price that is a Credit Bid, but shall be required to provide a good Faith Deposit for any portion of its Bid that is not a Credit Bid.</p> <p>The Good Faith Deposit of a Qualified Bidder will be forfeited to the Debtors if (i) the Qualified Bidder attempts to modify, amend, or withdraw its Qualified Bid, except as permitted in the Bid Procedures, during the time the Qualified Bid remains binding and irrevocable or (ii) the Qualified Bidder is selected as a Successful Bidder or Back-Up Bidder and refuses or fails to enter into the required definitive documentation or to consummate a Sale Transaction according to the Bid Procedures and the Proposed APA.</p> <p>The Proposed APA contemplates that once a Qualified Bidder is identified as a Successful Bidder, if the Successful Bidder fails to complete the Closing, then the Good Faith Deposit shall be disbursed as follows: (i) in the event of a termination of the Agreement by the Debtors if the Successful Bidder fails to satisfy any of its material obligations at Closing, the Debtors shall be entitled to retain the Good Faith Deposit as liquidated damages; (ii) in the event of a termination of this Agreement for any reason other than by the Debtors pursuant to the Successful Bidder failing to satisfy any of its material obligations at Closing, the Good Faith Deposit shall be returned to the Successful Bidder; or (iii) in the event of a termination of this Agreement and the Good Faith Deposit has not been disbursed in accordance with clauses (i) or (ii), above, then the Good Faith Deposit shall be disbursed as any court of competent jurisdiction may direct.</p>
<b>Interim Arrangements with Proposed Buyer</b>  <b>Local Rule 6004-1(b)(iv)(G)</b>	Not applicable.

<p><b>Proceeds Allocation</b></p> <p><b>Local Rule 6004-1(b)(iv)(H)</b></p> <p><b>(See APA, Section 2.9)</b></p>	<p>Within ninety (90) calendar days after the Closing Date, the Buyer shall in good faith prepare and deliver to the Sellers an allocation of the Purchase Price among the applicable Purchased Assets in accordance with section 1060 of the IRC and the Treasury Regulations thereunder (and any similar provision of United States, state, local or non-United States Law, as appropriate). The Buyer and the Sellers will negotiate in good faith to resolve any disputes relating to the allocation within thirty (30) calendar days of the Sellers' receipt thereof. If the Buyer and the Sellers are unable to resolve any such dispute, such dispute shall be resolved promptly by a nationally recognized accounting firm acceptable to the Buyer and the Sellers, the costs of which shall be borne equally by the Buyer and the Sellers. The Buyer and the Sellers shall report, act and file Tax Returns (including IRS Form 8594) in all respects and for all purposes consistent with the allocation of the Purchase Price agreed upon under <u>Error! Reference source not found.</u> of the APA Neither the Buyer nor the Sellers shall take any position (whether in audits, Tax Returns or otherwise) which is inconsistent with such allocation; <i>provided</i>, that nothing contained herein shall prevent the Buyer or the Sellers from settling any proposed deficiency or adjustment by any Governmental Entity based upon or arising out of such allocation, and neither the Buyer nor the Sellers shall be required to litigate before any court any proposed deficiency or adjustment by any Governmental Entity challenging the allocation.</p>
<p><b>Tax Exemption</b></p> <p><b>Local Rule 6004-1(b)(iv)(I)</b></p> <p><b>(See APA, Section 10.4)</b></p>	<p>The Contemplated Transaction is intended to constitute a transfer under occasional or insolvency tax exemption, as applicable.</p>
<p><b>Record Retention</b></p> <p><b>Local Rule 6004-1(b)(iv)(J)</b></p> <p><b>(APA, Section 13.2)</b></p>	<p>The Proposed APA contemplates that for a period of one (1) year following the Closing, (i) the Potential Bidder shall permit the Debtors' counsel and other professionals and counsel for any successor to Debtors and their respective professionals (collectively, "<u>Permitted Access Parties</u>") reasonable access to the financial and other books and records relating to the Acquired Assets or the Business, which access shall include the right of such Permitted Access Parties to copy, at such Permitted Access Parties' expense, such documents and records as they may request to the extent necessary to permit the Debtors to determine any matter relating to their rights and obligations hereunder or to any period ending on or before the Closing Date (for example, for purposes of any tax or accounting audit or any claim or litigation matter, but not for any dispute or claim between Potential Bidder and the Debtors in</p>

	connection with the Proposed APA, its attachments or otherwise), for periods prior to the Closing and shall preserve such books and records until the later of (a) such period as shall be consistent with the Potential Bidder's records retention policy in effect from time to time, (b) the retention period required by any applicable legal requirement, (c) the conclusion of all bankruptcy proceedings relating to these Chapter 11 Cases or (d) in the case of books and records relating to taxes, the expiration of the statute of limitations applicable to such taxes, and (ii) upon three (3) Business Days' advance written notice to the Potential Bidder, the Potential Bidder shall provide the Permitted Access Parties (at no cost to the Permitted Access Parties) with reasonable access during regular business hours to complete their post-Closing activities (including, without limitation, preparation of any tax returns), provided that such access does not unreasonably interfere with the Potential Bidder's business operations.
<b>Sale of Avoidance Actions</b>  <b>Local Rule 6004-1(b)(iv)(K)</b>  <b>(See APA, Section 2.2)</b>	Not applicable.
<b>Successor Liability</b>  <b>Local Rule 6004-1(b)(iv)(L)</b>  <b>(APA, Sections 1.1)</b>	The Proposed APA contemplates that the Debtors are seeking to sell the Acquired Assets free and clear of all Encumbrances, including successor liability claims, with the exception of any Encumbrances included among the Assumed Liabilities.
<b>Sale Free and Clear of Unexpired Leases</b>  <b>Local Rule 6004-1(b)(iv)(M)</b>	Not applicable.
<b>Credit Bid</b>  <b>Local Rule 7004-1(b)(iv)(N)</b>  <b>(See Bid Procedures)</b>	Persons or entities holding a perfected security interest, if any, in the assets specified in the Bid may seek to submit a credit bid to the extent permitted by applicable law, including, without limitation, 11 U.S.C. § 363(k).

<b>Relief from B.R. 6004(h)</b>  <b>Local Rule 6004-1(b)(iv)(O)</b>	The Debtors seek relief pursuant to Bankruptcy Rule 6004(h).
<b>Closing Date</b>	The APA sets forth the conditions and terms for the Closing of the Sale, and the APA provides an outside Closing date of July 18, 2024

31. The Debtors proposed timeline to conduct the Auction and Sale, subject to Bankruptcy Court availability and approval, is as follows:

<b>Contemplated Date</b>	<b>Task/Event</b>
March 18, 2024 at 4:00 p.m. (ET)	Bid Procedures Objection Deadline
March 25, 2024	Bid Procedures Hearing
March 29, 2024	Cure Notice
April 12, 2024	Contract Objection Deadline
May 6, 2024 at 4:00 p.m. (ET)	Bid Deadline
May 9, 2024 at 12:00 p.m. (ET)	Notice of Qualified Bid
May 13, 2024 at 10:00 a.m. (ET)	Auction
May 14, 2024 at 12:00 p.m. (ET)	Notice of Successful and Back-Up Bidders

May 14, 2024 at 4:00 p.m. (ET)	Sale Objection Deadline (including, without limitation, objections based on adequate assurance of future performance for a Successful Bidder other than the Senior Secured Lenders and the conduct of the Auction, if any)
May 16, 2024	Sale Hearing

32. The Debtors seek to have the Auction scheduled to commence in person or by telephonic and video conference at **10:00 a.m. (ET) on May 13, 2024** at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, New York, NY 10019. Within two (2) days of the entry of the Bid Procedures Order, the Debtors will cause to be served by first class mail, postage prepaid, copies of: (a) the Bid Procedures Order; and (b) the Sale Notice upon the following entities: (i) the U.S. Trustee (Attn: Jane M. Leamy); (ii) the holders of the twenty (20) largest unsecured claims against each Debtor; (iii) counsel to Deutsche Bank Trust Company Americas in its capacity as Collateral Agent, Hogan Lovells LLP; (iv) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP; (v) Berlin Biopower Investment Fund, LLC, with a copy to Murray Plumb & Murray; (vi) Greenline CDF Subfund XVIII LLC, with a copy to Kutak Rock LLP, U.S. Bancorp Community Development Corporation and Leverage Law Group, LLC; (vii) Public Service Company of New Hampshire d/b/a Eversource Energy, with a copy to Hunton Andrews Kurth LLP; (viii) the United States Attorney's Office for the District of Delaware; (ix) the United States Attorney's Office for the District of New Hampshire; (x) the United States Environmental Protection Agency; (xi) the Nuclear Regulatory Commission; (xii) the United States Department of Energy; (xiii) the Federal Energy Regulatory Commission; (xiv) New Hampshire Department of Environmental Services; (xv) New Hampshire Public Utilities Commission; (xvi) New Hampshire Site Evaluation Committee; (xvii) New Hampshire

Department of Energy; (xviii) City of Berlin; (xix) ISO New England, Inc.; (xx) the United States Securities and Exchange Commission; (xxi) the Internal Revenue Service; (xxii) any party that has requested notice pursuant to Bankruptcy Rule 2002; (xxiii) all persons or entities known to the Debtors that have or have asserted a lien on, or security interest in, all or any portion of the Assets; and (xxiv) any Potential Bidders previously identified or otherwise known to the Debtors (collectively, the “Sale Notice Parties”).

33. The Debtors further request, pursuant to Bankruptcy Rule 9014, that objections, if any, to the proposed Sale: (a) be in writing; (b) comply with the Bankruptcy Rules and the Local Rules; (c) be filed with the Clerk of the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801; and (d) be served on: (i) counsel for the Debtors, (x) Foley Hoag LLP, (1) 1301 Avenue of the Americas, New York, NY 10019, Attn: Alison D. Bauer, Esq. (e-mail: [abauer@foleyhoag.com](mailto:abauer@foleyhoag.com)) and Jiun-Wen Bob Teoh, Esq. (e-mail: [jteoh@foleyhoag.com](mailto:jteoh@foleyhoag.com)), and (2) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (email: [ksl@foleyhoag.com](mailto:ksl@foleyhoag.com)), and (y) Gibbons P.C., (1) 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (email: [cmclamb@gibbonslaw.com](mailto:cmclamb@gibbonslaw.com)) and (2) One Gateway Center, Newark, New Jersey 07102, Attn: Robert K. Malone, Esq. (email: [rmalone@gibbonslaw.com](mailto:rmalone@gibbonslaw.com)); (ii) counsel to any Committee; (iii) the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801 (Attn: Jane Leamy); and (iv) counsel to the Senior Secured Lenders, Greenberg Traurig, LLP, One Vanderbilt Avenue, New York, New York 10017, Attn: Oscar N. Pinkas (email: [pinkaso@gtlaw.com](mailto:pinkaso@gtlaw.com)) and Brian E. Greer (email: [greerb@gtlaw.com](mailto:greerb@gtlaw.com)).

**E. Procedures Relating to Executory Contracts and Unexpired Leases, Including Determination of Cure Amounts and Deadlines for Objections to Assumption, and Assumption and Assignment of Contracts in Connection with a Sale and Plan**

34. Given the number of executory contracts and unexpired leases to which the Debtors are parties, the Debtors seek to establish (a) procedures for determining the Cure Amounts and (b) the deadline for lodging objections to the Cure Amounts and/or the proposed assumption and assignment of executory contracts and unexpired leases (collectively, the “Contracts” and the procedures provided for herein, the “Contract Procedures”). The Contracts that may be assumed and/or assigned by the Debtors will be listed on a schedule filed with the Bankruptcy Court no later than March 29, 2024 (the “Contracts Schedule”).

35. Relatedly, no later than March 29, 2024, the Debtors shall serve by mail a notice, substantially in the form annexed as **Exhibit 3** to the Bid Procedures Order (a “Cure Notice”), on the non-Debtor counterparties to all Contracts (collectively, the “Contract Parties”) listed on the Contracts Schedule.

(i) Contract Objections

36. To facilitate a prompt resolution of (a) disputes relating to the Cure Amounts and (b) any other objections relating to the assumption and/or the assumption and assignment of the Contracts, the Debtors propose the following deadlines and procedures:

1. The Contract Parties shall have until 4:00 p.m. (ET) on the date that is fourteen (14) days following service of the Cure Notice (the “Contract Objection Deadline”), which deadline may be extended in the sole discretion of the Debtors, with the consent of the Senior Secured Lenders, to object (a “Contract Objection”) to (i) the Cure Amounts listed by the Debtors and to propose alternative Cure Amounts, and/or (ii) the proposed assumption and/or assumption and assignment of the Contracts (other than a Successful Bidder Adequate Assurance Objection (as defined in below) unless the Successful Bidder is the Senior Secured Lenders (or any designee thereof)).

- i. ***provided, however,*** that any objections related solely to the adequate assurance of future performance to be provided by the Successful Bidder in a Sale Scenario (a “Successful Bidder Adequate Assurance Objection”) shall be filed by Sale Objection Deadline unless the Successful Bidder is the Senior Secured Lenders (or any

designee thereof), in which case any such objections shall be filed on or before the Contract Objection Deadline;

- ii. **provided, further, however,** if the Debtors amend the Cure Notice after the Contract Objection Deadline to add a Contract, the Debtors shall promptly file and serve by mail a supplemental Cure Notice (the “Additional Cure Notice”) on the affected non-Debtor counterparties, substantially in the form attached as **Exhibit 4** to the Bid Procedures Order, and the non-Debtor party to the added contract or lease shall have until the earlier of (a) fourteen (14) days after service of notice of the additional contract or lease; or (b) the Sale Hearing to submit a Contract Objection with respect to the added Contract (the “Amended Contract Objection Deadline”); and
- iii. **provided, further, however,** that if the Debtors amend the Cure Notice after the Contract Objection Deadline to reduce the Cure Amount of a Contract, except where such reduction was upon mutual agreement of the parties, the non-Debtor party to the reduced Cure Amount contract or lease shall have until the Amended Contract Objection Deadline to object to the reduced Cure Amount.

- 2. The Debtors, the relevant Contract Party, and the Senior Secured Lenders (or, if applicable, the Successful Bidder) may consensually resolve the Contract Objection prior to, or after, the Sale Hearing. In the event the Contract Objection is not resolved, such Contract Objection will be heard at the Sale Hearing or thereafter. To the extent it is determined that the applicable Cure Amount exceeds the amount set forth in the Contracts Schedule, or an objection to assumption or assumption and assignment is sustained with regard to a Contract designed to be assumed or assumed and assigned (as applicable, the “Assumed/Assigned Contract”), the Senior Secured Lenders (or the Successful Bidder, if applicable) may determine to not have such Contract assumed or assumed and assigned to it.
- 3. Unless a Contract Objection is filed and served before the Contract Objection Deadline or the Amended Contract Objection Deadline, as applicable, all Contract Parties shall be:
  - a. forever barred from objecting to the proposed Cure Amounts and from asserting any additional cure or other amounts (other than as may be asserted in an Additional Cure Notice), and the Debtors, the Senior Secured Lenders, and the Successful Bidder shall be entitled to rely solely upon the proposed Cure Amounts set forth in the Cure Notice or the Additional Cure Notice, as applicable;
  - b. deemed to have consented to the assumption or assumption and assignment of the applicable Contracts;



- c. forever barred and estopped from asserting or claiming against the Debtors, the reorganized Debtors, the Senior Secured Lenders (and their designee) or the Successful Bidder, or their respective property, that any additional amounts are due or other defaults exist (other than as may be asserted in an Additional Cure Notice), that conditions to assignment must be satisfied under such Contracts, including, without limitation, any consent rights, or that there is any objection or defense to the assumption or assumption and assignment of such Contracts, including without limitation, adequate assurance of future performance;
- d. precluded from objecting to the Cure Amounts (if any) and the assumption and/or assumption and assignment; and
- e. barred and estopped from asserting or claiming that an Assumed/Assigned Contract contains an enforceable consent right.

**(ii) Designation by Qualified Bidders**

37. On or before the Bid Deadline, any Qualified Bidder (excluding the Senior Secured Lenders) shall, by delivering written notice to the Debtors and the Senior Secured Lenders, provide its initial designation of Contracts on the Contracts Schedule it wishes to become an Assumed/Assigned Contract. The Successful Bidder may remove any Assumed/Assigned Contract from such schedule prior to the Closing.

38. Immediately prior to the Sale Hearing, the Debtors shall file the Successful Bidder's list of Assumed/Assigned Contracts as of such date.

39. The Debtors request that the Sale Order, among other things:

- a. authorize and approve the assumption of the Assumed/Assigned Contracts or assumption and assignment (as applicable) of the Assumed/Assigned Contracts to the Successful Bidder or the Senior Secured Lenders (or their designee) (as applicable) upon the Closing, without the need for any further action by any party, pursuant to section 365 of the Bankruptcy Code;
- b. provide that where the Contract Party is unable to establish that a default exists under its Contract with the Debtor(s), the Cure Amount relating to such Contract shall be set at \$0.00; and
- c. find adequate assurance of future performance necessary to satisfy the requirements of section 365 of the Bankruptcy Code in respect of the

assumption and/or the assumption and assignment of the Assumed/Assigned Contracts.

### **RELIEF REQUESTED**

40. By this Motion, the Debtors seek the entry of two orders of the Bankruptcy Court: (a) the Bid Procedures Order (i) approving the Bid Procedures in connection with the solicitation and acceptance of bids with respect to the proposed Sale of the Assets; (ii) scheduling the Sale Hearing and setting objection deadlines with respect to the Sale; (iii) approving the form and manner of notice of the Sale and related Auction; (iv) establishing procedures to determine Cure Amounts and deadlines for objections to the potential assumption and assignment of executory contracts and unexpired leases and approving the form and manner of notice thereof; and (v) granting related relief; and (b) the Sale Order (i) authorizing and approving the Sale; (ii) authorizing the Sale free and clear of Encumbrances; (iii) authorizing the assumption and assignment of the Assumed/Assigned Contracts; and (iv) granting related relief.

41. The Debtors believe that the proposed Bid Procedures and potential Sale will maximize the value of the Assets for all stakeholders by fostering an environment for open and robust bidding on the Assets.

### **BASIS FOR RELIEF REQUESTED**

#### **A. The Bid Procedures Are Fair and Reasonable and Are Designed to Not Chill Bidding**

42. Maximization of proceeds received by the estate is one of the dominant goals of any proposed sale of estate property. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (debtor in possession “had a fiduciary duty to protect and maximize the estate’s assets”). In the hope of maximizing the value received by bankruptcy estates, courts typically establish procedures that are intended to enhance competitive bidding by, among other things, setting forth the rules that will govern the auction process. *See, e.g., In re Edwards*, 228 B.R. 552, 561 (Bankr.

E.D. Pa. 1998) (bid procedures should allow for “an open and fair public sale designed to maximize value for the estate”); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court-imposed rules for the disposition of assets ... [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”).

43. The Debtors submit that the Bid Procedures are designed to maximize the value received for the Assets and prevent any chilling of potential bids by establishing a competitive and fair bidding process. The process set forth in the Bid Procedures allows for a timely and efficient auction process given the circumstances facing the Debtors, while providing Potential Bidders with sufficient time and information to submit a Bid and perform diligence. The Bid Procedures are designed to ensure that the Assets will be sold for the highest or otherwise best possible purchase price by subjecting the value of the Assets to market testing and permitting prospective buyers to bid on the Assets. The Debtors and all parties in interest can be assured that the consideration received for the Assets will be fair and reasonable and that the proposed Bid Procedures will not chill bidding by any Potential Bidders. The proposed Bid Procedures are fair and appropriate in light of the extensive prepetition marketing process undertaken by the Debtors and their professionals.

44. Procedures to dispose of assets similar to the proposed Bid Procedures have been approved in many other chapter 11 cases in this District. *See, e.g., In re Pear Therapeutics, Inc.*, Case No. 23-10429 (TMH) (Bankr. D. Del. Apr. 28, 2023); *In re Allena Pharmaceuticals, Inc.*, Case No. 22-10842 (KBO) (Bankr. D. Del. Sep. 28, 2022); *In re EdgeMarc Energy Holdings, LLC*, Case No. 19-11104 (BLS) (Bankr. D. Del. June 21, 2019); *In re Things Remembered, Inc.*, Case No. 19-10234 (KG) (Bankr. D. Del. Feb. 21, 2019); *In re Argos Therapeutics, Inc.*, Case No. 18-12714 (KJC) (Bankr. D. Del. Dec. 20, 2018); *In re Bertucci's Holdings, Inc.*, Case

No. 18-10894 (MFW) (Bankr. D. Del. May 7, 2018); *In re Seastar Holdings, Inc.*, Case No. 18-10039 (CSS) (Bankr. D. Del. Jan. 29, 2018); *In re Peekay Acquisition, LLC*, Case No. 17-11722 (BLS) (Bankr. D. Del. Sept. 7, 2017); *In re Jumio, Inc.*, Case No. 16-10682 (BLS) (Bankr. D. Del. Apr. 21, 2016); *In re City Sports, Inc.*, Case No. 15-12054 (KG) (Bankr. D. Del. Oct. 23, 2015); *In re Saladworks*, Case No. 15-10327 (LSS) (Bankr. D. Del. Mar. 11, 2015); *In re iGPS Co. LLC*, Case No. 13-11459 (KG) (Bankr. D. Del. July 31, 2013); *Tri-Valley Corp.*, Case No. 12-12291 (MFW) (Bankr. D. Del. Sept. 5, 2012); *WP Steel Venture LLC*, Case No. 12-11661 (KJC) (Bankr. D. Del. June 21, 2012). The Debtors thus believe that the proposed Bid Procedures provide an appropriate framework for establishing that the Debtors will receive the highest or otherwise best offer for the Assets. The proposed Bid Procedures are reasonable, appropriate and within the Debtors' sound business judgment under the circumstances.

**B. The Proposed Sale Notice, Providing the Proposed Dates for the Sale Objection Deadline and the Sale Hearing, Is Appropriate**

45. The Debtors submit that the notice to be provided through the Sale Notice and the method of service proposed herein fully complies with the requirements of Bankruptcy Rule 2002 and constitutes good and adequate notice of the Bid Procedures and the subsequent proceedings related thereto, including the proposed dates for: (a) the Bid Deadline; (b) the Sale Objection Deadline; and (c) the Sale Hearing. Therefore, the Debtors respectfully request that the Bankruptcy Court approve the proposed notice procedures.

**C. The Contract Procedures Provide Adequate Notice and Opportunity to Object and Should be Approved**

46. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or [unexpired] lease of the debtor." 11 U.S.C. § 365(a). As discussed in greater detail below, the standard governing bankruptcy court approval of the Debtors' decision to assume or reject an

executory contract or unexpired lease is whether the Debtors' reasonable business judgment supports assumption or rejection. *See, e.g., In re Stable Mews Assoc., Inc.*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984).

47. The Debtors submit that the proposed Contract Procedures are appropriate and reasonably tailored to provide the Contract Parties with adequate notice of the proposed assumption or assumption and assignment of the applicable Contracts, as well as proposed Cure Amounts, if applicable. Such Contract Parties then will be given an opportunity to object to such notice. The Contract Procedures further provide that, in the event an objection is not resolved, the Bankruptcy Court will determine related disputed issues (including any adequate assurance of future performance issues). The Debtors submit that implementation of the proposed Contract Procedures is appropriate in these Chapter 11 Cases.

48. The Contract Procedures comport with the requirements of section 365 of the Bankruptcy Code (as described fully below) and Bankruptcy Rule 6006, and the non-Debtor contract counterparties' rights to adequate assurance are unaffected and fully preserved. The Debtors respectfully submit that the notices required by the Contract Procedures are sufficient to assume and assign the Assumed/Assigned Contracts because they are reasonably tailored to provide notice and an opportunity to object to the proposed assumption and assignment. For these reasons, the Contract Procedures and related notices should be approved.

**D. The Sale is Within the Sound Business Judgment of the Debtors and Should Be Approved**

49. Ample authority exists for approval of a proposed Sale to a Successful Bidder. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 363 of the Bankruptcy Code does not set

forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a Debtors' assets prior to confirmation of a plan. However, courts in the Third Circuit and others have required that the decision to sell assets outside the ordinary course of business be based upon the sound business judgment of the debtor. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (internal citation omitted); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070-71 (2d Cir. 1983); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147-48 (3d Cir. 1986) (implicitly adopting the "sound business judgment" test of *In re Lionel Corp.*); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (holding that the Third Circuit adopted the "sound business judgment" test in *Abbotts Dairies*); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147-53 (D. Del. 1999) (same).

50. The "sound business judgment" test requires a debtor to establish four elements in order to justify the sale or lease of property outside the ordinary course of business: (a) that a "sound business purpose" justifies the sale of assets outside the ordinary course of business; (b) that adequate and reasonable notice has been provided to interested parties; (c) that the debtor has obtained a fair and reasonable price; and (d) good faith. *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d at 143; *Titusville Country Club v. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Sovereign Estates, Ltd*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989). A debtor's showing of a sound business purpose need not be unduly exhaustive but, rather, a debtor is "simply required to justify the proposed disposition with sound business reasons." *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. *Lionel*, 722 F.2d at 1071; *Montgomery Ward*, 242 B.R. at 155 (approving funding of

employee incentive and severance program and holding that the business purpose requirement was fulfilled, because stabilizing turnover rate and increasing morale were necessary to successful reorganization). The demonstration of a valid business justification by the debtor leads to a strong presumption “that in making [the] business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

51. Additionally, section 105(a) of the Bankruptcy Code provides a bankruptcy court with broad powers in the administration of a case under the Bankruptcy Code. Section 105(a) provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Provided that a bankruptcy court does not employ its equitable powers to achieve a result not contemplated by the Bankruptcy Code, the exercise of its section 105(a) power is proper. *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993); *Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002).

**(i) A “Sound Business Purpose” Supports the Sale**

52. As set forth in the First Day Declaration, the Debtors have determined, in the exercise of their reasonable business judgment, that the most effective way to maximize the value of their estates for the benefit of their constituents is to propose a chapter 11 plan that provides for a “toggle” between a Stand-Alone Restructuring Scenario and, if a superior offer emerges as determined by the Debtors with the consent of the Senior Secured Lenders, a Sale of the Assets. To that end, the Debtors, with the assistance of their professionals, have designed the Bid

Procedures to promote a fair and open atmosphere for bidding on the Debtors' assets, with the goal of maximizing value to be distributed to creditors of the Debtors' estates.

***(ii) Sufficient Notice of the Proposed Sale Has Been Provided to Interested Parties***

53. Pursuant to the Bid Procedures and the notice procedures set forth herein, the Debtors will employ various methods of notification to ensure that all interested and potentially affected parties will be informed of the Sale. In order to generate the greatest number of bidders possible for the Sale and to satisfy the requirements of Bankruptcy Rule 2002, the Debtors will serve the Sale Notice upon the Sale Notice Parties.

54. The Debtors will file and serve the Cure Notice on all non-Debtor counterparties to the Contracts listed in the Contracts Schedule, providing them with notice of this Motion, the potential assumption and assignment of the Contracts, and the Debtors' proposed Cure Amount with respect to each Contract. The Debtors submit that more than ample notice of the Sale will be provided to interested parties under the facts and circumstances of these Chapter 11 Cases.

***(iii) The Proposed Sale is for a Fair and Reasonable Price***

55. At the Sale Hearing, the Debtors will establish that the purchase price for the Assets is fair and reasonable. The Bid Procedures have been designed to ensure that the highest or otherwise best offer for the Assets will be attained in connection with the restructuring provided for under the Debtors' chapter 11 plan. With the assistance of SSG, the Debtors continue to:

(a) conduct a comprehensive marketing process in order to maximize value; (b) solicit the interest of various potential strategic and financial buyers; and (c) entertain offers for a sale transaction that will maximize the value of the Debtors' Business. The Debtors expect that their continued



marketing efforts will result in the submission of one or more competing bids prior to the proposed Bid Deadline.

56. Because the ultimate purchase price for the Assets will be determined in accordance with the Bankruptcy Court-approved Bid Procedures at an Auction, it will be fair and reasonable as contemplated by section 363 of the Bankruptcy Code. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d at 149 (finding that “[g]enerally speaking, an auction may be sufficient to establish that one has paid ‘value’ for the assets of a bankrupt”); *In re Nat’l Health & Safety Corp.*, 1999 Bankr. LEXIS 1126 (Bankr. E.D. Pa. Sept. 2, 1999) (citing *Abbotts Dairies* for the proposition that an auction may be sufficient to establish that one has paid value for the assets of a debtor, and relying upon auction results to verify that the purchase price represented value).

**(iv) *The Proposed Sale Has Been Negotiated at Arm's Length and in Good Faith***

57. The “good faith” prong of the *Abbotts Dairies* standard is also satisfied. The Debtors request that the Bankruptcy Court find that the Successful Bidder is entitled to the benefits and protections provided by section 363(m) of the Bankruptcy Code in connection with the Sale. Section 363(m) provides, in pertinent part:

The reversal or modification on appeal of an authorization under subsection (b) . . . of this section of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m).

58. Section 363(m) of the Bankruptcy Code thus protects the buyer of assets sold pursuant to section 363 from the risk that it will lose its interest in the assets if the order allowing the sale is reversed on appeal. By its terms, section 363(m) of the Bankruptcy Code applies to sales of interests in tangible assets, such as the Assets.

59. The Debtors submit, and will present evidence at the Sale Hearing, if necessary, that as set forth above, the Successful Bidder's purchase agreement will be an arm's-length transaction, in which the Successful Bidder acted in good faith. The Debtors and the Successful Bidder will have negotiated the Successful Bidder's purchase agreement in good faith and without collusion or fraud of any kind. The Successful Bidder will not have engaged in collusion or any conduct that would otherwise control or tend to control the sale price as between or among Potential Bidders. The Bid Procedures are designed to maximize rather than chill competitive bidding and the Auction promotes an open and competitive sale process. The Debtors will have their own legal counsel in negotiations over the Successful Bid, and the Successful Bidder will likely have its own legal counsel to negotiate throughout the Auction and the Sale. The Debtors will request that the Bankruptcy Court find at the Sale Hearing that the Successful Bidder has purchased the Assets in good faith within the meaning of section 363(m).

**(v) *All Pertinent Information Regarding the Proposed Sale Has Been Fully Disclosed***

60. The Debtors have presented the proposed Sale openly and in good faith. The Debtors have fully disclosed and requested the Bankruptcy Court's approval of all of the terms and conditions of the proposed Sale. Sufficient and adequate notice of this Motion has been provided to interested parties and such parties will receive further notice of the Sale and all relevant dates and deadlines related thereto through the Bankruptcy Court-approved Sale Notice.

61. The Debtors will be prepared to introduce evidence at the Sale Hearing regarding the arm's-length, good faith nature of the Auction and the negotiation of any agreement with a Successful Bidder. Indeed, the Debtors will be able to demonstrate that the Bid from any Successful Bidder represents the highest or otherwise best bid available to the Debtors for the Assets following a robust marketing and competitive bidding process. Accordingly, any Sale will

be proposed and fully disclosed in good faith and will represent the sound business judgment of the Debtors, and, as such, is entitled to Bankruptcy Court approval.

**E. The Sale Satisfies the Requirements of Section 363(f) of the Bankruptcy Code**

62. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell all or any part of its property free and clear of any and all liens, claims or interests in such property if: (a) such a sale is permitted under applicable non-bankruptcy law; (b) the party asserting such a lien, claim or interest consents to such sale; (c) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property; (d) the interest is the subject of a *bona fide* dispute; or (e) the party asserting the lien, claim or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f); *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988).

63. Here, any proposed Sale will satisfy the criteria set forth in section 363(f) of the Bankruptcy Code. The Debtors believe that, at a minimum, any proposed Sale satisfies the fifth prong of section 363(f) of the Bankruptcy Code because the holders of any liens, claims, encumbrances, or interests could be compelled, in a legal or equitable proceeding, to accept a monetary satisfaction equal to the amount of their lien, claim, encumbrance, or interest.

**F. The Assumption and/or the Assumption and Assignment of Executory Contracts and Unexpired Leases Should Be Authorized.**

64. As explained above, section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession “subject to the court’s approval, may assume or reject any executory contract or [unexpired] lease of the debtor.” 11 U.S.C. § 365(a). The standard governing bankruptcy court approval of a Debtors’ decision to assume or reject an executory contract or unexpired lease is whether the Debtors’ reasonable business judgment supports

assumption or rejection. *See, e.g., In re Stable Mews Assoc., Inc.*, 41 B.R. at 596. If a debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See Grp. of Institutional Investors v. Chi., M., St. P. & P.R. Co.*, 318 U.S. 523 (1943); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989). The business judgment test "requires only that the trustee [or debtor in possession] demonstrate that [assumption or] rejection of the contract will benefit the estate." *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987) (quoting *In re Stable Mews Assoc., Inc.*, 41 B.R. at 596). Any more exacting scrutiny would slow the administration of a debtor's estate and increase costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially. *See Richmond Leasing Co. v. Capital Bank, NA.*, 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, pursuant to section 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must "cure, or provide adequate assurance that the debtor will promptly cure," any default, including compensation for any "actual pecuniary loss" relating to such default. 11 U.S.C. § 365(b)(1).

65. Once an executory contract is assumed, the trustee or debtor in possession may elect to assign such contract. *See In re Rickel Home Centers, Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) ("[t]he Code generally favors free assignability as a means to maximize the value of the Debtors' estate"); *see also In re Headquarters Dodge, Inc.*, 13 F.3d 674, 682 (3d Cir. 1994) (noting the purpose of section 365(f) is to assist the trustee in realizing the full value of the debtor's assets).

66. Section 365(f) of the Bankruptcy Code provides, in pertinent part, that a trustee may assign an executory contract or unexpired lease of a debtor only if:

- (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
- (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

67. Section 365(a) of the Bankruptcy Code provides that a debtor, “subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Moreover, section 365(b) of the Bankruptcy Code codifies the requirements for assuming an executory contract of a debtor. This provision provides that:

- (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee —
  - (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . .;
  - (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
  - (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

68. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” *See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent). Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *Accord*

*In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from debtors has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

69. To the extent any defaults exist under any Assumed/Assigned Contracts sought to be assumed by the Debtors and/or assigned to the Successful Bidder, such defaults will be cured as required under section 365(b)(1) of the Bankruptcy Code.

70. Further, the Debtors and/or the Successful Bidder will establish at the Sale Hearing that the Successful Bidder (or reorganized Debtor) has the financial capability to satisfy any and all obligations it will incur in connection with the Assumed/Assigned Contracts. In addition, under the proposed Bid Procedures, in order to be considered a Qualified Bid submitted by a Qualified Bidder, among other things, a Potential Bidder must establish it has the financial capability to satisfy any and all obligations it will incur in connection with the Assumed/Assigned Contracts. Further, facts will be further adduced at the Sale Hearing to show the financial wherewithal of the Successful Bidder, its experience in the industry and its willingness and ability to satisfy obligations under the Assumed/Assigned Contracts. Because the Sale Hearing will provide the Bankruptcy Court with an opportunity to evaluate the ability of the Successful Bidder to provide adequate assurance of future performance under the Assumed/Assigned Contracts, as required by section 365(b)(1)(C) of the Bankruptcy Code, the Debtors submit that the Bankruptcy Court should authorize the assumption and assignment of the Assumed/Assigned Contracts by the Debtors, effective upon the Closing of the proposed Sale.

71. Additionally, the contract procedures set forth herein provide that all of the counterparties to Contracts with the Debtors will be given notice of this Sale Motion and through

the Cure Notice and any Additional Cure Notice will be provided with notice of the potential assumption or assumption and assignment of their Contract and the Debtors' proposed Cure Amounts associated therewith. Based on the foregoing, the Debtors respectfully submit that their assumption and assignment of the Assumed/Assigned Contracts satisfies the requirements under section 365(f)(2)(A) and (B) of the Bankruptcy Code.

**G. Relief from the Fourteen Day Waiting Period Under Bankruptcy Rules 6004(h) and 6006(d) Is Appropriate**

72. The Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[an] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise.” *See* Fed. R. Bankr. P. 6004(h). As set forth above, the relief requested herein is essential to maximize the value of the Debtors' estate for the benefit of all stakeholders.

