

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re:		) Chapter 11
		)
Burgess BioPower, LLC,		) Case No. 24-10235 (LSS)
		)
Debtor.		)
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In re:		) Chapter 11
		)
Berlin Station, LLC,		) Case No. 24-10236(LSS)
		)
Debtor.		) (Joint Administration Pending)
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**MOTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, PURSUANT TO  
28 U.S.C. § 1412 AND FEDERAL RULE OF BANKRUPTCY PROCEDURE  
1014(a), TO TRANSFER VENUE OF BANKRUPTCY PROCEEDINGS TO UNITED  
STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW HAMPSHIRE**

Public Service Company of New Hampshire ("PSNH"), by counsel, pursuant to 28 U.S.C. § 1412 and Rule 1014(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), hereby moves (the "Venue Motion") to transfer venue of these bankruptcy proceedings to the United States Bankruptcy Court for the District of New Hampshire (the "NH Bankruptcy Court"), and states the following:

**INTRODUCTORY STATEMENT**

These bankruptcy cases belong in New Hampshire. The Debtors own and operate a biomass-fueled electrical generation facility (the "Facility"), which is located and operates exclusively in Berlin, New Hampshire. Debtor Berlin Station owns

the Facility and the related land and equipment, which is Berlin Station's sole asset. Debtor Burgess is the "Operator" of the Facility pursuant to a lease agreement between Burgess and Berlin Station. Moreover, contrary to what they assert in their voluntary petitions,<sup>1</sup> each Debtor has its principal place of business in New Hampshire.

The Facility supplies electricity exclusively within New Hampshire to PSNH under a Power Purchase Agreement (defined in paragraphs 20 and 21 herein, the "PPA") governed by New Hampshire law. The PPA was conditioned on regulatory approval by the New Hampshire Public Utilities Commission (the "NHPUC"), allowing for full cost recovery by PSNH of the rates, terms and conditions of the agreement and protecting New Hampshire citizens from paying too much for electricity. Accordingly, there is substantial public interest in having issues concerning the Facility and their effects on New Hampshire citizens resolved by the New Hampshire Bankruptcy Court, which currently has pending before it the bankruptcy of the prior, related operator of the Facility and has familiarity with the history and operations of the Facility, the constituencies involved, and the impact of the Facility's operations on the

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<sup>1</sup> The Debtors' bankruptcy petitions list a CS Ops address in North Palm Beach, Florida as their principal place of business, but that is not what the Debtors' current business records filed with the New Hampshire Secretary of State reflect. Further, CS Ops' current principal place of business is the Loudon Road Address as reflected in the New Hampshire Secretary of State's records.

citizens of New Hampshire.

An important part of the PPA is the recovery of the Excess Cumulative Reduction, which is described in more detail in paragraphs 24 to 31 of this Motion. The recovery of the Excess Cumulative Reduction by PSNH has been delayed for several years because the Debtors claimed that if PSNH began taking those credits the Debtors would not have adequate income to continue plant operations. In response, the State of New Hampshire and the NHPUC intervened and have been highly involved with the PPA and the Excess Cumulative Reduction. Twice, in 2018 and again in 2022, the General Court of New Hampshire (the "Legislature") decided that the continued operation of the Facility was sufficiently important to the energy infrastructure of New Hampshire and to the health of the state's forests and timber industry to require the Commission to impose a moratorium against PSNH performing its' contractual duty to collect the Excess Cumulative Reduction. Although the Legislature tried again to extend this moratorium in 2023, the Governor of New Hampshire vetoed the legislation. As a result, the government of the State of New Hampshire has determined that the citizens of New Hampshire should no longer continue to subsidize the Facility by paying increased rates for electricity. Thus, the moratorium expired on November 30, 2023, allowing PSNH to begin applying credits against the Debtors' invoices for the over \$71.5 million owed for the Excess Cumulative Reduction.

The Debtors claim that PSNH's recouping amounts owed related to the Excess Cumulative Reduction breached the PPA and gave them a right to terminate the PPA for nonpayment. PSNH disputes that any amounts owed were not paid. PSNH further disputes the Debtors' claim of breach and alleged termination. Prior to the alleged termination, PSNH invoked the dispute resolution procedures in the PPA, which require binding arbitration of the payment dispute, breach, and termination issues in New Hampshire. Most relevant witnesses for resolving the dispute, including current and former employees and managers, in all likelihood, either reside in New Hampshire or regularly conduct business in New Hampshire.

Furthermore, the Debtors expressly agreed, and waived all objections, to venue being placed in New Hampshire courts for all disputes arising out of the agreement pursuant to which the Debtors sell the Facility's products to PSNH. Accordingly, PSNH requests that the court transfer venue of these bankruptcy cases to the NH Bankruptcy Court, pursuant to 28 U.S.C. § 1412, "in the interest of justice or for the convenience of the parties.

### **FACTS**

#### **Jurisdictional Facts**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. Venue of this Venue Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) .

4. The statutory predicate for the relief requested herein is 28 U.S.C. § 1412 and Bankruptcy Rule 1014(a) .

**Procedural Facts**

5. On February 9, 2024 (the "Petition Date"), each of Berlin Station, LLC ("Berlin Station") and Burgess BioPower, LLC ("Burgess"; and together with Berlin Station, the "Debtors") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court.

6. The Debtors continue to operate their businesses and manage their properties pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors have filed a motion seeking joint administration of their bankruptcy cases.

**Facts Regarding Debtors**

7. The Debtors own and operate a biomass-fueled electrical generation facility (the "Facility"), which is located and operates exclusively in Berlin, New Hampshire.

8. Debtor Berlin Station owns the Facility and the related land and equipment, which is Berlin Station's sole asset.

9. Debtor Burgess is the "Operator" of the Facility pursuant to a lease agreement between Burgess and Berlin

Station.

10. CS Operations, Inc. ("CS Ops"), an affiliate of the Debtors, provides management and day-to-day operations services to the Facility and supplies all employees to the Facility pursuant to the terms of a Project Management Agreement between CS Ops, as assignee of Cate Street Capital, Inc. ("Cate Street Capital"), and Berlin Station (the "Project Management Agreement").

11. According to Annual Reports of the Debtors filed with the New Hampshire Department of State:

A. Berlin Station and Burgess are Delaware limited liability companies.

B. The principal place of business for each of the Debtors through at least March of 2022 was listed as One Cate Street, Portsmouth, New Hampshire 03801 (the "Cate Street Address").

C. The current principal place of business for each of the Debtors is 1 Old Loudon Road, Concord, New Hampshire 03301, which is the location of the Facility (the "Loudon Road Address").

D. The principal purpose of Berlin Station is to develop, own and operate the Facility.

E. The principal purpose of Burgess is to lease the Facility.

12. PSNH, which purchases nearly 100% of the products produced by the Facility, is located in and operates exclusively in New Hampshire.

13. As of December 1, 2023, PSNH became Berlin Station's largest creditor apart from its secured lenders.

14. The Facility's primary supplier, Richard Carrier Trucking, Inc. ("Richard Trucking"), is located and operates in New Hampshire and in Maine. It is not located in and, upon information and belief, does not operate in Delaware.

15. Deutsche Bank Trust Company Americas, the Collateral Agent for the Debtors' secured lenders, is located in New York and has an address of 60 Wall Street, 27<sup>th</sup> Floor, New York, New York 10005.

16. The employees of the Facility, whom CS Ops supplies pursuant to the Project Management Agreement, presumably are located in or near New Hampshire and, in any event, regularly conduct business in New Hampshire.

17. As both the Facility and the Debtors' principal place of business are located in New Hampshire, upon information and belief, the Debtors' books and records are located in New Hampshire.

18. The New Hampshire Public Utilities Commission ("NHPUC") regulates the Facility, its exclusive customer (PSNH), and the terms of the Power Purchase Agreement pursuant to which

the Debtors sell the Facility's products to PSNH.

19. The New Hampshire legislature has determined that operation of the Facility "(a) is desirable to the energy infrastructure of the state of New Hampshire; (b) is a source of indigenously-sourced, reliable baseload power that contributes to regional fuel security and reliability of the regional electricity grid; (c) is important for the attainment of renewable energy portfolio standard goals of fuel diversity, capacity, sustainability and energy independence; (d) is significant to the continued health of New Hampshire's forests; (e) provides valuable support to the timber industry; and (f) is a contributor of jobs and to the economy of both the North Country and the state as a whole." 2022 New Hampshire Laws Ch. 275 (S.B. 271) (A true and accurate copy of the foregoing statute is attached as Exhibit 1.)

**The Power Purchase Agreement Between Berlin Station and PSNH**

20. PSNH and Laidlaw Berlin Biopower, LLC ("LBB") entered into a Power Purchase Agreement, dated as of June 8, 2010 (the "Original PPA") with respect to the development and operation of the Facility. On April 18, 2011, after extensive proceedings before the NHPUC,<sup>2</sup> the NHPUC entered an Order Granting

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<sup>2</sup> In connection with its issuance of Order No. 25,213, the NHPUC heard and considered extensive evidence and arguments of counsel for numerous interested parties, including the City of Berlin, the Office of Consumer Advocate on behalf of residential ratepayers, NHPUC Staff, PSNH, and others, in determining that the terms of the Original PPA,



Conditional Approval of the PSNH Petition for Approval of Purchased Power Agreement with Laidlaw Berlin BioPower, LLC in Order No. 25,213, conditioned upon certain modifications to the Original PPA, which were subsequently made. A true and accurate copy of Order No. 25,213 can be obtained from the following link to the NHPUC:

<https://www.puc.nh.gov/Regulatory/Orders/2011orders/25213e.pdf>.

