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April 29, 2024

Via E-mail and First Class Mail

Daniel C. Goldner, Chairman
State of New Hampshire
Site Evaluation Committee
21 S. Fruit St., Suite 10
Concord, NH 03301-2429

Re: Berlin Station, LLC – Joint Petition for Administrative Approval of a Change of Ownership, etc., dated April 10, 2024

Dear Chairman Goldner:

Thank you for your letter dated April 19, 2024, regarding the above-referenced petition filed with the NH Site Evaluation Committee. Answers to the questions raised in your letter are provided below. Joint Petitioners trust that these answers are fully responsive to the questions and that they demonstrate that the petition, as filed, is administratively complete and is ready for the SEC's timely consideration and approval.

Given the nature of the issues raised by the SEC's questions, which appear to arise primarily due to the fact that this Joint Petition concerns a facility which is a debtor currently participating in a Chapter 11 reorganization case before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), some additional context addressing the interconnected relationship between these two proceedings might be helpful. A number of the questions appear to raise concerns stemming from the fact that the Joint Petition initiates SEC proceedings prior to finality of the bankruptcy process regarding ownership of the facility. As you are likely aware, the bankruptcy process is expensive and disruptive, and it is in the facility's and indeed all parties' best interests (regardless of who the ultimate owner is), to conduct and conclude the bankruptcy process in as efficient and timely manner as possible. Accordingly, some of the regulatory proceedings related to the facility have commenced so that they proceed along somewhat parallel as opposed to sequential paths. In this way, each of the several essential preconditions to a successful conclusion of the bankruptcy can be timely pursued, while each regulatory body is assured that its approval or authorization will become effective only if and when all other required approvals have been obtained. Accordingly, the change of ownership contemplated under the proposed Debtors'

First Amended *Joint Chapter 11 Plan for Burgess BioPower, LLC and Berlin Station, LLC*, dated April 11, 2024 (as may be amended, the “Plan”) is conditioned, among other milestones, upon the cumulative receipt of approvals from the SEC, the Federal Energy Regulatory Commission (FERC), and the Bankruptcy Court. The cumulative and conditional nature of these approvals means that none has effect unless and until all are obtained.

The nature of the questions posed also suggests that additional information describing generally the sales process in the bankruptcy case would be helpful. With respect to the sale process to identify a new owner, as you may be aware from the bankruptcy proceedings, an independent investment banking company, SSG Capital Advisors, LLC, (“SSG”) has been retained by the debtors to market the facility to interested purchasers. SSG is an industry leader skilled in working with distressed asset sales.¹ The Bankruptcy Court, approved the bidding and sales procedures on March 25, 2024 and approved the retention of SSG retroactive to the petition filing date on April 20, 2024.²

Activities related to the marketing and potential sale of the facility have been ongoing for months. SSG created a “teaser” and confidential informational memorandum that are to be used to market the facility as well as a non-disclosure agreement (“NDA”). SSG has proactively marketed the facility to potential strategic and financial buyers, including throughout the energy sector. A data room has been set up so that interested parties may, after signing the NDA, conduct appropriate due diligence relative to the facility. The identity and number of parties with which SSG is working must remain confidential to protect the integrity of the bid process. SSG has been diligent in its marketing efforts which continue to date. Bids for the facility are due by May 6, 2024. The deadline for the debtors to notify bidders of their status as qualified bidders and whether an auction will be conducted is May 9, 2024. Once that date has passed, and the existence of any bidders known, the Joint Petitioners will supplement their response to this letter, and if necessary, request additional guidance from the Committee at that time. A hearing on approval of a sale, if any, will be conducted on May 21, 2024, the same date as the proposed confirmation hearing.

With that additional context in mind, Joint Petitioners provide the following responses to questions raised in the April 19, 2024 letter as to why the SEC should not reject the Joint Petition:

(i) “. . . barred by the automatic stay under 11 U.S.C. § 362, including 11 U.S.C. § 362(a)(3), because of Berlin Station’s ongoing Chapter 11 cases”

Although it is understandable that a question concerning the applicability of the automatic stay be considered in connection with any proceeding involving a debtor, the plain language of the Bankruptcy Code and the consistent body of relevant case law make clear

¹ SSG’s qualifications in this regard are laid out in the application filed by Berlin Station and Burgess (together, the “Debtors”) in their Chapter 11 cases to retain SSG as their investment banker, which has been approved by order of the Bankruptcy Court.

² The bidding procedures are an exhibit to the Debtors’ motion, and the Bankruptcy Court’s order approving the bidding procedures can be found here.

that the SEC's consideration of the Joint Petition is not barred by the automatic stay under 11 U.S.C. § 362, including 11 U.S.C. § 362(a)(3).