73. Pursuant to Bankruptcy Rule 6004(h), unless the Bankruptcy Court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for fourteen (14) days after entry of the order. *See id.* The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(g).

74. Similarly, Bankruptcy Rule 6006(d) stays all orders authorizing a debtor to assign an executory contract or unexpired lease pursuant to section 365(f) of the Bankruptcy Code for fourteen (14) days, unless the Bankruptcy Court orders otherwise. *See* Fed. R. Bankr. P. 6006(d).

75. To preserve the value of the Assets and limit the costs of administering and preserving such assets, it is critical that the Debtors consummate the Restructuring (and, if

applicable, close the Sale) as soon as possible after all closing conditions have been achieved or waived. Accordingly, the Debtors hereby request that the Bankruptcy Court waive the fourteen (14) day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

76. Based upon the foregoing, the Debtors submit that the relief requested herein is necessary and appropriate, is in the best interests of the Debtors and their estates, and should be granted in all respects.

**NOTICE AND NO PRIOR REQUEST**

77. Notice of this Motion as it relates to approval of the Bid Procedures has been given to the Sale Notice Parties, excluding the Debtors' known creditors. Notice of the Motion as it relates to the approval of the Sale and related requests will be given to the Sale Notice Parties. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

78. No prior Motion for the relief requested herein has been made to this or any other court.

*[Remainder of Page Intentionally Left Blank]*



**WHEREFORE**, the Debtors respectfully request that the Bankruptcy Court grant the relief requested herein and such other and further relief as the Bankruptcy Court may deem just and proper.

Dated: February 29, 2024

/s/ Katharina Earle

Chantelle D. McClamb (No. 5978)

Katharina Earle (No. 6348)

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*Proposed Co-Counsel for Debtors Burgess  
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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10235 (LSS)

(Jointly Administered)

**Objection Deadline: March 14, 2024 at 4:00 p.m. (ET)**

**Hearing Date: March 25, 2024 at 11:00 a.m. (E.T)**

**NOTICE OF HEARING**

**TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (II) THE HOLDERS OF THE TWENTY (20) LARGEST UNSECURED CLAIMS AGAINST EACH DEBTOR; (III) COUNSEL TO DEUTSCHE BANK TRUST COMPANY AMERICAS IN ITS CAPACITY AS COLLATERAL AGENT, HOGAN LOVELLS LLP; (IV) COUNSEL TO THE DIP LENDERS AND THE SENIOR SECURED NOTEHOLDERS, GREENBERG TRAURIG, LLP; (V) BERLIN BIOPOWER INVESTMENT FUND, LLC, WITH A COPY TO MURRAY PLUMB & MURRAY; (VI) GREENLINE CDF SUBFUND XVIII LLC, WITH A COPY TO KUTAK ROCK LLP, U.S. BANCORP COMMUNITY DEVELOPMENT CORPORATION AND LEVERAGE LAW GROUP, LLC; (VII) PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY, WITH A COPY TO HUNTON ANDREWS KURTH LLP; (VIII) THE UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF DELAWARE; (IX) THE UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF NEW HAMPSHIRE; (X) THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; (XI) THE NUCLEAR REGULATORY COMMISSION; (XII) THE UNITED STATES DEPARTMENT OF ENERGY; (XIII) THE FEDERAL ENERGY REGULATORY COMMISSION; (XIV) NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES; (XV) NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION; (XVI) NEW HAMPSHIRE SITE EVALUATION COMMITTEE; (XVII) NEW HAMPSHIRE DEPARTMENT OF ENERGY; (XVIII) CITY OF BERLIN; (XIX) ISO NEW ENGLAND, INC.; (XX) THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION; (XXI) THE INTERNAL REVENUE SERVICE; (XXII) ANY PARTY THAT HAS REQUESTED NOTICE PURSUANT TO BANKRUPTCY RULE 2002; (XXIII) ALL PERSONS OR ENTITIES KNOWN TO THE DEBTORS THAT HAVE OR HAVE ASSERTED A LIEN ON, OR SECURITY INTEREST IN, ALL OR ANY PORTION OF THE ASSETS; AND (XXIV) ANY POTENTIAL BIDDERS**

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<sup>1</sup> 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.

**PREVIOUSLY IDENTIFIED OR OTHERWISE KNOWN TO THE DEBTORS (THE  
“SALE NOTICE PARTIES”).**

**PLEASE TAKE NOTICE** that the above captioned debtors and debtors in possession (the “Debtors”) in these chapter 11 cases (the “Chapter 11 Cases”) filed the *Debtors’ Motion for Entry of (A) an Order (I) Approving Bid Procedures Relating to the Sale of All or Substantially All of the Debtors’ Assets, (II) Scheduling a Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice of Sale By Auction, (IV) Establishing Procedures for the Assumption and/or Assumption and Assignment of Contracts and Leases and Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief; and (B) an Order (I) Authorizing the Sale of Assets Outside the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interests, (III) Authorizing the Assumption and/or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Court”).

**PLEASE TAKE FURTHER NOTICE** that any objections or responses to the relief requested in the Motion must be filed on or before **March 14, 2024 at 4:00 p.m. (ET)** (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 N. Market Street, 3rd Floor, Wilmington, Delaware 19801 and served upon, so as to be actually received by, the undersigned proposed counsel for the Debtors on or before the Objection Deadline.

**PLEASE TAKE FURTHER NOTICE** that a copy of the Motion and all other pleadings filed in these Chapter 11 Cases are available, free of charge, from the website of the Court-appointed claims agent, Epiq: <https://dm.epiq11.com/case/burgess/info>.

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON MARCH 25, 2024 AT 11:00 A.M. (ET) BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 N. MARKET STREET, WILMINGTON, DELAWARE 19801 (THE “HEARING”).**

**PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS OR RESPONSES TO THE MOTION ARE TIMELY FILED, SERVED, AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.**

Dated: February 29, 2024

/s/ Katharina Earle  
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Katharina Earle (No. 6348)  
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*Proposed Co-Counsel for Debtors Burgess  
BioPower, LLC and Berlin Station, LLC*

**EXHIBIT A**  
**(Proposed Order)**

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

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

**ORDER (I) APPROVING BID PROCEDURES RELATING TO THE SALE OF ALL OR  
SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (II) SCHEDULING A  
HEARING TO CONSIDER THE SALE, (III) APPROVING THE FORM AND MANNER  
OF NOTICE OF SALE BY AUCTION, (IV) ESTABLISHING PROCEDURES FOR THE  
ASSUMPTION AND/OR ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND  
LEASES AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF,  
AND (V) GRANTING RELATED RELIEF**

Upon the Motion<sup>2</sup> filed by the above-captioned debtors and debtors in possession (the “Debtors”), pursuant to sections 105(a), 363, 365, and 503 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”), and Rules 2002, 6004, 6006, 9007 and 9008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 2002-1 and 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), for entry of an order (the “Bid Procedures Order”) (a) approving the procedures (the “Bid Procedures”), substantially in the form attached hereto as Exhibit 1, with respect to the expected sale (the “Sale”) of all or substantially all of the Debtors’ assets (the “Assets”), (b) scheduling a hearing on the Sale (the “Sale Hearing”) and setting objection and bidding deadlines with respect to the Sale, (c) approving the form and manner of notice of the Sale and the auction (the “Auction”) for the Assets, a copy of which is attached hereto

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not defined herein shall have the same meanings given to such terms as in the Motion.

as Exhibit 2 (the “Sale Notice”), (d) establishing procedures to determine Cure Amounts and deadlines for objecting to the assumption and/or assumption and assignment of executory contracts and unexpired leases as set forth in the Motion (collectively, the “Contract Procedures”); and (e) granting related relief; and it appearing that notice of the Motion is appropriate and sufficient under the circumstances and that no other or further notice need be given; and it appearing that the relief requested is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and good and sufficient cause appearing therefor;

**THE COURT HEREBY FINDS AND CONCLUDES THAT:<sup>3</sup>**

A. This Court has jurisdiction over this matter and over the property of the Debtors and their estates pursuant to 28 U.S.C. §§ 157 and 1334. This proceeding is a core proceeding pursuant to 28 U.S.C. § 157. Venue is proper in this district and in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. The statutory and rule-based predicates for the relief requested in the Motion are sections 105(a), 363, 365, and 503 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, 9007, 9008 and Local Rules 2002-1 and 6004-1.

C. Notice of the Motion having been given as set forth in the Motion is sufficient in light of the circumstances and the nature of the relief requested in the Motion and no other or further notice is necessary or required, except as otherwise set forth herein.

D. The Debtors, based on the evidence submitted to the Court in connection with the Motion, have articulated good and sufficient reasons for this Court to grant the relief requested in

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<sup>3</sup> The findings and conclusions set forth herein constitute the Court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

the Motion regarding the Sale process, including, without limitation: (a) approving the Bid Procedures; (b) scheduling the Auction and the Sale Hearing; (c) approving the Sale Notice; and (d) approving the Cure Notice and Contract Procedures.

E. Based on the evidence submitted to the Court in connection with the Motion, the Bid Procedures were proposed and negotiated in good faith by the Debtors, are fair, reasonable and appropriate under the circumstances, and are properly designed to maximize the recovery from any sale of the Assets.

F. The form and scope of the Sale Notice attached hereto as Exhibit 2 is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Sale, the Sale Hearing and the Auction and no other and further notice is required.

G. The Contract Procedures and the notices related thereto, including the Cure Notice attached hereto as Exhibit 3 and the Additional Cure Notice attached as Exhibit 4, are appropriate and reasonably calculated to provide all Contract Parties with proper notice of the potential assumption and assignment of the Contracts and any Cure Amounts relating thereto, and no further or other notice is required.

H. The entry of this Bid Procedures Order is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it is therefore

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The relief requested in the Motion is GRANTED as set forth herein.
2. The Bid Procedures and Contract Procedures are approved in all respects and the relief requested in the Motion as it pertains to the Bid Procedures and Contract Procedures, is granted.



3. All objections to the relief requested in the Motion with respect to the Bid Procedures or the Contract Procedures that have not been withdrawn, waived, or settled as announced to the Court at the hearing on the Motion or as reflected in this Bid Procedures Order or by stipulation or withdrawal filed with the Court, are overruled.

4. The Bid Procedures attached hereto as **Exhibit 1** are hereby approved and fully incorporated into this Bid Procedures Order and shall apply with respect to the Auction and the proposed Sale of the Assets.

5. The Debtors are authorized to take any and all actions necessary or appropriate, consistent with the terms of this Bid Procedures Order, to implement the Bid Procedures.

6. Pursuant to the Bid Procedures, the Debtors, in consultation with any Committee and with the consent of the Senior Secured Lenders, shall have the right to determine at the Auction that any Qualified Bid shall be the Back-Up Bid.

7. Pursuant to the Bid Procedures, a Potential Bidder that desires to make a Bid shall deliver written copies of its Bid to the parties identified in the Bid Procedures no later than **May 6, 2024 at 4:00 p.m. (ET)**, (the “Bid Deadline”) and shall comply with all other requirements set forth in the Bid Procedures in making such a bid for the Assets.

8. To the extent the Debtors receive at least two Qualified Bids, the Debtors may, in their business judgment and upon consultation with the Senior Secured Lenders and any Committee, conduct the Auction commencing on **May 13, 2024 beginning at 10:00 a.m. (ET)**, at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019, or by remote audio and video link.

9. If the Debtors do not receive two or more Qualified Bids, the Debtors will not hold the Auction. No later than **May 9, 2024 at 12:00 p.m. (ET)**, the Debtors shall notify all Potential

Bidders, the Senior Secured Lenders, and counsel to the Committee, if one is appointed, whether the Auction will occur.

10. Upon conclusion of the bidding at any Auction held, the Auction shall be closed, and the Debtors shall (a) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the Sale process and the Contract assumption process, including, without limitation, those factors affecting the speed and certainty of consummating the proposed Sale and the amount of the cash (or cash equivalents) consideration and (b) in consultation with the Committee, if any, and subject to the consent of the Senior Secured Lenders, identify the highest or otherwise best offer for the Assets (the “Successful Bid” and the entity submitting such Successful Bid, the “Successful Bidder”), the Back-Up Bid and the Back-Up Bidder (as defined below), and advise the Qualified Bidders of such determinations.

11. After the Successful Bid, the next highest or otherwise best offer (the “Back-Up Bid”), as determined by the Debtors, in consultation with the Committee, if any, and subject to the consent of the Senior Secured Lenders, shall remain open and irrevocable, and the entity submitting such Back-Up Bid (the “Back-Up Bidder”) shall be required to fully perform under such Back-Up Bid until the earliest to occur of (i) consummation of a Sale Transaction with the Successful Bidder and (ii) the release of such Back-Up Bid by the Debtors in writing (such date of release, the “Back-Up Bid Expiration Date”). The Back-Up Bidder will continue to cooperate with the Debtors to obtain the FERC Authorizations until the Back-Up Bid Expiration Date. In the event the Successful Bidder fails to consummate the Sale as a result of the Successful Bidder’s default or breach under the applicable purchase agreement in accordance with the terms of such purchase agreement by the closing date contemplated in such purchase agreement, the Debtors, in consultation with the Committee, if any, and subject to the consent of the Senior Secured Lenders,

may, but are not required to, deem the Back-Up Bid, as disclosed at the Sale Hearing, the Successful Bid, and consummate the Sale to the Back-Up Bidder without further order of the Court, and the Back-Up Bidder shall be obligated to consummate the Back-Up Bid as the Successful Bid.

12. The Debtors shall file a notice of the identity of the Successful Bidder, Back-Up Bidder, and the amount of the Successful Bid and Back-Up Bid with the Court by no later than **May 14, 2024 at 12:00 p.m. (ET)**. At that same time, the Debtors shall serve notice of the same by fax, email or (if neither is available) overnight mail to all non-Debtor counterparties whose Contracts are to be assumed and assigned and to all creditors who have requested the same in writing and provided their fax numbers, email address or street address, to Debtors' counsel.

13. In the event the Debtors' proposed plan of reorganization as to Burgess is withdrawn and the proposed plan of reorganization solely as to Berlin proceeds, regardless of whether such withdrawal occurs prior to or following the Bid Deadline, the Senior Secured Lenders (or their designees) may, in their sole discretion, submit a bid for some or all of Burgess's assets, and in such case, the Bid Procedures shall apply such that the Senior Secured Lenders (or their designees) shall be deemed a Qualified Bidder and such bid, a Qualified Bid, and the Debtors may seek approval of any such Sale to the Senior Secured Lenders (or their designees).

14. At any time before the entry of an order of the Court approving a Sale Transaction envisioned by a Qualified Bid, the Debtors may reject such Qualified Bid (other than one submitted by the Senior Secured Lenders, if one is submitted) if, in their reasonable business judgment, in consultation with the Committee, if any, and subject to the consent of the Senior Secured Lenders, it is (a) inadequate or insufficient, (b) not in conformity with the requirements of the Bankruptcy

Code, the Bid Procedures, or the terms and conditions of the proposed Sale Transaction, or (c) contrary to the best interests of the Debtors and their estates.

15. The Debtors' presentation of a particular Qualified Bid to the Court for approval does not constitute the Debtors' acceptance of such Qualified Bid. Other than as expressly set forth in this Bid Procedures Order, the Debtors will be deemed to have accepted a Bid only when the Bid has been approved by the Court at the Sale Hearing.

16. The Contract Procedures, setting forth, among other things, (a) the procedures for determining the Cure Amounts, and the deadline for objecting to the Cure Amounts and (b) the proposed assumption and/or assumption and assignment of Contracts, as provided in the Motion, are hereby approved in their entirety. Notice of the Contract Procedures in the form attached hereto as **Exhibit 3** and service of such notice of the Contract Procedures to the Contract Parties, are appropriate and sufficient under the circumstances, and no other or further notice need to be given.

17. The Court shall conduct the Sale Hearing commencing on **May 16, 2024 at 2:00 p.m. (ET)**, at which time the Court will consider approving the Sale to the Successful Bidder and entry of the Sale Order.

18. If applicable, the Debtors shall file a proposed Sale Order on or before May 14, 2024 (the "**Sale Order Deadline**").

19. Objections to approval of the Sale and entry of the Sale Order, including the sale of the Assets free and clear of all Encumbrances pursuant to section 363(f) of the Bankruptcy Code, with valid and perfected Encumbrances to attach to the proceeds of the Sale (if any) and the conduct of the Auction (if any) (a "**Sale Objection**"), must (a) be in writing, (b) state the name and address of the objecting party and the amount and nature of the claim or interest of such party, (c) state with particularity the basis and nature of the Sale Objection, and provide proposed

language that, if accepted and incorporated by the Debtors, would obviate such objection, (d) conform to the Bankruptcy Rules and the Local Rules, (e) be filed with the Court, and (f) served on (i) counsel for the Debtors, (x) Foley Hoag LLP, (1) 1301 Avenue of the Americas, New York, NY 10019, Attn: Alison D. Bauer, Esq. (e-mail: [abauer@foleyhoag.com](mailto:abauer@foleyhoag.com)) and Jiun-Wen Bob Teoh, Esq. (e-mail: [jteoh@foleyhoag.com](mailto:jteoh@foleyhoag.com)), and (2) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (email: [ksl@foleyhoag.com](mailto:ksl@foleyhoag.com)), and (y) Gibbons P.C., (1) 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (email: [cmclamb@gibbonslaw.com](mailto:cmclamb@gibbonslaw.com)) and (2) One Gateway Center, Newark, New Jersey 07102, Attn: Robert K. Malone, Esq. (email: [rmalone@gibbonslaw.com](mailto:rmalone@gibbonslaw.com)); (ii) counsel to any official committee of unsecured creditors appointed in these Chapter 11 Cases (the “Committee”); (iii) the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801 (Attn: Jane M. Leamy); and (iv) counsel to the Senior Secured Lenders, Greenberg Traurig, LLP, One Vanderbilt Avenue, New York, New York 10017, Attn: Oscar N. Pinkas (email: [pinkaso@gtlaw.com](mailto:pinkaso@gtlaw.com)) and Brian E. Greer (email: [greerb@gtlaw.com](mailto:greerb@gtlaw.com)), so as to be received by such parties prior to **May 14, 2024 at 4:00 p.m. (ET)** (the “Sale Objection Deadline”). The Debtors shall file any replies to Sale Objections prior to **May 15, 2024 at 4:00 p.m. (ET)**.

20. Objections to (a) the Cure Amounts listed by the Debtors, and/or (b) the proposed assumption and/or assumption and assignment of the Contracts in connection with the Sale (a “Contract Objection”), must be (a) in writing, (b) state the name and address of the objecting party and the amount and nature of the claim or interest of such party, (c) state with particularity the basis and nature of the Contract Objection, (d) conform to the Bankruptcy Rules and the Local Rules, (e) be filed with the Court, and (f) served on (i) counsel for the Debtors, (A) Foley Hoag LLP, (1) 1301 Avenue of the Americas, New York, NY 10019, Attn: Alison D. Bauer, Esq. (e-

mail: abauer@foleyhoag.com) and Jiun-Wen Bob Teoh, Esq. (e-mail jteoh@foleyhoag.com), and (2) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (email: ksl@foleyhoag.com), and (B) Gibbons P.C., (1) 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (email: cmcclamb@gibbonslaw.com) and (2) One Gateway Center, Newark, New Jersey 07102, Attn: Robert K. Malone, Esq. (email: rmalone@gibbonslaw.com); (ii) counsel to the Committee, if any; (iii) the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801 (Attn: Jane M. Leamy); and (iv) counsel to the Senior Secured Lenders, Greenberg Traurig, LLP, One Vanderbilt Avenue, New York, New York 10017, Attn: Oscar N. Pinkas (email: pinkaso@gtlaw.com) and Brian E. Greer (email: greerb@gtlaw.com), so as to be received by such **parties no later than April 12, 2024 at 4:00 p.m. (ET)** (the “Contract Objection Deadline”); provided, however,

- a. that objections to the adequate assurance of future performance to be provided by the Successful Bidder (or any designee thereof) **if the Successful Bidder is a party other than the Senior Secured Lenders** (the “Successful Bidder Adequate Assurance Objection”) must comply with the requirements set forth above, except that any such objection must be filed with the Court and served on the aforementioned parties, so as to be received by such parties prior to **May 14, 2024 at 4:00 p.m. (ET)** (the “Successful Bidder Adequate Assurance Objection Deadline”); and
  - b. that if the Debtors amend the Cure Notice to add a contract or lease, which they shall do no later than **May 7, 2024 at 4:00 p.m. (ET)**, unless they receive the consent of the counterparty to each contract or lease on the proposed Additional Cure Notice, the non-Debtor party to the added contract or lease shall have until the earlier of (i) fourteen (14) days after service of notice of adding a contract or lease; or (ii) the Sale Hearing to submit a Contract Objection with respect to the contract or lease added by the Debtors’ amendment (the “Amended Contract Objection Deadline”); provided further, however, that if the Debtors amend the Cure Notice to reduce the Cure Amount of any Contract, except where such reduction was upon mutual agreement of the parties, the non-Debtor counterparty to the Contract with the reduced Cure Amount shall have until the Amended Contract Objection Deadline to object to the Cure Amount.
21. Unless a Contract Party files and serves a Contract Objection before the applicable objection deadline, such Contract Party shall be (i) forever barred from objecting to the proposed

Cure Amounts and from asserting any additional cure or other amounts (other than as may be asserted in an Additional Cure Notice), and the Debtors, the Senior Secured Lenders, and the Successful Bidder shall be entitled to rely solely upon the proposed Cure Amounts set forth in the Cure Notices; (ii) deemed to have consented to the assumption and/or assumption and assignment of the its Contract(s), (iii) forever barred and estopped from asserting or claiming against the Debtors, the reorganized Debtors, the Senior Secured Lenders, or the Successful Bidder, or their respective property, as applicable, that any additional amounts are due or other defaults exist (other than as may be asserted in an Additional Cure Notice), that conditions to assignment must be satisfied under its Contract(s), including, without limitation, any consent rights, or that there is any objection or defense to the assumption and assignment of its Contract(s), including, without limitation, adequate assurance of future performance; (iv) precluded from objecting to the Cure Amount (if any) and the assumption and/or assumption and assignment of its Contract(s); and (v) barred and estopped from asserting or claiming that its Contract(s), if an Assumed/Assigned Contract, contains an enforceable consent right.

22. The Debtors, the relevant Contract Party, and the Senior Secured Lenders (or, if applicable, the Successful Bidder) may consensually resolve any Contract Objection prior to the Sale Hearing. In the event a Contract Objection is not resolved, such Contract Objection will be heard at the Sale Hearing or thereafter, as the Court deems appropriate, or the Successful Bidder may designate such Contract as a Contract that will not be assumed and assigned to the Successful Bidder, in which case such Contract shall not be assumed and shall remain property of the Debtors' estates, subject to any further orders of the Court.

23. The Debtors are hereby authorized to share certain of the Contracts that contain confidentiality restrictions with Qualified Bidders, subject to the terms of the NDA by and between

the Debtors and each Qualified Bidder, provided that each such Qualified Bidder requesting access to such Contracts enters into an NDA with the Debtors, in a form acceptable to the Debtors.

24. All Qualified Bidders are deemed to have submitted themselves to the exclusive jurisdiction of the Court with respect to all matters between and among any Qualified Bidder and the Debtors related to the Auction and the Sale.

25. The Sale Notice attached hereto as **Exhibit 2** is approved. The Sale Notice provides all parties in interest good and sufficient notice of the relief sought in the Motion, including, but not limited to, the Auction, the Bid Deadline, the Bid Procedures, the Sale Hearing, and the Sale.

26. Within two (2) days of the entry of the Bid Procedures Order, the Debtors will cause to be served by first class mail, postage prepaid, copies of: (a) the Bid Procedures Order; and (b) the Sale Notice upon the following entities: (i) the U.S. Trustee (Attn: Jane M. Leamy); (ii) the holders of the twenty (20) largest unsecured claims against each Debtor; (iii) counsel to Deutsche Bank Trust Company Americas in its capacity as Collateral Agent, Hogan Lovells LLP; (iv) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP; (v) Berlin Biopower Investment Fund, LLC, with a copy to Murray Plumb & Murray; (vi) Greenline CDF Subfund XVIII LLC, with a copy to Kutak Rock LLP, U.S. Bancorp Community Development Corporation and Leverage Law Group, LLC; (vii) Public Service Company of New Hampshire d/b/a Eversource Energy, with a copy to Hunton Andrews Kurth LLP; (viii) the United States Attorney's Office for the District of Delaware; (ix) the United States Attorney's Office for the District of New Hampshire; (x) the United States Environmental Protection Agency; (xi) the Nuclear Regulatory Commission; (xii) the United States Department of Energy; (xiii) the Federal Energy Regulatory Commission; (xiv) New Hampshire Department of Environmental Services; (xv) New Hampshire Public Utilities Commission; (xvi) New Hampshire Site Evaluation



Committee; (xvii) New Hampshire Department of Energy; (xviii) City of Berlin; (xix) ISO New England, Inc.; (xx) the United States Securities and Exchange Commission; (xxi) the Internal Revenue Service; (xxii) any party that has requested notice pursuant to Bankruptcy Rule 2002; (xxiii) all persons or entities known to the Debtors that have or have asserted a lien on, or security interest in, all or any portion of the Assets; and (xxiv) any Potential Bidders previously identified or otherwise known to the Debtors (collectively, the “Sale Notice Parties”) In addition, the Debtors shall post copies of the Motion, together with all exhibits and schedules, this Bid Procedures Order, the Sale Notice and the Cure Notice to the website of Epiq Corporate Restructuring, LLC, the Debtors’ proposed claims and noticing agent, at <https://dm.epiq11.com/Burgess>, located under the tab labeled “Sale Documents.”

27. The Cure Notice attached hereto as **Exhibit 3** provides proper notice to all parties in interest and is approved. The Debtor shall serve the Cure Notice on all Contract Parties by first class mail no later than **March 29, 2024**

28. The Additional Cure Notice attached hereto as **Exhibit 4** provides proper notice to all parties in interest and is approved. To the extent necessary, the Debtors shall serve the Additional Cure Notice pursuant to the additional assumption procedures, as provided in the Motion and the Bid Procedures.

29. All of the dates set forth on the attached Schedule 1 are hereby approved.

30. This Bid Procedures Order shall constitute findings of fact and conclusions of law and shall take effect immediately upon execution hereof.

31. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise, the terms and conditions of this Bid Procedures Order shall be immediately effective

and enforceable upon its entry, and no automatic stay of execution shall apply to this Bid Procedures Order.

*[Remainder of Page Left Intentionally Blank]*

32. This Court shall retain jurisdiction over any matters related to or arising from the implementation, interpretation, or execution of this Bid Procedures Order and the Bid Procedures.

Dated: \_\_\_\_\_, 2024

\_\_\_\_\_  
HONORABLE LAURIE SELBERT  
SILVERSTEIN  
UNITED STATES BANKRUPTCY JUDGE

**SCHEDULE 1**

<b>Key Event</b>	<b>REVISED DEADLINE</b>
Deadline for Debtors to File Cure Notice	March 29, 2024
Deadline to File Contracts Schedule	March 29, 2024
Deadline to Object to Cure Amounts and to Adequate Assurance of Future Performance if the Successful Bidder is the Senior Secured Lenders	April 12, 2024
Deadline to Submit Bids	May 6, 2024 at 4:00 p.m. (ET)
Deadline for Debtors to Amend Cure Notice	May 7, 2024 at 4:00 p.m. (ET)
Deadline for Debtors to Notify Bidders of Status as Qualified Bidders	May 9, 2024 at 12:00 p.m. (ET)
Auction, if necessary, to be conducted at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, 25 <sup>TH</sup> Floor, New York, NY 10019, or by remote audio and/or video link	May 13, 2024 at 10:00 a.m. (ET)
Deadline to file notice of (i) Successful Bid and Back-Up Bid and (ii) identity of Successful Bidder and Back-Up Bidder	May 14, 2024 at 12:00 p.m. (ET)
Deadline to file objections to Adequate Assurance of Future Performance if the Successful Bidder is a party <u>other than</u> the Senior Secured Lenders	May 14, 2024 at 4:00 p.m. (ET)
Sale Objection Deadline	May 14, 2024 at 4:00 p.m. (ET)
Deadline for Successful Bidder to submit to the Debtors fully executed documentation memorializing the terms of a Successful Bid	May 15, 2024
Deadline to Object to Cure Amounts in Amended Cure Notice	The earlier of (a) fourteen (14) days after service of notice of adding a contract or lease; or (b) the Sale Hearing
Sale Hearing	May 16, 2024

**EXHIBIT 1**

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

In re

Chapter 11

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Case No. 24-10235 (LSS)

(Jointly Administered)

Debtors.

**BID PROCEDURES**

**Overview**

On February 9, 2024, Burgess BioPower, LLC (“Burgess”) and Berlin Station, LLC (“Berlin”), the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

On [●], 2024, the Bankruptcy Court entered an order [D.I. \_\_\_\_] (the “Bid Procedures Order”),<sup>2</sup> which, among other things, authorized the Debtors to solicit bids and approved these procedures (the “Bid Procedures”) for the consideration of the highest or otherwise best bid for all or substantially all of the Debtors’ assets on the terms and conditions set forth herein (a “Sale Transaction”).

The Bid Procedures describe, among other things: (i) the procedures for bidders to submit bids for the Debtors’ assets; (ii) the manner in which bidders and bids become Qualified Bidders and Qualified Bids; (iii) the process for negotiating the bids received; (iv) the conduct of the Auction if the Debtors receive Qualified Bids; (v) the procedure for the ultimate selection of any

<sup>1</sup> 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.

<sup>2</sup> Unless otherwise specified, capitalized terms used but not otherwise defined in these Bid Procedures shall have the meanings ascribed to such terms in the Bid Procedures Order and the *Debtors’ Motion for Entry of (A) an Order (I) Approving Bid Procedures Relating to the Sale of All or Substantially All of the Debtors’ Assets, (II) Scheduling a Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice of Sale by Auction, (IV) Establishing Procedures for the Assumption and/or Assumption and Assignment of Contracts and Leases and Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief; and (B) an Order (I) Authorizing the Sale of Assets Outside the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interests, (III) Authorizing the Assumption and/or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* [D.I. \_\_\_\_] (the “Motion”).

Successful Bidder; and (vi) the process for approval of a Sale Transaction at the Sale Hearing (as defined herein).

**The Debtors, in the exercise of their reasonable business judgment, with the consent of the Senior Secured Lenders, may modify or terminate these Bid Procedures, waive terms and conditions set forth herein, extend any of the deadlines or other dates set forth herein, adjourn the Auction and/or Sale Hearing, and/or terminate discussions with any and all prospective bidders at any time and without specifying the reasons therefor, in each case, to the extent not materially inconsistent with these Bid Procedures and/or the Bid Procedures Order.**

**Summary of Key Dates**

<b>Key Event</b>	<b>REVISED DEADLINE</b>
Deadline for Debtors to File Cure Notice	March 29, 2024
Deadline to File Contracts Schedule	March 29, 2024
Deadline to Object to Cure Amounts and to Adequate Assurance of Future Performance if the Successful Bidder is the Senior Secured Lenders	April 12, 2024
Deadline to Submit Bids	May 6, 2024 at 4:00 p.m. (ET)
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Deadline for Debtors to Notify Bidders of Status as Qualified Bidders	May 9, 2024 at 12:00 p.m. (ET)
Auction, if necessary, to be conducted at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, 25 <sup>TH</sup> Floor, New York, NY 10019, or by remote audio and/or video link	May 13, 2024 at 10:00 a.m. (ET)
Deadline to file notice of (i) Successful Bid and Back-Up Bid and (ii) identity of Successful Bidder and Back-Up Bidder	May 14, 2024 at 12:00 p.m. (ET)
Deadline to file objections to Adequate Assurance of Future Performance if the Successful Bidder is a party <u>other than</u> the Senior Secured Lenders	May 14, 2024 at 4:00 p.m. (ET)
Sale Objection Deadline	May 14, 2024 at 4:00 p.m. (ET)

Deadline for Successful Bidder to submit to the Debtors fully executed documentation memorializing the terms of a Successful Bid	May 15, 2024
Deadline to Object to Cure Amounts in Amended Cure Notice	The earlier of (a) fourteen (14) days after service of notice of adding a contract or lease; or (b) the Sale Hearing
Sale Hearing	May 16, 2024

### **Assets to be Sold**

The Debtors intend to offer all or substantially all of their assets for Sale. Parties may submit bids for the purchase and sale of all or substantially of the Debtors' assets, in accordance with the terms and conditions set forth herein.

### **Due Diligence**

The Debtors, in consultation with the Senior Secured Lenders, will post copies of all material documents related to the Debtors' assets to the Debtors' confidential electronic data room (the "Data Room"). To access the Data Room, a party must submit to the Debtors' advisors:

- (A) an executed NDA (unless such party is already a party to an existing confidentiality agreement with the Debtors that is acceptable to the Debtors for this due diligence process, in which case such agreement shall govern); and
- (B) sufficient information, as reasonably requested by the Debtors and the Senior Secured Lenders, to allow the Debtors to determine that the interested party (i) has the financial wherewithal to consummate a Sale Transaction, and (ii) intends to access the Data Room for the purpose consistent with these Bid Procedures.

An interested party that meets the aforementioned shall be a "Potential Bidder." As soon as practicable, the Debtors will provide such Potential Bidder access to the Data Room; provided, however, that, such access may be terminated by the Debtors in their reasonable discretion, upon consultation with the Senior Secured Lenders, at any time for any reason whatsoever, including that a Potential Bidder does not become a Qualified Bidder, violates these Bid Procedures or these Bid Procedures are terminated.

Each Potential Bidder shall comply with all reasonable requests for information and due diligence access by the Debtors or their advisors regarding the ability of such Potential Bidder to consummate a Sale Transaction.

Until the Bid Deadline, the Debtors will provide a Potential Bidder with reasonable access to the Data Room and additional information requested by Potential Bidders (subject to any restrictions pursuant to applicable law) that the Debtors, in consultation with the Senior Secured Lenders, believe to be reasonable and appropriate under the circumstances. All additional due diligence requests shall be directed to the Debtors' investment banker, SSG Advisors, LLC



(“SSG”), Attn: Teresa C. Kohl (tkohl@ssgca.com) and J. Scott Victor (jsvictor@ssgca.com). Unless prohibited by law or otherwise determined by the Debtors, in consultation with the Senior Secured Lenders, the availability of additional due diligence to a Potential Bidder will cease if (i) the Potential Bidder does not become a Qualified Bidder, (ii) these Bid Procedures are terminated, or (iii) the Potential Bidder breaches any obligations under its NDA.

Neither the Debtors nor any of their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Debtors’ assets to any person or entity who (i) is not a Potential Bidder, (ii) does not comply with the participation requirements set forth herein, or (iii) in the case of competitively sensitive information, is a competitor of the Debtors.

### **Bid Deadline**

A Potential Bidder that desires to make a Bid (as defined below) shall deliver electronic copies of its Bid so as to be received no later than **May 6, 2024 at 4:00 p.m. (ET)** (the “**Bid Deadline**”); provided that, the Debtors, with the consent of the Senior Secured Lenders, may extend the Bid Deadline without further order of the Bankruptcy Court, subject to providing notice to all Potential Bidders. The submission of a Bid by the Bid Deadline shall constitute a binding and irrevocable offer to acquire the assets specified in such Bid. Except as otherwise set forth herein, any party that does not submit a bid by the Bid Deadline will not be allowed to (i) submit any offer after the Bid Deadline or (ii) participate in any Auction. Bids should be submitted by email to the following representatives of the Debtors:

<b>SSG Advisors, LLC</b>	Teresa C. Kohl J. Scott Victor	tkohl@ssgca.com jsvictor@ssgca.com
<b>Foley Hoag LLP</b>	Alison D. Bauer Kenneth S. Leonetti Jiun-Wen Bob Teoh	abauer@foleyhoag.com ksl@foleyhoag.com jteoh@foleyhoag.com
<b>Gibbons P.C</b>	Robert K. Malone Chantelle McClamb	rmalone@gibbonslaw.com cmclamb@gibbonslaw.com

### **Form and Content of Qualified Bid**

A “**Bid**” is a signed document from a Potential Bidder received by the Bid Deadline that identifies the purchaser by its legal name and any other party that will be participating in connection with the bid, and includes the material terms of the offer to purchase all or substantially all of the Debtors’ assets. To constitute a “**Qualified Bid**” a Bid must include, at a minimum, the following:

- (i) **Acquired Assets**. Each Bid must clearly identify, in writing and as applicable, the particular assets the Potential Bidder seeks to acquire from the Debtors, including any contracts and leases of the Debtors that would be assumed and assigned in connection with a proposed Sale Transaction, subject to paragraph vi below.