One required condition to NHPUC's approval of the Original PPA was "that the PPA be revised to add a provision that expressly recognizes the [NHPUC]'s retention of such traditional regulatory authority in such circumstances." NHPUC Order No. 25,213 at p. 98.

21. Berlin Station, PSNH and LBB entered into an Amended and Restated Power Purchase Agreement, dated as of May 18, 2011 (as subsequently modified, the "PPA"), pursuant to which LLB assigned the Original PPA to Berlin Station and the parties amended and restated its terms in accordance with the NHPUC's conditions set forth in Order No. 25,213. A true and accurate copy of the PPA (without the subsequent amendments described below) is attached as **Exhibit 2**.

22. Pursuant to the terms of the PPA, Berlin Station, as Seller, was to construct, operate, and maintain the Facility.

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as modified in accordance with the conditions of the Order, are reasonable and in the public interest.

Upon completion of the Facility and from and after its In-Service Date (which occurred June 1, 2014), Berlin Station is required to sell, and PSNH is required to purchase and accept delivery of nearly 100% of the Products produced by the Facility - consisting of electricity, renewable energy certificates (RECs), and capacity - for a 20-year term. Specifically, all electricity and capacity generated by the Facility are sold exclusively to PSNH. Further, all Class 1 RECs up to 400,000 Class 1 RECs annually (where each REC represents one MWh of generation) is sold exclusively to PSNH. Annual RECs produced by the Facility in excess of that amount, if any, may be sold only in the regional Independent System Operator - New England ("ISO-NE") REC market, which includes New Hampshire but does not include Delaware.

23. Pursuant to section 6.1.2 of the PPA, the electricity purchased by PSNH under the PPA is purchased at a fixed price that is adjusted quarterly, based on a formula set forth in the PPA, including the backward review of the price of wood (biomass fuel) paid in the quarter just completed.

**The Cumulative Factor and Excess Cumulative Reduction**

24. Section 6.1.4(a) of the PPA provides for a rolling negative or positive adjustment to be calculated to reflect the difference between the prices of electricity purchased under the PPA and applicable ISO-NE market energy prices, as follows:

For each MWh of Energy delivered during the Term of this Agreement, a negative or positive adjustment shall be determined. When the Adjusted Base Price (in \$/MWh) in effect during an hour exceeds the ISO-NE Energy Price in that hour, the hourly negative adjustment shall equal the delivered MWhs multiplied by the difference between the ISO-NE Energy Price and the Adjusted Base Price. When the Adjusted Base Price (in \$/MWh) is less than the ISO-NE Energy Price, the hourly positive adjustment shall equal the delivered MWhs multiplied by the difference between the ISO-NE Energy Price and the Adjusted Base Price. These negative and positive adjustments will be continuously aggregated to determine a cumulative net negative adjustment or net positive adjustment for the purpose of adjusting the price of any Facility purchase option by PSNH pursuant to Article 7 hereof, if exercised. At any point in time, the cumulative value of these adjustments is defined as the "Cumulative Factor". At any point in time, a net negative Cumulative Factor value is termed a "Cumulative Reduction". A Cumulative Reduction will serve to reduce the purchase price of the Facility as provided in the Purchase Option Agreement. A net positive Cumulative Factor will bestow no rights or obligations on either Party to this Agreement.

25. Pursuant to section 6.1.4(c) of the PPA, if there exists a Cumulative Reduction in excess of \$100 million at the end of any Operating Year, PSNH is required to credit such excess ("Excess Cumulative Reduction") against amounts otherwise due for Energy delivered to PSNH during the subsequent operating year until the Excess Cumulative Reduction is eliminated. This credit is to be affected in 12 equal monthly credits (up to the full amount of the monthly payment otherwise due Berlin Station) or longer if such Cumulative Reduction exceeds charges to PSNH

over the subsequent year. If upon expiration of the PPA's Term PSNH does not purchase the Facility, Seller is required to reimburse PSNH the value of any Excess Cumulative Reduction.

26. In addition, pursuant to 10.3 of the PPA, PSNH is required to discharge and net all mutual debts and payment obligations due and owing under the PPA and/or the Interconnection Agreement (a separate agreement between PSNH and Berlin Station) to each other on the same date, such that only the excess amount remaining due shall be paid by the party who owes it.

27. The price of electricity sold by Berlin Station to PSNH under the PPA has been well over the applicable market price throughout its term thus far.

28. In accordance with orders entered by the NHPUC at the direction of the New Hampshire legislature - see SB 577 [2018 N.H. Laws, ch. 340] and SB 271 [2022 N.H. Laws, ch. 275.1 - Berlin Station and PSNH executed a First Amendment to the PPA dated November 19, 2019, which suspended operation of the Cumulative Reduction cap through November 30, 2022, and a Second Amendment to the PPA dated August 18, 2022, which further suspended operation of the Cumulative Reduction cap through November 30, 2023.

A. NHPUC Order No. 26,198 ordered the amendment of Order No. 25,213 in accordance with SB 577, and NHPUC Order

No. 26,333 approved the First Amendment to the PPA and authorized PSNH's recovery of all costs of the Amended PPA from its electric utility customers. True and accurate copies of NHPUC Order No. 26,198, SB 577 and NHPUC order No. 26,333 are attached as **Exhibit 3**.

B. NHPUC Order No. 26,665 ordered the amendment of Order Nos. 25,213, 26,198, and 26,333 in accordance with SB 271 and ordered a New Hampshire Department of Energy investigation and audit of the Facility's costs and revenues. NHPUC Order No. 26,705 approved the Second Amendment to the PPA and authorized PSNH to recover all costs of the amended PPA from its electric utility customers. True and accurate copies of NHPUC Order Nos. 26,665 and 26,705 are attached as **Exhibit 4**; see also Exhibit 1.

29. The Excess Cumulative Reduction is now in excess of \$71 million. The governor of New Hampshire recently vetoed the State of New Hampshire's legislature's bill that would have forgiven or further delayed PSNH's recapture of the Excess Cumulative Reduction pursuant to the price credit/reduction mechanism set forth in the PPA. The December 2023 invoice for Energy and Capacity (as subsequently amended to account for the netting required by Section 10.3 of the PPA) issued and includes a \$5,961,889.59 Energy Credit to begin recapturing the Excess

Cumulative Reduction in accordance with the terms of the PPA, as amended, and the NHPUC orders described above. PSNH's payment of that invoice was due January 23, 2024, on which date PSNH effected the applicable recoupment required by the PPA and submitted a net payment of \$1,801,868.33 to the Debtors.

30. Pursuant to orders entered by NHPUC, PSNH recovers the full cost of the rates, terms and conditions of the PPA to PSNH through the rates that it charges its electric utility customers, which are all located in New Hampshire.

31. The purpose of the Cumulative Reduction cap in the PPA is to protect New Hampshire ratepayers from the risk of paying over-market prices over the term of the PPA greater than \$100 million (i.e., the projected potential future value of the Facility at the time when the PPA was being negotiated and approved) than if PSNH were obtaining electricity from traditional sources. By using the Cumulative Reduction Factor to offset the over-market price of power, PSNH customers will have the opportunity to recapture the over-market payments, if any, made during the PPA term via the Purchase Option Agreement (described below).

**Pending NHPUC Regulatory Proceeding**

32. On December 15, 2023, PSNH filed a petition with the NHPUC (the "PSNH Petition"), including proposed revised tariffs, requesting that the Commission approve an adjustment to its

stranded cost recovery charge ("SCRC")<sup>3</sup> for effect on February 1, 2024. The PSNH Petition, seeks to adjust PSNH's SCRC rate billed to residential customers going forward based in part upon PSNH's anticipated recoupment of the Excess Cumulative Reduction pursuant to the terms of the PPA. In response to the PSNH Petition, the NHPUC issued an order commencing an adjudicative proceeding, DE 23-091, requesting certain data, and setting various filing deadlines. The NHPUC held a status conference on January 11, 2024 and the initial hearing on January 19, 2024. While the New Hampshire Department of Energy and the Office of Consumer Advocate representing residential ratepayers participated in both hearings, the Debtors have not participated in the proceeding nor sought to intervene therein.

33. On January 26, 2024, the NHPUC entered Order No. 26,938 approving the proposed adjustment to the SCRC on a partially-provisional basis and scheduled a further review proceeding and continued hearing for late February or early March 2024 to consider the portion of the proposed SCRC adjustment and resultant rates associated with PSNH's contract with the Burgess plant (i.e., the PPA). The NHPUC anticipates

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<sup>3</sup> For an explanation of the SCRC, see Section I of the *Commencement of Adjudicative Proceeding and Notice of Hearing, Status Conference, and Data Requests*, entered by the NHPUC on 12/22/23 in DE 23-091, concerning the PSNH Petition, attached as **Exhibit 5** hereto.

issuing further data requests concerning Burgess matters in advance of that hearing.