None of the provisions of 11 U.S.C. §362 bar an act by a state regulatory authority to consider a petition for approval of a transfer of ownership. Rather, in general, such provision operates to protect assets of the Debtors' estates by preventing third parties from interfering with those assets. Toward that end, courts have consistently held that the automatic stay does not apply to proceedings brought by the debtor. See *Freeman v. Commissioner of Internal Revenue*, 799 F.2d 1092-93 (5th Cir. 1986); *Censo, LLC v. NewRez, LLC*, 638 B.R.416 (B.A.P. 9th Cir. 2022). The same statutory language and case law provide that the automatic stay does not apply to sales or transfers of property initiated by debtors. See *Burkart v. Coleman (In re Tippett)*, 542 F.2d 684, 691-92 (9th Cir. 2008).

The automatic stay provision cited by the Committee is meant to stay acts to obtain possession of the estate's property by creditors and other actions against the debtor and does not apply in an administrative application by the debtors such as the one filed at the Site Evaluation Committee. See *Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp. (In re Krystal Cadillac Oldsmobile GMC Truck, Inc.)*, 142 F.3d 631, 637 (3d Cir. 1998) (describing the automatic stay as a fundamental *debtor* protection) (emphasis added).

(ii) “. . . incomplete due to the Joint Petition's lack of evidence sufficient for NCGH to satisfy the requirements of N.H. Admin. R., Site 301.03(c)(6)”

The Joint Petition is neither incomplete nor lacking in evidence. The statute governing the transfer of a Certificate of Site and Facility, RSA 162-H:8, was recently amended and provides for a 90-day administrative approval process,³ instead of an adjudicative hearing process. To that end, the statute authorizes the Site Evaluation Committee to approve a transfer of a Certificate of Site and Facility (“Certificate”) if the “new certificate holder has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.”⁴ Joint Petitioners assert that, under the statute, as amended, an assessment of site control is not within the scope of the Committee's examination on a transfer of a Certificate. Moreover, site control is generally an issue of concern while an entity is seeking initial approval of a Certificate, prior to its construction, not as here, where the facility is already built and operating.

Notwithstanding the above, Joint Petitioners assert that even if Site 301.03(c)(6) were applicable to Joint Petitioners' RSA 162-H:8 filing, the Joint Petition and Attachments demonstrate that under either the Equity Transaction or the Asset Transaction, NCGH has a “legal basis to acquire the right to construct, operate, and maintain the facility on, over, or

³ RSA 162-H:8 (VI) measures the 90-day period beginning on the date of the petition.

⁴ The SEC has not yet adopted rules following the amendment of statute to provide applicants of how the SEC will process these administrative transfer proceedings, but Joint Petitioners assert that the site control regulation does not apply in this context.

under the site . . .” Site 301.03(c)(6). NCGH has a legal basis to acquire the necessary rights by virtue of the Plan. In either scenario, NCGH will acquire all the equity interests in Berlin Station and Burgess or the assets of Berlin Station and Burgess, including the Facility. Both transaction options necessarily include the transfer of rights covered by Site 301.03(c)(6). While the transfer of ownership must ultimately be approved by the Bankruptcy Court, Joint Petitioners have demonstrated the legal basis to acquire those rights. The owner will have the requisite site control over the facility and the issue of site control will be moot.

(iii) “. . . incomplete or untimely because Berlin Station, LLC has no authority to transfer or to contract to transfer the Berlin Facility and its certificate to NCGH”

The Joint Petition is neither incomplete nor untimely based on the assertion that Berlin Station, LLC has no authority to transfer or to contract to transfer the Berlin Facility and its certificate to NCGH. The Petition is complete because it includes all information relevant to the Committee’s statutory jurisdiction to approve the transfer of the Certificate, i.e., that the new owners will have the requisite managerial, technical, and financial capability to operate the facility. While the Bankruptcy Court has jurisdiction over the facility, consistent with the bidding and sales procedures approved by the Bankruptcy Court, Berlin Station may seek to transfer the Certificate subject to the approval of the Bankruptcy Court. Any decision by the Committee to transfer the Certificate would not affect the transfer, but rather would be one of the requirements to consummation of the transfer once the Bankruptcy Court had approved it.

(iv) “. . . incomplete or untimely because any sale or disposition of the Berlin Facility is subject to Berlin Station, LLC’s Chapter 11 Plan, which is not scheduled for a confirmation hearing until May 24, 2024”

The Joint Petition is neither incomplete nor untimely simply because the sale or disposition of the facility is subject to confirmation of the Plan. As noted above, due to the nature of bankruptcy proceedings, the process for regulatory approvals related to the sale or disposition of a facility often follows parallel instead of sequential paths. Moreover, and consistent with the response to question (iii) above, the Joint Petitioners assert that the Committee can make its determination as to whether the new owners meet the statutory requirements, but make that approval conditioned on and subject to approval by the Bankruptcy Court at the Confirmation Hearing on May 21, 2024, or at such appropriate time during the bankruptcy case.

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We hope and trust that the answers and information provided above assists the Committee in its understanding and evaluation of the Joint Petition.

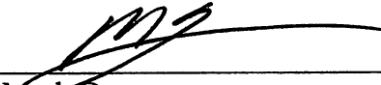
Very truly yours,

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By: 

Carol J. Holahan

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