- (ii) Purchase Price; Form of Consideration; Cash Requirements; Assumed Liabilities; Credit Bid. Each Bid must clearly set forth, as applicable:
  - (A) Purchase Price. Each Bid must clearly identify the purchase price to be paid (the “Purchase Price”) and whether the Bid is based on an all-cash offer or consists of certain non-cash components, including, without limitation, a Credit Bid (as defined herein) and/or the assumption of liabilities;
  - (B) Assumed Liabilities. Each Bid must clearly identify, in writing and as applicable, the particular liabilities, if any, such as, for example, executory contracts, the Potential Bidder seeks to assume. For the avoidance of doubt, a Qualified Bid may include a bid for less than all or substantially all of the Debtors’ liabilities; and
  - (C) Credit Bid. Persons or entities holding a perfected security interest in the assets specified in the Bid may seek to submit a credit bid (a “Credit Bid”), to the extent permitted by applicable law, including, without limitation, 11 U.S.C. § 363(k). Without limiting the foregoing, the Senior Secured Lenders shall have the right to credit bid any and all of the obligations owing under the Senior Notes Documents (as defined in the First Day Declaration) and/or the DIP Facility and the Bankruptcy Court orders approving the DIP Facility.
- (iii) Proposed APA. Each Bid must include an executed asset purchase agreement (the “Proposed APA”) for the assets included in such Bid, together with a redline comparing the Proposed APA to the form APA attached hereto as **Exhibit A**.
- (iv) Unconditional Offer. A statement that the Bid is formal, binding, and unconditional, is not subject to any further due diligence or financing contingency, and is irrevocable until the Debtors, with the consent of the Senior Secured Lenders, notify the Potential Bidder that such Bid is not a Successful Bid (as defined below) or a Back-Up Bid (as defined below), or until the first business day after the close of a Sale Transaction.
- (v) Proof of Financial Ability to Perform. Each Bid must contain such financial and other information that allows the Debtors, upon consultation with the Senior Secured Lenders, to make a reasonable determination as to the Potential Bidder’s financial and other capabilities to consummate a Sale Transaction including, without limitation, such financial and other information setting forth adequate assurance of future performance in satisfaction of the requirements under section 365(f)(2)(B) of the Bankruptcy Code, and the Potential Bidder’s willingness to perform under any contracts that are assumed and assigned to such party. Without limiting the foregoing, such information must include current financial statements or similar financial information certified to be true and correct as of the date thereof, proof of financing commitments, if needed, to consummate the transaction (not subject to, in the Debtors’ discretion and upon consultation with the Senior Secured Lenders, any unreasonable conditions), contact information for verification of such

information, including any financing sources, and any other information reasonably requested by the Debtors to demonstrate that such Potential Bidder has the ability to consummate a Sale Transaction in a timely manner.

- (vi) Designation of Contracts and Leases. Each Bid must identify, with particularity, each and every executory contract and unexpired lease, the assumption and assignment of which is a condition to closing a Sale Transaction (the “Closing”); **provided, however,** that the Bid may allow for the Potential Bidder to remove executory contracts and unexpired leases from the list of contracts to be assumed and assigned any time prior to the Closing; **provided, further, however,** that to the extent the Debtors identify any additional executory contracts or unexpired leases after the Bid is submitted, the Bid may allow for the Potential Bidder to add such executory contracts and unexpired leases to the list of contracts to be assumed and assigned any time from and after the Bid is submitted until the Closing of the proposed Sale Transaction.
- (vii) Required FERC Authorizations. Each Bid must include a statement or evidence of the Potential Bidder’s plan or ability to obtain all authorizations and certifications required by the Federal Energy Regulatory Commission (“FERC”) (1) for the Potential Bidder and the Debtors to consummate the contemplated Sale Transaction, and (2) for the Potential Bidder, following consummation of the contemplated Sale Transaction, to own and operate the Facility and sell electricity, capacity, and ancillary services at market-based rates (together, the “FERC Authorizations”).
- (viii) Other Required Approvals. In addition to a statement or evidence of the Potential Bidder’s plan or ability to obtain the FERC Authorizations, each Bid must include a statement or evidence (1) of the Potential Bidder’s plan and ability to obtain all other requisite governmental, regulatory, or other third-party approvals to consummate the contemplated Sale Transaction (“Other Required Approvals”); and (2) that the Bid is reasonably likely to be consummated, if selected as the Successful Bid, within a time frame required by the Bid Procedures Order and otherwise acceptable to the Debtors.
- (ix) Authorization. Each Bid must include evidence of corporate authorization and approval from the Potential Bidder’s board of directors (or comparable governing body) with respect to the submission, execution, and delivery of a Bid, participation in the Auction, and closing of the transactions contemplated by the Potential Bidder’s Proposed APA in accordance with the terms of the Bid and these Bid Procedures.
- (x) No Entitlement to Expense Reimbursement or Other Amounts. Each Bid must expressly state that the Bid does not entitle the Potential Bidder to any break-up fee, termination fee, expense reimbursement or similar type of payment or reimbursement, and a waiver of any substantial contribution administrative expense claims under section 503(b) of the Bankruptcy Code related to the bidding process; **provided, however,** that the foregoing restriction on reimbursement of expenses

does not apply to the Senior Secured Lenders in the event the Senior Secured Lenders submit a Bid.

- (xi) Joint Bids. The Debtors may, with the consent of the Senior Secured Lenders, approve joint Bids in their reasonable discretion on a case-by-case basis.
- (xii) Representations and Warranties. Each Bid must include the following representations and warranties:
  - (A) a statement that the Potential Bidder has had an opportunity to conduct any and all due diligence regarding the applicable assets prior to submitting its Bid;
  - (B) a statement that the Potential Bidder has relied solely upon its own independent review, investigation, and/or inspection of any relevant documents and the assets in making its Bid and did not rely on any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the assets or the completeness of any information provided in connection therewith, except as expressly stated in the representations and warranties contained in the Potential Bidder's Proposed APA if ultimately accepted and executed by the Debtors;
  - (C) a statement that the Potential Bidder agrees to serve as Back-Up Bidder if its Bid is selected as the next highest or next best bid after the Successful Bid with respect to the applicable assets;
  - (D) a statement that if selected as Back-Up Bidder, the Potential Bidder will continue to cooperate with the Debtors to obtain the FERC Authorizations and Other Required Approvals until the Back-Up Bid Expiration Date (as defined herein);
  - (E) a statement that the Potential Bidder has not engaged in any collusion with respect to the submission of its Bid; and
  - (F) a statement that the Potential Bidder agrees to be bound by the terms of these Bid Procedures.
- (xiii) A Potential Bidder must also accompany its Bid with:
  - (A) a cash deposit in the amount of ten percent (10%) of the Purchase Price (a "Good Faith Deposit"); provided that, a Potential Bidder submitting a Credit Bid will not be required to accompany its Bid with a Good Faith Deposit for any portion of the Purchase Price that is a Credit Bid, but shall be required to provide a Good Faith Deposit for any portion of its Bid that is not a Credit Bid; provided, however, that the foregoing shall not apply to the Senior Secured Lenders in the event the Senior Secured Lenders submit a Bid;

- (B) the contact information of the specific person(s) whom the Debtors or their advisors should contact in the event that the Debtors have any questions or wish to discuss the Bid submitted by the Potential Bidder;
- (C) a covenant to cooperate with the Debtors to provide pertinent factual information regarding the Potential Bidder's operations reasonably required to analyze issues arising with respect to any applicable regulatory requirements; and
- (D) if the value of a Bid includes additional non-cash components, a detailed analysis of the value of any additional non-cash component of the Bid and back-up documentation to support such value.

### **Good Faith Deposit**

To the extent applicable, a Good Faith Deposit must be deposited prior to the Bid Deadline, with an escrow agent selected by the Debtors (the "Escrow Agent") pursuant to an escrow agreement to be provided by the Debtors. To the extent a Qualified Bid is modified before, during, or after the Auction, the Debtors reserve the right to require that such Qualified Bidder adjust the amount of its Good Faith Deposit so that it equals ten percent (10%) of the Purchase Price. If a Qualified Bidder is required to adjust its Good Faith Deposit, its status as a Qualified Bidder shall be suspended pending satisfaction of such adjustment.

### **Review of Bids; Designation of Qualified Bids**

The Debtors, in consultation with the Senior Secured Lenders and any Committee, will evaluate Bids that are timely submitted and may engage in negotiations with Potential Bidders who submitted Bids as the Debtors deem appropriate in the exercise of their business judgment, based upon the Debtors' evaluation of the content of each Bid.

A Bid received for assets that is determined by the Debtors, after consultation with any Committee and with the consent of the Senior Secured Lenders, to meet the requirements set forth herein, will be considered a "Qualified Bid" and any bidder that submits a Qualified Bid will be considered a "Qualified Bidder."

By no later than **May 9, 2024** (the "Qualified Bid Deadline"), the Debtors shall determine, in their reasonable judgment, after consultation with any Committee and with the consent of the Senior Secured Lenders, which of the Bids received by the Bid Deadline qualify as a Qualified Bid. The Debtors shall notify each Potential Bidder who submits a Qualified Bid of its status as a Qualified Bidder by the Qualified Bid Deadline.

In evaluating the Bids, the Debtors may take into consideration the following non-binding factors:

1. the amount of the Purchase Price, including any Credit Bid and/or other non-cash consideration, as applicable, set forth in the Bid, provided that for purposes of evaluating competing bids, every dollar of a Credit Bid shall be treated the same as

a dollar from a cash or other non-cash Bid, and a Credit Bid shall not be considered inferior to a comparable cash or other non-cash Bid because it is a Credit Bid;

2. the assets included in or excluded from the Bid, including any executory contracts or leases proposed to be assumed and assigned;
3. the value to be provided to the Debtors under the Bid, including the net economic effect upon the Debtors' estates;
4. any benefit to the Debtors' bankruptcy estates from any assumption of liabilities or waiver of liabilities;
5. the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required FERC, governmental or other approvals;
6. the impact on trade creditors; and
7. any other factor the Debtors may reasonably deem relevant consistent with their fiduciary duties.

The Debtors reserve the right to work with any Potential Bidder in advance of the Auction to cure any deficiencies in a Bid that is not initially deemed a Qualified Bid. The Debtors, in their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, as reasonably determined in good faith by the Debtors in consultation with their legal counsel, may amend or waive the conditions precedent to being a Qualified Bidder at any time after consultation with any Committee and with the consent of the Senior Secured Lenders.

Without the written consent of the Debtors, subject to the consent of the Senior Secured Lenders, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid, except for proposed amendments to increase the Purchase Price or otherwise improve the terms of the Qualified Bid for the Debtors during the period that such Qualified Bid remains binding as specified herein; provided that, any Qualified Bid may be improved at the Auction as set forth in these Bid Procedures.

The Debtors, after consultation with any Committee and with the consent of the Senior Secured Lenders, shall make a determination regarding which Bids have been determined to be Qualified Bids and the applicable assets relating to such Qualified Bids.

#### **Failure to Receive Qualified Bids; Severance of Burgess from Plan**

If no Qualified Bid is received by the Qualified Bid Deadline, the Debtors will not conduct the Auction, and shall file a notice with the Bankruptcy Court indicating that no Auction will be held. The Debtors shall also publish such Notice on the website of its claims and noticing agent, Epiq Corporate Restructuring, LLC, located under the tab labeled "Sale Documents."

In the event the Debtors' proposed chapter 11 plan as to Burgess is withdrawn and goes forward solely as to Berlin (either before or after the Bid Deadline), then the Senior Secured Lenders (or their designees) shall be deemed a Qualified Bidder and may, in their sole discretion, submit a Bid for the purchase of some or all of Burgess's assets, which Bid shall be deemed a Qualified Bid.

### **Auction Procedures**

If the Debtors receive two or more Qualified Bids for substantially the same assets, the Debtors may, in their business judgment, and upon consultation with the Senior Secured Lenders and any Committee, conduct the Auction in person or by remote audio and video link on **May 13, 2024 beginning at 10:00 a.m. (ET)** at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019. Only a Qualified Bidder, its professionals and/or other representatives of the Qualified Bidder will be eligible to participate at the Auction, subject to such limitations as the Debtors, with the consent of the Senior Secured Lenders, may impose in good faith. In addition, professionals and/or other representatives of the Debtors, any Committee, the Senior Secured Lenders, and any creditors or equity holders of the Debtors shall be permitted to attend and observe the Auction. Each Qualified Bidder shall be required to confirm, both before and after the Auction, that it has not engaged in any collusion with respect to the submission of any Bid or the Auction.

The Debtors, with the consent of the Senior Secured Lenders, may adopt rules for the Auction at any time that the Debtors reasonably determine to be appropriate to promote a value-maximizing auction. Any rules developed by the Debtors, with the consent of the Senior Secured Lenders, will provide that all bids in the Auction will be made and received on an open basis, and all bidders participating in the Auction will be entitled to be present for all bidding with the understanding that the true identity of each bidder placing a bid at the Auction will be fully disclosed to all other bidders participating in the Auction and that all material terms of a bid submitted in response to any successive bids made at the Auction will be disclosed to all other bidders. Each Qualified Bidder will be permitted what the Debtors, with the consent of the Senior Secured Lenders, reasonably determine to be an appropriate amount of time to respond to the previous bid at the Auction. The Auction will be conducted openly and shall be transcribed or recorded.

The Debtors may, in their discretion and in consultation with any Committee and with the consent of the Senior Secured Lenders, identify the highest or otherwise best Qualified Bid as the successful bid (a "Successful Bid") and the bidder submitting such bid, a "Successful Bidder"). The Debtors, with the consent of the Senior Secured Lenders, may also identify a Qualified Bidder that submitted the next highest or otherwise best Qualified Bid as a back-up bid (a "Back-Up Bid") and the bidder submitting such bid, a "Back-Up Bidder"). A Back-Up Bid shall remain open and irrevocable until the earliest to occur of (i) consummation of a Sale Transaction with the Successful Bidder and (ii) the release of such Back-Up Bid by the Debtors in writing (such date, the "Back-Up Bid Expiration Date"). The Back-Up Bidder will continue to cooperate with the Debtors to obtain the FERC Authorizations up until the Back-Up Bid Expiration Date. If a Sale Transaction with a Successful Bidder is terminated prior to the Back-Up Bid Expiration Date, the Back-Up Bidder shall be deemed a Successful Bidder and shall be obligated to consummate the Back-Up

Bid as if it were a Successful Bid; provided, however, that the Debtors are not required to accept any bid or designate a Successful Bidder or Back-Up Bidder.

Within two (2) business days after the Auction, a Successful Bidder shall submit to the Debtors fully executed documentation memorializing the terms of a Successful Bid. A Successful Bid may not be assigned to any party without the consent of the Debtors and the Senior Secured Lenders.

At any time before entry of an order approving an applicable Sale Transaction envisioned by a Qualified Bid, the Debtors reserve the right to and may reject such Qualified Bid if such Qualified Bid, in the Debtors' judgment, after consultation with any Committee and with the consent of the Senior Secured Lenders, is: (i) inadequate or insufficient; (ii) not in conformity with the requirements of the Bankruptcy Code, these Bid Procedures, or the terms and conditions of the applicable Sale Transaction; or (iii) contrary to the best interests of the Debtors and their estates.

### **Post-Auction Process**

By no later than May 14, 2024 at 12:00 p.m. (ET), the Debtors shall file with the Bankruptcy Court a notice of a Successful Bid, Successful Bidder, Back-Up Bid, and Back-Up Bidder. Unless otherwise required pursuant to the Debtors' fiduciary duties, the Debtors shall not consider any bids submitted after the conclusion of the Auction.

Within seven (7) days after the Auction, the Debtors shall direct the Escrow Agent to return the Good Faith Deposit of any Potential Bidder or Qualified Bidder, as applicable, who is not declared a Successful Bidder or Back-Up Bidder. Within seven (7) days after the Back-Up Bid Expiration Date, the Debtors shall direct the Escrow Agent to return the Good Faith Deposit of a Back-Up Bidder. Upon the authorized return of any such deposit, the Bid of such Potential Bidder, Qualified Bidder or Back-Up Bidder, as applicable, shall be deemed revoked and no longer enforceable.

A Successful Bidder's Good Faith Deposit shall be applied against the cash portion of the Purchase Price of such bidder's Successful Bid upon the consummation of a Sale Transaction.

In addition to the foregoing, the Good Faith Deposit of a Qualified Bidder will be forfeited to the Debtors if (i) the Qualified Bidder attempts to modify, amend, or withdraw its Qualified Bid, except as permitted herein, during the time the Qualified Bid remains binding and irrevocable or (ii) the Qualified Bidder is selected as a Successful Bidder or Back-Up Bidder and the Qualified Bidder refuses or fails to enter into the required definitive documentation or to consummate a Sale Transaction according to these Bid Procedures.

### **Notices Regarding Assumption and Assignment**

The Debtors shall provide all notices regarding the proposed assumption and assignment of contracts and leases in accordance with the Contract Procedures included in the Bid Procedures Order.



### **Sale Hearing**

If the Debtors, with the consent of the Senior Secured Lenders, elect to proceed with a Sale Transaction, the Debtors will seek the entry of an order authorizing and approving the Sale Transaction at a hearing before the Bankruptcy Court on **May 16, 2024 at 2:00 p.m. (ET)** (or such other date as the Bankruptcy Court may determine) (the “Sale Hearing”). The Sale Hearing shall be scheduled to occur on the same date as the hearing to consider confirmation of the Debtors’ plan (or Berlin’s plan, as applicable). The Debtors, in the exercise of their business judgment, with the consent of the Senior Secured Lenders, may adjourn the Sale Hearing without notice or with limited and shortened notice to parties, including by (i) an announcement of such adjournment at the Sale Hearing or at the Auction and (ii) the filing of a notice of adjournment with the Bankruptcy Court prior to the commencement of the Sale Hearing.

Objections to a Sale Transaction, including any objection to the sale of the Debtors’ assets free and clear of liens, claims, encumbrances, and other interests pursuant to section 363(f) of the Bankruptcy Code (each, a “Sale Objection”), shall (i) be in writing; (ii) state the name and address of the objecting party and the amount and nature of the Claim or Interest of such party; (iii) state with particularity the basis and nature of the Sale Objection, and provide proposed language that, if accepted and incorporated by the Debtors, would obviate such objection; (iv) conform to the Bankruptcy Rules and the Local Rules; (v) be filed with the Bankruptcy Court; and (vi) be served upon the Sale Notice Parties (as defined in the in the Bid Procedures Order) by **May 14, 2024 at 4:00 p.m. (ET)** (the “Sale Objection Deadline”); provided that, the Debtors, with the consent of the Senior Secured Lenders, may extend the Sale Objection Deadline, as the Debtors deem appropriate in the exercise of their reasonable business judgment. If a timely Sale Objection cannot otherwise be resolved by the parties, such objection shall be heard by the Bankruptcy Court at the Sale Hearing.

A Successful Bidder shall appear at the Sale Hearing and be prepared to have a representative(s) testify in support of the Successful Bid and such Successful Bidder’s ability to close in a timely manner and provide adequate assurance of its future performance under any and all executory contracts and unexpired leases to be assumed and assigned as part of the proposed transaction.

Any party who fails to file with the Bankruptcy Court and serve on the Sale Notice Parties a Sale Objection by the Sale Objection Deadline may be forever barred from asserting, at the Sale Hearing or thereafter, any Sale Objection to the relief requested in the Motion with regard to a Successful Bidder, or to the consummation and performance of a Sale Transaction, contemplated by an asset purchase agreement between the Debtors and a Successful Bidder, including the transfer of assets to a Successful Bidder, free and clear of all liens, claims, encumbrances, and other interests pursuant to section 363(f) of the Bankruptcy Code. Failure to object shall constitute consent for the purposes of section 363(f)(2) of the Bankruptcy Code.

### **Consent to Jurisdiction and Authority as Condition to Bidding**

All Potential Bidders that participate in the bidding process shall be deemed to have (i) consented to the core jurisdiction of the Bankruptcy Court to enter any order or orders, which shall be binding in all respects, in any way related to these Bid Procedures, the bid process, the Auction,

the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to an applicable Sale Transaction; (ii) waived any right to a jury trial in connection with any disputes relating to these Bid Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to an applicable Sale Transaction; and (iii) consented to the entry of a final order or judgment in any way related to these Bid Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to an applicable Sale Transaction if it is determined that the Bankruptcy Court would lack Article III jurisdiction to enter such a final order or judgment absent the consent of the parties.

### **Reservation of Rights**

The Debtors reserve the right, in their reasonable business judgment and in a manner consistent with their fiduciary duties and applicable law, in consultation with any Committee and with the consent of the Senior Secured Lenders, to modify these Bid Procedures, waive terms and conditions set forth herein with respect to all Potential Bidders or Qualified Bidders, as applicable, extend the deadlines set forth herein, announce at the Auction modified or additional procedures for conducting the Auction, and alter the assumptions set forth herein, in each case, to the extent not materially inconsistent with these Bid Procedures and the Bid Procedures Order. The Debtors shall not be obligated to consummate or pursue any transaction with respect to any asset.

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**ASSET PURCHASE AGREEMENT**

**BY AND AMONG**

**BERLIN STATION, LLC,**

**BURGESS BIOPOWER, LLC,**

**[BUYER]**

**and, solely for purposes of Section 11.22,**

**[GUARANTOR]**

**[ ], 2024**

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## **EXHIBITS & SCHEDULES**

### **EXHIBITS**

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## ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (the “Agreement”) is entered into as [ ], 2024 (the “Effective Date”), by and among Berlin Station, LLC, a Delaware limited liability company (“Berlin”), Burgess BioPower, LLC, a Delaware limited liability company (“BBP” and collectively with Berlin, the “Sellers” and each, a “Seller”), for the bankruptcy estates (together, the “Estates”) of the Sellers, solely for purposes of Section 11.22, [GUARANTOR], a [ ] (the “Guarantor”), and [BUYER], a [ ] (together with its permitted successors, designees, and assigns, the “Buyer” and collectively with the Sellers, the “Parties”).

## RECITALS

WHEREAS, on [ ], 2024, each of the Sellers commenced the bankruptcy cases by filing a voluntary petition (the “Petition”) for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”) which are being administered under Case No. [ ] (the “Chapter 11 Cases”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) and intend, in that case, to seek approval of and authorization for a sale and transfer of substantially all of the Sellers’ real property and non-real property assets relating to or used in the operation of the Energy Station (as defined below) to the individual or entity submitting the highest or best bid for those assets in a process (the “Sale Process”) conducted pursuant to Sections 105, 363 and 365 of title 11 of the Bankruptcy Code;

WHEREAS, the Sellers desire to sell, transfer, and assign to the Buyer, and the Buyer desires to purchase, acquire, and assume, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, the Purchased Assets (as defined below) and Assumed Liabilities (as defined below) upon the terms and subject to the conditions set forth herein and in accordance with Sections 105, 363 and 365 of the Bankruptcy Code, as authorized by the Bankruptcy Court;

WHEREAS, the Sellers intend to seek the entry of the Sale Order (as defined below) by the Bankruptcy Court approving this Agreement and authorizing the Sellers to consummate the Contemplated Transaction (as defined below) upon the terms and subject to the conditions set forth herein and in the Sale Order;

WHEREAS, the Sellers have determined, in the reasonable exercise of their business judgment, that it is advisable and in the best interest of the Estates and the beneficiaries thereof to enter into this Agreement and to consummate the Contemplated Transaction provided for herein pursuant to the Sale Order; and

WHEREAS, the Contemplated Transaction is subject to the approval of the Bankruptcy Court and will be consummated only pursuant to the Sale Order as entered by the Bankruptcy Court.

NOW, THEREFORE, in consideration of the mutual promises herein made, and in consideration of the representations, warranties and covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties agree as follows:



## **ARTICLE I.** **DEFINITIONS**

“Accounts Receivable” means (a) all accounts, accounts receivable (whether current or non-current), credit card receivables, contractual rights to payment, notes, notes receivable, negotiable instruments, chattel paper, and vendor and supplier rebates, including those in connection with the Energy Station Assets, and (b) any security interest, claim, remedy or other right related to any of the foregoing.

“Affiliate” means, with respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term “control” (including the terms “controlled by” and “under common control with”) means, when used with reference to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by Contract or otherwise.

“Agreement” has the meaning set forth in the preamble.

“Alternative Transaction” means (a) any agreement or transaction involving the sale or other disposition (in a single transaction or a series of transactions) of all or substantially all of the Purchased Assets, (b) the issuance, sale or other disposition (in a single transaction or a series of transactions) of all or substantially all of the equity interests of the Sellers or any of their successors to any Person other than the Buyer or a designee of the Buyer or (c) a plan of reorganization or liquidation that does not contemplate the sale of the Purchased Assets to the Buyer or an Affiliate thereof in accordance with the terms of this Agreement.

“Assignment of Assumed Contracts” means a duly executed Assignment and Assumption of Leases and Contracts, substantially in the form attached as Exhibit A, pursuant to which the Sellers’ interest in all Assumed Contracts shall be assigned to the Buyer.

“Assignment of Domain Names” means a duly executed Assignment of Domain Names, substantially in the form attached hereto as Exhibit D, pursuant to which the Sellers’ interests in all Domain Names shall be assigned to the Buyer.

“Assignment of Easements” means a duly executed Assignment of Easements, substantially in the form attached hereto as Exhibit C.<sup>1</sup>

“Assignment of Intangible Property Assets” means a duly executed Assignment of Intangible Property Assets, substantially in the form attached hereto as Exhibit B, pursuant to which the Sellers’ interest in all the Intangible Property Assets shall be assigned to the Buyer.

“Assumed Contracts” has the meaning set forth in Section 2.6(b).

“Assumed Liabilities” has the meaning set forth in Section 2.3.

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<sup>1</sup> Note to Draft: To be limited to easements that are Permitted Liens.

“Assumed Permits” means all Permits relating to the Energy Station Assets that are transferable and assignable, but excluding all Permits to the extent related exclusively to any Excluded Asset (including any Lease that is not an Assumed Contract).

“Assumption of Liabilities Agreement” means a duly executed Assumption of Liabilities Agreement with respect to the Assumed Liabilities, substantially in the form attached hereto as Exhibit E.

“Auction” shall have the meaning set forth in the Bidding Procedures.

“Avoidance Action” means all preference or avoidance claims and actions of the Sellers, including, without limitation, any such claims and actions arising under Sections 544, 547, 548, 549, and 550 of the Bankruptcy Code and any other affirmative Claim of the Sellers against third parties, including, without limitation, any Claims arising under non-bankruptcy law.

“Backup Bidder” shall have the meaning set forth in the Bidding Procedures.

“Bankruptcy Code” has the meaning set forth in the Recitals.

“Bankruptcy Court” has the meaning set forth in the Recitals.

“Bankruptcy Rules” means the Federal Rules of Bankruptcy Procedure.

“BBP” has the meaning set forth in the preamble.

“BBP-BS Lease” means that certain Lease dated as of September 2, 2011, by and between BBP and Berlin, as may be amended, restated, or modified from time to time, pursuant to which BBP leases the Owned Real Property and the Energy Station from Berlin.

“Berlin” has the meaning set forth in the preamble.

“Bidding Procedures” means the procedures governing the submission, evaluation and qualification of competing bids for the Purchased Assets, and the Auction among qualified bidders for the purchase of the Purchased Assets, as described in the Bidding Procedures Order.

“Bidding Procedures Order” means an Order of the Bankruptcy Court approving the Sale Process described in the Sale Motion and the Bidding Procedures, entered at Docket No. [ ] in the Chapter 11 Cases.

“Bill of Sale” means a duly executed bill of sale, substantially in the form attached as Exhibit F hereto.

“Biomass” means the biomass inventory at the Energy Station, in transit or stored in the quantities and qualities as owned by the Sellers or the Estates for the use of the Energy Station, as of Closing.

“Biomass Supply Agreement” means that certain Biomass Fuel Supply Agreement, dated as of March 1, 2011, by and between Berlin, as successor-in-interest to Laidlaw Berlin Biopower, LLC, and Richard Carrier Trucking, Inc., as may be amended, restated, or modified from time to time.

“Business” means the business of owning and operating the Energy Station or any portion thereof or arising out of or in relation thereto.

“Business Day” means any day other than a Saturday, a Sunday or a day on which banks located in Berlin, New Hampshire shall be authorized or required by Law to close.

“Buyer” has the meaning set forth in the preamble.

“Buyer Express Representations” has the meaning set forth in Section 3.14.

“Buyer Released Parties” has the meaning set forth in Section 5.1(e).

“Cash Purchase Price” has the meaning set forth in Section 2.5(a).

“Chapter 11 Cases” has the meaning set forth in the Recitals.

“Claim” means any claim, cause of action, right of recovery, right of set-off, and right of recoupment of every kind and nature including but not limited to prepayments, warranties, guarantees, refunds, reimbursements, including any claim as defined in section 101(5) of the Bankruptcy Code, whether arising before or after the Petition Date.

“Closing” means the closing of the Contemplated Transaction.

“Closing Cash” means all cash, certificates of deposit, bank deposits, cash equivalents (including all undeposited checks, marketable securities, and short-term investments), payments in process, and similar cash items of the Sellers or the Estates, including those in connection with the Energy Station Assets, as of the Closing Date.

“Closing Date” means the date on which the Closing actually occurs.

“Collateral Agent” means Deutsche Bank Trust Company Americas, in its capacity as Collateral Agent for the Secured Parties under the Note Purchase Agreement.

“Consent” means any approval, consent, ratification, permission, clearance, designation, qualification, waiver, or authorization from a Governmental Entity, or an Order of the Bankruptcy Court that deems or renders any of the foregoing unnecessary.

“Contemplated Transaction” means the sale to the Buyer, and the purchase by the Buyer, of the Purchased Assets (subject to Permitted Liens) and the assumption by the Buyer of the Assumed Liabilities, pursuant to, and in accordance with, this Agreement, the other Related Agreements, and the Sale Order.

“Contract” means any written or oral agreement, contract, lease, sublease, indenture, mortgage, instrument, guaranty, loan or credit agreement, note, bond, customer order, purchase order, sales order, sales agent agreement, supply agreement, development agreement, joint venture agreement, promotion agreement, license agreement, contribution agreement, partnership agreement, or other arrangement, understanding, permission, or commitment that, in each case, is legally-binding.

“COVID-19” means the novel coronavirus disease 2019 caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) (or any mutation or variation thereof or related health condition).

“Cure Amounts” means the amounts necessary to cure all defaults and to pay all actual pecuniary losses as of the Petition Date and to the extent required by Section 365 of the Bankruptcy Code and any Order of the Bankruptcy Court.

“Deposit” means the good faith cash deposit in the amount of ten percent (10%) of the Purchase Price to be deposited, prior to the Binding Bid Deadline (as defined in the Bidding Procedures), with the Deposit Escrow Agent, as modified or adjusted from time to time in the event that the Purchase Price is altered.

“Deposit Escrow Agent” means the Person serving from time to time as escrow agent under the Deposit Escrow Agreement.

“Deposit Escrow Agreement” means the escrow agreement being entered into by the Sellers and the Buyer or their Representatives as of the date of this Agreement, reasonably satisfactory in form and substance to the Sellers and the Buyer, pursuant to which the Deposit Escrow Agent will hold the Deposit.

“Disclosure Schedules” has the meaning set forth in ARTICLE III.

“Effective Date” has the meaning set forth in the preamble.

“Energy Station” means the 75-megawatt baseload wood-fired electric generation facility located on an approximately sixty-two (62) acre site in Berlin, New Hampshire and owned and operated by the Sellers, and all components and ancillary facilities, including associated interconnection facilities, thereof.

“Energy Station Assets” means all of the assets associated with or related to the Energy Station, including (a) the Energy Station itself, (b) tangible and intangible assets (including biomass), (c) the Owned Real Property and (d) all equipment, machinery, buildings, generators, step up transformers, circuit breakers, facilities necessary to connect to the electrical interconnection point(s), protective and associated equipment, all necessary fuel receiving and handling equipment and associated control systems, fuel transport systems, improvements, any facilities for the disposal or storage of waste generated by the Energy Station and any other facilities and any other assets ancillary or related thereto.

“Environmental Laws” means any federal, state, provincial, local, foreign, international or multinational constitution, statute, law, ordinance, regulation, rule, code, Order, principle of common law, or decree enacted, promulgated, issued, enforced or entered by any Governmental Entity, or court of competent jurisdiction, or other requirement or rule of law relating to pollution, storage, transport, release of, contamination by, or exposure to Hazardous Substances, or protection of the environment, human health and safety (to the extent related to exposure to Hazardous Substances), natural resources and ash disposal.

“Estates” has the meaning set forth in the preamble.

“Excluded Accounts Receivable” has the meaning set forth in Section 2.2(s).

“Excluded Actions” means any and all rights, claims, debts, causes of action, demands, suits for damages or otherwise, liabilities, acts, or rights of action of any nature whatsoever, whether asserted or unasserted, known or unknown, contingent or noncontingent, liquidated or unliquidated, that constitute property of, otherwise belong to, or may be asserted by the Estates or the Sellers (whether direct or derivative).

“Excluded Assets” has the meaning set forth in Section 2.2.

“Excluded Contracts” has the meaning set forth in Section 2.2(e).

“Excluded Leases” has the meaning set forth in Section 2.2(e).

“Excluded Liabilities” has the meaning set forth in Section 2.4.

“FERC” means the Federal Energy Regulatory Commission.

“Final Sale Notice” means a notice distributed in accordance with the Bidding Procedures regarding the transactions contemplated by this Agreement and the Sale Order.

“GAAP” means United States generally accepted accounting principles as in effect from time to time, consistently applied.

“Goodwill” has the meaning set forth in Section 2.1(n).

“Governmental Approvals” means any authorization, consent, approval, license, ruling, permit, exemption, variance, order, judgment, decree, guidance, policy, declaration of or regulation by any Governmental Entity relating to the acquisition, development, ownership, occupation, construction, start-up, testing, operation or maintenance of the Energy Station or to the execution, delivery or performance of this Agreement, the other Related Agreements and the Operational Agreements, in each case, including each appendix, schedule and exhibit thereto.

“Governmental Entity” means any: (a) nation, principality, state, commonwealth, province, territory, county, municipality, district or other jurisdiction of any nature; (b) federal, state, local, municipal, foreign or other government; (c) governmental, quasi-governmental or regulatory authority of any nature (including any governmental division, subdivision, department, agency, bureau, branch, office, commission, council, board, instrumentality, officer, official, representative, organization, unit, body or entity and any court or other tribunal); (d) multinational organization or body; or (e) individual, entity or body exercising, or entitled to exercise, any executive, legislative, judicial, administrative, regulatory, police, military or taxing authority or power of any nature. For the avoidance of doubt, FERC, New Hampshire Site Evaluation Committee, NHDES, NHDES Wastewater Engineering Bureau, NHDES Air Resources Division, NHDES Alteration of Terrain Bureau, New Hampshire Public Utilities Commission, New Hampshire Department of Energy, and City of Berlin each constitutes a Governmental Entity, as does any of their successor agencies or entities.

“Guarantor” has the meaning set forth in the Preamble.

“Hazardous Substance” means any substance, material or waste which is classified or regulated under any Environmental Law as a “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “restricted hazardous waste,” “contaminant,” “toxic waste,” “pollutant” or “toxic substance”, and including petroleum or any fraction or by-product thereof, asbestos, asbestos-containing materials as defined under Environmental Law, urea formaldehyde, toxic mold, radioactive material, and polychlorinated biphenyls.