**PSNH Rights To Purchase Facility**

34. Under section 7.1 of the PPA, PSNH has a right of first refusal to purchase all or any portion of the Facility or its assets on terms and conditions, including price, not less favorable to PSNH than those on which Berlin Station proposes to sell such offered assets to a proposed transferee.

35. Pursuant to section 7.2.1 of the PPA and a Purchase Option Agreement duly recorded in the land records of Berlin, NH, PSNH also has an exclusive, irrevocable, first priority option to purchase the Facility and all other real, personal and intangible property associated with the Facility and its operations, free of all other interests, at the end of the 20-year PPA term.

**Limitations on Amendments to the PPA**

36. Section 26.7 of the PPA provides: "No amendment of all or any part of this Agreement shall be valid unless it is reduced to writing and signed by both Parties and, in the case of a material amendment, approved by the NHPUC."

37. Section 24.2 of the PPA provides: "It is the intention of the Parties that any authority of FERC or the NHPUC to change this Agreement shall be strictly limited to that authority which applies when the Parties have irrevocably waived their right to



seek to have FERC or the NHPUC change any term of this Agreement.”

38. Section 24.3 of the PPA provides as follows:

24.3.1 Absent the agreement of all Parties to a proposed change, the standard of review for changes to any section of this Agreement specifying the pricing or other material economic terms and conditions agreed to by the Parties herein, whether proposed by a Party, a non-party or FERC acting sua sponte, shall solely be the “public interest” application of the “just and reasonable” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 128 S.Ct. 2733 (June 26, 2008) (the “*Mobile-Sierra*” doctrine).

24.3.2 The Parties, for themselves and their successors and assigns, (i) agree that the “public interest” standard of review shall apply to any proposed changes in any other documents, instruments or other agreements executed or entered into by the Parties in connection with this Agreement, and (ii) hereby expressly and irrevocably waive any rights they can or may have to the application of any other standard of review, including the “just and reasonable” standard.

24.3.3 Notwithstanding the foregoing Sections 24.3.1 and 24.3.2, to the fullest extent permitted by applicable law, each Party, for itself and its successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under §§ 205 and/or 206 of the Federal Power Act or otherwise, to seek to obtain from FERC, or to support another in obtaining, by any means, directly or indirectly (through complaint, investigation or otherwise), and each hereby covenants and agrees not at any time to seek to

so obtain, or support another in obtaining, an order from FERC changing any section of this Agreement specifying the pricing, charges, classifications or other economic terms and conditions agreed to by the Parties. It is the express intent of the Parties that, to the fullest extent permitted by applicable law, the "sanctity of contract" principles acknowledged by FERC in its Notice of Proposed Policy Statement (issued August 1, 2002) in Docket No. PL02-7-000, Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities, shall prevail, notwithstanding any changes in applicable law or markets that may occur. In the event it were to be finally determined that applicable law precludes one or both Parties from waiving its rights to seek changes from FERC to its market-based power sales contracts (including entering into covenants not to do so) then this Section 24.3.3 shall not apply, provided that, consistent with Section 24.3.1, neither Party shall seek any such changes except under the "public interest" standard of review and otherwise as set forth in Section 24.3.1.

**Governing Law and Venue Provisions in PPA**

39. Section 22.1 of the PPA provides that interpretation and performance of the PPA shall be in accordance with and controlled by the laws of the State of New Hampshire (other than any conflicts of law provision), among other applicable local, state and federal laws, regulations and bodies having jurisdiction over the matters therein.

40. Section 22.2 of the PPA, concerning venue, provides:

Subject to Article 25, Dispute Resolution, any dispute arising out of this Agreement shall be brought in a court of competent jurisdiction located in Manchester in the State of New Hampshire. Each Party irrevocably waives any

objection which it may have to the venue of any proceeding brought in any such court and waives any claim that such proceedings have been brought in an inconvenient forum.

**Debtors' Purported Termination of PPA**

41. By correspondence dated January 23, 2024, the Debtors notified PSNH of a purported default of the PPA for an alleged failure to pay amounts owing thereunder, which default PSNH disputes. After subsequent correspondence in which PSNH demanded that the parties seek to resolve the resulting billing dispute pursuant to Articles 10.5 (concerning billing disputes) and 25.1 (concerning negotiation between executives for dispute resolution) of the PPA, by correspondence dated February 8, 2024, the Debtors purported to: (a) terminate the PPA, (b) terminate PSNH as Lead Market Participant, and (c) terminate the Purchase Option Agreement and Purchase Option, all effective as of February 8, 2024, i.e., the day immediately prior to filing these bankruptcy cases. PSNH disputes any default on its part and disputes the effectiveness of the foregoing purported terminations. Moreover, the Debtors filing for bankruptcy petition is a default under Section 12.1.4 of the PPA.

**Cate Street Capital Bankruptcy Proceedings**

42. Cate Street Capital, the original project manager for the construction of the Facility for Berlin Station, ceased operations in 2018, and on May 12, 2020, Cate Street Capital

filed a chapter 7 bankruptcy case in the NH Bankruptcy Court, Case No. 20-10506-BAH (the "Cate Street Bankruptcy Case"), which proceedings are still pending.

43. There are over 300 entries on the Cate Street Bankruptcy Case docket (excluding docket entries in the various adversary proceedings filed in that case). Debtor Berlin Station, as well as CS Ops, each appeared as creditors in the Cate Street Bankruptcy Case. CS Ops is the assignee of the Project Management Agreement to operate the Facility.

44. As the original counterparty to the Project Management Agreement, Cate Street Capital managed and operated the Facility through March 1, 2018, at which time the Project Management Agreement was assigned to Debtor CS Ops.

45. There is an adversary proceeding currently pending in the Cate Street Bankruptcy Case [Adv. Pro. No. 21-01017], which was filed by the chapter 7 trustee against Berlin Station, CS Ops, and various current and/or former directors, officers and/or other personnel of those entities (including Robert Desrosiers, John Halle and others) (collectively, the "AP Defendants"). The adversary proceeding alleges various claims against the AP Defendants in connection with Cate Street Capital's assignment of the Project Management Agreement to CS Ops, purportedly for no consideration, and Cate Street Capital's write-off of millions of dollars of receivables owing from CS

Ops and other affiliated entities. Those claims include claims of successor liability and fraudulent transfer against CS Ops; fraudulent transfer against Debtor Berlin Station; substantive consolidation and alter ego against all AP Defendants; and fraud, conspiracy, and breach of fiduciary duty against John Halle, Robert Desrosiers and other individual AP Defendants.

46. The chapter 7 trustee, Berlin Station, and CS Ops have entered into a settlement agreement to resolve all of the Cate Street Capital bankruptcy estate's claims against Berlin Station and CS Ops and those entities' claims against the estate. That settlement agreement (as subsequently revised) has not yet been approved by the NH Bankruptcy Court due to objections made by Cate Street Capital's largest creditor, Xpress Natural Gas, LLC ("Xpress"), which objection resulted in lengthy litigation, including a two-day hearing before the NH Bankruptcy Court concerning the claims at issue and the standards for settling those claims pursuant to Bankruptcy Rule 9019. During the course of that litigation, the NH Bankruptcy Court gained in-depth knowledge, through testimony of Robert Desrosiers, among others (including expert testimony) and extensive documentary evidence concerning: (A) the complex corporate, capital and operating structure of Berlin Station, Burgess, CS Ops, Cate Street Capital, and various other affiliated project development entities; (B) the positions and/or interests that various

individuals (including Robert Desrosiers and John Halle) held in those companies; (C) the complex cash management system and cash flow waterfall utilized by Berlin Station, Burgess and CS Ops; (D) the Facility's creditors; (E) the Facility's history; and (F) the Facility's energy, economic and environmental importance to the citizens of New Hampshire.

47. Both Berlin Station and CS Ops have actively participated in litigation in the Cate Street Bankruptcy Case and have filed significant contingent claims in that case.

**Additional Connections Among the Debtors, CS Ops, Cate Street Capital, and Other Affiliated Entities**

48. Robert Desrosiers and/or John Halle (or his family members) have for many years simultaneously held various positions of Manager, Owner, Director, and Officer of Cate Street Capital, Berlin Station, Burgess, CS Ops, CSC Group Holdings, LLC ("CSC Group Holdings") and other related/affiliated entities, each of which was located at and operated from the Cate Street Address through at least 2022 (through 2018 for Cate Street Capital, when it ceased operating), and each of which (except for Cate Street Capital) currently operates from the Loudon Road Address.

49. According to Annual Reports filed with the New Hampshire Department of State:

A. Robert Desrosiers was the sole Manager of Berlin

Station as of both March 21, 2018 and March 16, 2022.

B. Robert Desrosiers was the sole Manager of Burgess as of both March 21, 2018 and March 16, 2022.

C. Robert Desrosiers was Director and President of CS Ops, and John Halle was Director and Secretary of CS Ops, as of both March 21, 2018 and March 16, 2022.

D. Robert Desrosiers was Vice President, Secretary, Treasurer and Director of Cate Street Capital, and John Halle was President of Cate Street Capital as of March 21, 2018; and Robert Desrosiers had held positions as officer and Director of Cate Street Capital since its inception.

E. As of May 10, 2023, Jean R. Halle (who upon information and belief is a relative of John Halle) was and currently is the sole Manager of Berlin Station and Burgess.

F. As of May 31, 2023, Jean R. Halle was and currently is the President and Chairman of the Board of Directors of CS Ops.

50. According to testimony given by Robert Desrosiers in October 2022 in the Cate Street Bankruptcy Case:

A. Robert Desrosiers was the Vice President of Compliance for Cate Street Capital from 2009 through 2016; an officer of CS Ops and CS Berlin Ops, Inc. from their inception through July 2022; a director and officer of

Berlin Station through July 2022; the director for Burgess through July 2022; manager of CSC Group Holdings, LLC (an indirect equity investor in Berlin Station) through July 2022; and director, officer and/or manager at a number of affiliated entities through July 2022.

B. Robert Desrosiers assisted in the completion of and signed, as Director, Cate Street Capital's bankruptcy Schedules and Statement of Financial Affairs.

C. John Halle is or was the CEO of CS Ops and also has or had a direct or indirect equity interest in Cate Street Capital and potentially other affiliated entities.

D. Cate Street Capital arranged the financing for Berlin Station and was the project manager for the Facility through March 2018, when the Project Management Agreement was assigned to CS Ops.

E. John Desrosiers negotiated and signed the Project Management Agreement on behalf of Berlin Station, as its Director, and also negotiated and signed the Project Management Agreement on behalf of Cate Street Capital, as its VP of Compliance.

F. The Assignment Agreement assigning the Project Management Agreement from Cate Street Capital to CS Ops was signed by John Halle as President of Cate Street Capital and by Robert Desrosiers as Executive Vice President of CS



Ops.

G. CSC Group Holdings was a direct and/or indirect equity investor in both Berlin Station and Cate Street Capital.

H. Cate Street Capital provided management services to CSC Group Holdings through approximately 2018 pursuant to a management agreement signed by John Desrosiers as Manager on behalf of CSC Group Holdings and John Halle on behalf of Cate Street Capital.

I. CS Ops now provides certain incidental management services to CSC Group Holdings.

J. Prior to filing bankruptcy, Cate Street Capital wrote off millions of dollars of debt owing from CSC Holdings Group and certain related entities.

K. Cate Street Capital, CSC Holdings Group, CS Ops and Berlin Station, among other entities, are affiliated project development companies. Cate Street Capital would raise capital to invest into various project companies (such as Berlin Station), CSC Holdings Group and other entities would make equity investments in the applicable project, and then Cate Street Capital (and later CS Ops) would enter into a management agreement with the project company. The equity ownership of each one of the project companies was different, but the affiliated development

companies would expend and cover costs as a team in hopes of making a collective profit for the affiliated development companies.

51. According to testimony given by the chapter 7 trustee in October 2022 in the Cate Street Bankruptcy Case:

A. The Project Management Agreement between Cate Street Capital (later assigned to and currently held by CS Ops) and Berlin Station was "the major asset in the [Cate Street Capital bankruptcy] estate."

B. John Halle and Robert Desrosiers were the principal persons involved in all negotiations, and the signatories on both sides of, all management contracts entered into by Cate Street Capital.

52. The Statement of Financial Affairs in the Cate Street Bankruptcy Case lists John Halle as a Director of Cate Street Capital at the time of the bankruptcy filing, and a former President and CEO of Cate Street Capital.

53. On September 24, 2019, the Superior Court of Rockingham County, New Hampshire issued a ruling that CS Ops is a mere continuation of Cate Street Capital. See Exhibit K to the *Objection By Xpress Natural Gas LLC To Joint Motion To Approve Settlement* filed in the United States Bankruptcy Court District of New Hampshire in *In re: Cate Street Capital, Inc.*, Case No. 20-10506 attached as **Exhibit 6**.

**Key Witnesses' and Other Interested Parties'  
Connections to New Hampshire**

54. Upon information and belief, Robert Desrosiers resides in New Hampshire.

55. Upon information and belief, John Halle resides in Florida, and regularly conducted business in New Hampshire through at least March 2022 in connection with the Facility and CS Ops' management thereof.

56. Jean R. Halle is listed in New Hampshire public business records with a North Palm Beach, Florida address. Upon information and belief, Jean R. Halle is related to John Halle and, as the current principal officer and/or manager of each of the Debtors, regularly conducts business in New Hampshire in connection with the Facility.

57. Upon information and belief, Xpress is headquartered at 30 Rows Wharf, 6<sup>th</sup> Floor, Boston, MA 02110, and also maintains an office at 300 Brickstone Sq., Andover, MA 01810.

**DISCUSSION**

**I. Venue Generally**

58. 28 U.S.C. § 1408 provides that a bankruptcy case may be commenced in the district court for the district -

- (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the

one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district or

- (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

59. A corporation is domiciled where it is incorporated.

A corporation's principal place of business is where the company's headquarters is located, i.e., "where a corporation's officers direct, control, and coordinate the corporation's activities" - "sometimes referred to as the 'nerve center' of the company." *In re Grayson O Co.*, 2023 Bankr. LEXIS 1906, \*4 (Bankr. W.D.N.C.) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)).

## **II. Transfer of Venue**

60. 28 U.S.C. § 1412 provides:

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

61. Bankruptcy Rule 1014(a) provides:

If a petition is filed in the proper district, the court, on timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

62. Thus, even if venue is properly laid in a district, a bankruptcy court may nevertheless transfer venue to another district "in the interest of justice or for the convenience of the parties." *In re LTL Mgmt. LLC*, 2021 Bankr. LEXIS 3173, \*7 (Bankr. D.N.J.). "The moving party bears the burden of showing by a preponderance of the evidence that either the interests of justice or the convenience of the parties would be served by a transfer of the case." *Id.* (citations omitted) (emphasis added).

63. "Ultimately, the decision to transfer venue is within the sound discretion of the court based on a 'case-by-case analysis of the facts underlying each particular case.'" *Id.* (citations omitted); see also *In re Rehoboth Hospitality, LP*, 2011 Bankr. LEXIS 3992 \*10 (Bankr. D. Del.) (citing *In re Centennial Coal, Inc.*, 282 B.R. 140, 146 (Bankr. D. Del. 2002)).

**A. Convenience of the Parties**

64. Bankruptcy courts generally consider six factors in determining whether to transfer venue for the convenience of the parties, as follows:

- A. The proximity of creditors of every kind to the court;
- B. The proximity of the debtor to the court;
- C. The proximity of witnesses necessary to the administration of the estate;
- D. The location of the assets;

- E. The economic administration of the estate; and
- F. The necessity for ancillary administration if a liquidation should occur.

See, e.g., *In re Enron Corp.*, 274 B.R. 327, 343 (Bankr. S.D.N.Y. 2002) (citing *In re Commonwealth Oil Refining Co.*, 596 F.2d 1239, 1244 (5<sup>th</sup> Cir. 1979)). Of these six factors, the economic and efficient administration of the estate is generally given the most weight in determining whether to transfer venue. *In re LTL Mgmt. LLC*, 2021 Bankr. LEXIS 3173, \*8 (citation omitted); see also *In re Grayson O Co.*, 2023 Bankr. LEXIS 1906, \*10 (citations omitted).

**B. Interest of Justice**

65. "The interest of justice standard is a 'broad and flexible standard that is applied based on the facts and circumstances of each case.'" *In re LTL Mgmt. LLC*, 2021 Bankr. LEXIS 3173, \*15 (quoting *In re Enron Corp.*, 284 B.R. 376, 403 (Bankr. S.D.N.Y. 2002)). Generally, in evaluating this standard, bankruptcy courts consider whether a transfer of venue would promote "the efficient administration of the bankruptcy estate, judicial economy, timeliness and fairness." *Id.* (quoting *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1391 (2d Cir. 1990)). "As a practical matter...if the convenience of the parties and witnesses will be served by a transfer, it usually follows that justice will also be served by a transfer."

*Id.* (quoting *In re Pinehaven Assoc.*, 132 B.R. 982, 990 (Bankr. E.D.N.Y. 1991)); see also *In re Grayson O Co.*, 2023 Bankr. LEXIS 1906, \*13 (citations omitted).

**C. Delaware Bankruptcy Court's Formulation of Test**

66. The Delaware Bankruptcy Court has articulated and applied a slightly different, but similar, eight-factor test in determining whether to transfer venue, as follows:

- (1) the location of the plaintiff and defendant (i.e., where the debtor operates and where secured and unsecured creditors are located);
- (2) the ease of access to the necessary proof (i.e., where witnesses and books and records are located);
- (3) the availability of subpoena power for the unwilling witnesses;
- (4) the expense related to obtaining willing witnesses;
- (5) the enforceability of any judgment rendered;
- (6) the ability to receive a fair trial;
- (7) the state's interest in having local controversies decided within its borders; and
- (8) the economics of the estate administration.