“Indebtedness” shall mean and include (i) all obligations for borrowed money, (ii) all obligations evidenced by bonds, debentures, notes or other similar instruments, (iii) all obligations to pay the deferred purchase price of property or services (other than accounts payable and accrued expenses), (iv) all obligations with respect to capital leases, (v) all obligations created or arising under any conditional sale or other title retention agreement with respect to property acquired by such Person, (vi) all non-contingent reimbursement and other payment obligations in respect of letters of credit and similar surety instruments (including construction performance bonds, but not contingent obligations in respect of letters of credit and similar surety instruments (including construction performance bonds)), and (vii) all guaranty obligations with respect to the types of obligations listed in clauses (i) through (vi) above.

“Initial Notice of Proposed Assumed Contracts” means a notice filed by the Sellers with the Bankruptcy Court in accordance with the Bidding Procedures identifying the Contracts the Buyer intends, as of the date of such notice, to assume as of the Closing Date.

“Insurance Policy” means each primary, excess and umbrella insurance policy, bond (surety or otherwise), and other forms of insurance, bonding or surety owned or held by or on behalf, or providing insurance, bonding, or surety coverage to, the Estates or the Sellers.

“Intangible Property Assets” means any Intellectual Property Assets and other intangible personal property owned or held by the Sellers, including the Records and the Goodwill. As used in this Agreement, “Intangible Property Assets” shall in all events exclude any software or other item of intangible property held by the Sellers pursuant to a license or other Contract where the Buyer does not assume the underlying Contract relating to such software or item of intangible personal property at the Closing.

“Intellectual Property” means any and all rights, title and interest in or relating to intellectual property of any type, which may exist or be created under the Laws of any jurisdiction throughout the world, including all: (a) patents and patent applications, together with all reissues, continuations, continuations-in-part, divisionals, extensions and reexaminations in connection therewith (collectively, “Patents”); (b) service marks, brand names, logos, symbols, trade dress, assumed names, fictitious names, trade names and other indicia of origin, all applications and registrations for all of the foregoing, and all goodwill associated therewith and symbolized thereby, along with all applications, registrations and renewals in connection therewith, and all goodwill associated with any of the foregoing (collectively, “Trademarks”); (c) rights associated with works of authorship, including exclusive exploitation rights, mask work rights, copyrights, database and design rights, whether or not Registered or published, all registrations and recordings thereof and applications in connection therewith, along with all extensions and renewals thereof (collectively, “Copyrights”); (d) rights in electronic data processing systems, information management systems, recordkeeping systems, communications and telecommunications systems, networking systems, account management systems, Internet websites and related content, inventory management

systems and other such applications, software, hardware, equipment and services (including any firmware, applications and software installed on such hardware and equipment, and all associated databases, and related documentation); (e) Internet domain names and all registrations, applications and renewals related thereto (collectively, the “Domain Names”) and social media accounts or “handles,” (f) trade secrets and proprietary or confidential information relating to the Energy Station Assets (including operation manuals, specifications, pictures, drawings, maps, books, files, surveys, CAD drawings, mock-ups, prototypes, processes, ideas, formulae, compositions, know-how, discoveries, inventions, blueprints, designs, plans, proposals, industrial designs, technical data, financial, business and marketing plans, and customer and supplier lists and related information); and (g) any other intellectual property rights held by the Sellers related to the Energy Station Assets.

“Intellectual Property Assets” has the meaning set forth in Section 2.1(l).

“Interconnection Agreement” means that certain Large Generator Interconnection Agreement, dated as of July 18, 2011, by and among Berlin, ISO-NE and Northeast Utilities Service Company on behalf of Public Service Company of New Hampshire (“PSNH”), as may be amended, restated, or modified from time to time.

“Inventory” means all inventories, including (a) raw materials, work in progress, and finished goods and supplies of the Sellers or the Estates to the extent related to the Energy Station Assets or the Purchased Assets, including any such items held at the Sellers’ or the Estates’ places of business; and (b) the Sellers’ or the Estates’ interests in any work in progress inventory in place at any customer location or in the possession or custody of any other Person.

“IRC” means the United States Internal Revenue Code of 1986, as amended.

“IRS” means the Internal Revenue Service.

“ISO-NE” means ISO New England Inc. or its successors and assigns.

“ISO-NE Tariff” means the ISO New England, Inc. Transmission, Markets and Services Tariff, as may be amended from time to time, or any successor tariff accepted by FERC.

“Law” means any federal, state, provincial, local, municipal, foreign, or international, multinational, or other law, statute, legislation, constitution, principle of common law, resolution, ordinance, code, edict, decree, proclamation, treaty, convention, rule, regulation, ruling, directive, pronouncement, determination, decision, opinion, or requirement issued, enacted, adopted, promulgated, implemented, or otherwise put into effect by or under the authority of any Governmental Entity, or court of competent jurisdiction, or other legal requirement or rule of law, including applicable building, zoning, subdivision, health, and safety and other land use Laws.

“Lease” means leases, subleases and all rights thereunder, together with all amendments and modifications thereto, relating to the Leased Real Property.

“Leased Real Property” means (a) the Leases set forth on Schedule 2.6(b) and any real property leased by the Sellers or the Estates pursuant to such Leases and (b) any other real property

leased by the Sellers or the Estates and used in connection with the operation of the Energy Station Assets, including subleases and all rights appurtenant thereto.

“Liability” means, as to any Person, any Indebtedness, Claim, liability (including any liability that results from, relates to or arises out of tort or any other product liability claim), assessment, cost, expense, loss, expenditure, Tax, charge, fee, penalty, fine, contribution, or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, accrued or unaccrued, liquidated or unliquidated, or due or to become due, and regardless of when sustained, incurred, or asserted or when the relevant events occurred or circumstances existed.

“Lien” means any lien (as that term is defined in section 101(37) of the Bankruptcy Code), encumbrance, right, demand, charge, hypothecation, statutory or deemed trust, mortgage, deed of trust, right to purchase, option, right of first of refusal, pledge, security interest or similar interest, title defect, hypothecation, easement, license, right of way, servitude, encroachment, judgment, conditional sale or other title retention agreements and other similar impositions, imperfection or defect of title or restriction on transfer or use (whether known or unknown, secured or unsecured or in the nature of setoff or recoupment, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or nonmaterial, disputed or undisputed, whether arising prior to or subsequent to the commencement of the Chapter 11 Cases, and whether imposed by agreement, understanding, Law, equity, or otherwise, including claims otherwise arising under doctrines of successor liability, alter ego, or veil piercing).

“Litigation” means any action, cause of action, suit, claim, investigation, mediation, arbitration, audit, grievance, demand, hearing, proceeding or investigation, whether civil, criminal, administrative or arbitral, whether at law or in equity and whether before any Governmental Entity, arbitrator, or mediator.

“Long-Term” means a term greater than sixty-two (62) days or a forward start date greater than sixty-two (62) days from the execution of a transaction.

“Material Adverse Effect” means any change, event, effect, development, condition, circumstance or occurrence (when taken together with all other changes, events, effects, developments, conditions, circumstances, or occurrences) since the date of this Agreement, that has had, or would reasonably be expected to have, individually or in the aggregate, a material adverse effect on the Energy Station or the Purchased Assets (each taken as a whole); *provided, however*, that no change, event, effect, development, condition, circumstance or occurrence related to any of the following shall be deemed to constitute, and none of the following shall be taken into account in determining whether there has been, a Material Adverse Effect: (i) the filing, announcement, pendency, or administration of the Chapter 11 Cases; (ii) acts of war, armed hostilities, sabotage, or terrorism, or any escalation or worsening of any such acts of war, armed hostilities, sabotage, or terrorism threatened or underway as of the date of this Agreement; (iii) changes in conditions in the U.S., foreign or global economy or capital or financial markets generally, including changes in interest or exchange rates; (iv) resulting from any act of God or other force majeure event (including natural disasters, or any epidemic, pandemic or wide-spread



disease outbreak (including the COVID-19 virus outbreak)); (v) changes in Law or in GAAP or interpretations thereof; (vi) any failure, in and of itself, to meet any projections or forecasts for any period (*provided*, that this subclause (vi) shall not prevent a determination that any cause underlying such failure to meet projections or forecasts has had, or would reasonably be expected to have, a Material Adverse Effect); (vii) any actions or omissions required by this Agreement and the Related Agreements; (viii) any actions taken by or at the request of the Buyer or any of its Affiliates; or (ix) the negotiation, announcement, or pendency of this Agreement or the consummation of the Contemplated Transaction and assumption of the Assumed Liabilities contemplated hereby, or the identity, nature, or ownership of the Buyer or its Affiliates, except in the case of clauses (ii) – (v), to the extent that such change, event, effect, development, condition, circumstance or occurrence has a disproportionate impact on the Energy Station or any of the Energy Station Assets relative to the other companies comparable to the Sellers in the industry and geography in which the Energy Station operates (in which case, taking into account the extent of such disproportionate impact).

“NHDES” means the New Hampshire Department of Environmental Services.

“Note Purchase Agreement” means that certain Note Purchase Agreement, dated as of September 2, 2011, by and between Berlin and the Noteholders, as may be amended, restated, or modified from time to time.

“Noteholders” means the holders of (or managers or investment managers to certain holders of) the Notes.

“Notes” means the 7.00% Series A Senior Secured Fixed Rate Notes due on September 30, 2031, 7.50% Series B Senior Secured Fixed Rate Notes due September 30, 2031, and Floating Rate Senior Secured Notes due September 30, 2022, in each case, issued pursuant to the Note Purchase Agreement.

“O&M Agreement” means the Operation and Maintenance Agreement, dated as of January 19, 2018, by and between Berlin and CS Berlin Ops, Inc., as amended on January 19, 2022 and December 1, 2023, and as may be amended, restated, or modified from time to time.

“Operational Agreements” means the Biomass Supply Agreement, the Interconnection Agreement, the BBP-BS Lease, the PMA and the O&M Agreement.

“Order” means any order, judgment, decree, ruling, decision, opinion, injunction, assessment, attachment, undertaking, award, charge, writ, executive order, judicial order, administrative order, or any other order of any Governmental Entity.

“Ordinary Course of Business” means the ordinary and usual course of business of the Estates, considering the commencement of the Chapter 11 Cases and as otherwise required by the Bankruptcy Code.

“Organizational Documents” means, with respect to any entity, the certificate of incorporation, articles of incorporation, certificate of formation, articles of organization, by-laws, partnership agreement, limited liability company agreement, formation agreement, or other similar

organizational or organic documents of such entity (in each case, as amended through the date of this Agreement).

“Outside Date” means 160 days after the Petition Date.

“Owned Real Property” means all real property owned in fee (of record, beneficially or otherwise) necessary for, or used in, the operation of the Energy Station Assets, including as set forth on Schedule 1.1, and including all improvements, and fixtures thereon and other rights appurtenant thereto.

“Parties” has the meaning set forth in the preamble.

“Permit” means any and all approvals, permits (including environmental, construction and operation permits), licenses, registrations, certificates, variances, Consents, exemptions, or similar rights issued, granted, given, or otherwise obtained or required to be obtained, from or by any Governmental Entity, under the authority thereof or pursuant to any applicable Law.

“Permitted Access Parties” has the meaning set forth in Section 7.6.

“Permitted Liens” means (a) Liens for Taxes which are (i) being contested in good faith by appropriate proceedings or (ii) not due and payable as of the Closing Date, and, in each case of clauses (i) and (ii), for which adequate reserves have been made and which Liens shall be released from the Purchased Assets at Closing; (b) mechanics liens and similar liens for labor, materials or supplies provided with respect to Energy Station Assets incurred in the Ordinary Course of Business, which are being contested in good faith by appropriate proceedings for which adequate reserves have been made and which Liens shall be released from the Purchased Assets at Closing; (c) with respect to real property zoning, building codes and other land use, health and Environmental Laws regulating the use or occupancy of the Owned Real Property, the operation of the Energy Station, or any activities related thereto, which are imposed by any Governmental Entity having jurisdiction thereover; and (d) easements, covenants, conditions, restrictions, reservations of record and other similar rights, interests, or things affecting title to real property and other encroachments and title and survey defects that do not or would not materially impair the value or the use or occupancy of the Energy Station Assets or materially interfere with the operation of the Energy Station, *provided*, that, for the avoidance of doubt, Permitted Liens shall expressly exclude anything related to (i) that certain Purchase Option Agreement, dated as of November 25, 2013, by and among PSNH and the Sellers, recorded on November 25, 2013 in the Coos County Registry of Deeds, Doc #0005307 (as may be amended, restated, or modified from time to time, the “Purchase Option Agreement”), and (ii) that certain Subordination Agreement, dated as of November 19, 2013, by the Collateral Agent, recorded on November 25, 2013 in the Coos County Registry of Deeds, Doc #0005309 (as may be amended, restated, or modified from time to time, the “DB-PSNH Subordination Agreement”).

“Person” means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, or any other entity, including any Governmental Entity or any group or syndicate of any of the foregoing.

“Personal Property Leases” means all leases of personal property to which the Sellers are a party relating to personal property used by the Estates or the Sellers or by which the properties

or assets of the Estates or the Sellers are bound, in each case relating to any of the Energy Station Assets.

“Petition” has the meaning set forth in the Recitals.

“Petition Date” means the date of filing of the Petitions in the Bankruptcy Court.

“PMA” means that certain Project Management Agreement, dated as of June 29, 2011, by and between Berlin and CS Operations, Inc., as successor-in-interest to Cate Street Capital, Inc., as amended on February 8, 2024 and as may be amended, restated, or modified from time to time.

“Power Purchase Agreement” means that certain Amended and Restated Power Purchase Agreement, dated as of May 18, 2011, by and between PSNH, Laidlaw Berlin Biopower, LLC and Berlin, as assignee of Laidlaw Berlin Biopower, LLC, as amended on November 19, 2019 and August 18, 2022, and as may be amended, restated or modified from time to time.

“Pre-Closing Period” has the meaning set forth in Section 6.1(a).

“Purchase Orders” means all purchase or service orders unperformed by and to which the Sellers or the Estates is a party, that relate to the Energy Station Assets, and that are outstanding as of the Closing Date.

“Purchase Price” has the meaning set forth in Section 2.5.

“Purchased Assets” has the meaning set forth in Section 2.1; *provided, however*, that, notwithstanding the foregoing or anything contained in this Agreement to the contrary, the Purchased Assets shall not include any Excluded Assets.

“Purchased Inventory” means Inventory that constitutes Purchased Assets pursuant to Section 2.1.

“Quitclaim Deed” means a duly executed New Hampshire quitclaim deed for the Owned Real Property, substantially in the form attached as Exhibit G hereto.

“Records” means the books, records, information, ledgers, files, invoices, documents, work papers, budgets, forecasts, journals, correspondence, emails, lists (including customer lists, vendor and supplier lists, service provider lists, mailing lists, and other distribution lists), plans, processes, drawings, technical information, diagrams, designs, specifications, creative materials, advertising or promotional materials, marketing documentation, personnel and employment records, studies, reports, data, and similar materials to the extent related to the Energy Station, Purchased Assets or Assumed Liabilities, in each case wherever situated and whether in hard copy, electronic format, or in any other medium; *provided, however*, for the avoidance of all doubt, the following items shall not be deemed “Records,” but rather as Excluded Assets for all purposes hereof: (x) any such records that are prohibited for being transferred to Buyer due to federal or state privacy laws and (y) any other of the foregoing which are subject to attorney-client or any other privilege.

“Registered” means issued by, registered with, renewed by or the subject of a pending application before any Governmental Entity or domain name registrar.

“Related Agreements” means this Agreement, Bill of Sale, the Quitclaim Deed, the Assignment of Assumed Contracts, the Assignment of Intangible Property Assets, the Assignment of Easements, the Assignment of Domain Names, the Assumption of Liabilities Agreement and any other instruments of transfer and conveyance required or reasonably necessary to convey valid title of the Purchased Assets to the Buyer and any other agreement executed in connection with the Closing.

“Representative” means a Person’s officers, directors, managers, employees, advisors, representatives (including its legal counsel, accountants, and other such professionals), and any other agents thereof.

“Sale Motion” means one or more motions filed by the Sellers (a) seeking approval of the Bidding Procedures Order, this Agreement and the Contemplated Transaction, including the sale of the Sellers’ assets, free and clear of all Liens (other than the Assumed Liabilities and the Permitted Liens), and (b) seeking approval of the Sale Order.

“Sale Order” means an Order of the Bankruptcy Court, in substantially the form attached as Exhibit K hereto, with any revisions thereto that are reasonably acceptable to the Sellers and the Buyer and the Noteholders.

“Sale Order Deadline” means 92 days after the Petition Date.

“Sale Process” has the meaning set forth in the Recitals.

“Section 203(a)” has the meaning set forth in Section 8.1(f).

“Secured Parties” means the Secured Parties under the Note Purchase Agreement.

“Seller” or “Sellers” has the meaning set forth in the preamble.

“Seller Express Representations” has the meaning set forth in Section 4.10.

“Seller Released Claims” has the meaning set forth in Section 5.1(e).

“Seller Releasing Parties” has the meaning set forth in Section 5.1(e).

“Sellers’ Knowledge” (or words of similar import) means the actual knowledge, after due inquiry and investigation of the Sellers and their counterparties to the O&M Agreement and the PMA, of Dean Vomero.

“Short-Term” means a term of sixty-two (62) days or less but greater than one day, and with a forward start date within sixty-two (62) days from the execution of a transaction.

“Subsidiary” means, with respect to any Person, any corporation, limited liability company, partnership, association or other business entity of which (a) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof (or other persons performing similar functions with respect to such corporation) is at the time owned or controlled, directly or

indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (b) if a limited liability company, partnership, association or other business entity (other than a corporation), a majority of partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more Subsidiaries of that Person or a combination thereof and for this purpose, a Person or Persons owns a majority ownership interest in such a business entity (other than a corporation) if such Person or Persons shall be allocated a majority of such business entity's gains or losses or shall be or control any managing director, managing member, or general partner of such business entity (other than a corporation). The term "Subsidiary" shall include all Subsidiaries of such Subsidiary.

"Successful Bidder" shall have the meaning set forth in the Bidding Procedures.

"Supplemental Notice of Proposed Assumed Contracts" means a notice filed by the Sellers with the Bankruptcy Court in accordance with the Bidding Procedures identifying the Contracts the Buyer intends, as of the date of such notice, to assume as of the Closing Date and that were not listed on the Initial Notice of Proposed Assumed Contracts.

"Tax" or "Taxes" means (a) any United States federal, state or local or non-United States income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the IRC), customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, real property, personal property, ad valorem, escheat, unclaimed property, sales, use, liquor, cigarette, transfer, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever (however denominated), whether computed on a separate or consolidated, unitary or combined basis or in any other manner, including any interest, penalty or addition thereto, whether or not disputed, and (b) any Liability for the payment of any amounts of the type described in clause (a) of this definition as a result of being a member of an affiliated, consolidated, combined or unitary group for any period, as a result of any tax sharing or tax allocation agreement, arrangement or understanding, or as a result of being liable for another Person's taxes as a transferee or successor, by contract or otherwise.

"Tax Return" means any return, declaration, report, claim for refund or information return or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

"Transfer Tax" means any stamp, documentary, registration, transfer, real estate transfer, use, sales, added-value, or similar Tax imposed under any applicable Law in connection with the Contemplated Transaction.

"Treasury Regulations" means regulations promulgated by the United States Department of Treasury under the IRC.

"Utilities" has the meaning set forth in Section 2.11.

**ARTICLE II.**  
**PURCHASE AND SALE**

**Section 2.1**      **Purchase and Sale of Purchased Assets.** Subject to the terms and conditions set forth in this Agreement, at the Closing, the Buyer shall purchase, acquire and accept, and the Sellers shall, and shall cause the Estates, to sell, transfer, assign, convey and deliver to the Buyer, all of the Estates' or the Sellers' right, title and interest in, to and under the Purchased Assets, free and clear of Claims, Liens and Liabilities (for the avoidance of doubt, free and clear of Excluded Liabilities), other than the Assumed Liabilities and the Permitted Liens, to the extent permitted by applicable Law, for the consideration specified in Section 2.5. "Purchased Assets" shall mean all of the direct or indirect right, title and interest of the Estates or the Sellers in, to and under the following assets (to the extent they exist) held for use in, or related to, the Energy Station wherever situated, whether or not carried or reflected on the books and records of the Estates or the Sellers, and of whatever kind and nature, real or personal, in each case as of the Closing (but excluding, in all instances, the Excluded Assets):

- (a) all Energy Station Assets and any assets or properties purchased, installed, constructed, completed or otherwise acquired pursuant to any Operational Agreement;
- (b) all rights and interests under easements, rights-of-way and other instruments creating similar rights, including those set forth on Schedule 2.1(b);
- (c) all Governmental Approvals owned or possessed, including those set forth on Schedule 2.1(c);
- (d) all Purchase Orders;
- (e) the Biomass;
- (f) all Accounts Receivable of the Sellers or the Estates (other than the Excluded Accounts Receivable);
- (g) all of the Sellers' or the Estates' proceeds, reserves, and rights to all power commodity sales transactions, including Short-Term commodity transactions and Long-Term commodity transactions, consummated prior to the Closing Date, whether sales documentation is executed prior to the Closing or thereafter;
- (h) the right to receive and retain mail relating to Accounts Receivable (other than the Excluded Accounts Receivable), payments and other communications of the Sellers and the Estates and the right to bill and receive payment for goods, power, labor, or services performed but unbilled or unpaid as of prior to the Closing Date;
- (i) all deposits (including deposits in transit) under any Assumed Contract and other prepaid charges and expenses of the Sellers or the Estates listed on Schedule 2.1(i), as to each related to the Energy Station Assets;

(j) all Assumed Contracts, which shall be assumed and assigned to Buyer at Closing pursuant to Section 365 of the Bankruptcy Code in accordance with the Bidding Procedures and the Sale Order;

(k) all rights, to the extent assignable, under any agreements in favor of any of the Sellers or for the benefit of any of the Sellers with current or former contractors or third parties, with respect to confidentiality, non-disclosure, non-competition, non-solicitation, or other restrictive covenants, regardless of whether any such Person accepts an offer of employment from the Buyer, continues to perform services for the Buyer, or submits a bid for all or any portion of the Purchased Assets;

(l) all Intellectual Property owned by the Estates or the Sellers in connection with, relating to or necessary for, or used in the operation of, the Energy Station Assets (the “Intellectual Property Assets”);

(m) all Records, including Records related to Taxes paid or payable relating in any manner to the Energy Station or the Purchased Assets (*provided*, that the Sellers are entitled to retain copies of all Records and the Buyer will provide all such Records to the Sellers at no charge), but excluding any materials exclusively identified as or related to any Excluded Assets;

(n) all goodwill associated with the Energy Station Assets or the Purchased Assets, including goodwill associated with the Intellectual Property Assets (collectively, the “Goodwill”) and all rights under any confidentiality agreements executed by any third party for the benefit of the Estates or the Sellers to the extent relating to the Purchased Assets or the Assumed Liabilities (or any portion thereof), but excluding any confidentiality agreements relating to the retention of professionals by the Estates;

(o) Assumed Permits;

(p) to the extent transferable under the Sale Order, all rights under or pursuant to all warranties, representations, and guarantees made by suppliers, manufacturers, contractors, and any other Person to the Sellers or the Estates relating in any manner to the Energy Station Assets;

(q) all of the Sellers’ or the Estates’ telephone numbers, fax numbers, e-mail addresses, websites, URLs, Internet domain names, corporate names and social media accounts or “handles” relating in any manner to the Energy Station Assets;

(r) subject to the provisions of Section 2.11 below, all Claims for deposits and other prepaid amounts under any of the Assumed Contracts or held by any Utilities or trade vendors relating to the Energy Station; *provided, however*, any adequate assurance deposits paid to the provider of any Utilities or held by the Sellers shall be Excluded Assets for purposes of this Agreement;

(s) all vehicles, trailers and any other titled asset and all equipment, supplies, computers, telephones and other tangible personal property, including any such assets listed on Schedule 2.1(s); and

- (t) all Inventory.

**Section 2.2** **Excluded Assets.** The following assets, properties, and rights of the Sellers or the Estates shall be retained by the Estates and are not being sold to the Buyer hereunder (the “Excluded Assets”):

- (a) all bank or other accounts of the Sellers or the Estates, including those in connection with the Energy Station Assets;

- (b) all Closing Cash and the Purchase Price;

- (c) all securities, whether capital stock or debt, and other ownership interests issued by any of the Sellers;

- (d) subject to Section 2.1(i) and Section 2.1(r), all rights and Claims to deposits (including deposits in transit, customer deposits or prepayments, and any cash collateral for any obligation of the Sellers and all post-Petition deposits made by the Sellers), credits, security deposits, prepaid amounts, charges and expenses (including, without limitation, as to Taxes), refunds, reimbursements, vendor and other rebates, set-offs and similar rights and claims of the Sellers and the Estates, including, without limitation, any of the foregoing relating to any Contract other than the Assumed Contracts;

- (e) all Leases and Contracts listed on Schedule 2.6(a) of the Disclosure Schedules, in each case, other than the Assumed Contracts (such Leases, the “Excluded Leases” and such Contracts, the “Excluded Contracts”), including any refund, rebate, credit or payment due to the Sellers thereunder;

- (f) all Permits listed on Schedule 3.9 of the Disclosure Schedules other than the Assumed Permits;

- (g) all other assets agreed to be listed on Schedule 2.2(g) by the Buyer and the Sellers and delivered to the Sellers prior to the Closing;

- (h) a copy of all Records (and the Buyer will provide all such Records to the Sellers at no charge);

- (i) the rights, defenses, claims and causes of action of the Sellers and the Estates under this Agreement and the other Related Agreements and all consideration payable or deliverable under this Agreement;

- (j) all proceeds, reserves, benefits, rights or claims under any Insurance Policies relating to the Energy Station,

- (k) any premium refunds (including, without limitation, any prepaid premiums) of the Sellers arising from any Insurance Policies on account of reduction in workforce, liability coverage, and the like;



(l) all proceeds, reserves, benefits, rights or claims under any Insurance Policy (1) to the extent not relating to the operation of the Energy Station or (2) concerning fiduciary, directors' or officers' liability, including under any tail Insurance Policies (i.e., such as advancement of expenses and liability coverage with respect to claims made against such officers and directors);

(m) all rights, privileges, defenses, claims and causes of action (and proceeds thereof) of any and every kind or nature whatsoever, including those relating to, arising out of, or in connection with or under Chapter 5 of the Bankruptcy Code or similar state laws;

(n) all intercompany claims (including any related rights and security interests) by any Seller against any other Seller or any Subsidiary or Affiliate of any Seller;

(o) all losses, loss carry forwards and rights to receive refunds or credits with respect to any and all Taxes of the Sellers incurred or accrued on or before the Closing Date;

(p) all Excluded Actions;

(q) all company seals, minute books, organizational documents, limited liability company interest record books, original Tax and financial records and such other files, books and records of the Sellers that the Sellers are required by Law to retain or that exclusively relate to the Excluded Assets or the Excluded Liabilities; *provided, however*, that the Sellers shall provide the Buyer with reasonable access to and copies of any such materials;

(r) all Avoidance Actions related to Purchased Assets or Assumed Contracts;

(s) all Accounts Receivable from PSNH (the "Excluded Accounts Receivable") and all rights privileges, defenses, claims and causes of action (and proceeds thereof) against PSNH; and

(t) all other assets that do not expressly constitute Purchased Assets, including any item expressly excluded pursuant to the provisions of Section 2.1 above.

**Section 2.3 Assumption of Assumed Liabilities.** On the terms and subject to the conditions of this Agreement and the Sale Order, at the Closing, the Buyer shall assume (and from and after the Closing pay, perform, discharge, or otherwise satisfy), and the Sellers shall, and shall cause the Estates, to irrevocably convey, transfer, and assign to the Buyer, only the following Liabilities, without duplication and only to the extent not paid prior to the Closing, and no other Liabilities (collectively, the "Assumed Liabilities");

(a) all Liabilities under any of the Assumed Contracts only to the extent such Liabilities (i) arise and accrue from and after the Closing Date and (ii) do not arise from or relate to any fact, circumstance, actual or alleged breach of contract, breach of warranty, violation of law, tort, infringement, failure to perform improper performance, default or

any Litigation, in each case, with respect to this clause (ii), arising as of, or related to the period prior to, Closing;

(b) Liabilities and Taxes arising out of or related to the Purchased Assets or the Energy Station, in each case, first arising and accruing from and after the Closing Date, including the Taxes payable by the Buyer pursuant to Section 6.5(c);

(c) Cure Amounts;

(d) all Liabilities under any of the Assumed Permits only to the extent such Liabilities (i) arise and accrue from and after the Closing Date and (ii) do not arise from or relate to any fact, circumstance, actual or alleged breach of contract, breach of warranty, violation of law, tort, infringement, failure to perform improper performance, default or any Litigation, in each case, with respect to this clause (ii), arising as of, or related to the period prior to, Closing;

(e) all Liabilities of the Sellers for accrued sales, use and similar Taxes as of the Closing;

(f) Transfer Taxes and any Taxes or Liabilities arising or imposed under any Tax-related bulk transfer Laws of any jurisdiction that are not exempted from payment pursuant to the terms of the Sale Order; and

(g) all Liabilities related to Environmental Laws first arising after the Closing Date under federal, state and local law relating to or arising out of or in connection with the Purchased Assets.

**Section 2.4 Excluded Liabilities.** Notwithstanding anything to the contrary set forth herein, the Buyer shall not assume and shall be deemed not to have assumed, and the Sellers and the Estates shall be solely and exclusively liable with respect to all Claims, Liens and Liabilities thereof, whether existing on the Closing Date or arising thereafter, other than the Assumed Liabilities (collectively, the “Excluded Liabilities”), which Excluded Liabilities shall include, but are not limited to, those listed on Schedule 2.4 and the following:

(a) Claims arising under Section 503(b)(9) of the Bankruptcy Code;

(b) any of the Sellers’ professional costs or expenses incurred in connection with, or related to, this Agreement, the consummation of the Contemplated Transaction or the administration of the Chapter 11 Cases, including, without limitation, any accrued professional fees and expenses of attorneys, accountants, financial advisors and other professional advisors related to the Chapter 11 Cases;

(c) any Liabilities to any broker, finder, agent or similar intermediary for any broker’s fee, finder’s fee or similar fee or commission relating to the Contemplated Transaction for which any Seller or its Affiliates are responsible including any transaction fee payable to the Sellers’ investment banker pursuant to Section 3.13 of this Agreement;

(d) any Liabilities with respect to the Purchase Option Agreement or the DB-PSNH Subordination Agreement; and

(e) all Liabilities with respect to the operation of the Business which arises under or related to any Environmental Laws (including without limitation any relating to exposure to any Hazardous Substances) other than those specified in Section 2.3(g).

**Section 2.5** **Consideration**. In aggregate, consideration for the sale and transfer of the Purchased Assets under this Agreement (the “Purchase Price”) shall be composed of the following:

(a) cash in an amount equal to \$[ ] by wire to the account designated by the Sellers (the “Cash Purchase Price”); *plus*

(b) the assumption by the Buyer of the Assumed Liabilities through one or more assignment and assumption agreements.

The Buyer has provided the Deposit in good faith to the Deposit Escrow Agent to be held in trust in a non-interest-bearing account pursuant to the terms and conditions of the Deposit Escrow Agreement. If the Closing occurs, the Deposit shall be paid to the Sellers and applied against the Cash Purchase Price at the Closing.

**Section 2.6** **Assumption and Assignment of Contracts**.

(a) Schedule 2.6(a) of the Disclosure Schedules sets forth a list of all Contracts and Leases to which any Seller is a party, together with estimated Cure Amounts.

(b) Schedule 2.6(b) of the Disclosure Schedules sets forth a list of all Contracts and Leases for assumption and assignment to the Buyer, effective on and as of the Closing, and shall include the Operational Agreements absent the prior written consent of the Sellers and the Buyer (such Contracts and Leases, the “Assumed Contracts”). Any Contracts or Leases listed on Schedule 2.6(a) that are not also listed on Schedule 2.6(b) shall not be assumed by and assigned to the Buyer, *provided, however*, notwithstanding anything to the contrary contained in this Agreement, the Buyer shall have the right to notify the Sellers in writing of any Contract or Lease that it does not wish to take assignment of or a Contract or Lease to which any Seller or Estate is a party that the Buyer wishes to add as an Assumed Contract at any time no later than seven (7) days prior to the Closing Date (and no later than three (3) Business Days after a determination of applicable Cure Amounts as determined by the Bankruptcy Court if determined after the Closing Date), and (i) any such previously considered Assumed Contract that the Buyer no longer wishes to assume shall be automatically deemed removed from Schedule 2.6(b) and automatically deemed an Excluded Asset added to Schedule 2.2(e), in each case, without any adjustment to the Purchase Price other than a reduction in Cure Amounts payable by the Buyer on account of such Excluded Contracts, and (ii) any such previously considered Excluded Contract or Excluded Lease that the Buyer wishes to assume as an Assumed Contract shall be automatically deemed a Purchased Asset added to Schedule 2.6(b), automatically deemed removed from Schedule 2.2(e), and assumed by the Sellers and the Estates to sell and assign to the Buyer, in each case, without any adjustment to the Purchase Price. The Buyer

shall be solely responsible for the payment, performance and discharge when due of the liabilities and obligations under the Assumed Contracts that relate to payment or performance for the period beginning from and after the Closing, in each case, as set forth in, and subject to the terms of, Section 2.3(a).

(c) In connection with the assumption by and assignment to the Buyer of any Assumed Contracts, (i) the Buyer shall comply with section 365(b)(1) of the Bankruptcy Code by paying such Cure Amounts to the counterparties of the Assumed Contracts at Closing; (ii) the Buyer shall provide adequate assurance of future performance sufficient to satisfy the conditions contained in Sections 365(b)(1)(C) and/or 365(f)(2)(B) of the Bankruptcy Code, as applicable, with respect to Assumed Contracts; and (iii) on and after the Closing, the Buyer shall bear all risk associated with any failure by the Buyer to provide such adequate assurance of future performance.

(d) The Sellers shall use their commercially reasonable efforts to obtain the entry of an order of the Bankruptcy Court to assign the Assumed Contracts to the Buyer on the terms set forth in this Section 2.6. In the event the Sellers are unable to obtain an order of the Bankruptcy Court to assign any such Assumed Contract to the Buyer, then the Parties shall use their commercially reasonable efforts to obtain and to cooperate in obtaining, all Consents from Governmental Entities and third parties necessary to assume and assign such Assumed Contracts to the Buyer.

(e) To the maximum extent permitted by the Bankruptcy Code and in accordance with the Bidding Procedures, each Assumed Contract shall be assumed and assigned to the Buyer pursuant to Section 365 of the Bankruptcy Code as of the later of: (a) for any Assumed Contract listed on the Initial Notice of Proposed Assumed Contracts, (1) if no objection is filed by the Closing Date, the Closing Date, or (2) if an objection is filed by the Closing Date, the date such assumption and assignment is approved by an Order of the Bankruptcy Court, and (b) for any Assumed Contract listed on a Supplemental Notice of Proposed Assumed Contracts, (1) if no objection is filed by the date specified in such Supplemental Notice of Proposed Assumed Contracts, such date, or (2) if an objection is filed by the date specified in such Supplemental Notice of Proposed Assumed Contracts, the date such assumption and assignment is approved by an Order of the Bankruptcy Court. Any Contract of any Seller that is an Excluded Contract or an Excluded Lease may be assumed or rejected by the Sellers in the Sellers' sole discretion and shall be deemed an Excluded Asset.

(f) As part of the Sale Motion, the Sellers shall seek approval by the Bankruptcy Court of the sale, assumption and assignment by the Sellers to the Buyer of all Assumed Contracts. The Sellers shall timely serve the Sale Motion on all counterparties to all such Assumed Contracts along with the Initial Notice of Proposed Assumed Contracts and any Supplemental Notice of Proposed Assumed Contracts and shall notify such parties of the deadline for objecting to the Cure Amounts. As part of the Sale Motion, the Sellers shall seek authority to file with the Bankruptcy Court the list identifying the Assumed Contracts and the amounts necessary to cure defaults under each, so as to enable any such party to object to the proposed Cure Amounts and the Bankruptcy Court to determine such Cure Amounts as promptly as reasonably possible.