See generally *In re Rehoboth Hospitality, LP*, 2011 Bankr. LEXIS 3992, \*11; *In re Borden Chem.'s and Plastics Operating Limited P'ship*, 2004 Bankr. LEXIS 1251, 2004 WL 1887532, \*2 (Bankr. D. Del. 2004) (citing *Hechinger Inv. Co. of Del. v. M.G.H. Home*

*Improvement, Inc.*, 288 B.R. 398, 402-03 (Bankr. D. Del. 2003));  
*Continental Airlines Inc. v. Chrysler*, 133 B.R. 585, 587-88  
(Bankr. D. Del. 1991).

67. In *In re Innovative Communication Co., LLC*, 358 B.R. 120, 126-28 (Bankr. D. Del. 2006), as clarified on denial of reconsideration, 2007 Bankr. LEXIS 520 (Bankr. D. Del. Feb. 13, 2007), the Delaware court transferred venue to the Virgin Islands after considering a slightly different set of factors including forum preference, where the claim arose, convenience of witnesses, location of books and records, relative administrative difficulty, local interest and public policies, and familiarity with applicable state law.

68. As to factor number (7) above, the *Rehoboth* court found that the future of the debtor's single asset, a hotel, was of primary importance to the community in which the hotel was located (Texas) and that the central issue in the case was likely to be the value of that single asset. Accordingly, the Texas court, with its local knowledge of the property, locale and real estate values, was better situated to determine an appropriate valuation based on the local valuation expert's testimony. *In re Rehoboth Hospitality, LP*, 2011 Bankr. LEXIS 3992, \*14-15.

69. As to factor number (8) above, the *Rehoboth* court found that in the context of what is essentially a single asset



case, the location of the lone improved real estate asset is of particular concern to the court, especially in the event of a potential liquidation, and thus the case is better administered by a court in the district in which it is located, which has more familiarity with the local real estate market and application of Texas real property law. *In re Rehoboth Hospitality, LP*, 2011 Bankr. LEXIS 3992, \*15-16.

**III. Both the Convenience of the Parties and the Interest of Justice Weigh Overwhelmingly in Favor of Transferring Venue of These Bankruptcy Proceedings to the NH Bankruptcy Court.**

**A. Location of the Debtors, Creditors and Other Interested Parties**

70. The Facility, which is Berlin Station's sole asset and the sole asset operated by Burgess, is located in New Hampshire, operates exclusively in New Hampshire, and its products are sold exclusively in New Hampshire. Further, as in the *Rehoboth* case, a central issue in the case is likely to be the value of the Facility.

72. The principal place of business for each of Berlin Station and Burgess is located in New Hampshire.

73. PSNH, the Facility's exclusive customer and its sole creditor (other than its secured lenders), is located and operates exclusively in New Hampshire.

74. The Facility's primary supplier, Richard Trucking, is located and operates in New Hampshire and Maine (which is far closer to New Hampshire than Delaware).

75. Deutsche Bank, the collateral agent for the Debtors' secured lenders, is located in New York, which does not favor either Delaware or New Hampshire.

76. The Facility's employees, which are supplied by CS Ops, presumably reside in or very near New Hampshire. In any event, they regularly conduct business in New Hampshire in connection with the Facility.

77. Jean R. Halle, listed as the current managing member of Berlin Station and Burgess (as well as CS Ops), resides in Florida, which does not favor Delaware or New Hampshire, as plane travel would be required to either location.

78. Xpress, which is likely to be an active constituent in the Debtors' bankruptcy proceedings, is headquartered in Boston, Massachusetts and maintains an office in Andover, Maine, both of which are far closer to New Hampshire than Delaware.

79. The Debtors do not have any creditors located in Delaware, as the Debtors do not conduct any business there. In fact, the Debtors admit in their list of Top 20 Creditors their only unsecured creditor is PSNH.

80. Further, as the NHPUC regulates the operation of the Facility and the PPA, it is likely to be an active participant

in the Debtors' bankruptcy proceedings. Not only does the NHPUC have jurisdiction over issues impacting the PPA, the Facility, and corresponding rates charged by PSNH to its customers, but the NHPUC is currently actively exercising that jurisdiction in connection with the PSNH Petition to adjust its SCRC based in part on anticipated recoupment of the Excess Cumulative Reduction under the PPA.

81. As set forth in the *Burgess BioPower, LLC Bi-Annual Report Required by Public Utilities Commission Order 26,333* (the "May 2022 Report"), which is attached as **Exhibit 7**:

In addition to its important economic and energy impact statewide, Burgess contributes significantly to the local Berlin economy through its payments-in-lieu-of-taxes ("PILOT") agreement with the City of Berlin:

- . Burgess accounts for **25% of annual water fees** and **10% of annual sewer fees**
- . Burgess pays **12% of the city's total annual taxes**
- . Burgess has contributed nearly **\$1.2 million to the City of Berlin** in just two years from the sale of Renewable Energy Certificates ("RECs")
- . A third payment is anticipated for the summer of 2022
- . Closure could place the **City of Berlin into receivership**

82. Thus, while the Debtors are undisputedly Delaware entities, none of their assets, operations, creditors, or other interested parties are in Delaware. As one bankruptcy court

explained in a similar venue dispute between Massachusetts and Delaware:

[T]he Debtor's contacts with Delaware are minimal... Other than the Debtor being incorporated there...there is no other apparent connection to Delaware... The Debtor's contacts with Massachusetts are substantial, more so than any other place in the World. The Debtor's operations are here; its assets are here; its current and former employees are here; and its management is here. Many of its creditors (measured in both numbers of creditors and the amounts owed to them) are here, too, notably from the list of the 30 largest unsecured creditors... Clearly, the Debtor's venue selection was not based on the convenience of these constituencies given their geographic connection to Massachusetts.

*In re Malden Mills Indus., Inc.*, 361 B.R. 1, 10 (Bankr. D. Mass. 2007). Similarly in this case, the Debtors' contacts with Delaware are minimal, while their contacts with New Hampshire "are substantial, more so than any other place in the World." In recognition of this fact, the Debtors expressly agreed and waived all objections to venue being placed in New Hampshire courts for all disputes arising out of the PPA, the terms of which prompted these bankruptcy proceedings and will be a major, if not the primary, focus of these bankruptcy proceedings.

83. Further, under remarkably similar facts to those at issue in these proceedings, this Court transferred venue

of a related debtor<sup>4</sup> paper-mill operator's bankruptcy case from the Delaware bankruptcy court to the U.S. Bankruptcy Court for the District of Maine. See *In re GNP Maine Holdings, LLC*, Case No. 14-12179, Docket Nos. 10 and 43 (Hon. Mary F. Walrath), copies of which are attached as **Exhibit 8**. In the *GNP Maine Holdings* case: (A) more than 56% of the debtor's creditors were in Maine, while less than 1% were in Delaware; (b) all of the debtor's assets and operations were in Maine; (c) most relevant witnesses necessary to administration of the estate, including the debtor's current and former employees and managers, resided in Maine; (d) the Maine court was already familiar with the history, operations and constituencies involved, having presided over a previously-filed bankruptcy case involving the same mill assets, which bankruptcy was still pending when the *GNP Maine Holdings* bankruptcy was filed, providing the Maine court with greater efficiency in resolving the case; and (e) there was substantial public interest in having issues concerning the mill and their effects on Maine citizens resolved by the Maine bankruptcy court.

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<sup>4</sup> Upon information and belief, Cate Street Capital, Robert Desrosiers, John Halle, and other insiders and affiliates of the Debtors were also involved in the development, funding, management and operation of GNP Maine Holdings, LLC and its facility.

84. Accordingly, this factor weighs heavily in favor of transferring venue of these Bankruptcy Proceedings to the NH Bankruptcy Court.

**B. Ease of Access to Necessary Proof**

85. As the Facility and the Debtors' principal place of business are located in New Hampshire, the Debtors' books and records and the vast majority of their current and former personnel with relevant information necessary to the administration of the estate, including but not limited to Robert Desrosiers and John Halle, either reside in New Hampshire or regularly conduct business in New Hampshire.

86. As the Debtors do not conduct any business in Delaware, it is unlikely that any records or witnesses necessary to the administration of the estate are located in Delaware.

87. Accordingly, this factor weighs strongly in favor of a transfer of these bankruptcy proceedings to the NH Bankruptcy Court.

**C. Availability of Subpoena Power and Expense of Obtaining Unwilling Witnesses**

88. As the vast majority of the Debtors' (current and former) personnel and creditors reside in or regularly conduct business in New Hampshire, and presumably few if any witnesses are located in Delaware, many necessary witnesses are likely beyond this Court's subpoena power. Even if such witnesses are

willing to voluntarily appear in Delaware to participate in these proceedings, the travel costs alone would impose a significant expense on the estate. Thus, these factors weigh heavily in favor of transferring the Debtors' bankruptcy proceedings to the NH Bankruptcy Court.

**D. State's Interest in Having Local Controversies Decided Within Its Borders**

89. The New Hampshire legislature has made express, documented findings that the operation of the Facility is important to: the state's energy infrastructure; the regional fuel security and reliability of the regional electricity grid; the state's attainment of renewable energy portfolio standard goals of fuel diversity, capacity, sustainability and energy independence; the continued health of the state's forests; the state's timber industry; and employment and the economy of both the North Country and the state as a whole.

90. The Debtors have admitted the importance of the Facility to local and state governments in New Hampshire in the May 2022 Report attached as Exhibit 3.

91. Further, as PSNH recovers the full cost of the rates, terms and conditions of the PPA to PSNH through the rates that it charges its electric utility customers, all of whom are located in New Hampshire, the operation of the Facility and the effect of the Excess Cumulative Reduction on electric utility

rates is of great interest to the citizens and businesses of New Hampshire and to the NHPUC, which regulates those rates.

92. Moreover, the NHPUC regulates PSNH and the PPA pursuant to which PSNH purchases the products of the Facility, and is actively exercising that jurisdiction in connection with the recent PSNH petition to adjust its SCRC. Accordingly, the NHPUC is likely to be an active participant in the Debtors' bankruptcy proceedings.

93. Accordingly, this factor weighs strongly in favor of transferring venue of these bankruptcy proceedings to the NH Bankruptcy Court.

**E. Economics of Estate Administration**

94. As set forth above, the Facility is located in and operates exclusively in New Hampshire and sells its products exclusively in New Hampshire. Further, the sole creditor, (current and former) personnel, and other interested parties of the Debtors are located in New Hampshire. In addition, witnesses and records necessary to the administration of the estate are located primarily, if not exclusively, in New Hampshire. Whereas, no creditors, and few if any records or witnesses, are located in Delaware.

95. Moreover, the Cate Street Bankruptcy Case, which involves a company affiliated with the Debtors that managed the day-to-day operations of the Facility until March of 2018, has



been pending in the NH Bankruptcy Court for over three years. Cate Street Capital was managed and operated by the same directors and officers (including Mr. Desrosiers and Mr. Halle) that managed and operated the Debtors and other related entities until just last year, when such management was taken over by a family member of Mr. Halle. Further, Berlin Station, CS Ops, and Mr. Desrosiers, among other current or former personnel of the Debtors, have actively participated in Cate Street Capital's bankruptcy proceedings. Through the numerous pleadings filed, extensive testimony and evidence presented, and hearings held in the Cate Street Bankruptcy Case (including a two-day hearing with testimony from Mr. Desrosiers and an expert witness, among others), the NH Bankruptcy Court has already gained in-depth knowledge concerning (A) the complex corporate, capital and operating structure of Berlin Station, Burgess, CS Ops, and affiliated development entities; (B) the positions and/or interests that various individuals (including Robert Desrosiers and John Halle) held in those companies; (C) the complex cash management system and cash flow waterfall utilized by Berlin Station, Burgess and CS Ops; (D) the Facility's creditors; (E) the Facility's history; and (F) the Facility's economic and environmental importance to the citizens of New Hampshire, as well as its importance to the state's energy infrastructure, diversity and independence. Further, Xpress, which was actively

involved in the Cate Street Bankruptcy Case, is extremely likely to be actively involved in the Debtors' bankruptcy proceedings given the positions taken in that case concerning Berlin Station and CS Ops, among other debtor-affiliated entities, being alter egos of Cate Street Capital and/or recipients of fraudulent conveyances.

96. Accordingly, it is overwhelmingly clear that both judicial economy and the efficient and economic administration of the Debtors' bankruptcy estates strongly favor transferring these proceedings to the NH Bankruptcy Court.

**F. Enforceability of Judgments Rendered and Ability to Receive a Fair Trial**

97. The last two factors - enforceability of judgments rendered and the ability to receive a fair trial - are neutral, as there is no reason to believe that judgments and orders entered by either the Delaware Bankruptcy Court or the NH Bankruptcy Court would not be given full faith and credit by other courts or that any parties in interest would be unable to obtain a fair trial in either court.

98. Based on all of the foregoing, it is clear that a transfer of the Debtors' bankruptcy cases to the NH Bankruptcy Court is appropriate, as it would overwhelmingly serve both the convenience of the vast majority of interested parties and the interest of justice within the meaning of 28 U.S.C. § 1412.

WHEREFORE, for all of the foregoing reasons, PSNH respectfully requests that the Court promptly transfer venue of the Debtors' jointly administered bankruptcy cases to the NH Bankruptcy Court, and provide such other and further relief as the Court deems just and appropriate.

Dated: February 12, 2024

WHITEFORD, TAYLOR & PRESTON LLC

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New Hampshire*

**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)

(Joint Administration Requested)

**OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
TO DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS (I)  
APPROVING ENTRY INTO NEW LEAD MARKET PARTICIPANT  
AGREEMENT AND (II) GRANTING RELATED RELIEF**

Public Service Company of New Hampshire, d/b/a Eversource Energy (“PSNH”) hereby objects (the “Objection”) to the Debtors’ Motion for Interim and Final Orders (I) Approving Entry Into New Lead Market Participant Agreement and (II) Granting Related Relief [Docket. No. 18] (the “Motion”).<sup>2</sup> In support of the Objection, PSNH respectfully states as follows:

**PRELIMINARY STATEMENT**

1. In the Motion, the Debtors inappropriately seek both declaratory and injunctive relief that only may be obtained through an adversary proceeding. Specifically, the Debtors effectively seek a declaration that they terminated the PPA pre-petition and an injunction to compel PSNH to take actions that would deprive PSNH of its current rights and interests as the exclusive Lead Market Participant for the Facility. Neither of these types of relief should be granted through a motion, let alone through a first day motion.

2. Moreover, this Court is not the proper place to decide the parties’ disputes concerning the December 2023 invoice and the alleged termination of the PPA because the PPA

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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).

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

contains a binding arbitration clause. Accordingly, the parties' disputes must be resolved through arbitration, not in this Court.

3. In addition to the multiple substantive procedural deficiencies of the Motion, the underlying assertions concerning the termination of the PPA are incorrect. PSNH acted in accordance with the PPA in withholding payment to the Debtors and thus the Debtors had no right to terminate the PPA.

4. For all of these reasons, the interim relief sought in the Motion should be denied.

### **BACKGROUND**

5. Debtor Berlin Station, LLC and PSNH are parties to the PPA. Pursuant to the PPA, PSNH purchased the Facility's energy, capacity, and renewable energy certificates. A copy of the PPA and its amendments is attached hereto as Exhibit A. Pursuant to the PPA, PSNH also is the exclusive Lead Market Participant for the Facility.

6. The Facility has operated at a substantial loss since it began operating. Although this loss was anticipated, a critical component of the PPA and the other contractual relationships between the Debtors and PSNH is the Cumulative Reduction cap of \$100 million. The Cumulative Reduction cap protects New Hampshire citizens by ensuring that they would only pay \$100 million more than they otherwise would pay for electricity as a result of receiving electricity from the Facility instead of from other sources.

7. The Cumulative Reduction cap and the associated amounts owed by the Debtors to PSNH have been the subject of multiple decisions by the government of the State of New Hampshire ("New Hampshire") and the New Hampshire Public Utilities Commission (the "Commission"). In 2018 and again in 2022, New Hampshire instructed the Commission to enter orders to require PSNH to enter into amendments to the PPA that temporarily suspended the

operation of the cap, which delayed PSNH's recovery of the amounts in excess of the Cumulative Reduction cap. New Hampshire and the Commission decided to allow this moratorium to expire as of November 30, 2023, so that the Debtors would begin to recover the substantial amounts the Debtors owe to PSNH, and thereby avoid increasing electricity rates for New Hampshire citizens.

8. As of December 31, 2023, the total Cumulative Reduction above the \$100 million cap was \$71,542,675.07 (the "Excess Cumulative Reduction"). As a result of the decisions of New Hampshire and the Commission to allow the moratorium to expire, PSNH is now entitled to collect the Excess Cumulative Reduction under the PPA so that New Hampshire citizens will not have to pay increased rates for electricity.

9. The PPA authorizes PSNH to net and recoup the Excess Cumulative Reduction in two ways. First, Section 6.1.4(c) of the PPA identifies how PSNH is to net and recoup the Excess Cumulative Reduction against the amounts PSNH otherwise would owe for energy. Second, Section 10.3 of the PPA authorizes PSNH to net and recoup all amounts owed to PSNH. For ease of reference, Sections 6.1.4(c) and 10.3 are set forth below.

6.1.4(c) Notwithstanding Section 6.1.2 above, if at the end of any Operating Year other than the last Operating Year during the Term, there exists a Cumulative Reduction in excess of One Hundred Million Dollars (\$100,000,000), such excess ("Excess Cumulative Reduction") will be credited against amounts otherwise due for Energy delivered to PSNH during the subsequent Operating Year until such Excess Cumulative Reduction is eliminated. To effect such credit, in each month during the subsequent Operating Year, one twelfth (1/12th) of the Excess Cumulative Reduction ("Monthly Energy Credit") shall be deducted by PSNH from the Seller's invoice, up to the full amount of the payment due to Seller pursuant to Section 6.1.2(a), and any excess over that amount shall carry forward to the following month to the Monthly Energy Credit. If, at the end of the Operating Year subsequent to the year during which there was an Excess Cumulative Reduction, any such amount remains, it shall be deducted by PSNH from the Seller's invoice in the next Operating Year in the same manner described above. If upon expiration of the Term PSNH does not purchase the Facility, Seller shall reimburse PSNH the value of any Excess Cumulative Reduction.