(g) Notwithstanding the foregoing, but subject to ARTICLE VI, a Contract shall not be an Assumed Contract hereunder and shall not be assigned to, or assumed by, the Buyer to the extent that such Contract (i) is rejected by a Seller or terminated by a Seller in accordance with the terms hereof, or terminates or expires by its terms, on or prior to the Closing and is not continued or otherwise extended upon assumption, or (ii) relates solely to Excluded Assets. In addition, a Permit shall not be an Assumed Permit hereunder and shall not be assigned to, or assumed by, the Buyer to the extent that such Permit requires a Consent of any Governmental Entity or other third party (other than, and in addition to, that of the Bankruptcy Court) to permit the sale or transfer to the Buyer rights under such Permit (except as permitted by the Bankruptcy Code), and no such Consent has been obtained prior to the Closing. For the avoidance of doubt, the Purchased Assets shall not include any Contract or Lease that is not an Assumed Contract or an Assumed Permit, as applicable, hereunder, and the Assumed Liabilities shall not include any liability or obligation in connection with any Contract or Permit that is not an Assumed Contract or Assumed Permit, as applicable, hereunder. In no event shall the Sellers be required to bear or pay any fee or the like payable for any third party consent.

**Section 2.7**      **Closing.** The Closing shall take place remotely by electronic exchange of electronic documents and signatures (or wet signatures, to the extent required) on or before the third (3<sup>rd</sup>) Business Day after the date on which all conditions to the obligations of the Sellers and the Buyer to consummate the Contemplated Transaction set forth in ARTICLE VIII (other than conditions with respect to actions the Sellers or the Buyer will take at the Closing itself, but subject to the satisfaction or waiver of those conditions) have been satisfied or waived by the Party entitled to waive that condition, or at such other place, time or on such other date (no later than the Outside Date) as shall be mutually agreed upon by the Sellers and the Buyer beforehand. The Closing shall be deemed to have occurred at 12:01 a.m. (prevailing Eastern Time) on the Closing Date.

**Section 2.8**      **Deliveries at Closing.**

(a) At the Closing, the Sellers shall deliver to the Buyer the following documents and other items, duly executed by the Sellers (as applicable):

- i. the Bill of Sale;
- ii. the Assignment of Assumed Contracts;
- iii. the Assignment of Intangible Property Assets;
- iv. the Quitclaim Deed, together with an affidavit of title and such other affidavits and instruments as may be required by the title company in connection with the conveyance of the Owned Real Property;
- v. the Assignment of Easements;
- vi. the Assignment of Domain Names;

vii. appropriate evidence of all necessary company action by the Sellers in connection with the Contemplated Transaction, including, without limitation: (i) certified copies of resolutions duly adopted by the Sellers' respective boards of directors (or other governing body, as appropriate) approving the Contemplated Transaction and authorizing the execution, delivery, and performance by the Sellers of this Agreement and the other Related Agreements; and (ii) a certificate as to the incumbency of those officers of the Sellers executing this Agreement, the other Related Agreements and any other instrument or document delivered in connection with the Contemplated Transaction;

viii. IRS Form W-9;

ix. the Sale Order; and

x. all other previously undelivered certificates, agreements and other documents, instruments and writings reasonably requested by the Buyer to be delivered by the Sellers at or prior to the Closing pursuant to this Agreement.

(b) At the Closing, the Buyer shall undertake the following to or for the benefit of the Sellers:

i. pay, by wire transfer of immediately available funds, and in addition to the Cash Purchase Price, all Cure Amounts to the parties to whom and pursuant to the terms by which the Bankruptcy Court directs such payments to be made under the Sale Order;

ii. instruct the Deposit Escrow Agent in writing to release to the Sellers, by wire transfer of immediately available funds, the Deposit as a credit against the Cash Purchase Price;

iii. pay to the Sellers, by wire transfer of immediately available funds, an amount equal to the Cash Purchase Price, less the funds to be released pursuant to Section 2.8(b)(ii);

iv. deliver a counterpart of the Bill of Sale, duly executed by the Buyer;

v. deliver a counterpart of the Assignment of Assumed Contracts, duly executed by the Buyer;

vi. deliver a counterpart of the Assignment of Intangible Property Assets, duly executed by the Buyer;

vii. deliver a counterpart to the Assignment of Easements, duly executed by the Buyer;

viii. deliver a counterpart to the Assignment of Domain Names, duly executed by the Buyer;

ix. deliver the Assumption of Liabilities Agreement, duly executed by the Buyer;

x. deliver appropriate evidence of all necessary company action by the Buyer in connection with the Contemplated Transaction, including, without limitation: (i) certified copies of resolutions duly adopted by the Buyer's [ ] approving the Contemplated Transaction and authorizing the execution, delivery, and performance by the Buyer of this Agreement and the other Related Agreements; and (ii) a certificate as to the incumbency of those officers of the Buyer executing this Agreement, the other Related Agreements and any other instrument or document delivered in connection with the Contemplated Transaction; and

xi. all other previously undelivered certificates, agreements and other documents, instruments and writings reasonably requested by the Sellers to be delivered by the Buyer at or prior to the Closing in connection with the Contemplated Transaction.

(c) At the Closing, the Buyer shall assume the Assumed Liabilities, and with regard to the Assumed Contracts, shall pay to the applicable counter-party to such Assumed Contract any Cure Amounts, at such time as may be designated by the Bankruptcy Court in the Sale Order or otherwise agreed between the Buyer and such applicable counter-party to such Assumed Contract.

(d) Except as otherwise expressly set forth in this Agreement, all utility charges, rents or other payments under or in respect of the Purchased Assets and all real property, personal property and similar Taxes with respect to the Purchased Assets shall be prorated as of the Closing Date, except as otherwise expressly provided to the contrary in this Agreement. All proration shall be final.

**Section 2.9 Allocation.** Within ninety (90) calendar days after the Closing Date, the Buyer shall in good faith prepare and deliver to the Sellers an allocation of the Purchase Price among the applicable Purchased Assets in accordance with section 1060 of the IRC and the Treasury Regulations thereunder (and any similar provision of United States, state, local or non-United States Law, as appropriate). The Buyer and the Sellers will negotiate in good faith to resolve any disputes relating to the allocation within thirty (30) calendar days of the Sellers' receipt thereof. If the Buyer and the Sellers are unable to resolve any such dispute, such dispute shall be resolved promptly by a nationally recognized accounting firm acceptable to the Buyer and the Sellers, the costs of which shall be borne equally by the Buyer and the Sellers. The Buyer and the Sellers shall report, act and file Tax Returns (including IRS Form 8594) in all respects and for all purposes consistent with the allocation of the Purchase Price agreed upon under this Section 2.9. Neither the Buyer nor the Sellers shall take any position (whether in audits, Tax Returns or otherwise) which is inconsistent with such allocation; *provided*, that nothing contained herein shall prevent the Buyer or the Sellers from settling any proposed deficiency or adjustment by any Governmental Entity based upon or arising out of such allocation, and neither the

Buyer nor the Sellers shall be required to litigate before any court any proposed deficiency or adjustment by any Governmental Entity challenging the allocation.

**Section 2.10** **Withholding.** The Buyer shall be entitled to deduct or withhold from any amounts payable or otherwise deliverable pursuant to this Agreement any withholding Taxes or other amounts that may be or are required to be deducted or withheld therefrom under the IRC or any applicable Law. In connection with this section, each Seller agrees to provide at Closing such certifications as reasonably required by the Buyer and in form reasonably approved by the Buyer, duly executed by such Seller, including an IRS Form W-9.

**Section 2.11** **Apportionment.** Before the Closing Date, the Sellers and the Buyer shall make mutually satisfactory arrangements with respect to, or take readings or other measurements of, gas, water, electricity (other than as produced at the Energy Station) and other utilities at the Energy Station (the “Utilities”); *provided, however*, that to the extent any post-Petition claims for Utilities services come due after the Closing, such claims shall be the responsibility of the Buyer. On and as of the Closing, the Sellers and the Buyer shall mutually determine (or, to the extent impractical, using the Parties’ best estimates as of the Closing Date) the amount of any refunds or rebates under any supplier contracts relating to the Energy Station, and all amounts for Utilities, rent, common area expense, and real estate Taxes arising out of or relating to the Energy Station therefor which were paid by the Sellers in respect of any period following the Closing, which amounts shall be promptly paid to the Sellers by the Buyer.

### **ARTICLE III.**

#### **SELLERS’ REPRESENTATIONS AND WARRANTIES**

Except as set forth in the disclosure schedules accompanying this Agreement (the “Disclosure Schedules”), the Sellers represent and warrant to the Buyer as of the date hereof and as of the Closing Date as follows:

**Section 3.1** **Authorization, No Conflicts, Etc.** Each Seller is an entity duly formed, validly existing and in good standing under the Laws of the State of Delaware and has all requisite power and authority to own and operate its assets and to carry on its business as now being conducted. Each Seller, subject to the entry and effectiveness of the Sale Order, has full power and authority to execute and deliver this Agreement, all other Related Agreements to which it is a party and all other agreements, instruments, and documents contemplated hereby and thereby and to perform its obligations hereunder and thereunder. The execution, delivery and performance of this Agreement and all other Related Agreements to which each Seller is a party have been duly authorized by such Seller, and no other action on the part of such Seller is necessary to authorize this Agreement or the other Related Agreements to which it is a party or to consummate the Contemplated Transaction. Subject to the entry and effectiveness of the Sale Order, this Agreement has been duly and validly executed and delivered by each Seller and (assuming this Agreement constitutes a valid and legally binding obligation of the Buyer and upon the entry and effectiveness



of the Sale Order) constitutes a valid and legally binding agreement of such Seller, enforceable against such Seller in accordance with its terms. To the extent each Related Agreement constitutes a valid and legally-binding obligation of the Buyer thereto, each Related Agreement to which a Seller is a party, when executed and delivered, constituted or will constitute the valid and legally-binding obligations of such Seller, enforceable against such Seller in accordance with their respective terms and conditions. Subject to the entry and effectiveness of the Sale Order, neither the execution and delivery of this Agreement or any other agreement, instrument, or document contemplated hereby to be executed and delivered by a Seller, nor the performance of the obligations of such Seller hereunder or thereunder, will result in the (i) violation of any applicable Law, (ii) require any filing with or permit, consent or approval of, or the giving of any notice to, a Governmental Entity (including filings, consents or approvals required under any Permits to which a Seller is a named party), (iii) result in a violation or breach of, conflict with, constitute (with or without due notice or lapse of time or both) a default under, or give rise to any right of termination, cancellation or acceleration of any right or obligation of the Estates or to a loss of any benefit to which the Estates are entitled under, any Assumed Contract binding upon the Estates or any of the Permits, franchises or other similar authorizations held by the Estates, or (iv) result in the creation or imposition of any Lien on any asset of the Estates.

**Section 3.2**      **Consents and Approvals.** No consent, approval, or authorization of, or declaration, filing, or registration with, any Governmental Entity is required to be made or obtained by a Seller in connection with the execution and delivery of this Agreement or any other agreement, instrument, or document contemplated hereby to be executed and delivered by a Seller or the performance of the obligations of a Seller hereunder or thereunder, except for (i) consents, approvals, or authorizations of, or declarations or filings with, the Bankruptcy Court in connection with the entry and effectiveness of the Sale Order, (ii) the filing of such assignments or other conveyance documents as may be required to transfer the Estates' interest in the Purchased Assets, (iii) the filing of such documents as may be necessary to reflect the release of any Liens and Excluded Liabilities as a matter of public record and (iv) any consent, approval or authorization set forth on Schedule 3.2.

**Section 3.3**      **Title to Purchased Assets.** The Estates have good, valid, legal, and indefeasible title to the Purchased Assets. At the Closing or such time as title is conveyed under this Agreement, the Sellers will, and will cause the Estates, to convey, subject to the Sale Order having been entered and still being in effect and not subject to any stay pending appeal at the time of Closing, to the Buyer good, valid, legal, and indefeasible title to all of the Purchased Assets as provided in the Sale Order.

**Section 3.4**      **Taxes.** Neither Seller is a "foreign person" as defined in section 1445 of the IRC. All Tax Returns required to be filed by a Seller with respect to the Purchased Assets have been timely filed with the appropriate Governmental Entity and all such Tax Returns are true, complete and correct in all material respects. All Taxes due and payable by a Seller with respect to the Purchased Assets have been

timely paid. No audits, examination, investigation or other administrative or court proceedings are pending with regard to any Taxes or Tax Returns of the Sellers with respect to the Purchased Assets, and no Seller has received written notice of any such audits, examinations, investigations or other administrative or court proceedings.

**Section 3.5**      **Contracts.** Schedule 2.6(a) of the Disclosure Schedules sets forth an accurate list, as of the date hereof, of all executory Contracts and unexpired Leases, including any and all amendments, modifications, supplements, exhibits, and restatements thereto and thereof, to which the Estates or any Seller is a party with respect to the Energy Station as of the date hereof (and the Sellers have made available to the Buyer true and complete copies of all such Contracts and Leases), and each such Contract and Lease is in full force and effect and is a legal, valid and binding obligation of any Estate or Seller, as applicable, and of the other parties thereto, enforceable against them in accordance with such Contract's or Lease's terms, and upon consummation of the transactions contemplated hereby, shall continue in full force and effect regardless of notice or the lapse of time without default, penalty or other adverse consequences. Except as set forth in Schedule 2.6(b) of the Disclosure Schedules, to the Sellers' Knowledge, there has not been any material default, penalty, breach or violation by any Estate or Seller under any such Contract or Lease. No Seller has assigned, delegated, or otherwise transferred to any third party any of its rights or obligations with respect to any Assumed Contract. No Seller has, and, to the Sellers' Knowledge, no other party to any Assumed Contract has, commenced any action against any of the parties to any Assumed Contract, nor has any Seller given or received any written notice of any material default, breach or violation under any Assumed Contract, except to the extent such default, breach or violation will be cured as a result of the payment of the applicable Cure Amounts, assuming entry of the Sale Order.

**Section 3.6**      **Intellectual Property.**

(a)      Schedule 3.6(a) of the Disclosure Schedules sets forth a true and complete list of (i) all Registered Intellectual Property that is owned by any Seller, (ii) executory Contracts pursuant to which any Seller obtains the right to use any Intellectual Property, and (iii) all material Contracts pursuant to which any Seller grants to any other Person the right to use any Intellectual Property.

(b)      To the Sellers' Knowledge, except as set forth on Schedule 3.6(b) of the Disclosure Schedules, none of the use of the Intellectual Property included in the Purchased Assets, the conduct of the Energy Station, or any of the products sold or services provided by the Sellers in connection therewith, infringes upon or otherwise violates the Intellectual Property of any other Person. To the Sellers' Knowledge, no third party is infringing any Intellectual Property owned by any Seller and included in the Purchased Assets, except as would not reasonably be expected to have a Material Adverse Effect.

**Section 3.7**      **Litigation.** Other than the Chapter 11 Cases, Schedule 3.7 of the Disclosure Schedules sets forth, as of the date hereof, all unresolved or pending Litigation brought or threatened by or against any Seller or Estate, and to the Sellers'

Knowledge, there is no other Litigation pending or threatened in writing against any Seller or Estate which would materially delay or materially impair the ability of the Sellers to enter into this Agreement or any other Related Agreement or to consummate the Contemplated Transactions. There are no outstanding Orders and no unsatisfied judgments, penalties or awards against, relating to or affecting the Energy Station or the Energy Station Assets.

**Section 3.8 Owned Real Property; Leased Property; Tangible Personal Property Leases.**

(a) The Estates have made available to the Buyer copies of all deeds and other instruments (as recorded) by which Berlin acquired the Owned Real Property. Schedule 1.1 sets forth the true, accurate and complete legal description of the Owned Real Property, the record title holder (and beneficiary or beneficiaries, if applicable), the common address, legal description and tax parcel index number of such Owned Real Property. With respect to Owned Real Property: (i) the record owner set forth on Schedule 1.1 has good and marketable indefeasible fee simple title, free and clear of all Liens, except for (x) Liens listed or described on Schedule 1.1 and (y) Permitted Liens; (ii) except as set forth on Schedule 1.1, neither the Sellers nor the Estates have leased or otherwise granted to any Person the right to use or occupy such Owned Real Property or any portion thereof and (iii) except as set forth in the Power Purchase Agreement, the Purchase Option Agreement, and the DB-PSNH Subordination Agreement, there are no outstanding options, rights of first offer or rights of first refusal to purchase the Owned Real Property or any portion thereof or interest therein. Neither the Estates nor the Sellers have made any claims for material loss, damage or indemnification against the existing title policies with respect to such Owned Real Property.

(b) Schedule 2.6(b) sets forth a true, accurate and complete list of all Leased Real Property that constitutes a Purchased Asset. The Sellers and the Estates have made available to the Buyer a correct and complete copy of each Lease or sublease pertaining to any of the Leased Real Property, including all amendments, extensions, renewals, guaranties and other written agreements with respect thereto, all of which are identified on Schedule 2.6(b). Assuming good title in the landlord, a Seller has a valid and assignable interest or estate in such Lease, free and clear of all Liens except Permitted Liens.

(c) There has been no written notice received of any eminent domain, condemnation, expropriation or other similar proceedings pending or threatened against the Owned Real Property or, to the Sellers' Knowledge, the Leased Real Property. The Owned Real Property and the Leased Real Property constitutes all of the material real property currently owned, used or occupied in connection with the operation of the Energy Station.

(d) Schedule 3.8(d) of the Disclosure Schedules sets forth all material Personal Property Leases related to the Energy Station Assets, and each such material Personal Property Lease is valid and enforceable, subject to applicable bankruptcy, insolvency, moratorium, or other similar Laws relating to creditors' rights and general principles of equity.

**Section 3.9** **Permits.** Schedule 3.9 of the Disclosure Schedules contains a list of all material Permits that the Estates or the Sellers hold as of the date hereof in connection with the operations of the Energy Station. As of the date hereof, there is no Litigation pending or, to the Sellers' Knowledge, threatened in writing that seeks the revocation, cancellation, suspension, failure to renew or adverse modification of any material Assumed Permits. To the Sellers' Knowledge, all required filings with respect to the Assumed Permits have been made and all required applications for renewal thereof have been filed, except where a failure of this representation and warranty to be so true and correct would not be material to the ownership and operation of the Energy Station.

**Section 3.10** **Purchased Inventory.**

(a) To the Sellers' Knowledge, no Purchased Inventory is damaged in any way or subject to a current or past product recall, except for any such damage or any such recall which would not be material to the Purchased Inventory taken as a whole; and

(b) To the Sellers' Knowledge, the Purchased Inventory is in material compliance with United States federal and applicable state guidelines for such products as of the date hereof.

(c) To the Sellers' Knowledge, the Purchased Inventory is in working condition or in a condition fit for sale and consumption in accordance with all applicable Laws.

**Section 3.11** **Environmental Matters.** Except as to matters set forth in Schedule 3.11 of the Disclosure Schedules:

(a) To the Sellers' Knowledge, each Seller is in compliance in all material respects with all applicable Environmental Laws, which compliance, to the Sellers' Knowledge, has included the Energy Station obtaining and maintaining all material permits, licenses and authorizations required under applicable Environmental Laws;

(b) No Seller has received during the course of the Chapter 11 Cases written notice from any Governmental Entity or third party regarding any actual or alleged violation of or Liability under Environmental Laws;

(c) To the Sellers' Knowledge, no Hazardous Substance has been released at the Energy Station by any Seller in violation of any Environmental Law and which would be reasonably likely to result in an investigation or cleanup required by Environmental Law that would have a Material Adverse Effect; and

(d) To the Sellers' Knowledge, the Sellers have made available to the Buyer copies of all material environmental audits, assessments and reports in its possession relating any actual or potential Liabilities under Environmental Laws with respect to the Energy Station.

**Section 3.12 Ownership.** The Purchased Assets constitute the interests necessary to own and operate the Energy Station Assets, subject in each instance to Section 2.3 (Assumption of Assumed Liabilities).

**Section 3.13 Brokers' Fees.** Neither the Sellers nor the Estates have entered into any Contract to pay any fees or commissions to any broker, finder or agent with respect to the Contemplated Transaction and there is no investment banker, broker, finder or other such intermediary that is entitled to a fee or commission in connection with Contemplated Transactions, other than the Sellers' investment banker, SSG Capital Advisors, LLC, which shall seek the Bankruptcy Court's approval to receive a transaction fee in accordance with the terms of its retention application.

**Section 3.14 No Outside Reliance.** Notwithstanding anything contained in this ARTICLE III or any other provision of this Agreement to the contrary, each Seller acknowledges and agrees that the representations and warranties made by the Buyer to the Sellers in ARTICLE IV (as qualified by the Disclosure Schedules and ARTICLE V below and in accordance with the express terms and conditions (including limitations and exclusions) of this Agreement) (the "Buyer Express Representations") are the sole and exclusive representations, warranties, and statements of any kind made by the Buyer to the Sellers in connection with the Contemplated Transaction.

#### **ARTICLE IV.** **BUYER'S REPRESENTATIONS AND WARRANTIES**

The Buyer represents and warrants to the Sellers as of the date hereof and as of the Closing Date as follows:

**Section 4.1 Organization of Buyer.** The Buyer is an entity duly formed, validly existing and in good standing under the Laws of the State of [ ] and has all requisite power and authority to own and operate its assets and to carry on its business as now being conducted.

#### **Section 4.2 Authorization of Transaction.**

(a) The Buyer has full power and authority to execute and deliver this Agreement and all other Related Agreements to which it is a party and to perform its obligations hereunder and thereunder.

(b) The execution, delivery and performance of this Agreement and all other Related Agreements to which the Buyer is a party have been duly authorized by the Buyer, and no other action on the part of the Buyer is necessary to authorize this Agreement or the other Related Agreements to which it is a party or to consummate the Contemplated Transaction.

(c) This Agreement has been duly and validly executed and delivered by the Buyer. This Agreement constitutes a valid and legally-binding obligation of the Buyer,

enforceable against the Buyer in accordance with its terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar Laws relating to creditors' rights and general principles of equity. To the extent each Related Agreement constitutes a valid and legally-binding obligation of the Sellers party thereto, each Related Agreement to which the Buyer is a party, when executed and delivered, constituted or will constitute the valid and legally-binding obligations of the Buyer, enforceable against the Buyer in accordance with their respective terms and conditions, subject to applicable bankruptcy, insolvency, moratorium or other similar Laws relating to creditors' rights and general principles of equity.

**Section 4.3      Noncontravention.** Neither the execution and delivery of this Agreement, nor the consummation of the Contemplated Transaction (including the assignments and assumptions referred to in Section 2.6) will (i) conflict with or result in a breach of the certificate of incorporation, operating agreement, or other Organizational Documents, of the Buyer, (ii) subject to any consents required to be obtained from any Governmental Entity, violate any Law to which the Buyer is, or its assets or properties are subject, or (iii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify or cancel any Contract to which the Buyer is a party or by which it is bound, except, in the case of either clause (ii) or (iii), for such conflicts, breaches, defaults, accelerations or rights as would not, individually or in the aggregate, reasonably be expected to prevent, materially delay or materially impair the ability of the Buyer to consummate the Contemplated Transaction or the Related Agreements.<sup>2</sup>

**Section 4.4      Litigation.** There are no Litigations pending or, to the Buyer's knowledge, threatened in writing against or affecting the Buyer that will adversely affect the Buyer's performance under this Agreement or the consummation of the Contemplated Transaction.

**Section 4.5      Adequate Assurances Regarding Executory Contracts.** The Buyer will be capable of satisfying as of the Closing Date the conditions contained in section 365(b)(1)(C) and (f) of the Bankruptcy Code with respect to the Assumed Contracts.

**Section 4.6      Brokers' Fees.** Neither the Buyer nor any of its Affiliates has entered into any Contract to pay any fees or commissions to any broker, finder, or agent with respect to the Contemplated Transaction for which the Sellers could become liable or obligated to pay.

**Section 4.7      Good Faith Purchaser.** The Buyer (i) is a "good faith" purchaser, as such term is used in the Bankruptcy Code, and (ii) is entitled to the protections of Section 363(m) of the Bankruptcy Code with respect to the transactions contemplated by this Agreement. The Buyer has negotiated and entered into this Agreement in compliance with the Bidding Procedures in compliance with Section

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<sup>2</sup> Note to Draft: Buyer is going to have to make regulatory filings in an asset sale; see sections below.

363(n) of the Bankruptcy Code, and in good faith and without collusion or fraud of any kind.

**Section 4.8** **FERC Authorizations.** As of the Closing Date, the Buyer has obtained or made all authorizations and certifications required by FERC in order to allow the Buyer and the Sellers to complete the Contemplated Transaction, and for the Buyer to own and operate the Energy Station, and sell electricity, capacity, and ancillary services at wholesale at market-based rates, including all such authorizations or approvals set forth on Schedule 4.8.<sup>3</sup>

**Section 4.9** **State and Local Authorizations.** As of the Closing Date, the Buyer has obtained or made all authorizations, certifications, prior notifications, or any other state and local governmental authorizations or approvals necessary to allow the Buyer and the Sellers to complete the Contemplated Transaction and for the Buyer to own and operate the Energy Station, including all such authorizations or approvals set forth on Schedule 4.9.<sup>4</sup>

**Section 4.10** **No Outside Reliance.** Notwithstanding anything contained in this Article IV or any other provision of this Agreement to the contrary, the Buyer acknowledges and agrees that the representations and warranties made by the Sellers to the Buyer in ARTICLE III (as qualified by the Disclosure Schedules and ARTICLE V below and in accordance with the express terms and conditions (including limitations and exclusions) of this Agreement) (the “Seller Express Representations”) are the sole and exclusive representations, warranties, and statements of any kind made by the Sellers to the Buyer in connection with the Contemplated Transaction.

## **ARTICLE V.**

### **DISCLAIMERS; WAIVERS, RELEASES**

**Section 5.1** **Sale “As Is” “Where Is”; Release for Physical and Environmental Conditions.**

(a) EACH SELLER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION OTHER THAN SELLER EXPRESS REPRESENTATIONS.

(b) THE BUYER REPRESENTS THAT IT HAS COMPLETED ITS DILIGENCE, INSPECTION, INVESTIGATION, OR REVIEW, AND HAS BE GIVEN ACCESS TO INFORMATION AND THE OPPORTUNITY TO CONDUCT DILIGENCE, INSPECTION, INVESTIGATION, AND REVIEW. THE BUYER HAS RELIED UPON ONLY (I) ITS OWN INDEPENDENT DILIGENCE, REVIEW, INVESTIGATION, OR INSPECTION IN EXECUTING THIS AGREEMENT AND

<sup>3</sup> Note to Draft: Parties to add appropriate authorizations and certifications in schedule depending on regulatory requirements applicable to said parties.

<sup>4</sup> Note to Draft: Parties to add appropriate authorizations, certifications, and prior notifications in schedule depending on regulatory requirements applicable to said parties.

CONSUMMATING THE CONTEMPLATED TRANSACTION AND (II) THE SELLER EXPRESS REPRESENTATIONS.

(c) EXCEPT IN THE CASE OF FRAUD OR WILLFUL MISCONDUCT BY ANY PERSON, THE BUYER AGREES TO ACCEPT THE PHYSICAL, ECONOMIC AND ENVIRONMENTAL CONDITION OF THE PURCHASED ASSETS AND ASSUMED LIABILITIES ON AN “AS IS-WHERE IS” BASIS SUBJECT TO THE TERMS OF THIS AGREEMENT AND THE OTHER RELATED AGREEMENTS.

(d) THE BUYER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION OTHER THAN THE BUYER EXPRESS REPRESENTATIONS.

(e) EFFECTIVE AS OF THE CLOSING, EACH SELLER, ON ITS OWN BEHALF AND ON BEHALF OF THE ESTATES AND SUCH SELLER’S DIRECTORS, MANAGERS, OFFICERS, EMPLOYEES, ADVISORS, COUNSEL, AGENTS AND REPRESENTATIVES OF EACH OF THE FOREGOING AND EACH PERSON OR ENTITY THAT MAY CLAIM THROUGH THEM OR ON THEIR BEHALF, AND ALL SUCCESSORS OR ASSIGNS OF ANY OF THE FOREGOING (COLLECTIVELY, “SELLER RELEASING PARTIES”), RELEASES (A) THE BUYER, (B) ITS AFFILIATES, (C) ALL EQUITYHOLDERS, MEMBERS, DIRECTORS, MANAGERS, OFFICERS, EMPLOYEES, ADVISORS, COUNSEL, AGENTS AND REPRESENTATIVES OF THE BUYER AND ITS AFFILIATES OR ANY OF THEIR AFFILIATES AND (D) ALL OF THE SUCCESSORS OR ASSIGNS OF ANY OF THE FOREGOING IN CLAUSES (A) – (D) (COLLECTIVELY, “BUYER RELEASED PARTIES”) FROM, AND HEREBY VOLUNTARILY, UNCONDITIONALLY AND IRREVOCABLY WAIVES, ANY AND ALL DAMAGES, CLAIMS, LOSSES, LIABILITIES, PENALTIES, FINES, LIENS, JUDGMENTS, COSTS AND EXPENSES WHATSOEVER, (INCLUDING ATTORNEYS’ FEES AND COSTS), WHETHER DIRECT OR INDIRECT, KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, CONTINGENT OR NON-CONTINGENT, LIQUIDATED OR UNLIQUIDATED, DISPUTED OR UNDISPUTED, THAT ANY SELLER RELEASING PARTY EVER HAD, NOW HAS OR EVER MAY HAVE AGAINST ANY BUYER RELEASED PARTY FOR OR BY REASON OF ANY MATTER, CIRCUMSTANCE, EVENT, ACTION, INACTION, OMISSION, ERROR, NEGLIGENCE, BREACH OF CONTRACT, TORT, VIOLATION OF LAW, CAUSE OR THING WHATSOEVER ARISING PRIOR TO THE CLOSING CONCERNING THE SALE PROCESS ESTABLISHED IN THE BIDDING PROCEDURES ORDER OR THIS AGREEMENT (THE “SELLER RELEASED CLAIMS”). NOTWITHSTANDING THE FOREGOING, NOTHING CONTAINED IN THIS SECTION 5.1(E) SHALL (A) CONSTITUTE A RELEASE OR WAIVER OF ANY RIGHTS OF ANY SELLER RELEASING PARTY OR (B) RELEASE OR RELIEVE ANY OBLIGATIONS OF ANY PERSON, IN EITHER CASE OF CLAUSES (A) AND (B), THAT ARE (I) EXPRESSLY SET FORTH IN THIS AGREEMENT, ANY OTHER RELATED AGREEMENT OR ANY OTHER AGREEMENT, CERTIFICATE OR INSTRUMENT DELIVERED PURSUANT HERETO OR THERETO OR OTHERWISE IN CONNECTION HERewith OR THEREWITH, (II) OBLIGATIONS PURSUANT TO A CONFIDENTIALITY



AGREEMENT OR ANY SIMILAR CONTRACT OR (III) ANY CLAIM THAT CANNOT BE WAIVED BY LAW. THE FOREGOING RELEASE AND WAIVER OF SELLER RELEASED CLAIMS (I) WAS MADE WITH THE ADVICE OF COUNSEL AND FULLY, FINALLY AND FOREVER SETTLES AND RELEASES THE SELLER RELEASED CLAIMS AND (II) SHALL BE AND REMAIN IN EFFECT NOTWITHSTANDING THE DISCOVERY OF ANY ADDITIONAL CLAIMS OR FACTS RELATING TO ANY OF THE SELLER RELEASED CLAIMS.

**Section 5.2 DISCLAIMER OF WARRANTIES FOR ASSETS.**

EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS AGREEMENT AND THE OTHER RELATED AGREEMENTS (IT BEING UNDERSTOOD THAT THE BUYER HAS RELIED UPON SUCH REPRESENTATIONS AND WARRANTIES) AND FRAUD OR WILLFUL MISCONDUCT BY ANY PERSON, THE BUYER ACKNOWLEDGES THAT NONE OF THE SELLERS OR THE ESTATES, OR ANY PERSON ACTING ON BEHALF OF ANY SELLER OR THE ESTATES, HAS MADE, AND THE BUYER ACKNOWLEDGES THE EXPRESS DISCLAIMER AND NEGATION, OF ANY OTHER SUCH REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, RELATING TO THE CONDITION OF ANY IMMOVABLE PROPERTY, MOVABLE PROPERTY, EQUIPMENT, INVENTORY, MACHINERY, FIXTURES AND PERSONAL PROPERTY CONSTITUTING PART OF THE ASSETS, INCLUDING (a) ANY IMPLIED OR EXPRESS WARRANTY OF MERCHANTABILITY, (b) ANY IMPLIED OR EXPRESS WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, (c) ANY IMPLIED OR EXPRESS WARRANTY OF CONFORMITY TO MODELS OR SAMPLES OF MATERIALS, (d) ANY RIGHTS OF THE BUYER UNDER APPROPRIATE STATUTES TO CLAIM DIMINUTION OF CONSIDERATION OR RETURN OF THE PURCHASE PRICE, (e) ANY IMPLIED OR EXPRESS WARRANTY OF FREEDOM FROM PATENT OR TRADEMARK INFRINGEMENT, (f) ANY IMPLIED OR EXPRESS WARRANTY OF FREEDOM FROM REDHIBITORY VICES OR DEFECTS OR OTHER VICES OR DEFECTS, WHETHER KNOWN OR UNKNOWN, AND (g) ANY AND ALL IMPLIED WARRANTIES EXISTING UNDER APPLICABLE LAW NOW OR HEREAFTER IN EFFECT, IT BEING THE EXPRESS INTENTION THAT THE IMMOVABLE PROPERTY, MOVABLE PROPERTY, EQUIPMENT, INVENTORY, MACHINERY, FIXTURES AND PERSONAL PROPERTY SHALL BE CONVEYED TO THE BUYER AS IS AND IN THEIR PRESENT CONDITION AND STATE OF REPAIR, WITH ALL FAULTS, AND THE BUYER REPRESENTS TO THE SELLERS AND THE ESTATES THAT THE BUYER HAS MADE OR CAUSED TO BE MADE SUCH INSPECTIONS WITH RESPECT TO THE IMMOVABLE PROPERTY, MOVABLE PROPERTY, EQUIPMENT, INVENTORY, MACHINERY, FIXTURES AND PERSONAL PROPERTY AS THE BUYER DEEMS APPROPRIATE AND THE BUYER WILL ACCEPT THE IMMOVABLE PROPERTY, MOVABLE PROPERTY, EQUIPMENT, INVENTORY, MACHINERY, FIXTURES AND PERSONAL PROPERTY AS IS, IN THEIR PRESENT CONDITION AND STATE OF REPAIR, WITH ALL FAULTS.

**Section 5.3 DISCLAIMER REGARDING INFORMATION.**

(a) IT IS EXPRESSLY NEGATED AND DISCLAIMED, AND THE BUYER HEREBY WAIVES, AND ACKNOWLEDGES THAT, EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT AND IN THE OTHER RELATED AGREEMENTS (IT BEING UNDERSTOOD THAT THE BUYER HAS RELIED UPON THE SELLER EXPRESS REPRESENTATIONS) AND FOR FRAUD OR WILLFUL MISCONDUCT BY ANY PERSON, NONE OF THE SELLERS, THE ESTATES, OR ANY PERSON ACTING ON BEHALF OF ANY SELLER OR THE ESTATES, HAS MADE, AND THE BUYER IS NOT RELYING UPON, ANY STATEMENT, REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, OR OTHER ASSURANCE RELATING TO (a) THE ACCURACY, COMPLETENESS OR MATERIALITY OF ANY INFORMATION, DATA OR OTHER MATERIALS (WRITTEN OR VERBAL) NOW, HERETOFORE, OR HEREAFTER FURNISHED TO THE BUYER BY OR ON BEHALF OF ANY SELLER OR THE ESTATES OR (b) THE HISTORICAL, CURRENT OR FUTURE BUSINESS, FINANCIAL CONDITION, RESULTS OF OPERATIONS, ASSETS, LIABILITIES, PROPERTIES, CONTRACTS, AND PROSPECTS OF THE SELLERS OR THE ESTATES.