10.3 The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing under this Agreement and the Interconnection Agreement to each other on the same date, in which case all amounts owed by each Party to the other Party during the monthly billing period under this Agreement and/or the Interconnection Agreement, including any related damages, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it. If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts, interest, and payments or credits, that Party shall pay such sum in full when due, subject to the provisions addressing disputed amounts set forth in Section 10.5. Except as set forth above in this Section 10.4, all payments hereunder shall be made without set-off or deduction.

10. The Debtors argue by negative implication that because Section 6.1.4(c) does not reference netting and recouping amounts owed for capacity and renewable energy credits, PSNH is prohibited from doing so. Section 6.1.4(c) contains no such prohibition, and the plain language of Section 10.3 authorizes each party to net and recoup all amounts owed. Instead, Section 6.1.4(c) simply prescribes the method for PSNH netting and recouping amounts owed for energy.

11. After PSNH exercised its netting and recoupment rights in accordance with the PPA and applicable New Hampshire law<sup>3</sup> with respect to the December 2023 invoice, on January 23, 2024, the Debtors sent PSNH a letter purporting to give notice of a breach of PSNH's payment obligations under the PPA. A copy of this letter was attached as Exhibit G to the First Day Declaration.

12. In response, on January 25, 2024, PSNH sent a letter to the Debtors disputing that any amounts were owed under the PPA and invoking the dispute resolution procedures of the PPA. A copy of this letter was attached as Exhibit H to the First Day Declaration and is attached hereto as Exhibit B. For ease of reference, the pertinent parts of this letter state as follows:

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<sup>3</sup> Section 22.1 of the PPA provides that New Hampshire law applies to the governance and construction of the PPA.

Pursuant to Article 10.3 of the PPA, Eversource is entitled to net and recoup the deferred Excess Cumulative Reduction (“ECR”) Amount against all amounts owed by Eversource, including, but not limited to, any amounts owed for New Hampshire Class I Renewable Energy Credits (“RECs”) and/or Capacity. Nothing in Article 6.1.4(c)—or elsewhere in the PPA—prohibits Eversource from netting and recouping payments due for New Hampshire Class I RECs and/or Capacity against the outstanding ECR balance owed pursuant to Article 10.3. Thus, Eversource denies that it owes the Berlin Parties \$3,685,958.55 for New Hampshire Class I RECs during the current billing cycle, and therefore further denies that it has failed to make payment of the same when due. Note that consistent with PPA Article 12.1.1 it is clear such exercise of Eversource’s contractual right to deduct the disputed amount does not constitute a failure to make payment and/or an Event of Default.

In light of the parties’ disagreement on this issue, this letter serves as Eversource’s formal Initial Notice of Dispute pursuant to Articles 10.5 and 25.1 of the PPA. Undersigned counsel, along with James G. Daly, Vice President – Energy Supply, will be representing Eversource in the parties negotiations concerning this dispute. As required by Section 25.1, kindly provide the Berlin Parties’ response to this Initial Notice within five (5) business days of receipt hereof.

13. The dispute resolution procedures of the PPA are contained in Sections 25.1, 25.2, and 25.3. Importantly, Section 25.3 contains a mandatory arbitration provision. For ease of reference, these Sections of the PPA are identified below.

25.1 Negotiation Between Executives. The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any Party may give the other Party notice of any dispute not resolved in the normal course of business. Such notice shall include: (a) a statement of that Party’s position and a summary of arguments supporting that position; and (b) the name and title of the executive who will be representing that Party and of any other person who will accompany the executive (“Initial Notice”). Within five (5) Business Days after delivery of the Initial Notice, the receiving Party shall respond with: (a) a statement of that Party’s position and a summary of arguments supporting that position; and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within ten (10) Business Days after delivery of the Initial Notice, the executives of both Parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as



AMENDED AND RESTATED 31 PSNH POWER PURCHASE AGREEMENT  
May 18, 2011 Berlin Station compromise and settlement negotiations for purposes  
of applicable rules of evidence.

25.2 Mediation. If the dispute has not been resolved by negotiation within twenty (20) Business Days of the disputing Party's Initial Notice, or if the Parties failed to meet within five (5) Business Days of the delivery of the Initial Notice, the Parties shall endeavor to settle the dispute by mediation under the then-current CPR Mediation Procedure. Unless otherwise agreed, the Parties will select a mediator from the CPR Panels of Distinguished Neutrals.

25.3 Arbitration. Except in cases where the dispute is subject to NHPUC and/or FERC jurisdiction, any dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which has not been resolved by one of the non-binding procedures set forth in Sections 25.1 and 25.2 within thirty (30) Business Days of the delivery of Initial Notice, shall be finally resolved by binding arbitration in accordance with the then-current CPR Rules for Non-Administered Arbitration (the "CPR Rules") by a sole arbitrator, for disputes involving amounts in the aggregate under three million dollars (\$3,000,000), or three arbitrators, for disputes involving amounts in the aggregate equal to or greater than three million dollars (\$3,000,000), of whom each Party shall designate one in accordance with the "screened" appointment procedure provided in Rule 5.4 of the CPR Rules; provided, however, that if either Party will not participate in a non-binding procedure, the other may initiate arbitration before expiration of the above period. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, with appeals limited to the grounds expressed therein, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be Manchester, New Hampshire. The arbitrator(s) are not empowered to award damages in excess of compensatory damages and each Party expressly waives and forgoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.

14. Additionally, because the parties dispute whether the amounts at issue are to be paid, the PPA authorizes PSNH to retain such amounts until the dispute is resolved. As a result, even if the Debtors were correct and PSNH was not authorized to net and recoup against amounts otherwise owed for capacity and renewable energy credits, PSNH was authorized to retain the amounts at issue until the dispute was resolved in accordance with the PPA dispute resolution procedures. Specifically, Section 10.5 of the PPA states as follows:

10.5 If either Party disputes the amount of any bill, it shall so notify the other Party in writing. Each Party receiving a bill shall pay to the other Party any undisputed amount of the bill or charges when due. The disputed amount may, at the discretion of the paying Party, be held by that Party until the dispute has been resolved; provided that the paying Party shall be responsible to pay interest at the Interest Rate on any withheld amounts that are determined to have been properly billed. The disputed amount may be held by the paying Party provided that the paying Party or its guarantor, if applicable, has an Investment Grade Rating, or by a Qualified Institution if the paying Party or its guarantor, if applicable, does not have such a rating. Neither Party shall have the right to challenge any monthly bill or to bring any court or administrative action of any kind questioning the propriety of any bill after a period of twenty-four (24) months from the date the bill was delivered to the Party required to make payment thereunder; provided, however, that in the case of a bill based on estimates, such twenty-four month period shall run from the due date of the final adjusted bill.

15. On February 5, 2024, the Debtors sent PSNH a response again indicating that the Debtors disputed PSNH's ability to net and recoup against amounts owed for capacity and renewable energy credits. This letter also incorrectly asserted that Sections 10.3, 10.5, and 25.1 of the PPA do not apply to this payment dispute. This letter was attached to the First Day Declaration as Exhibit J.

16. On February 8, 2024, prior to complying with the mandatory dispute resolution procedures set forth in the PPA, the Debtors sent the letters attached to the First Day Declaration as Exhibit K and Exhibit L asserting that they were terminating the PPA and the Option Agreement.

17. As indicated by the plain terms of the PPA, PSNH acted within its rights and therefore the notices of termination were invalid.

### **THE MOTION**

18. In the Motion, the Debtors seek entry of interim and final orders authorizing the Debtors to enter into a new Lead Market Participant agreement with an affiliate so that they can sell electricity to entities other than PSNH. Pursuant to the PPA, PSNH is the exclusive Lead

Market Participant for the Facility and is entitled to receive all of the electricity and related products from the Facility. Accordingly, the relief requested in the Motion is only available if the PPA has been terminated. Thus, the Motion effectively seeks a declaration that the PPA has been terminated.

19. The Motion also expressly seeks injunctive relief to compel PSNH to take steps to remove itself as the exclusive Lead Market Participant of the Facility.

### **OBJECTION**

20. The Motion should be denied for at least three reasons. First, the Motion seeks declaratory and injunctive relief that only may be obtained through an adversary proceeding. Second, the disputes between the Debtors and PSNH are subject to binding arbitration and therefore are not appropriately before this Court. Third, PSNH has acted within its rights under the PPA and therefore there has been no breach or termination of the PPA, which are predicates to the relief sought in the Motion.

#### **A. Declaratory and Injunctive Relief Must Obtained in an Adversary Proceeding**

21. Bankruptcy Rules 7001(7) and 7001(9) provide that injunctive relief and a declaratory judgment only may be obtained through an adversary proceeding. Fed. R. Bankr. P. 7001(7) and 7001(9); See, e.g., In re Conxus Communications, Inc. et al., 262 B.R. 893, 899 (D. Del. 2001) (noting that failure to file required adversary proceeding for injunctive relief was alone sufficient for court to deny debtor's requested injunction); In re Best Products Co., 203 B.R. 51, 54 (Bankr. E.D. Va. 1996).

22. The Motion seeks extraordinary expedited relief that would materially affect PSNH's rights in connection with the first day hearing in these bankruptcy cases.