(b) IT IS EXPRESSLY NEGATED AND DISCLAIMED, AND EACH SELLER, ON ITS OWN BEHALF AND ON BEHALF OF THE ESTATES, HEREBY WAIVES, AND ACKNOWLEDGES THAT, EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT AND IN THE OTHER RELATED AGREEMENTS (IT BEING UNDERSTOOD THAT THE SELLERS HAVE RELIED ONLY UPON THE BUYER EXPRESS REPRESENTATIONS), NONE OF THE BUYER OR ANY OF THE BUYER RELEASED PARTIES, HAS MADE, AND THE SELLERS ARE NOT RELYING UPON, ANY STATEMENT, REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, OR OTHER ASSURANCE RELATING TO (a) THE ACCURACY, COMPLETENESS OR MATERIALITY OF ANY INFORMATION, DATA OR OTHER MATERIALS (WRITTEN OR VERBAL) NOW, HERETOFORE, OR HEREAFTER FURNISHED TO THE SELLERS BY OR ON BEHALF OF THE BUYER OR ANY THE BUYER RELEASING PARTY, OR (b) THE HISTORICAL, CURRENT OR FUTURE BUSINESS, FINANCIAL CONDITION, RESULTS OF OPERATIONS, ASSETS, LIABILITIES, PROPERTIES, CONTRACTS, AND PROSPECTS OF THE BUYER OR ANY BUYER RELEASING PARTY.

**Section 5.4 DISCLAIMER AS TO TITLE TO ASSETS.** SUBJECT TO SECTION 3.3, THE SELLERS SHALL CONVEY THE SELLERS' AND THE ESTATES' INTERESTS IN AND TO THE ASSETS TO THE BUYER WITHOUT ANY WARRANTY OF TITLE.

**Section 5.5 SOLE REMEDY; WAIVER OF TITLE AND ENVIRONMENTAL MATTERS.** THE BUYER HEREBY EXPRESSLY WAIVES ANY AND ALL RIGHTS OR REMEDIES AGAINST THE SELLERS AND THE ESTATES, INCLUDING ANY STATUTORY OR COMMON LAW RIGHT OF CONTRIBUTION, (X) WITH RESPECT TO ANY IMMATERIAL DEFECT, DEFICIENCY OR OTHER TITLE MATTER WITH RESPECT TO THE

PURCHASED ASSETS (SUBJECT TO THE BUYER'S RIGHT TO RECEIVE TITLE TO THE ASSETS FREE AND CLEAR OF ALL LIENS (OTHER THAN PERMITTED LIENS) AND ALL LIABILITIES (INCLUDING EXCLUDED LIABILITIES, BUT FREE AND CLEAR OF ASSUMED LIABILITIES)) UPON THE TERMS AND SUBJECT TO THE CONDITIONS OF THE SALE ORDER, AND (Y) WITH RESPECT TO ANY CIRCUMSTANCE WITH RESPECT TO THE PURCHASED ASSETS RELATING TO ENVIRONMENTAL LAWS, THE RELEASE OF SUBSTANCES OR HAZARDOUS SUBSTANCES INTO THE ENVIRONMENT OR PROTECTION OF THE ENVIRONMENT OR PUBLIC HEALTH DISCLOSED ON SCHEDULE 3.11.

**Section 5.6** **CONSPICUOUSNESS**. EACH OF THE BUYER AND THE SELLERS ACKNOWLEDGE THAT THE DISCLAIMERS, WAIVERS AND RELEASES CONTAINED IN THIS ARTICLE V AND ELSEWHERE IN THIS AGREEMENT ARE CONSPICUOUS.

## **ARTICLE VI.**

### **PRE-CLOSING COVENANTS**

The Parties agree as follows with respect to the period between the execution of this Agreement and the Closing (except as otherwise expressly stated to apply to a different period):

**Section 6.1** **Conduct of Business**. Until the earlier of the termination of this Agreement and the Closing, except as expressly contemplated by this Agreement or required under the Bankruptcy Code or other applicable Law, and except with the prior written consent of the Buyer:

(a) During the period from the date of this Agreement through the earlier of the Closing or the termination of this Agreement in accordance with ARTICLE IX (the "Pre-Closing Period"), except as otherwise provided in this Agreement or the Bidding Procedures Order (after entry thereof), the Sellers shall use commercially reasonable efforts to conduct the Estates' operations in the Ordinary Course of Business.

(b) Without limiting the generality or effect of the foregoing, during the Pre-Closing Period, the Sellers shall use commercially reasonable effort to (i) preserve intact the Sellers' business organization, (ii) continue in full force and effect without material modification all existing material policies or binders of insurance maintained by the Sellers as of the Petition Date, (iii) pay any post-Petition debts and trade and other accounts payable punctually when and as the same will become due and payable and perform and observe, in all material respects, its duties and obligations under all Assumed Contracts, (iv) maintain the Purchased Assets in the same condition as they are as of the date hereof, subject only to ordinary wear and tear and other changes in the Ordinary Course of Business, and (v) maintain its relationships and goodwill with customers, mechanics, materialmen, suppliers, landlords, employees, agents and others having business relationships with the Estates and/or the Sellers.

(c) Except as expressly permitted herein or as set forth on Schedule 6.1(c), the Sellers shall not (i) renew, amend, reject or voluntarily terminate any Assumed Contract, (ii) encumber, sublease, or otherwise grant any Liens or other rights with respect to the Purchased Assets, except to the extent of Liens arising in the Ordinary Course of Business or any Lien is approved by the Bankruptcy Court, (iii) enter into any Contracts affecting the Purchased Assets or that will be binding on the Buyer, (iv) sell, assign, license, transfer, convey, lease, surrender, relinquish or otherwise dispose of any Purchased Asset, (v) move or remove, or permit to be moved or removed, any Purchased Asset from or at the Owned Real Property or Leased Real Property or move, place or locate, or permit to be moved, placed or located, any Excluded Asset from or at the Owned Real Property or Leased Real Property, (vi) other than the planned turbine upgrade at the Energy Station, undertake or approve any renovation or rehabilitation of the Owned Real Property or Leased Real Property, (vii) acquire any material properties or assets that would be Purchased Assets, (viii) cancel or compromise any debt or Claim or waive or release any right of any Seller or Estate that constitutes a Purchased Asset, (ix) resolve any Liability that would be an Assumed Liability other than payments to vendors and suppliers in the Ordinary Course of Business, (x) satisfy any Excluded Liability with a Purchased Asset, (xi) make, change or revoke any material Tax election; change an annual accounting period with respect to Taxes; adopt or change any accounting method with respect to Taxes; file any amended Tax Return; enter into any closing agreement with respect to Taxes; settle or compromise any material Tax claim or assessment; or consent to any extension or waiver of the limitation period after the Closing Date applicable to any claim or assessment with respect to Taxes, in each case, to the extent such action would reasonably be expected to adversely affect the Purchased Assets in a period after the Closing, or (xii) agree or commit to do any of the foregoing.

**Section 6.2** Access. During the Pre-Closing Period, the Sellers will (i) allow all designated officers, attorneys, accountants and other Representatives of the Buyer reasonable access at reasonable times during normal business hours to the Representatives of the Sellers and/or the Estates and the books and records of the Sellers and/or the Estates, (ii) furnish to the Buyer and its authorized Representatives such financial and operating data and other information as such Persons may reasonably request, and (iii) allow the Buyer, personally or through its authorized Representative, to enter upon and inspect the Purchased Assets and Energy Station during normal business hours upon providing at least a seven-days notice; *provided*, that (x) the Buyer may not conduct engineering studies, surface or subsurface testing or investigations, or environmental studies and (y) the foregoing right of access will not be exercisable in such a manner as to interfere unreasonably with the normal operations and business of the Sellers, the Energy Station or any Energy Station Asset.

**Section 6.3** Commercially Reasonable Efforts. The Buyer, on the one hand, and the Sellers, on the other hand, will use their respective commercially reasonable efforts (i) to take, or cause to be taken, all actions, and do, or cause to be done, and assist and cooperate with each other in doing, all things necessary to consummate, in the most expeditious manner practicable, the transactions contemplated hereby, including the satisfaction of the conditions set forth in ARTICLE VIII, and (ii) to not take, or cause to be not taken, any action that will have

the effect of unreasonably delaying, impairing or impeding the receipt of any authorizations, Consents or Orders to be sought pursuant to this Agreement.

**Section 6.4**      **Filings with Governmental Entities; Permits and Licenses.**

(a) Without limiting the generality or the effect of Section 6.3, the Buyer, on the one hand, and the Sellers, on the other hand, will (i) cooperate with each other in connection with, and use their respective commercially reasonable efforts to provide information required for, any application or other filing to be made with any Governmental Entity in connection with the transactions contemplated by this Agreement, and (ii) cooperate with each other in connection with, and use their respective commercially reasonable efforts to resolve, objections, if any, that are asserted by any Governmental Entity with respect to the transactions contemplated hereby.

(b) Without limiting the generality or effect of Section 6.3, the Buyer, on the one hand, and the Sellers, on the other hand, will use their commercially reasonable efforts to effect the transfer of the Assumed Permits to the Buyer on the Closing Date, to the extent such transfer is permissible under applicable Law.

**Section 6.5**      **Tax Matters.**

(a) The Sellers and the Buyer shall prepare their respective Tax Returns and cooperate to finalize and timely file any Tax Returns required to be filed. The Buyer, on the one hand, and the Sellers, on the other hand, will (i) provide each other with any assistance that may reasonably be requested by the other in connection with the preparation of any Tax Return, audit or other examination by any taxing authority or judicial or administrative proceedings relating to liability for Taxes, (ii) each retain and provide the other with any records or other information that may be relevant to that Tax Return, audit, examination or proceeding, and (iii) provide each other with any final determination of any such audit, examination or proceeding that affects any amount required to be shown on any Tax Return of the other for any period. Without limiting the generality of the foregoing, the Buyer, on the one hand, and the Sellers, on the other hand, will retain until the applicable statutes of limitations (including any extensions) have expired copies of all records or information that may be relevant to Tax Returns filed by the other for all Tax periods or portions thereof ending before or including the Closing Date. Such records and information may nevertheless be destroyed by the Buyer, on the one hand, or the Sellers, on the other hand, if such Party sends to the other party written notice of its intent to destroy such records and information, specifying with particularity the contents of the records and information to be destroyed. Such records and information may then be destroyed after the 30th day after such notice is given unless the Party receiving the notice objects to the destruction, in which case the Party that provided the notice will deliver, at the objecting Party's expense, such records to the objecting Party.

(b) To the extent not exempted under the Bankruptcy Code pursuant to the terms of the Sale Order, the Buyer shall pay all Transfer Taxes. To the extent not exempted under state Law pursuant to the terms of the Sale Order, the Buyer shall pay all Taxes

arising or imposed under any Tax-related bulk transfer Laws of any jurisdiction. The Sellers and the Buyer shall use their commercially reasonable efforts to seek such exemptions in the Sale Order to the extent permitted by applicable Law.

(c) All real property, personal property, *ad valorem* or other similar Taxes (not including income Taxes) levied with respect to the Purchased Assets or the Energy Station for a taxable period which includes (but does not end on) the Closing Date shall be apportioned to the Sellers based on the number of days included in such period through and including the Closing Date and apportioned to the Buyer based upon the number of days included in such period after the Closing Date.

**Section 6.6** **Public Announcements.** The Sellers, on the one hand, and the Buyer, on the other hand agree that they will not make any public announcement or issue any press release or respond to any press inquiry with respect to this Agreement or the Contemplated Transaction without the prior approval of the other Party or Parties (which approval will not be unreasonably withheld), except as may be required (i) by any applicable Law, or (ii) to administer the Chapter 11 Cases.

## **ARTICLE VII.**

### **OTHER COVENANTS**

The Parties agree as follows with respect to the period from and after the Closing; *provided*, that (i) the Sellers shall not incur any costs or Liabilities associated with the obligations hereunder, including with respect to ordinary and necessary professional fees as are required for the Sellers to comply with the obligations hereunder, and (ii) the Sellers' obligations hereunder shall only continue until the Chapter 11 Cases are closed or dismissed.

**Section 7.1** **Cooperation.** Each of the Parties shall cooperate with each other and shall use their commercially reasonable efforts to cause their respective Representatives to cooperate with each other, to provide an orderly transition of the Purchased Assets and Assumed Liabilities from the Sellers to the Buyer and to minimize the disruption to the Energy Station resulting from the Contemplated Transaction, *provided*, that no Party shall be required to expend other than nominal unreimbursed costs in providing such cooperation.

**Section 7.2** **Further Assurances; Turnover.** In case at any time from and after the Closing any further action is necessary or reasonably required to carry out the purposes of this Agreement, subject to the terms and conditions of this Agreement and the terms and conditions of the Sale Order, each Party shall take such further action (including the execution and delivery to any other Party of such other reasonable instruments of sale, transfer, conveyance, assignment, assumption and confirmation and providing materials and information) as another Party may reasonably request and as may be necessary to transfer, convey, and assign to the Buyer all of the Purchased Assets, to confirm the Buyer's assumption of the Assumed Liabilities and to confirm the Sellers' retention of the Excluded Assets and Excluded Liabilities. Without limiting the generality of this Section 7.2, to the extent that either the Buyer or the Sellers discover any additional assets or properties which the Parties

mutually agree should have been transferred or assigned to the Buyer as Purchased Assets but were not so transferred or assigned, the Buyer and the Sellers shall cooperate and execute and deliver any instruments of transfer or assignment necessary to transfer and assign such asset or property to the Buyer. If, after the Closing, the Sellers receive any cash or other payments in respect of the Purchased Assets, the Sellers shall pay any such amounts to the Buyer promptly after the receipt thereof and provide the Buyer with information as to the nature and source of any such amount. Without limiting the generality of this Section 7.2, to the extent that either the Buyer or the Sellers discover any additional assets or properties which the Parties mutually agree constitute Excluded Assets, the Buyer and the Sellers shall cooperate and execute and deliver any instruments necessary to ensure the Estates' ownership and possession of such asset or property. If, after the Closing, the Buyer receives any cash or other payments in respect of the Excluded Assets, the Buyer shall pay any such amounts to the applicable Seller promptly after the receipt thereof and provide the Sellers with information as to the nature and source of any such amount. Notwithstanding the foregoing, nothing herein shall require the Sellers to execute any document or take any action that would (i) impose Liabilities on the Sellers over and above those imposed on Sellers by the other provisions of this Agreement, (ii) involve any cost or expense (individually or in the aggregate) that is material in amount, or (iii) include joining or otherwise becoming a party to any action or proceeding of any kind.

**Section 7.3 Post-Closing Regulatory Notices.** The Buyer shall be responsible for completing any post-Closing notifications or filings required by a Governmental Entity or ISO-NE as a result of the Contemplated Transaction. To the extent any such notification or filing must by law or ISO-NE Tariff or other ISO-NE requirement be made by the Sellers, the Buyer will cooperate and provide reasonable assistance to facilitate the Sellers' completion of such notification or filing.

**Section 7.4 Personally Identifiable Information.** The Buyer shall honor and observe any and all written policies of the Sellers in effect on the Petition Date prohibiting the transfer of personally identifiable information about individuals and otherwise comply with the requirements of Section 363(b)(1)(A) of the Bankruptcy Code.

**Section 7.5 Books and Records.** The Buyer will preserve for a period of three (3) years after the Closing Date (or such longer period as may be required by any Governmental Entity or ongoing claim) all books and records related to the Business of the Estates and/or the Sellers on or prior to the Closing Date. After the Closing Date, where there is a legitimate purpose, the Buyer will provide the Sellers hereto with access to and the right to copy any books and records not provided at Closing, during regular business hours; *provided*, that the foregoing right of access will not be exercisable in such a manner as to interfere unreasonably with the normal operations and business of the Buyer, the Energy Station or any Energy Station Asset.

**Section 7.6 Reasonable Access to Records and Certain Personnel.** Without limiting Section 6.5(a), for a period beginning on the Closing Date and ending

on the later of (A) the date that is one (1) year following the Closing and (B) the date that all of the bankruptcy proceedings relating to the Chapter 11 Cases have been concluded (such period, the “Access Period”), (i) the Buyer shall permit the Sellers’ counsel and other professionals and counsel for any successor to the Sellers and their respective professionals (collectively, “Permitted Access Parties”) reasonable access to the financial and other books and records relating to the Purchased Assets, Excluded Assets, Assumed Liabilities and Excluded Liabilities, which access shall include the right of such Permitted Access Parties to retain a copy, at such Permitted Access Parties’ expense, of such documents and records as they may request to the extent necessary to permit the administration of bankruptcy claims and the winddown of the Estates and shall preserve such books and records during the Access Period, and (ii) upon seven (7) Business Days’ advance written notice to the Buyer, the Buyer shall provide the Permitted Access Parties with reasonable access during regular business hours to inspect the information set forth in clause (i) above, *provided*, that such access does not unreasonably interfere with the Buyer’s business operations.

## **ARTICLE VIII.**

### **CONDITIONS TO CLOSING**

**Section 8.1**      **Conditions to the Buyer’s Obligations.** Subject to Section 8.3, the Buyer’s obligation to consummate the Contemplated Transaction in connection with the Closing is subject to satisfaction or written waiver of the following conditions (any or all of which may be waived in writing by the Buyer in whole or in part to the extent permitted by applicable Law):

(a) each of the representations and warranties of the Sellers contained in this Agreement (without giving effect to any qualification as to materiality, Material Adverse Effect or words of similar import included therein) shall be true and correct in all respects on and as of the date hereof and on and as of the Closing Date, as if made at and as of such date (except those representations and warranties that address matters only as of a specified date, the accuracy of which shall be determined as of that specified date in all respects), except where the failure to be so true and correct would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect;

(b) the Sellers shall have performed and complied with the covenants and agreements hereunder to the extent required to be performed by the Sellers prior to the Closing in all material respects, and the Sellers shall have caused the documents and instruments required by Section 2.8(a) to be delivered to the Buyer (or tendered subject only to Closing);

(c) no Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Order or Law (whether temporary, preliminary or permanent) that is in effect and that has the effect of making the Closing illegal or that enjoins, restrains or otherwise prohibits the consummation of the Closing;



(d) all consents and approvals of any Governmental Entity necessary to the consummation of the Contemplated Transaction shall have been obtained and shall be in full force and effect;

(e) the Sale Order, together with any other Order of the Bankruptcy Court required to consummate the Contemplated Transaction (including the Bidding Procedures Order) shall have been entered by the Bankruptcy Court and each such Order (i) is not subject to any stay, (ii) has not been vacated, reversed, or modified in a material manner with respect to the Buyer's rights or protections thereunder without the Buyer's prior written consent, and (iii) except with respect to the Bidding Procedures Order, provides for a waiver of the provisions of Rule 6004(h) of the Federal Rules of Bankruptcy Procedures;

(f) to the extent approval by FERC is required, FERC shall have issued an order authorizing the Contemplated Transaction under Federal Power Act Section 203(a), 16 U.S.C. § 824b(a) ("Section 203(a)"), or disclaiming jurisdiction over the Contemplated Transactions under Section 203(a); and

(g) each Seller shall have delivered a certificate by such Seller or an authorized representative or agent thereof to the effect that each of the conditions specified in Section 8.1(a) and Section 8.1(b) has been satisfied.

**Section 8.2 Conditions to the Sellers' Obligations.** Subject to Section 8.3, the Sellers' obligation to consummate the Contemplated Transaction in connection with the Closing are subject to satisfaction or written waiver of the following conditions (any or all of which may be waived in writing by the Sellers in whole or in part to the extent permitted by applicable Law):

(a) each of the representations and warranties of the Buyer contained in this Agreement (without giving effect to any qualification as to materiality, material adverse effect or words of similar import included therein) shall be true and correct in all respects on and as of the date hereof and on and as of the Closing Date, as if made at and as of such date (except those representations and warranties that address matters only as of a specified date, the accuracy of which shall be determined as of that specified date in all respects), except where the failure to be so true and correct would not, individually or in the aggregate, reasonably be expected to have a material adverse effect on the Buyer's ability to consummate the Contemplated Transaction;

(b) the Buyer shall have performed and complied with the covenants and agreements hereunder to the extent required to be performed by the Buyer prior to the Closing in all material respects, and the Buyer shall have caused the documents, instruments and payments required by Section 2.8(b) to be delivered to the Sellers (or tendered subject only to the Closing);

(c) no Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Order or Law (whether temporary, preliminary or permanent) that is in effect and that has the effect of making the Closing illegal or that enjoins, restrains or otherwise prohibits the consummation of the Closing;

(d) all consents and approvals of any Governmental Entity necessary to the consummation of the Contemplated Transaction shall have been obtained and shall be in full force and effect, and the Sellers shall have received from the Buyer copies of documentation evidencing receipt of all authorizations, approvals and certifications from, and prior notifications to, state and local Governmental Entities as are listed on Schedule 4.9;

(e) the Sale Order, together with any other Order of the Bankruptcy Court required to consummate the Contemplated Transaction (including the Bidding Procedures Order), shall have been entered by the Bankruptcy Court and each such Order (i) is not subject to any stay, (ii) has not been vacated, reversed, or modified in a material manner with respect to the Buyer's rights or protections thereunder without the Buyer's prior written consent, and (iii) except with respect to the Bidding Procedures Order, provides for a waiver of the provisions of Rule 6004(h) of the Federal Rules of Bankruptcy Procedures;

(f) to the extent approval by FERC is required, FERC shall have issued an order authorizing the Contemplated Transaction under Section 203(a), or disclaiming jurisdiction over the Contemplated Transaction under Section 203(a); and

(g) the Buyer shall have delivered a certificate by the Buyer or an authorized Representative thereof to the effect that each of the conditions specified in Section 8.2(a) and Section 8.2(b) has been satisfied.

**Section 8.3** **No Frustration of Closing Conditions.** Neither the Buyer nor the Sellers may rely on the failure of any condition to its obligation to consummate the Contemplated Transaction set forth in Section 8.1 or Section 8.2, as the case may be, to be satisfied if such failure was caused by such Party's (i) failure to use its commercially reasonable efforts with respect to those matters contemplated by the applicable Sections of this Agreement to satisfy the conditions to the consummation of the Contemplated Transaction, or (ii) breach of a representation, warranty or covenant hereunder.

**Section 8.4** **Waiver of Conditions.** Upon the occurrence of the Closing, any condition set forth in this Article VIII that was not satisfied as of the Closing will be deemed to have been waived for all purposes by the Party having the benefit of such condition as of and after the Closing.

## **ARTICLE IX.**

### **TERMINATION**

**Section 9.1** **Termination of Agreement.** This Agreement may be terminated and the Contemplated Transaction abandoned at any time prior to the Closing in accordance with this ARTICLE IX:

(a) by the mutual written consent of the Buyer, on the one hand, and the Sellers, on the other hand;

(b) by written notice of either the Buyer, on the one hand, or the Sellers, on the other hand, if there shall be any Law that makes consummation of the Contemplated Transaction illegal or otherwise prohibited, or upon the issuance by any Governmental Entity of an Order restraining, enjoining, or otherwise prohibiting the consummation of the Contemplated Transaction or declaring unlawful the Contemplated Transaction, and such Order having become final, binding and non-appealable; *provided*, that no termination may be made by a Party under this Section 9.1(b) if the issuance of such Order was caused by the breach action or inaction of such Party;

(c) by (i) written notice of either the Buyer, on the one hand, or the Sellers, on the other hand, if the Closing shall not have occurred on or before the Outside Date; *provided*, that at the time of such termination, the Party seeking to terminate shall not (i) be in material breach of its obligations under this Agreement, including its obligation to consummate the Closing on the terms and subject to the conditions set forth herein, (ii) assuming the Sale Order is entered, have failed to use its commercially reasonable efforts to avoid or eliminate each and every impediment to Closing so as to enable those events to occur on or before the Outside Date (*provided*, that this clause (ii) shall not be construed to impair the Sellers' contractual rights under this Agreement and the other Related Agreements), or (iii) have failed to fulfill any of its obligations under this Agreement, which was the direct or indirect cause of, or otherwise resulted in the failure of the Closing to occur on or before the Outside Date; *provided, further*, that if the Buyer is selected as the Backup Bidder at the conclusion of the Auction, the Buyer shall not be permitted to terminate this Agreement until the earlier of (x) one hundred twenty (120) days after entry of the Sale Order if the Closing shall not have occurred by such date, and (y) the date on which the Sellers consummate an Alternative Transaction;

(d) by the Buyer by written notice to the Sellers at any time prior to Closing (i) in the event any Seller has materially breached any representation, warranty, covenant, or agreement contained in this Agreement and as a result of such breach the conditions set forth in Section 8.1 hereof would not then be satisfied at the time of such breach, the Buyer has notified the Sellers of the breach, and the breach has continued without cure until the earlier of (i) five (5) days prior to the Outside Date so long as all other material conditions of the Buyer to be satisfied prior to such date have been satisfied or (ii) thirty (30) days after the notice of the breach, in each case, unless such failure shall be due to the failure of the Buyer to perform or comply with any of the covenants hereof to be performed or complied with by it prior to the Closing, and such breach or condition is not waived by the Buyer;

(e) by the Sellers by written notice to the Buyer at any time prior to Closing (i) in the event the Buyer has materially breached any representation, warranty, covenant, or agreement contained in this Agreement and as a result of such breach the conditions set forth in Section 8.2 hereof would not then be satisfied at the time of such breach, the Sellers have notified the Buyer of the breach, and the breach has continued without cure until the earlier of (i) five (5) days prior to the Outside Date so long as all other material conditions of the Seller to be satisfied prior to such date have been satisfied or (ii) thirty (30) days after the notice of the breach, in each case, unless such failure shall be due to the failure of the Sellers to perform or comply with any of the covenants hereof to be performed or

complied with by it prior to the Closing, and such breach or condition is not waived by the Sellers;

(f) by the Sellers, by written notice to the Buyer, if the Buyer has not unconditionally confirmed to the Sellers in writing by 5:00 p.m. (prevailing Eastern Time) on or before [ ] that it has sufficient cash to satisfy its obligations under this Agreement;

(g) by the Buyer, by written notice to the Sellers, if the Chapter 11 Cases are dismissed for any reason prior to Closing;

(h) by the Buyer, on the one hand, or the Sellers on the other hand, by written notice to the other, at any time after entry of the Sale Order, such Sale Order is reversed, stayed, vacated, or otherwise modified by a subsequent order in a manner material and adverse to the terminating Party and such order having become final, binding and non-appealable (except as modified or amended in any immaterial respect or with the consent of the Buyer, which consent shall not be unreasonably withheld, conditioned or delayed, for material modifications and amendments); *provided, further*, that at the time of such termination, the Party seeking to terminate shall not (i) be in material breach of its obligations under this Agreement, (ii) have failed to use its commercially reasonable efforts to avoid or eliminate each and every impediment to the entry of the Sale Order by the Sale Order Deadline (*provided*, that this clause (ii) shall not be construed to impair the Sellers' contractual rights under this Agreement and the other Related Agreements), or (iii) have failed to fulfill any of its obligations under this Agreement, which was the direct or indirect cause of, or otherwise resulted in, the failure of the Sale Order to be entered by the Sale Order Deadline;

(i) by the Buyer, if (i) the Buyer is not named by the Sellers as the Successful Bidder or the Backup Bidder at the conclusion or cancellation of the Auction or (ii) the Sellers terminate the bidding process contemplated by the Bidding Procedures or the Auction without the consent of the Buyer (unless Buyer is the Successful Bidder), which consent shall not be unreasonably withheld, conditioned or delayed;

(j) automatically, if an Alternative Transaction is approved by order of the Bankruptcy Court and consummated; and

(k) by the Sellers, by written notice to the Buyer, if there is an Alternative Transaction approved by order of the Bankruptcy Court and that may be consummated and the Sellers have determined in good faith after consultation with the Sellers' outside legal counsel, investment banker and financial advisors that failure to consummate the Alternative Transaction would reasonably be expected to constitute a breach of the fiduciary duties of the members of the governing body of any Seller or the Sellers' duty to maximize the value of assets under the Bankruptcy Code.

Notwithstanding anything to the contrary contained herein, (i) in no event may the Buyer terminate this Agreement on account of the Buyer's failure to satisfy the conditions contained in section 365(b)(1)(C) and (f)(2)(B) of the Bankruptcy Code with respect to any proposed Assumed Contract, and (ii) a Party shall not be permitted to terminate this

Agreement pursuant to this ARTICLE IX if the applicable termination was caused by the breach of such Party or such Party's gross negligence, willful misconduct, or bad faith.

**Section 9.2** **Procedure upon Termination.** The Sellers shall give written notice to the Buyer promptly upon becoming aware of any occurrence, or failure to occur, of any event, which occurrence or failure to occur has caused or could reasonably be expected to cause any condition to the obligations of the Buyer to effect the Contemplated Transaction not to be satisfied. The Buyer shall give written notice to the Sellers promptly upon becoming aware of any occurrence, or failure to occur, of any event, which occurrence or failure to occur has caused or could reasonably be expected to cause any condition to the obligations of the Sellers to effect the Contemplated Transaction not to be satisfied. In the event of termination by the Buyer, on the one hand, or the Sellers, on the other hand, or both, pursuant to Section 9.1, written notice thereof shall forthwith be given to the other Party (unless termination is by consent of the Parties), and this Agreement shall terminate (subject to the conditions of this Section 9.2 and Section 9.3) and the Contemplated Transaction shall be abandoned, without further action by the Buyer or the Sellers. In the event of a proper, timely and permitted termination of this Agreement, either automatically pursuant to Section 9.1(j) or by the Buyer pursuant to Section 9.1(b), Section 9.1(c) or Section 9.1(d), and at the time of the notice or effectiveness of termination the Sellers did not have the right to terminate this Agreement, the Deposit shall be returned to the Buyer. In all other instances of termination of this Agreement, the Deposit shall be forfeited to the Sellers.

**Section 9.3** **Effect of Termination.** In the event that this Agreement is validly terminated pursuant to a right of termination as provided in Section 9.1, then all rights of the Parties hereunder shall terminate and each of the Parties shall be relieved of its duties and obligations arising under this Agreement effective as of the date of such termination and such termination shall be without Liability to the Buyer or the Sellers (or any other Person) and termination shall be the sole and exclusive remedy of the Parties for a breach of this Agreement other than the return or forfeiture of the Deposit as provided in Section 9.2; *provided, however*, notwithstanding the foregoing, that Section 9.1, Section 9.2, this Section 9.3 and ARTICLE XI shall survive any such termination and shall be enforceable hereunder and in no event shall any termination of this Agreement relieve any Party hereto of any Liability for any breach of this Agreement by such Party.

## **ARTICLE X.** **BANKRUPTCY MATTERS**

### **Section 10.1** **Bankruptcy Court Approvals.**

(a) The Sellers and the Buyer acknowledge that this Agreement is subject to approval by the Bankruptcy Court by entry of, as applicable, the Bidding Procedures Order and the Sale Order.

(b) The Buyer acknowledges that the Purchased Assets may be subject to competitive bidding and that the Bidding Procedures may be supplemented by other customary procedures consistent with the terms of this Agreement, *provided*, that the Bidding Procedures may not be amended, modified, or supplemented in any respect except as provided for in the Bidding Procedures.

(c) In the event Buyer is the Successful Bidder, the Sellers will, as promptly as practicable, but in all events in accordance with the Bidding Procedures, file and serve the Initial Notice of Proposed Assumed Contracts, any Supplemental Notice of Proposed Assumed Contracts, and the Final Sale Notice, together with the proposed Sale Order and copies of this Agreement and any instrument or other document delivered in connection with the Contemplated Transaction (with any redactions the Sellers and the Buyer mutually deem appropriate in accordance with Bankruptcy Rule 9018 and the Bidding Procedures Order), and serve it upon the parties required to be served in accordance with the Bidding Procedures.

(d) The Sellers shall use commercially reasonable efforts to obtain the Sale Order. Any material changes to the form of the Sale Order must be approved by the Buyer and the Sellers in their respective discretion, which consent shall not be unreasonably withheld. The Buyer shall provide adequate assurance of future performance (satisfactory to the Bankruptcy Court) to the counterparties to the Assumed Contracts.

(e) Each of the Buyer and the Sellers will promptly take such actions as are reasonably requested by the other Party to assist in (x) obtaining entry of the Sale Order by no later than the Sale Order Deadline, and (y) consummating the Contemplated Transaction in accordance with this Agreement. The Sale Order shall, among other things, (i) approve, pursuant to Sections 105, 363, and 365 of the Bankruptcy Code, (A) the execution, delivery and performance by the Sellers of this Agreement and the other Related Agreements, (B) the sale of the Purchased Assets to the Buyer free and clear of any and all Claims, Liens and Liabilities (for the avoidance of doubt, free and clear of Excluded Liabilities), other than Assumed Liabilities or Permitted Liens, pursuant to Section 363(f) of the Bankruptcy Code, and (C) the consummation of the Contemplated Transaction and the performance by the Sellers of their obligations under this Agreement and the other Related Agreements, (ii) authorize and empower the Sellers to assume and assign to the Buyer the Assumed Contracts and Assumed Permits, and (iii) find that the Buyer is a “good faith” buyer within the meaning of Section 363(m) of the Bankruptcy Code, not a successor to or alter ego of the Sellers, and that this Agreement and the Contemplated Transaction are undertaken by the Buyer and the Sellers at arm’s length, without collusion, that the Buyer is entitled to the protections of Section 363(m) of the Bankruptcy Code, and that the provisions of Section 363(n) of the Bankruptcy Code are not applicable.

(f) The Buyer and the Sellers acknowledge that this Agreement and the sale of the Purchased Assets and assumption and assignment of the Assumed Contracts are subject to Bankruptcy Court approval and the consideration by the Sellers of higher or better competing transactions (including any competing bids, plan of reorganization or recapitalization or restructuring transaction) in respect of all or any part of the Purchased Assets in accordance with the Bidding Procedures Order.

**Section 10.2      Further Filings and Assurances.**

(a) The Buyer agrees that it will promptly take such actions as are reasonably requested by the Sellers to assist in obtaining entry of the Sale Order and a finding of adequate assurance of future performance by the Buyer, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of providing necessary assurances of performance by the Buyer under this Agreement and demonstrating that the Buyer is a “good faith” purchaser under Section 363(m) of the Bankruptcy Code.

(b) From and after the date of this Agreement and until the Closing Date, to the extent reasonably practicable under the circumstances, the Sellers shall make reasonable efforts to consult and cooperate with the Buyer regarding (a) any pleadings, motions, notices, statements, applications, schedules, reports or other papers to be filed with the Bankruptcy Court in relation to the implementation of the Contemplated Transaction, (b) any discovery taken in connection with the seeking entry of the Sale Order (including any depositions), (c) any objections, reservations of rights, appeals, motions for reconsideration, or any other relief requested by a non-Party in relation to implementation of the Contemplated Transaction, and (d) any hearing that is a predicate for or relating to the Sale Order, including the submission of any evidence, including witnesses testimony, in connection with such hearing.

(c) If the Bidding Procedures Order, the Sale Order or any other Orders of the Bankruptcy Court relating to the Contemplated Transaction shall be appealed by any Person (or if any petition for certiorari or motion for reconsideration, amendment, clarification, modification, vacation, stay rehearing or re-argument shall be filed with respect to the Bidding Procedures Order, the Sale Order, or any other Orders of the Bankruptcy Court relating to the Contemplated Transaction), subject to rights otherwise arising from this Agreement, including the conditions to Closing set forth in Section 8.1(e) and Section 8.2(e), and each Party’s respective right to terminate this Agreement pursuant to Section 9.1, as applicable, the Sellers and the Buyer shall consult with one another and use their commercially reasonable efforts to oppose such appeal, petition or motion and obtain an expedited resolution of any such appeal, petition or motion so as to permit the Contemplated Transaction to be consummated pursuant to the Sale Order as promptly as practicable.

(d) The Sellers and the Buyer agree that, in the event that the Buyer is not the Successful Bidder, the Buyer shall act as the Backup Bidder as set forth in the Bidding Procedures and Bidding Procedures Order, if so named; *provided*, that, the Buyer’s obligation to act as the Backup Bidder shall terminate on the earlier of (i) one hundred twenty (120) days after entry of the Sale Order if the Closing shall not have occurred by such date, (ii) one hundred thirty (130) days after the date of the Auction and (iii) the date on which the Sellers consummate an Alternative Transaction. If the Buyer is selected as the Backup Bidder, (a) neither such selection itself nor the failure to select the Buyer as the Successful Bidder shall give rise to a right of the Buyer to terminate this Agreement, and (b) this Agreement shall remain in full force and effect until terminated in accordance with the terms herein.

**Section 10.3** **Free and Clear.** The transfer of the Purchased Assets shall vest the Buyer with all right, title and interest of the Sellers in the Purchased Assets free and clear of any and all Claims, Liens and Liabilities (for the avoidance of doubt, free and clear of Excluded Liabilities), other than Assumed Liabilities or Permitted Liens, pursuant to Section 363(f) of the Bankruptcy Code, whether arising by statute or otherwise and whether arising before or after the commencement of the Chapter 11 Cases, whether known or unknown, including, interests of or asserted by any of the creditors, vendors, employees, suppliers, or lessors of the Sellers or any other third party. Any and all such Claims, Liens and Liabilities (for the avoidance of doubt, encompassing Excluded Liabilities), other than Assumed Liabilities or Permitted Liens, shall attach to the proceeds of the Purchase Price, with the same priority, validity, force, and effect as they now have against the Purchased Assets. The Buyer shall not be liable for any Claims, Liens and Liabilities (for the avoidance of doubt, encompassing Excluded Liabilities), other than Assumed Liabilities or Permitted Liens.

**Section 10.4** **Transfer Tax Exemption.** The Contemplated Transaction is intended to constitute a transfer under occasional or insolvency tax exemption, as applicable.

## **ARTICLE XI.**

### **MISCELLANEOUS**

**Section 11.1** **Remedies.** The Parties recognize that if a Party breaches or refuses to perform as set forth in this Agreement, monetary damages alone would not be adequate to compensate the non-breaching Party for their injuries. The non-breaching Party shall therefore be entitled, in addition to any other remedies that may be available, to obtain specific performance of, or to enjoin the violation of, this Agreement. If any Litigation is brought by the non-breaching Party to enforce this Agreement, the breaching Party shall waive the defense that there is an adequate remedy at Law. The Parties agree to waive any requirement for the security or posting of any bond in connection with any Litigation seeking specific performance of, or to enjoin the violation of, this Agreement. The Parties agree that the only permitted objection that they may raise in response to any action for specific performance or an injunction is that it contests the existence of a breach, threatened breach, or refusal to perform.

**Section 11.2** **Limitation of Liability.** In no event shall the Sellers or the Buyer be liable to the other for punitive, exemplary, consequential, or special damages.

**Section 11.3** **Expenses.** Except as otherwise provided in this Agreement or the other Related Agreements, the Sellers, on the one hand, and the Buyer, on the other hand, shall bear their own expenses, including attorneys' fees, incurred in connection with the negotiation and execution of this Agreement, the other Related Agreements and each other agreement, document and instrument contemplated by this Agreement and the consummation of the Contemplated Transaction.



**Section 11.4 Entire Agreement.** This Agreement (including the schedules and exhibits hereto and other documents specifically referred to herein) and the other Related Agreements constitute the entire agreement among the Parties and supersede any prior understandings, agreements, or representations (whether written or oral) by or among the Parties, written or oral, with respect to the subject matter hereof.

**Section 11.5 Incorporation of Schedules, Exhibits, and Disclosure Schedules.** The schedules, appendices and exhibits to this Agreement, the documents and other information made available in the Disclosure Schedules are incorporated herein by reference and made a part hereof.

**Section 11.6 Amendments and Waivers.** No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by each Party except as expressly provided herein. No waiver of any breach of this Agreement shall be construed as an implied amendment or agreement to amend or modify any provision of this Agreement. No waiver by any Party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be valid unless the same shall be in writing and signed by the Party making such waiver, nor shall such waiver be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent default, misrepresentation or breach of warranty or covenant; *provided, however*, that the consent of a Party to the Closing shall constitute a waiver by such Party of any condition precedent to Closing not satisfied as of the Closing Date. No conditions, course of dealing or performance, understanding or agreement purporting to modify, vary, explain, or supplement the terms or conditions of this Agreement shall be binding unless this Agreement is amended or modified in writing pursuant to the first sentence of this Section 11.6 except as expressly provided herein. Except where a specific period for action or inaction is provided herein, no delay on the part of any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

**Section 11.7 Succession and Assignment.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. None of the Parties may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of all Parties; *provided, however*, that the Buyer shall be permitted to assign any of its rights hereunder to (i) its lenders as collateral security for their obligations under any of their secured debt financing arrangements or (ii) one or more of its Affiliates, as designated by the Buyer in writing to the Sellers; *provided, however*, the Buyer shall remain liable for all of its obligations under this Agreement after any such assignment.

**Section 11.8 Notices.** All notices, requests, demands, claims and other communications hereunder shall be in writing except as expressly provided herein. Any notice, request, demand, claim or other communication hereunder shall be deemed duly given (i) when delivered personally to the recipient, as of the date of such

delivery; (ii) one (1) Business Day after being sent to the recipient by reputable overnight courier service (charges prepaid); (iii) when sent by email, as of the date of the email transmission; or (iv) three (3) Business Days after being mailed to the recipient by certified or registered mail, return receipt requested and postage prepaid, and addressed to the intended recipient as set forth below:

If to the Sellers, then to:

Burgess BioPower, LLC and Berlin Station, LLC  
c/o CS Operations, Inc.,  
631 US Hwy 1, #300, North Palm Beach, FL 33408  
Attn: Dean Vomero  
Email: dean.vomero@appliedbusinessstrategy.com

With copies (which shall not constitute notice) to:

Foley Hoag LLP  
1301 Avenue of the Americas  
New York, New York 10019  
Attn: Alison Bauer, Esq.  
Email: abauer@foleyhoag.com

If to the Buyer, then to:

☐

With copies (which shall not constitute notice) to:

☐

If to the Guarantor, then to:

☐

With copies (which shall not constitute notice) to:

☐

Any Party may change the mailing address or email address to which notices, requests, demands, claims and other communications hereunder are to be delivered by giving the other Party notice in the manner set forth in this Section 11.8.

**Section 11.9 Governing Law; Jurisdiction.** This Agreement shall in all aspects be governed by and construed in accordance with the Bankruptcy Code and to the extent not inconsistent with the Bankruptcy Code, the law of the State of Delaware applicable to contracts made and performed in such State without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any

other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, and the obligations, rights and remedies of the Parties shall be determined in accordance with such Laws. The Parties agree that any Litigation one Party commences against any other Party pursuant to this Agreement shall be brought exclusively in the Bankruptcy Court and each of the Parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in the Bankruptcy Court or that any such suit, action or proceeding which is brought in the Bankruptcy Court has been brought in an inconvenient forum; *provided*, that if the Bankruptcy Court is unwilling or unable to hear any such Litigation, then the federal courts of the United States of America sitting in the District of Delaware, shall have exclusive jurisdiction over such Litigation.

**Section 11.10 Consent to Service of Process.** Each of the Parties hereby consents to process being served by any Party, respectively, in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 11.8.

**Section 11.11 WAIVERS OF JURY TRIAL.** EACH OF THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT, THE OTHER RELATED AGREEMENTS OR THE CONTEMPLATED TRANSACTIONS OR THEREBY.

**Section 11.12 Severability.** The provisions of this Agreement shall be deemed severable, and the invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement. If any provision of this Agreement, or the application thereof to any Person or any circumstance, is invalid or unenforceable, (a) the Parties shall amend the Agreement with a suitable and equitable provision that shall be substituted therefor in order to carry out to the closest extent possible, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision, and (b) the remainder of this Agreement and the application of such provision to other Persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability in any one jurisdiction affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

**Section 11.13 No Third-Party Beneficiaries.** This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns, except that the Buyer Released Parties are express third party beneficiaries of Section 5.1(e).

**Section 11.14 No Survival of Representations, Warranties, and Agreements.** Each of the representations and warranties and the covenants and

agreements (to the extent such covenant or agreement contemplates or requires performance to be completed by such Party prior to the Closing) of the Parties set forth in this Agreement or in any other document contemplated hereby, or in any certificate delivered hereunder or thereunder, will terminate effective immediately as of the Closing such that no claim for breach of any such representation, warranty, covenant or agreement, detrimental reliance or other right or remedy (whether in contract, in tort or at law or in equity) may be brought with respect thereto after the Closing. Each covenant and agreement that explicitly contemplates performance after the Closing, will, in each case and to such extent, expressly survive the Closing in accordance with its terms, and if no term is specified, then for two (2) years following the Closing Date, and nothing in this Section 11.14 will be deemed to limit any rights or remedies of any Person for breach of any such surviving covenant or agreement. The Buyer and the Sellers acknowledge and agree that the agreements contained in this Section 11.14: (a) require performance after the Closing to the maximum extent permitted by applicable Law; and (b) are an integral part of the Contemplated Transaction and that, without the agreements set forth in this Section 11.14, none of the Parties would enter into this Agreement.

**Section 11.15 Non-Recourse.** This Agreement may only be enforced against, and any Litigation based upon, arising out of or related to this Agreement may only be brought against, the Persons that are expressly named as Parties to this Agreement. Except to the extent named as a Party to this Agreement, and then only to the extent of the specific obligations of such Parties set forth in this Agreement, no past, present or future shareholder, member, partner, manager, director, officer, employee, Affiliate, agent, advisor or Representative of any Party to this Agreement will have any Liability (whether in contract, tort, equity or otherwise) for any of the representations, warranties, covenants, agreements or other obligations or Liabilities of any of the Parties to this Agreement or for any Litigation based upon, arising out of or related to this Agreement.

**Section 11.16 Construction.** The definitions contained in this Agreement are applicable to the singular as well as the plural forms of such terms. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of names and pronouns shall include the plural and vice versa. The words “including” and “include” and other words of similar import shall be deemed to be followed by the phrase “without limitation.” The words “herein,” “hereto” and “hereby,” and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section, or other subdivision of this Agreement. The word “or” shall not be exclusive. Except as otherwise provided herein, references to Articles, Sections, clauses, subclauses, subparagraphs, Schedules, Exhibits, Appendices, and the Disclosure Schedules herein are references to Articles, Sections, clauses, subclauses, subparagraphs, Schedules, Appendices, Exhibits and the Disclosure Schedules of this Agreement. Any reference herein to any Law (or any provision thereof) shall include such Law (or any provision thereof) and any rule or regulation promulgated thereunder, in each case, including any successor thereto, and as it may be amended, modified, or supplemented from time to time. Any reference herein to “dollars” or “\$” means United States dollars.

**Section 11.17 Computation of Time.** In computing any period of time prescribed by or allowed with respect to any provision of this Agreement that relates to the Sellers or the Chapter 11 Cases, the provisions of Rule 9006(a) of the Federal Rules of Bankruptcy Procedure shall apply.

**Section 11.18 Mutual Drafting.** Each of the Parties has participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement.

**Section 11.19 Disclosure Schedules.** The Disclosure Schedules have been arranged for purposes of convenience in separately numbered sections corresponding to the sections of this Agreement. The disclosure of any fact or item in any numbered and lettered section of the Disclosure Schedules shall, should the existence of such fact or item be relevant to any other section of the Disclosure Schedules, be deemed to be disclosed with respect to such other section of the Disclosure Schedules only so long as the relevance of such disclosure to such other section of the Disclosure Schedules is reasonably apparent. Capitalized terms used in the Disclosure Schedules and not otherwise defined therein have the meanings given to them in this Agreement. The specification of any dollar amount or the inclusion of any item in the representations and warranties contained in this Agreement, the Disclosure Schedules or the attached exhibits is not intended to imply that the amounts, or higher or lower amounts, or the items so included, or other items, are or are not required to be disclosed (including whether such amounts or items are required to be disclosed as material or threatened) or are within or outside of the Ordinary Course of Business or consistent with past practice, and no Party will use the fact of the setting of the amounts or the fact of the inclusion of any item in this Agreement, the Disclosure Schedules or exhibits in any dispute or controversy between the Parties as to whether any obligation, item or matter not set forth or included in this Agreement, the Disclosure Schedules or exhibits is or is not required to be disclosed (including whether the amount or items are required to be disclosed as material or threatened) or are within or outside of the Ordinary Course of Business or consistent with past practice. In addition, matters reflected in the Disclosure Schedules are not necessarily limited to matters required by this Agreement to be reflected in the Disclosure Schedules. Such additional matters are set forth for informational purposes only and do not necessarily include other matters of a similar nature. No information set forth in the Disclosure Schedules will be deemed to broaden in any way the scope of the Parties' representations and warranties. The information contained in this Agreement, in the Disclosure Schedules and exhibits hereto is disclosed solely for purposes of this Agreement, and no information contained herein or therein will be deemed to be an admission by any Party or any third party of any matter whatsoever, including any violation of Law or breach of contract.

**Section 11.20 Headings; Table of Contents.** The section headings and the table of contents contained in this Agreement and the Disclosure Schedules are

inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

**Section 11.21 Counterparts; Facsimile and Email Signatures.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. This Agreement or any counterpart may be executed and delivered by facsimile or email with scan attachment copies, each of which shall be deemed an original.

**Section 11.22 Limited Guarantee.** Guarantor absolutely, unconditionally and irrevocably guarantees to Sellers the due, full and punctual payment by Buyer of the amounts required to be paid or reimbursed by Buyer under or relating to this Agreement, when and if such amounts are so required to be paid or reimbursed. This guarantee is an absolute, irrevocable, continuing and unconditional guarantee of payment (and not collection) and shall continue in effect notwithstanding and shall not be released or discharge, in whole or in part, any extension, amendment, waiver or modification of the terms of this Agreement or any departure from the terms and conditions of this Agreement that may be agreed to by all of the other Parties hereto in accordance with the terms of this Agreement, any assumption of any such guaranteed obligation by any other party or any other act or event that might otherwise operate as a legal or equitable discharge of Guarantor under this Agreement. Guarantor agrees that its obligations hereunder shall not be released or discharged, in whole or in part, or otherwise affected by (a) the failure or delay on the part of Sellers to assert any claim or demand or to enforce any right or remedy against Buyer, except to the extent such failure or delay on the part of Sellers would release the Buyer payment or reimbursement obligation, (b) any insolvency, bankruptcy, reorganization or other similar proceeding instituted by or against Buyer or (c) any other act or omission to act or delay of any kind by Buyer. Guarantor hereby waives promptness, diligence, notice of the acceptance of this guarantee, presentment, demand for payment, notice of non-performance, default, dishonor and protest, and all other notices of any kind.

**[SIGNATURE PAGES TO FOLLOW]**

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

**SELLERS:**

**BERLIN STATION, LLC**

By: \_\_\_\_\_

Name:

Title:

**BURGESS BIOPOWER, LLC**

By: \_\_\_\_\_

Name:

Title:

**BUYER:**

☐

By: \_\_\_\_\_

Name:

Title:

**GUARANTOR:**

☐

**Solely for purposes of Section 11.22**

By: \_\_\_\_\_

Name:

Title:



## EXHIBIT A

### ASSIGNMENT AND ASSUMPTION OF LEASES AND CONTRACTS

This Assignment and Assumption of Leases and Contracts (this “*Assignment*”) is entered into as of [ ], 2024, by and among Burgess BioPower, LLC, a Delaware limited liability company and Berlin Station, LLC, a Delaware limited liability company, each of the foregoing being a Chapter 11 Debtor and Debtor in Possession under Case No. [ ] in the Bankruptcy Court (collectively, the “*Assignors*”), and [ ], a [ ] (the “*Assignee*”).

Assignors and Assignee acknowledge that:

A. Assignors, as the Sellers, and Assignee, as the Buyer, have heretofore entered into that certain Asset Purchase Agreement dated as of [ ], 2024 (the “*Purchase Agreement*”). Except for terms specifically defined herein, the capitalized terms used in this Assignment shall have the same meanings as capitalized terms used in the Purchase Agreement.

B. Concurrently with the mutual execution and delivery of this Assignment, Assignors and Assignee are consummating the Contemplated Transactions. Assignors and Assignee are executing and delivering this Assignment in satisfaction of certain obligations pursuant to Sections 2.8(a)(ii) and 2.8(b)(v) of the Purchase Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which Assignors and Assignee hereby acknowledge, Assignors and Assignee hereby agree as follows:

1. Assignment. Effective as of the Closing Date, each of the Assignors hereby assigns to Assignee all of its respective right, title and interest in and to the those of the Assumed Contracts described on **Schedule 1** attached hereto and incorporated herein by this reference (collectively, the “*Assigned Contracts*”).

2. Assumption. Effective as of the Closing Date, Assignee hereby accepts the foregoing assignment and assumes and agrees to be bound by the terms and provisions of the Assigned Contracts and to perform all of Assignors’ obligations thereunder to be performed from and after the Closing Date (other than any obligations which are Excluded Liabilities) as though Assignee had been the original contracting party thereunder.

3. Amendments. This Assignment may only be amended by a writing signed by both Assignors and Assignee.

4. Execution in Counterparts. This Assignment may be executed in counterparts and delivered by the delivery of facsimile signatures; *provided, however*, that if the Parties exchange facsimile or electronic pdf signatures, each of them agrees to provide the other with a copy of this Assignment bearing their original signature promptly thereafter.

5. Delivery Pursuant to Purchase Agreement. Notwithstanding anything to the contrary herein, Assignors and Assignee are executing and delivering this Assignment in accordance with and subject to all of the terms and provisions of the Purchase Agreement

(including, without limitation, the acknowledgement and disclaimer set forth in Section 7 of the Purchase Agreement).

6. Governing Law. This Assignment shall be governed by and construed and enforced in accordance with the laws of the State of Delaware.

IN WITNESS WHEREOF, Assignors and Assignee have executed this Assignment as of the day and year first set forth above.

**ASSIGNORS:**

Burgess BioPower, LLC, a Delaware limited liability company and Debtor and Debtor in Possession

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Berlin Station, LLC, a Delaware limited liability company and Debtor and Debtor in Possession

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**ASSIGNEE:**

\_\_\_\_\_,  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**Schedule 1**

Assigned Contracts

[To be provided.]

**EXHIBIT B**

**ASSIGNMENT OF INTANGIBLE PROPERTY ASSETS**

Burgess BioPower, LLC, a Delaware limited liability company and Berlin Station, LLC, a Delaware limited liability company, each of the foregoing being a Chapter 11 Debtor and Debtor in Possession under Case No. [ ] in the Bankruptcy Court (collectively, the “**Assignors**”) are executing this Assignment of Intangible Property Assets (this “**Assignment**”) in favor of [ ] (the “**Assignee**”), with respect to the following facts and circumstances:

(A) Assignors and Assignee have heretofore entered into that certain Asset Purchase Agreement dated as of [ ], 2024 (the “**Purchase Agreement**”). Except for terms specifically defined in this Assignment, the capitalized terms used in this Assignment shall have the same meanings as such terms when used in the Purchase Agreement.

(B) Concurrently with the execution and delivery of this Assignment, Assignors and Assignee are consummating the transactions contemplated by the Purchase Agreement. Pursuant to the Purchase Agreement, Assignors are required to execute and deliver this Assignment at the Closing.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which Assignors hereby expressly acknowledge, each of the Assignors hereby assigns, conveys, transfers and sets over unto Assignee, all of its respective right, title and interest, if any, in and to all Intangible Property Assets.

This Assignment shall inure to the benefit of, and be binding upon, the successors, executors, administrators, legal representatives and assigns of Assignors and Assignee.

Notwithstanding anything to the contrary herein, Assignors are executing and delivering this Assignment in accordance with and subject to all of the terms and provisions of the Purchase Agreement (including, without limitation, the acknowledgements and disclaimers set forth in Article V of the Purchase Agreement).

This Assignment shall be governed by and construed and enforced in accordance with the laws of the State of Delaware.

*[Balance of Page Intentionally Left Blank]*

IN WITNESS WHEREOF, Assignors and Assignee have executed this Assignment as of the \_\_\_\_ day of \_\_\_\_\_, 2024.

**ASSIGNORS:**

Burgess BioPower, LLC, a Delaware limited liability company and Debtor and Debtor in Possession

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Berlin Station, LLC, a Delaware limited liability company and Debtor and Debtor in Possession

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**ASSIGNEE:**

\_\_\_\_\_,  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

## EXHIBIT C

## ASSIGNMENT OF EASEMENTS

## WHEN RECORDED RETURN

TO:

[ ]

## ASSIGNMENT OF EASEMENTS

STATE OF

§

§

COUNTY OF

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This ASSIGNMENT OF EASEMENTS (this “**Assignment**”) is effective as of 10:00 a.m. ET on [ ], 2024 (“**Closing Date**”), by and between Berlin Station, LLC, a Delaware limited liability company (“**Berlin**”), Burgess BioPower, LLC, a Delaware limited liability company (collectively with Berlin, the “**Assignor**”), and [ ], a [ ] (the “**Assignee**”), in connection with the Asset Purchase Agreement (the “**Purchase Agreement**”) dated as of [ ], 2024, by and between Assignor and Assignee. Capitalized terms used but not defined herein shall have the meanings given to such terms in the Purchase Agreement.

WHEREAS, Assignor and Assignee have entered into the Purchase Agreement, pursuant to which Assignor has agreed to sell, assign, convey, transfer and deliver to Assignee, and Assignee has agreed to purchase, acquire, accept and receive from Assignor, certain assets of Assignor including, without limitation, the easements listed and described on Exhibit A attached hereto (the “*Easements*”);

WHEREAS, it is the intention of the parties to the Purchase Agreement that the Assignor shall transfer all of the Easements by the execution and delivery of this Assignment on the Closing Date; and

WHEREAS, the Assignor and Assignee now desire to carry out the intent and purpose of the Purchase Agreement by their execution and delivery to Assignee of this Assignment as evidence of the sale, assignment, conveyance, transfer and delivery to Assignee all of the Easements.

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby agrees as follows:

1. Sale of Easements. Effective as of the Closing Date, Assignor does hereby sell, assign, convey, transfer and deliver, or cause to be sold, assigned, conveyed, transferred and

delivered, to Assignee, all of Assignor's right, title and interest in, to and under the Easements, to have and to hold unto Assignee and its successors and assigns, to its and their own use forever; it being understood that this Assignment is subject to any terms and conditions of the Easements. Effective as of the Closing Date, by accepting this Assignment, Assignee does hereby purchase, acquire, accept and receive all such rights, title and interests of the Assignor with respect to the Easements assigned hereunder, and hereby assumes all the obligations under the Easements accruing from and after the Closing Date.

2. No Third-Party Beneficiaries. This Assignment is made for the sole benefit of Assignor and Assignee and their respective legal representatives, successors, and permitted assigns, and nothing contained herein, express or implied, is intended to or shall confer upon any other Person any third-party beneficiary right or any other legal or equitable rights, benefits, or remedies of any nature whatsoever under or by reason of this Assignment.

3. Assignment; Successors. This Assignment shall be binding upon and inure to the benefit of Assignee and Assignor and their respective successors and permitted assigns.

4. Purchase Agreement Controls. If any of the terms of this Assignment conflict or are inconsistent in any way with the provisions of the Purchase Agreement, the Purchase Agreement shall control.

5. Governing Law. This instrument shall be governed by and construed in accordance with the laws of the State of New Hampshire, without giving effect to any choice of law or conflict of law rules or provisions that would cause the application of the laws of any jurisdiction other than the State of New Hampshire.

6. Counterparts. This Assignment may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together will constitute one and the same instrument. Execution of a copy of this Assignment which has been telecopied, faxed, or transmitted by other electronic transmission, and/or following execution thereof returned by any such device, will be deemed to be effective and constitute an original instrument.

7. Modifications; Severability. This Assignment may not be amended except by an instrument in writing signed on behalf of each of Assignee and Assignor. In case any one or more of the provisions of this Assignment shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, all other provisions of this Assignment shall be construed as if such invalid, illegal, or unenforceable provisions had never been contained herein. Such invalid, illegal, or unenforceable provisions shall be given effect to the maximum extent then permitted by applicable Law, such that the original intention of the invalid, illegal or unenforceable term or provision is as nearly as possible realized.

*[Signature Pages Follow]*



IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment on the dates set forth in the respective acknowledgements below, to be effective as of the Closing Date.

**ASSIGNOR:**

**BERLIN STATION, LLC**

By: \_\_\_\_\_

Name:

Title:

**BURGESS BIOPOWER, LLC**

By: \_\_\_\_\_

Name:

Title:

STATE OF

§

COUNTY OF \_\_\_\_\_

§

§

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2024, by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_, on behalf of the \_\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

Printed Name: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

Commission Number: \_\_\_\_\_

Exhibit A

Easements

[*See Attached.*]

**EXHIBIT D**

**ASSIGNMENT OF DOMAIN NAMES**

Burgess BioPower, LLC, a Delaware limited liability company and Berlin Station, LLC, a Delaware limited liability company, each of the foregoing being a Chapter 11 Debtor and Debtor in Possession under Case No. [ ] in the Bankruptcy Court (collectively, the “**Assignors**”) are executing this Assignment of Domain Names (this “**Assignment**”) in favor of [ ] (the “**Assignee**”), with respect to the following facts and circumstances:

(A) Assignors and Assignee have heretofore entered into that certain Asset Purchase Agreement dated as of [ ], 2024 (the “**Purchase Agreement**”). Except for terms specifically defined in this Assignment, the capitalized terms used in this Assignment shall have the same meanings as such terms when used in the Purchase Agreement.

(B) The Assignors have registered or hold the registration to certain domain names listed in Schedule 1 attached and incorporated herein (“**Domain Names**”);

(C) Concurrently with the execution and delivery of this Assignment, Assignors and Assignee are consummating the transactions contemplated by the Purchase Agreement. Pursuant to the Purchase Agreement, Assignors are required to execute and deliver this Assignment at the Closing.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Each Assignor hereby sells, assigns, transfers, conveys and delivers to Assignee all of Assignor’s right, title and interest in and to the Domain Names, together with the goodwill and activities of the business connected with the use of and symbolized by the Domain Names, free and clear of all known liens and encumbrances. Each Assignor will promptly confirm to each relevant registrar Assignor’s consent and confirmation to the transfer of the Domain Names to Assignee or its designee within thirty (30) days after being contacted by the relevant registrar.

2. From and after the Effective Date, each Assignor shall, without further consideration, execute and deliver such documents or instruments of transfer, conveyance, assignment and assumption and take such other action as may reasonably be necessary to consummate or to give effect to this Assignment.

3. This Assignment shall be governed by and interpreted in accordance with the laws of the State of Delaware, without giving effect to its choice of law provisions.

4. This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of the signature page to this Assignment by facsimile or electronic mail (with signature visible) shall be as effective as delivery of a manually executed counterpart of this Assignment.

*[Signature page follows]*

IN WITNESS WHEREOF, Assignors and Assignee have executed this Assignment as of the \_\_\_\_ day of \_\_\_\_\_, 2024.

**ASSIGNORS:**

Burgess BioPower, LLC, a Delaware limited liability company and Debtor and Debtor in Possession

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Berlin Station, LLC, a Delaware limited liability company and Debtor and Debtor in Possession

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**ASSIGNEE:**

\_\_\_\_\_,  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**Schedule 1**

Domain Names

[To be provided.]

## EXHIBIT E

### **ASSUMPTION OF LIABILITIES AGREEMENT**

This Assumption of Liabilities Agreement (this “*Assumption*”) is entered into as of this [ ] day of [ ], 2024, by [ ], a [ ] (the “*Purchaser*”) in favor of Burgess BioPower, LLC, a Delaware limited liability company and Berlin Station, LLC, a Delaware limited liability company, each of the foregoing (other than Purchaser) being a Chapter 11 Debtor and Debtor in Possession under Case No. [ ] in the Bankruptcy Court (the “*Sellers*”). This Assumption is entered into with respect to the following facts and circumstances:

A. Sellers and Purchaser have heretofore entered into that certain Asset Purchase Agreement dated [ ], 2024 (the “*Purchase Agreement*”). Except for terms specifically defined herein, the capitalized terms used in this Assumption shall have the same meanings as capitalized terms used in the Purchase Agreement.

B. Concurrently with the execution and delivery of this Assumption, Purchaser and Sellers are consummating the transactions contemplated by the Purchase Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which Purchaser hereby acknowledges, Purchaser hereby agrees as follows:

1. Assumption. Effective as of the Closing Date, Purchaser hereby assumes and agrees to perform all of the Assumed Liabilities in accordance with their terms as expressed in the Purchase Agreement.

2. Amendments. This Assumption may only be amended by a writing signed by both Purchaser and Sellers.

3. Governing Law. This Assumption shall be governed by and construed and enforced in accordance with the laws of the State of Delaware.

4. Execution in Counterparts. This Assumption may be executed in counterparts and delivered by the delivery of facsimile signatures; *provided, however*, that if the Parties exchange facsimile or electronic pdf signatures, each of them agrees to provide the other with a copy of this Assumption bearing their original signature promptly thereafter.

IN WITNESS WHEREOF, Purchaser has executed this Assumption Agreement as of the day and year first set forth above.

**PURCHASER:**

\_\_\_\_\_,'

a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_



**EXHIBIT F**

**BILL OF SALE AGREEMENT**

This Bill of Sale Agreement is effective as of the [ ] day of [ ], 2024, by and among Berlin Station, LLC, a Delaware limited liability company (“Berlin”), Burgess BioPower, LLC, a Delaware limited liability company (collectively with Berlin, “Sellers”), and [BUYER], a [ ] (“Buyer”). All capitalized terms used in this Bill of Sale and not otherwise defined herein shall have the respective meanings ascribed to such terms in that certain Asset Purchase Agreement dated as of [ ], 2024, by and among Sellers and Buyer (the “Purchase Agreement”).

WHEREAS, Sellers and Buyer are parties to the Purchase Agreement, under which Sellers desire to sell, transfer, convey, assign and deliver the Purchased Assets in accordance with Section 2.1 of the Purchase Agreement and the Sale Order, excluding the Excluded Assets defined in Section 2.2 of the Purchase Agreement;

WHEREAS, Buyer desires to purchase, acquire and receive from Sellers the Purchased Assets;

NOW, THEREFORE, in consideration of the foregoing, the consideration set forth in the Purchase Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

Sellers hereby SELL, ASSIGN, CONVEY, AND TRANSFER unto Buyer and each of its respective successors and assigns, as applicable, all of right, title and interest of the Sellers and the Estate in and to the Purchased Assets pursuant to the terms and conditions of the Purchase Agreement and Sale Order, TO HAVE AND TO HOLD unto Buyer and each of its successors and assigns, as applicable, together with, all and singular, the rights and appurtenances thereto in any way belonging to Sellers or the Estate. Notwithstanding anything in this Bill of Sale to the contrary, Sellers and Buyer hereby expressly acknowledge and agree that Sellers shall retain the Excluded Assets and Excluded Liabilities.

Buyer hereby assumes any and all applicable duties, obligations and liabilities with respect to the Purchased Assets to the extent provided in the Purchase Agreement.

The sale and conveyance made hereby shall be effective as of the Closing and risk of loss of the Purchased Assets shall pass to Assignee upon execution of this Assignment.

The terms of the Purchase Agreement, including but not limited to, the representations, warranties, covenants, agreements and indemnities of any party are incorporated herein by reference. Sellers and Buyer acknowledge and agree that the representations, warranties, covenants, agreements and indemnities contained in the Purchase Agreement shall not be superseded or deemed enlarged, modified or altered in any way hereby, but shall remain in full force and effect to the full extent provided in the Purchase Agreement. In the event that any provision of this Bill of Sale or the Purchase Agreement may be construed to

conflict or be inconsistent with a provision or term of the Sale Order, the provision or term in the Sale Order shall control.

This Bill of Sale shall be governed by and interpreted in accordance with the laws of the State of Delaware, without regard to the conflict of laws principles thereof.

This Bill of Sale may be executed in counterparts, and when so executed, each counterpart shall be deemed an original, and said counterparts shall constitute one and the same instrument.

IN WITNESS WHEREOF, Sellers and Buyer have executed this Bill of Sale as follows, effective as of the date first above written.

**[SIGNATURE PAGES TO FOLLOW]**

**SELLERS:**

**BERLIN STATION, LLC**

By: \_\_\_\_\_  
Name:  
Title:

**BURGESS BIOPOWER, LLC**

By: \_\_\_\_\_  
Name:  
Title:

**BUYER:**

[ ]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT G**

**QUITCLAIM DEED**

[To come.]

**EXHIBIT H**

**SALE ORDER**

[See attached.]

**EXHIBIT 2**

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

In re

Chapter 11

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>Case No. 24-10235 (LSS)  
(Jointly Administered)

Debtors.

**NOTICE OF BID DEADLINE, AUCTION, AND SALE HEARING IN CONNECTION  
WITH THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS**<sup>2</sup>

NOTICE IS HEREBY GIVEN, as follows:

1. On February 9, 2024, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). As set forth in the Restructuring Support Agreement, which is attached as Exhibit M to the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* (“First Day Declaration”) [D.I. 4], and which was revised as provided in the *Notice of Filing of Revised Exhibit M to the Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings*, filed on February 27, 2024 [D.I. 171], the Debtors have determined that the most effective way to maximize the value of their estates for the benefit of their constituents is to propose a chapter 11 plan (as may be amended, the “Plan”) that provides for a “toggle” between a Stand-Alone Restructuring Scenario and a Sale Scenario (each as defined in the First Day Declaration), only to the extent the Sale Scenario results in a superior offer.

2. In furtherance thereof, on February 29, 2024, the Debtors filed a motion [D.I. \_\_\_] (the “Bid Procedures Motion”), seeking the Bankruptcy Court’s approval of, among other things, (i) procedures (the “Bid Procedures”) in connection with the sale (the “Sale”) of all or substantially all of the Debtors’ assets (the “Assets”), (ii) procedures (the “Contract Procedures”) to determine cure amounts and deadlines for filing objections to the proposed assumption and/or assumption and assignment by the Debtors of certain contracts and leases in connection with the Sale and the

<sup>1</sup> 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.

<sup>2</sup> This notice is subject to the full terms and conditions of the Bid Procedures Motion, the Bid Procedures and the Bid Procedures Order (each as defined below). The Bid Procedures Order shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.



Plan, (iii) the date, time, and place for a sale hearing (the “Sale Hearing”) and deadlines for filing objections to the Sale, and (iv) related relief.

3. On March \_\_, 2024, the Bankruptcy Court entered an order [D.I. \_\_] (the “Bid Procedures Order”) approving the Bid Procedures Motion, the Bid Procedures and the Contract Procedures.<sup>3</sup>

4. All interested parties are invited to make offers to purchase the Assets in accordance with the terms of the Bid Procedures and the Bid Procedures Order. Potential Bidders are encouraged to review the Bid Procedures attached to the Bid Procedures Order carefully and, for further information, are invited to contact the Debtors’ investment banker, SSG Advisors, LLC (“SSG”), Attn: Teresa C. Kohl (tkohl@ssgca.com) and J. Scott Victor (jsvictor@ssgca.com). **The Bid Deadline is May 6, 2024 at 4:00 p.m. (ET).**

5. Consistent with the Bid Procedures Order, in the event the Debtors receive one or more Qualified Bids on or before the Bid Deadline, the Debtors shall conduct an Auction for the purpose of determining the highest or otherwise best bid for the Assets. **The Auction shall be organized by the Debtors’ professionals and conducted at the offices of Foley Hoag LLP, 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019, or by remote audio and video link, beginning at May 13, 2024 beginning at 10:00 a.m. (ET) or such other location and time as may be announced prior to the Auction to all Qualified Bidders, the U.S. Trustee, the Senior Secured Lenders, and the official committee of unsecured creditors, if any, formed in the Chapter 11 Cases (the “Committee”).**

6. The Auction will be recorded and transcribed by an authorized court reporter. Professionals and/or other representatives of the Debtors, the Committee, the Senior Secured Lenders, Qualified Bidders, and creditors or equity holders of the Debtors may attend and observe the Auction.

7. The time and place of the Auction may change with notice. The Debtors shall file notice of any such change with the Bankruptcy Court **not later 4:00 p.m. (ET) one (1) day prior to the Auction** and shall serve such notice by email on all Qualified Bidders and/or their authorized representatives, counsel for the Committee, counsel for the Senior Secured Lenders, and all creditors who notified Debtors’ counsel of their intention to attend the Auction in accordance with the procedure set forth in paragraph 8 below.

8. **Any party-in-interest wishing to attend the Auction, whether virtually or in person, by no later than one (1) day prior to the start of the Auction, must contact Foley Hoag LLP, (x) 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019, Attn: Alison D. Bauer, Esq. (abauer@foleyhoag.com) and Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com), and (y) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com) and provide his/her/its e-mail address and/or fax number, so as to receive notice of any change in the date, time or location of the Auction.**

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<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Bid Procedures Order and/or the Bid Procedures Motion.

9. In the event an Auction occurs, no later than **May 14, 2024 at 12:00 p.m. (ET)**, the Debtors will file with the Bankruptcy Court a notice identifying the Successful Bid, Successful Bidder, Back-Up Bid, and Back-Up Bidder, and the amount of the Successful Bid and Back-Up Bid (the “Successful Bidder Notice”).

10. At that same time, the Debtors shall serve the Successful Bidder Notice by fax, email, or, if neither is available, overnight mail, on (i) all Contract Parties whose Contracts are to be assumed and/or assumed and assigned and (ii) all creditors who have timely submitted a written request for the notice and provided their fax numbers, email address or street address to Debtors’ counsel. By no later than the Bid Deadline, those creditors who wish to receive a copy of the Successful Bidder Notice must submit a written request, including such creditor’s fax number, email address, and/or street address, to Debtors’ counsel: Foley Hoag LLP, (x) 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019, Attn: Alison D. Bauer, Esq. (abauer@foleyhoag.com) and Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com), and (y) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com).

11. The Bankruptcy Court shall conduct the Sale Hearing on **May 16, 2024 at 2:00 p.m. (ET)**. At the Sale Hearing, the Debtors intend to seek the Bankruptcy Court’s approval of the Sale of the Assets to the Successful Bidder. The Sale Hearing will be held before the Honorable Laurie Selber Silverstein at the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 6th Floor, Courtroom No. 2, Wilmington, Delaware 19801.

12. The Debtors, in the exercise of their business judgment, with the consent of the Senior Secured Lenders, may adjourn the Sale Hearing without notice or with limited and shortened notice to parties, including by (i) an announcement of such adjournment at the Sale Hearing or at the Auction and (ii) the filing of a notice of adjournment with the Bankruptcy Court prior to the commencement of the Sale Hearing.

13. Except with respect to any Assumed Liabilities, the Debtors will seek to have the Sale be free and clear of all liens, claims, encumbrances, defenses (including, without limitation, rights of setoff) and interests, including, without limitation, security interests of whatever kind or nature, mortgages, conditional sales or title retention agreements, pledges, deeds of trust, hypothecations, liens, encumbrances, assignments, preferences, debts, easements, charges, suits, licenses, options, rights-of-recovery, judgments, orders and decrees of any court or foreign or domestic governmental entity, taxes (including foreign, state and local taxes), licenses, covenants, restrictions, indentures, instruments, leases, off-sets, claims for reimbursement, contribution, indemnity or exoneration, successor, product, environmental, tax, labor, ERISA, CERCLA, alter ego and other liabilities, causes of action, contract rights and claims, to the fullest extent of the law, in each case, of any kind or nature (including, without limitation, all “claims” as defined in section 101(5) of the Bankruptcy Code), known or unknown, whether pre-petition or post-petition, secured or unsecured, choate or inchoate, filed or unfiled, scheduled or unscheduled, perfected or unperfected, liquidated or unliquidated, noticed or unnoticed, recorded or unrecorded, contingent or non-contingent, material or non-material, statutory or non-statutory, matured or unmatured, legal or equitable to the maximum extent permitted by section 363 of the Bankruptcy Code.

14. At the Sale Hearing, the Bankruptcy Court may enter such orders as it deems appropriate under applicable law and as required by the circumstances and equities of these

Chapter 11 Cases, and the Debtors, subject to the terms of the Successful Bidder's asset purchase agreement, may seek entry of an order which provides, except with respect to any Assumed Liabilities, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax and regulatory authorities, lenders, trade creditors, litigation claimants and other creditors, holding liens, claims, encumbrances or interests of any kind or nature whatsoever against or in all or any portion of the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, liquidated or unliquidated or subordinate), arising under or out of, in connection with, or in any way relating to the Debtors, the Assets, the operation of the Debtors' business prior to the Closing Date or the transfer of the Assets to the Successful Bidder, that all such persons are forever prohibited and permanently enjoined from (a) commencing or continuing in any manner any action or other proceeding, the employment of process, or any act (whether in law or equity, in any judicial, administrative, arbitral, or other proceeding) to collect or recover any interest; (b) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order with respect to an interest, (c) creating, perfecting, or enforcing any interest, or (d) asserting any right of subrogation of any kind with respect to an interest, in each case as against the Successful Bidder or its designee, any of their respective affiliates or subsidiaries, or any of their respective representatives, or any of their respective property or assets, including the Assets.

15. Objections, if any, to approval of the Sale and entry of the Sale Order, including, without limitation, with respect to (a) the sale of the Assets free and clear of all Encumbrances pursuant to section 363(f) of the Bankruptcy Code, with valid and perfected Encumbrances to attach to the proceeds of the Sale (if any) (b) the conduct of the Auction (if any); (c) the form of Sale Order approving such Successful Bidder's asset purchase agreement; and/or (d) the proposed asset purchase agreement between the Debtors and such Successful Bidder (each, a "Sale Objection") shall (a) be in writing, (b) set forth the name and address of the objecting party and the nature and amount of any claims or interests of the objecting party or asserted against the Debtors' estates or properties by the objecting party, (c) state with particularity the basis and nature of the Sale Objection, and provide proposed language that, if accepted and incorporated by the Debtors, would obviate such objection, (d) conform to the Bankruptcy Rules and the Local Rules, (e) be filed with the Bankruptcy Court, and (f) be served upon: (i) counsel for the Debtors, (1) Foley Hoag LLP, (x) 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019 Attn: Alison D. Bauer, Esq. (e-mail: [abauer@foleyhoag.com](mailto:abauer@foleyhoag.com)) and Jiun-Wen Bob Teoh, Esq. (e-mail: [jteoh@foleyhoag.com](mailto:jteoh@foleyhoag.com)), and (y) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (e-mail: [ksl@foleyhoag.com](mailto:ksl@foleyhoag.com)); and (2) Gibbons P.C., (x) 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (e-mail: [cmclamb@gibbonslaw.com](mailto:cmclamb@gibbonslaw.com)) and (y) One Gateway Center, Newark, New Jersey 07102, Attn: Robert K. Malone, Esq. (e-mail: [rmalone@gibbonslaw.com](mailto:rmalone@gibbonslaw.com)); (ii) counsel to the Committee; (iii) the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801 (Attn: Jane Leamy); and (iv) counsel to the Senior Secured Lenders, Greenberg Traurig, LLP, One Vanderbilt Avenue, New York, New York 10017, Attn: Oscar N. Pinkas (e-mail: [pinkaso@gtlaw.com](mailto:pinkaso@gtlaw.com)) and Brian E. Greer (e-mail: [greerb@gtlaw.com](mailto:greerb@gtlaw.com)) (collectively, the "Sale Objection Parties"), so as to be received such parties on or before **May 14, 2024 at 4:00 p.m. (ET)**.

16. You may obtain copies of the Bid Procedures Motion, the Bid Procedures, the Bid Procedures Order, the form of Sale Order, and/or other Sale-related documents by sending a

request to the Debtors' counsel, attention to Alison D. Bauer, Esq. (abauer@foleyhoag.com), Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com), and Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com). These documents are also published on the website maintained by the Debtors' claims and noticing agent in these Chapter 11 Cases at <https://dm.epiq11.com/Burgess>, located under the tab labeled "Sale Documents".

Dated: March \_\_\_, 2024

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Chantelle D. McClamb (No. 5978)  
**GIBBONS P.C.**  
300 Delaware Avenue, Suite 1015  
Wilmington, Delaware 19801  
Telephone: (302) 518-6300  
E-mail: cmcclamb@gibbonslaw.com

-and-

Robert K. Malone (admitted *pro hac vice*)  
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BioPower, LLC and Berlin Station, LLC*

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wgray@foleyhoag.com  
jteoh@foleyhoag.com

-and-

Kenneth S. Leonetti (admitted *pro hac vice*)  
Jonathan Bard (admitted *pro hac vice*)  
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ybard@foleyhoag.com

*Proposed Co-Counsel for Debtors Burgess  
BioPower, LLC and Berlin Station, LLC*

**EXHIBIT 3**

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

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

**NOTICE OF DEBTORS' INTENT TO ASSUME AND/OR ASSUME AND ASSIGN  
CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS AND  
FIXING OF CURE AMOUNTS<sup>2</sup>**

NOTICE IS HEREBY GIVEN, as follows:

1. On February 9, 2024, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). As set forth in the Restructuring Support Agreement, which is attached as Exhibit M to the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings* (“First Day Declaration”) [D.I. 4], and which was revised as provided in the *Notice of Filing of Revised Exhibit M to the Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings*, filed on February 27, 2024 [D.I. 171], the Debtors have determined that the most effective way to maximize the value of their estates for the benefit of their constituents is to propose a chapter 11 plan (as may be amended, the “Plan”) that provides for a “toggle” between a Stand-Alone Restructuring Scenario and a Sale Scenario (each as defined in the First Day Declaration), only to the extent the Sale Scenario results in a superior offer.

2. In furtherance thereof, on February 29, 2024, the Debtors filed a motion [D.I. \_\_\_] (the “Bid Procedures Motion”), seeking the Bankruptcy Court’s approval of, among other things, (i) procedures (the “Bid Procedures”) in connection with the sale (the “Sale”) of all or substantially all of the Debtors’ assets (the “Assets”), (ii) procedures (the “Contract Procedures”) to determine cure amounts and deadlines for filing objections to the proposed assumption and/or assumption and assignment by the Debtors of certain contracts and leases in connection with the Sale and the Plan, (iii) the date, time, and place for a sale hearing (the “Sale Hearing”) and deadlines for filing

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<sup>1</sup> 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.

<sup>2</sup> This notice is subject to the full terms and conditions of the Bid Procedures Motion, the Bid Procedures and the Bid Procedures Order (each as defined below). The Bid Procedures Order shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.

objections to the Sale, and (iv) related relief. On March \_\_\_, 2024, the Bankruptcy Court entered an order [D.I. \_\_] (the “Bid Procedures Order”),<sup>3</sup> approving the Bid Procedures Motion.

3. Pursuant to the Bid Procedures Order and the Contract Procedures approved therein, the Debtors may seek to assume and/or assume and assign certain unexpired leases and executory contracts (collectively, the “Contracts”).

4. You have been identified as a party to a Contract (a “Contract Party”) that the Debtors may seek to assume in connection with a Stand-Alone Restructuring Scenario and/or assume and assign in connection with a Sale Scenario. The Contract with respect to which you have been identified as a Contract Party is set forth on **Exhibit 1** annexed hereto.

5. In the Sale Scenario, the Debtors’ decision to assume and assign a Contract is subject to the Successful Bidder’s designation in accordance with the Contract Procedures and the Bankruptcy Court’s approval of and consummation of the Sale. In a Stand-Alone Restructuring Scenario—including one where the plan as to Burgess is withdrawn and the Senior Secured Lenders, in their discretion, pursue a Sale Transaction solely as to Burgess’s assets—the Debtors’ decision to assume and/or assume and assign a Contract is subject to the Bankruptcy Court’s approval of and the consummation of the Plan as to Berlin and the Sale Transaction as to Burgess’s assets. Absent consummation of the Sale and Plan, a Contract shall not be deemed assumed or assumed and assigned (as applicable) and shall in all respects be subject to further administration under the Bankruptcy Code.

6. The designation of any agreement as a Contract shall not constitute or be deemed to be a determination or admission by the Debtors or the Successful Bidder (if applicable) that such document is, in fact, an executory contract or unexpired lease within the meaning of the Bankruptcy Code (all rights with respect thereto being expressly reserved including, for the avoidance of doubt, the right to change the designation of any agreement as an executory contract or unexpired lease under Bankruptcy Code section 365 at any time prior to the Closing Date of the Sale or the effective date of the Plan).

7. The Debtors believe that any and all defaults (other than the filing of these Chapter 11 Cases), actual pecuniary losses and any amounts due under the Contracts can be cured and satisfied in full by the payment of the cure amounts (the “Cure Amounts”), which are also set forth on **Exhibit 1**; provided, however, the Debtors may adjust the Cure Amount with respect to any Contract on **Exhibit 1** as necessary and in accordance with the Bid Procedures. **The inclusion of a Contract on Exhibit 1 is not, and should not be deemed to be, an agreement or acknowledgement by the Debtors that such Contract is an executory contract or unexpired lease under section 365 of the Bankruptcy Code or that such Contract will be assumed and/or assumed and assigned by the Debtors; the Successful Bidder has the right up to the Closing to determine whether or not to have your Contract assigned.**

8. Objections to (a) any of the Cure Amounts set forth on **Exhibit 1** hereto, and/or (b) the proposed assumption and/or assumption and assignment of any Contract in connection with

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<sup>3</sup> Unless otherwise stated, capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Bid Procedures Order or the Bid Procedures Motion.

the Sale or in a Stand-Alone Restructuring Scenario (other than with respect to the adequate assurance of future performance to be provided by the Successful Bidder, unless the Successful Bidder is the Senior Secured Lenders (or any designee thereof)), as applicable (a “Contract Objection”), shall (i) be in writing, (ii) set forth the name and address of the objecting party and the nature and amount of any claims or interests of the objecting party or asserted against the Debtors’ estates or properties by the objecting party, (iii) the basis for the objection and the specific grounds therefor, including, without limitation, any and all obligations that the objecting party asserts must be cured or satisfied in respect to the Contract(s), together with all documentation supporting such cure claim or objection, (iv) conform to the Bankruptcy Rules and the Local Rules, (v) be filed with the Bankruptcy Court, and (vi) be served upon the Sale Objection Parties (as defined herein) so as to be received **April 12, 2024 at 4:00 p.m. (ET)**] (the “Contract Objection Deadline”); provided, however,

- a. that if the Debtors amend the Cure Notice to add a contract or lease, which they shall do no later than **May 7, 2024 at 4:00 p.m. (ET)**, unless they receive the consent of the Contract Party to each contract or lease on the proposed amended Cure Notice, the Contract Party to the added contract or lease shall have until the earlier of (i) fourteen (14) days after service of notice of adding a contract or lease; or (ii) the Sale Hearing (defined below) (such date, the “Amended Contract Objection Deadline”) to submit a Contract Objection with respect to the contract or lease added by the Debtors; and
- b. if the Debtors amend the Cure Notice to reduce the Cure Amount of a Contract or lease, except where such reduction was upon mutual agreement of the parties, the Contract Party to the contract or lease with the reduced Cure Amount shall have until the Amended Contract Objection Deadline to object to the Cure Amount; and provided further, that if the Successful Bidder is a person or entity other than the Senior Secured Lenders, a Contract Party shall have until **May 14, 2024 at 4:00 p.m. (ET)**] (the “Successful Bidder Adequate Assurance Objection Deadline”) to object to assumption and/or assumption and assignment of its Contract to such Successful Bidder solely with respect to the adequate assurance of future performance to be provided by the Successful Bidder (or any designee thereof), with any such objection being heard at the Sale Hearing or at a later-scheduled hearing as the Bankruptcy Court deems appropriate.

“Sale Objection Parties” mean, collectively:

(1) counsel for the Debtors, (A) Foley Hoag LLP, (x) 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019 (Attn: Alison D. Bauer, Esq. (e-mail: [abauer@foleyhoag.com](mailto:abauer@foleyhoag.com)) and (y) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. ([ksl@foleyhoag.com](mailto:ksl@foleyhoag.com)); and (B) Gibbons P.C., (x) 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (e-mail: [cmccclamb@gibbonslaw.com](mailto:cmccclamb@gibbonslaw.com)) and (y) One Gateway Center, Newark, New Jersey 07102, Attn: Robert K. Malone, Esq. (e-mail: [rmalone@gibbonslaw.com](mailto:rmalone@gibbonslaw.com));

(2) counsel to the Committee, if any;



(3) the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801, Attn: Jane M. Leamy (e-mail: jane.m.leafy@usdoj.gov); and

(4) counsel to the Senior Secured Lenders, Greenberg Traurig, LLP, (x) One International Place, Suite 2000, Boston, Massachusetts 02110, Attn: Julia Frost-Davies (Julia.FrostDavies@gtlaw.com), (y) One Vanderbilt Avenue, New York, New York 10017, Attn: Oscar N. Pinkas (pinkaso@gtlaw.com) and Leo Muchnik (muchnikl@gtlaw.com), and (z) 222 Delaware Avenue, Suite 1600, Wilmington, Delaware 19801, Attn: Dennis Meloro (MeloroD@gtlaw.com) and Anthony Clark (Anthony.Clark@gtlaw.com).

9. **Unless a Contract Party files and serves an objection before the applicable objection deadline, such Contract Party shall be (i) forever barred and estopped from objecting to the proposed Cure Amounts and from asserting any additional cure or other amounts (other than as may be asserted in an Additional Cure Notice), and the Debtors, the Senior Secured Lenders, and the Successful Bidder shall be entitled to rely solely upon the proposed Cure Amounts set forth in the Cure Notice(s); (ii) deemed to have consented to the assumption and/or assumption and assignment of its Contract(s), (iii) forever barred and estopped from asserting or claiming against the Debtors, the reorganized Debtors, the Senior Secured Lenders, or the Successful Bidder, or their respective property, as applicable, that any additional amounts are due or other defaults exist (other than as may be asserted in an Additional Cure Notice), that conditions to assignment must be satisfied under its Contract(s), including, without limitation, any consent rights, or that there is any objection or defense to the assumption and assignment of its Contract(s), including, without limitation, adequate assurance of future performance; (iv) precluded from objecting to the assumption and/or assumption and assignment of its Contract(s); and (v) barred and estopped from asserting or claiming that its Contract(s), if an Assumed/Assigned Contract, contains an enforceable consent right.**

10. If no Cure Amount is due or owing under a Contract and the Contract Party to such Contract does not otherwise object to the Debtors' proposed assumption and/or assumption and assignment of such Contract, no further action needs to be taken on the part of that Contract Party.

11. Where a Contract Party files an objection meeting the requirements of paragraph 8 above, objecting to the assumption and/or assumption and assignment of such Contract and/or asserting a cure amount higher than the proposed Cure Amount listed on this notice, the Debtors, the Contract Party, and the Senior Secured Lenders (or, if applicable, the Successful Bidder) shall meet and confer in good faith to attempt to resolve any such objection without Bankruptcy Court intervention. In the event the Contract Objection is not resolved prior to the Sale Hearing, such Contract Objection will be heard at the Sale Hearing or at a later-scheduled hearing as the Bankruptcy Court deems appropriate. To the extent it is determined that the Cure Amount exceeds the amount set forth on **Exhibit 1**, (x) in a Sale Scenario, the Successful Bidder may determine not to have such Contract assumed and assigned to it and/or (y) in a Stand-Alone Restructuring Scenario, the Debtors, with the consent of the Senior Secured Lenders, may determine not to have such Contract assumed or assumed and assigned.

12. In the event an Auction occurs, no later than **May 13, 2024 at 10:00 a.m. (ET)**, the Debtors will file with the Bankruptcy Court a notice identifying the Successful Bid, Successful Bidder, Back-Up Bid, and Back-Up Bidder, and the amount of the Successful Bid and Back-Up Bid (the “Successful Bidder Notice”). At that same time, the Debtors shall serve the Successful Bidder Notice by fax, email, or, if neither is available, overnight mail, on (i) all Contract Parties whose Contracts are to be assumed and assigned and (ii) all creditors who have timely submitted a written request for the notice and provided their fax numbers, email address or street address to Debtors’ counsel. By no later than the Bid Deadline, those creditors who wish to receive a copy of the Successful Bidder Notice must submit a written request, including such creditor’s fax number, email address, and/or street address, to Debtors’ counsel: Foley Hoag LLP, (x) 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019, Attn: Alison D. Bauer, Esq. (abauer@foleyhoag.com) and Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com), and (y) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com).

13. In the event the Sale, conducted in accordance with the Bid Procedures, results in a superior offer than the Stand-Alone Restructuring Scenario as determined by the Senior Secured Lenders in their sole discretion, the Debtors will pursue the Sale Scenario. In such case, a Sale Hearing will be held on **May 16, 2024 at 2:00 p.m. (ET)** for the Bankruptcy Court to consider approving the Sale to such party as determined by the Debtors, pursuant to the Bid Procedures, to have submitted the highest or otherwise best bid for the Assets (the “Successful Bidder”).

14. The Sale Hearing will be held before the Honorable Laurie Selber Silverstein at the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 6th Floor, Courtroom No. 2, Wilmington, Delaware 19801. The Debtors, in the exercise of their business judgment, with the consent of the Senior Secured Lenders, may adjourn the Sale Hearing without notice or with limited and shortened notice to parties, including by (i) an announcement of such adjournment at the Sale Hearing or at the Auction and (ii) the filing of a notice of adjournment with the Bankruptcy Court prior to the commencement of the Sale Hearing.

15. Except with respect to any Assumed Liabilities, the Debtors will seek to have the Sale be free and clear of all liens, claims, encumbrances, defenses (including, without limitation, rights of setoff) and interests, including, without limitation, security interests of whatever kind or nature, mortgages, conditional sales or title retention agreements, pledges, deeds of trust, hypothecations, liens, encumbrances, assignments, preferences, debts, easements, charges, suits, licenses, options, rights-of-recovery, judgments, orders and decrees of any court or foreign or domestic governmental entity, taxes (including foreign, state and local taxes), licenses, covenants, restrictions, indentures, instruments, leases, options, off-sets, claims for reimbursement, contribution, indemnity or exoneration, successor, product, environmental, tax, labor, ERISA, CERCLA, alter ego and other liabilities, causes of action, contract rights and claims, to the fullest extent of the law, in each case, of any kind or nature (including, without limitation, all “claims” as defined in section 101(5) of the Bankruptcy Code), known or unknown, whether pre-petition or post-petition, secured or unsecured, choate or inchoate, filed or unfiled, scheduled or unscheduled, perfected or unperfected, liquidated or unliquidated, noticed or unnoticed, recorded or unrecorded, contingent or non-contingent, material or non-material, statutory or non-statutory, matured or unmatured, legal or equitable to the maximum extent permitted by section 363 of the Bankruptcy Code.

16. At the Sale Hearing, the Bankruptcy Court may enter such orders as it deems appropriate under applicable law and as required by the circumstances and equities of these Chapter 11 Cases, and the Debtors, subject to the terms of the Successful Bidders' asset purchase agreement, may seek entry of an order which provides, except with respect to any Assumed Liabilities, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax and regulatory authorities, lenders, trade creditors, litigation claimants and other creditors, holding liens, claims, encumbrances or interests of any kind or nature whatsoever against or in all or any portion of the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, liquidated or unliquidated or subordinate), arising under or out of, in connection with, or in any way relating to the Debtors, the Assets, the operation of the Debtors' business prior to the Closing Date or the transfer of the Assets to the Successful Bidder, shall be forever prohibited and permanently enjoined from (a) commencing or continuing in any manner any action or other proceeding, the employment of process, or any act (whether in law or equity, in any judicial, administrative, arbitral, or other proceeding) to collect or recover any interest; (b) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order with respect to an interest, (c) creating, perfecting, or enforcing any interest, or (d) asserting any right of subrogation of any kind with respect to an interest, in each case as against the Successful Bidder or its designee, any of their respective affiliates or subsidiaries, or any of their respective representatives, or any of their respective property or assets, including the Assets.

17. You may obtain a copy of the Bid Procedures Motion, the Bid Procedures, the Bid Procedures Order, and related Sale documents by sending a request to the Debtors' counsel, attention to Alison D. Bauer, Esq. (abauer@foleyhoag.com), Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com), and Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com). These documents are also published on the website maintained by the Debtors' claims and noticing agent in these Chapter 11 Cases at <https://dm.epiq11.com/Burgess>, located under the tab labeled "Sale Documents".

Dated: March \_\_, 2024

\_\_\_\_\_  
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**EXHIBIT 4**

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

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

**NOTICE OF DEBTORS' INTENT TO ASSUME AND/OR ASSUME  
AND ASSIGN CERTAIN ADDITIONAL LEASES AND EXECUTORY  
CONTRACTS AND FIXING OF ADDITIONAL CURE AMOUNTS<sup>2</sup>**

NOTICE IS HEREBY GIVEN, as follows:

1. On March \_\_, 2024, the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) entered an order [D.I. \_\_] (the “Bid Procedures Order”),<sup>3</sup> pursuant to the bid procedures motion [D.I. \_\_] (the “Bid Procedures Motion”), approving, among other things, (i) procedures (the “Bid Procedures”) in connection with the sale (the “Sale”) of all or substantially all of the Debtors’ assets (the “Assets”) and (ii) procedures (the “Contract Procedures”) to determine cure amounts and deadlines for filing objections to the proposed assumption and/or assumption and assignment by the Debtors of certain contracts and leases in connection with the Sale and the Debtors’ proposed chapter 11 plan (as may be amended, the “Plan”).

2. Pursuant to the Bid Procedures Order and the Contract Procedures approved therein, on \_\_\_\_\_, 2024, the Debtors filed the *Notice of Debtors’ Intent to Assume and/or Assume and Assign Certain Unexpired Leases and Executory Contracts and Fixing of Cure Amounts* [D.I. \_\_] (the “Initial Cure Notice”). Among other things, the Initial Cure Notice identified those Contracts subject to assumption and/or assumption and assignment by the Debtors and the respective Cure Amounts proposed by the Debtors.

3. As set forth in the Initial Cure Notice, the non-Debtor parties to the Contracts subject to assumption and/or assumption and assignment by the Debtors (the “Contract Parties”) had no later than **April 12, 2024 at 4:00 p.m. (ET)** (the “Contract Objection Deadline”), to object

<sup>1</sup> 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.

<sup>2</sup> This notice is subject to the full terms and conditions of the Bid Procedures Motion, the Bid Procedures and the Bid Procedures Order (each as defined below). The Bid Procedures Order shall control in the event of any conflict. The Debtors encourage parties in interest to review such documents in their entirety and consult an attorney if they have questions or want advice.

<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Bid Procedures Order and/or the Bid Procedures Motion.

to (i) the proposed Cure Amounts listed by the Debtors in the Initial Cure Notice (and to propose alternative cure amounts); and/or (ii) the proposed assumption and/or assumption and assignment of any Contract in connection with the Sale and/or Plan (other than with respect to the adequate assurance of future performance to be provided by the Successful Bidder, unless the Successful Bidder is the Senior Secured Lenders (or any designee thereof)), as applicable (a “Contract Objection”).

4. As provided by the Bid Procedures Order and the Bid Procedures, and set forth in the Initial Cure Notice, the Debtors may amend the Initial Cure Notice (an “Amended Cure Notice”) through **May 7, 2024 at 4:00 p.m. (ET)** to (a) add a contract or lease or (b) reduce the Cure Amount of a contract or lease identified in the Initial Cure Notice. A Contract Party to (x) a contract or lease added to the Amended Cure Notice or (y) a contract or lease for which the Cure Amount was reduced as set forth in the Amended Cure Notice shall have until the earlier of (A) fourteen (14) days after service of the Amended Cure Notice; or (B) the Sale Hearing (such date, the “Amended Contract Objection Deadline”) to submit a Contract Objection, unless (1) the Debtors received the consent of each Contract Party to a contract or lease added to the Amended Cure Notice or (2) a reduced Cure Amount set forth on the Amended Cure Notice was based upon mutual agreement of the applicable Contract Party and the Debtors.

5. By this Amended Cure Notice, the Debtors hereby amend the Initial Cure Notice to either add Contract(s) inadvertently omitted from the Initial Cure Notice or to reduce the Cure Amounts the Debtors believe are owed with respect to certain of the Contracts listed in the Initial Cure Notice. You have been identified as a Contract Party to a Contract on the amended Contract list attached hereto as **Exhibit 1** that the Debtors *may* seek to assume and/or assume and assign that was either added to the amended Contract list or for which the Cure Amount as set forth in the Initial Cure Notice was reduced.

6. As set forth above, except for those Contract Parties receiving this Amended Cure Notice that either (x) consented to the addition of their Contract(s) to the Amended Cure Notice or (y) agreed with the Debtors on a reduced Cure Amount from that set forth in the Initial Cure Notice, Contract Parties receiving this notice have until the Amended Contract Objection Deadline to assert a Contract Objection.

7. A Contract Objection by any such Contract Party shall (a) be in writing, (b) set forth the name and address of the objecting Contract Party and the nature and amount of any claims or interests of the objecting Contract Party or asserted against the Debtors’ estates or properties by the objecting party, (c) set forth the basis and specific grounds for the objection, including, without limitation, any and all obligations that the objecting Contract Party asserts must be cured or satisfied in respect to its Contract(s), together with all documentation supporting objection, (d) conform to the Bankruptcy Rules and the Local Rules, (e) be filed with the Bankruptcy Court, and (f) be served upon the following parties (collectively, the “Sale Objection Parties”):

- a. counsel for the Debtors, (A) Foley Hoag LLP, (x) 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, NY 10019 (Attn: Alison D. Bauer, Esq. (e-mail: [abauer@foleyhoag.com](mailto:abauer@foleyhoag.com)) and (y) 155 Seaport Boulevard, Boston, MA 02210, Attn: Kenneth S. Leonetti, Esq. ([ksl@foleyhoag.com](mailto:ksl@foleyhoag.com)); and (B) Gibbons P.C., (x) 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D.

McClamb, Esq. (e-mail: cmcclamb@gibbonslaw.com) and (y) One Gateway Center, Newark, New Jersey 07102, Attn: Robert K. Malone, Esq. (e-mail: rmalone@gibbonslaw.com);

- b. counsel to the Committee, if any;
- c. the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801, Attn: Jane M. Leamy (e-mail: jane.m.leafy@usdoj.gov); and
- d. counsel to the Senior Secured Lenders, Greenberg Traurig, LLP, (x) One International Place, Suite 2000, Boston, Massachusetts 02110, Attn: Julia Frost-Davies (e-mail: Julia.FrostDavies@gtlaw.com), (y) One Vanderbilt Avenue, New York, New York 10017, Attn: Oscar N. Pinkas (e-mail: pinkaso@gtlaw.com) and Leo Muchnik (e-mail: muchnikl@gtlaw.com), and (z) 222 Delaware Avenue, Suite 1600, Wilmington, Delaware 19801, Attn: Dennis Meloro (e-mail: MeloroD@gtlaw.com) and Anthony Clark (e-mail: Anthony.Clark@gtlaw.com).

8. If no eligible Contract Party files a Contract Objection by the Amended Contract Objection Deadline, the Bankruptcy Court may enter an order authorizing the assumption and/or assumption and assignment of the Contracts listed in this Amended Cure Notice. In the event a Contract Objection is filed by the Amended Contract Objection Deadline, and the Debtors, the objecting Contract Party, and the Senior Secured Lenders and/or Successful Bidder, as applicable, are unable to consensually resolve the Contract Objection by the Sale Hearing, the Contract Objection will be heard at the Sale Hearing or at a later-scheduled hearing as the Bankruptcy Court deems appropriate.

9. If a Contract Party receiving this Amended Cure Notice has no issue with its Contract(s) being added to the list of Contracts subject to potential assumption and/or assumption and assignment by the Debtors and/or agrees with Cure Amount set forth on **Exhibit 1**, as applicable, no further action needs to be taken, and the Bankruptcy Court may enter an order authorizing the assumption and/or assumption and assignment by the Debtors of the Contracts listed on **Exhibit 1**.

10. A hearing (the “Sale Hearing”) will be held on **May 16, 2024 at 2:00 p.m. (ET)** for the Bankruptcy Court to consider, among other things, approving the Sale to such party as determined by the Debtors, pursuant to the Bid Procedures, to have submitted the highest or otherwise best bid for the Assets (the “Successful Bidder”).

11. The Sale Hearing will be held before the Honorable Laurie Selber Silverstein at the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 6th Floor, Courtroom No. 2, Wilmington, Delaware 19801. The Debtors, in the exercise of their business judgment, with the consent of the Senior Secured Lenders, may adjourn the Sale Hearing without notice or with limited and shortened notice to parties, including by (i) an announcement of such adjournment at the Sale Hearing or at the Auction and (ii) the filing of a notice of adjournment with the Bankruptcy Court prior to the commencement of the Sale Hearing.

12. Except with respect to any Assumed Liabilities, the Debtors will seek to have the Sale be free and clear of all liens, claims, encumbrances, defenses (including, without limitation,



rights of setoff) and interests, including, without limitation, security interests of whatever kind or nature, mortgages, conditional sales or title retention agreements, pledges, deeds of trust, hypothecations, liens, encumbrances, assignments, preferences, debts, easements, charges, suits, licenses, options, rights-of-recovery, judgments, orders and decrees of any court or foreign or domestic governmental entity, taxes (including foreign, state and local taxes), licenses, covenants, restrictions, indentures, instruments, leases, options, off-sets, claims for reimbursement, contribution, indemnity or exoneration, successor, product, environmental, tax, labor, ERISA, CERCLA, alter ego and other liabilities, causes of action, contract rights and claims, to the fullest extent of the law, in each case, of any kind or nature (including, without limitation, all “claims” as defined in section 101(5) of the Bankruptcy Code), known or unknown, whether pre-petition or post-petition, secured or unsecured, choate or inchoate, filed or unfiled, scheduled or unscheduled, perfected or unperfected, liquidated or unliquidated, noticed or unnoticed, recorded or unrecorded, contingent or non-contingent, material or non-material, statutory or non-statutory, matured or unmatured, legal or equitable to the maximum extent permitted by Bankruptcy Code section 363.

13. At the Sale Hearing, the Bankruptcy Court may enter such orders as it deems appropriate under applicable law and as required by the circumstances and equities of these Chapter 11 Cases, and the Debtors, subject to the terms of the Successful Bidders’ asset purchase agreement, may seek entry of an order which provides, except with respect to any Assumed Liabilities, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax and regulatory authorities, lenders, trade creditors, litigation claimants and other creditors, holding liens, claims, encumbrances or interests of any kind or nature whatsoever against or in all or any portion of the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, liquidated or unliquidated or subordinate), arising under or out of, in connection with, or in any way relating to the Debtors, the Assets, the operation of the Debtors’ business prior to the Closing Date or the transfer of the Assets to the Successful Bidder, shall be forever prohibited and permanently enjoined from (a) commencing or continuing in any manner any action or other proceeding, the employment of process, or any act (whether in law or equity, in any judicial, administrative, arbitral, or other proceeding) to collect or recover any interest; (b) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order with respect to an interest, (c) creating, perfecting, or enforcing any interest, or (d) asserting any right of subrogation of any kind with respect to an interest, in each case as against the Successful Bidder or its designee, any of their respective affiliates or subsidiaries, or any of their respective representatives, or any of their respective property or assets, including the Assets.

14. You may obtain copies of the Bid Procedures Motion, the Bid Procedures, the Bid Procedures Order, and related Sale documents, including the Initial Cure Notice and this Amended Cure Notice, by sending a request to the Debtors’ counsel, attention to Alison D. Bauer, Esq. (abauer@foleyhoag.com), Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com) and Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com). These documents are also published on the website maintained by the Debtors’ claims and noticing agent in these Chapter 11 Cases at <https://dm.epiq11.com/Burgess>, located under the tab labeled “Sale Documents”.

Dated: \_\_\_, 2024

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