23. In fact, although the Motion attaches an Interim Order and a Final Order, the Interim Order, which the Debtors ask the Court to enter in connection with the first day hearing, would grant the substantive relief sought in the Motion by (i) effectively granting a declaratory judgment that the PPA has been terminated by authorizing the Debtors to enter into a new Lead Market Participant agreement for the Facility and to sell electricity to entities other than PSNH; and (ii) granting an affirmative injunction compelling PSNH to take steps to remove itself as the Lead Market Participant for the Facility.

24. The Debtors are not entitled to such declaratory and injunctive relief through a motion, let alone through an expedited motion heard at the first day hearing of these cases.

25. This is not a case in which filing a motion rather than an adversary proceeding is harmless to PSNH. Among other things, in an adversary proceeding, to obtain the expedited declaratory and injunctive relief they seek, the Debtors would be required to seek a temporary restraining order and/or a preliminary injunction, which would provide PSNH with substantial defenses to the Debtors' efforts to obtain the extraordinary expedited relief sought in the Motion.

26. This also is not a case in which emergency relief on the Motion is required. The Debtors have known for years that the Cumulative Reduction cap has been reached and that PSNH would have the right to start recovering the Excess Cumulative Reduction. The effort to circumvent the dispute resolution process in the PPA through the Motion should not be countenanced.

27. As a result, the Motion should be denied.

**B. The Disputes Are Subject to Binding Arbitration**

28. Arbitration provisions are enforceable in bankruptcy as long as the dispute at issue does not arise out of the Bankruptcy Code. See, e.g., Mintze v. American General Financial

Services, Inc. (In re Mintze), 434 F.3d. 222 (3d Cir. 2006) (enforcing arbitration provision where the claims were not created by the Bankruptcy Code); In re Olympus Healthcare Group, Inc., 352 B.R. 603, 610 (Bankr. D. Del. 2006) (“For claims that are derivative of the debtor, the Court does not have discretion and such claims are subject to mandatory enforcement of the arbitration agreement.”).

29. The Debtors and PSNH dispute whether PSNH owes any amounts to the Debtors in connection the December 2023 invoice. Any rights to such amounts existed prior to the Petition Date and arise under the PPA, not under the Bankruptcy Code.

30. PSNH invoked the dispute resolution procedures of the PPA in the January 25, 2024, letter attached hereto as Exhibit B.

31. Section 25.3 of the PPA contains a binding arbitration provision that governs “any dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which has not been resolved by one of the non-binding procedures set forth in Section 25.1 and 25.2 within thirty (30) Business Days of the delivery of Initial Notice.”

32. The binding arbitration provision of Section 25.3 of the PPA applies to the dispute between the Debtors and PSNH.

33. As a result, the parties’ dispute must be addressed through binding arbitration, not by this Court through the Motion.

**C. The PPA Has Not Been Terminated**

34. PSNH has fully complied with the PPA. As a result, there was no default, the Debtors’ attempt to terminate the PPA failed, and the PPA remains in effect and binding on the Debtors and PSNH.

35. Due to New Hampshire ordered moratoriums on the exercise of PSNH's rights, the December 2023 invoice was the first time PSNH was authorized to net and recoup any amounts related to the Excess Cumulative Reduction. The fact that it was the first time is the reason the initial invoice and other correspondence by PSNH attached as Exhibits B, C, D, and E to the First Day Declaration incorrectly failed to indicate that PSNH would net and recoup against amounts that otherwise would be owed for capacity and renewable energy credits.

36. Section 6.1.4(c) of the PPA does not prohibit PSNH from exercising the netting and recoupment rights granted by Section 10.3 of the PPA and applicable New Hampshire law against amounts that otherwise would be owed for capacity and renewable energy credits. See, e.g., Lago & Sons Dairy v. H.P. Hood, Inc., 892 F. Supp. 325, 336-37 (D.N.H. 1995) (discussing recoupment under New Hampshire law); Zurback Steel Corp. v. Edgcomb, 120 N.H. 42, 44-45 (1980) (same). Instead, Section 6.1.4(c) simply prescribes the method for PSNH netting and recouping amounts owed for energy.

37. Once the parties notified each other of their dispute, PSNH acted in accordance with Section 10.5 of the PPA and retained the disputed amount. Should the Debtors ultimately prevail in the dispute, Section 10.5 of the PPA provides that the Debtors would be entitled to interest on the disputed amount. In pertinent part, Section 10.5 of the PPA states “[t]he disputed amount may, at the discretion of the paying Party, be held by that Party until the dispute has been resolved; provided that the paying Party shall be responsible to pay interest at the Interest Rate on any withheld amounts that are determined to have been properly billed.”

38. As a result, PSNH has complied with the terms of the PPA and is not in breach. Therefore, the Debtors' attempt to terminate the PPA was unsuccessful, and the PPA remains in effect and binding on the Debtors and PSNH.

39. As the PPA remains binding on the Debtors, the Motion should be denied because PSNH remains authorized to be the exclusive Lead Market Participant for the Facility and entitled to receive all of the electricity from the Facility.

**RESERVATION OF RIGHTS**

40. In accordance with Local Rule 9013-1(h), PSNH does not consent to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

41. PSNH reserves the right to raise additional arguments and issues, and to submit additional evidence, in further pleadings and at any hearing on the Motion.

WHEREFORE, PSNH respectfully requests that the Court deny the Motion and grant PSNH such further and additional relief as is just and appropriate.

Dated: February 12, 2024

Respectfully submitted,

*/s/ Jason W. Harbour*

Tyler P. Brown (*Pro Hac Vice Motion to be Filed*)

Jason W. Harbour (No. 4176)

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Public Service Company of New Hampshire

d/b/a Eversource Energy

# **Exhibit A**



**AMENDED AND RESTATED  
POWER PURCHASE AGREEMENT**

This AMENDED AND RESTATED POWER PURCHASE AGREEMENT (this “Agreement”) is made as of May 18, 2011 (the “Effective Date”) by and between Public Service Company of New Hampshire (“PSNH”), Laidlaw Berlin Biopower, LLC (“LBB”) and Berlin Station, LLC a Delaware limited liability company, as assignee of Laidlaw Berlin Biopower, LLC (“Seller”). PSNH, LBB and Seller together are the “Parties” and each individually is a “Party” to this Agreement.

WHEREAS, PSNH and LBB entered into that certain Power Purchase Agreement, dated as of June 8, 2010 (“Original PPA”) with respect to a biomass-fueled electrical generation facility to be located in Berlin, New Hampshire (the “Facility”); and

WHEREAS, the Original PPA is the subject of that certain Order No. 25, 213, dated April 18, 2011 issued by the New Hampshire Public Utilities Commission (the “NHPUC Order”); and

WHEREAS, LBB desires to assign the Original PPA to Seller, and Seller and PSNH desire to amend and restate the Original PPA as provided herein in response to the terms of the PUC Order; and

WHEREAS, Seller wishes to sell to PSNH and PSNH wishes to purchase from Seller the Products (as defined below) to be produced by the Facility (as defined below) on and after the Effective Date on the terms specified herein.

NOW, THEREFORE, in consideration of the mutual promises herein contained, the Parties hereto agree as follows:

**ARTICLE 1. DEFINITIONS**

For the purposes of this Agreement, the following terms shall have the meanings set forth in this Article 1. Capitalized terms used but not defined in this Agreement shall have the meanings set forth in the ISO-NE Documents.

- 1.1 “Affiliate” of a Person means any other person controlling, controlled by or under common control with such first Person.
- 1.2 “Adjusted Base Price” is defined in Section 6.1.2(a)(ii).
- 1.3 “Adjustment Percentage” means a percentage equal to (i) the number of days in the first Operating Year, divided by (ii) 365.
- 1.4 “Ancillary Services” means any Product other than Energy, Capacity or Renewable Products that is recognized and compensated pursuant to the ISO-NE Documents from time to time.

- 1.5 “Average LMP Price” means the weighted average dollar value of Energy (in MWhs) delivered from the Facility to PSNH over any Operating Year (including all MWhs paid for at the Adjusted Base Price), based solely on the hourly Day-Ahead ISO-NE locational marginal price in effect at the pricing location designated for the Facility within the ISO-NE settlement and billing systems of the ISO-NE market system for each MWh delivered, or such successor energy price or other prices in effect from time to time which include all equivalent price components as the current locational marginal price for Energy.
- 1.6 “Base Price” means as defined in Section 6.1.2(a)(i).
- 1.7 “Biomass Fuel” means untreated, plant derived material including brush, stumps, lumber ends and trimmings, wood pallets, bark, wood chips or pellets, shavings, sawdust and slash, agricultural crops, and any other form of biomass eligible for use to generate a REC in New Hampshire under applicable law from time to time.
- 1.8 “Business Day” means a day on which Federal Reserve member banks in New York, New York are open for business; and a Business Day shall start at 8:00 a.m. and end at 5:00 p.m. Eastern Prevailing Time. Notwithstanding the foregoing, with respect to notices only, a Business Day shall not include the Friday immediately following the U.S. Thanksgiving holiday.
- 1.9 “Capacity” means the MWs of capacity that (i) has obtained a capacity supply obligation as a result of participation and clearing in an ISO-NE administered forward capacity auction, reconfiguration capacity auction or any successor or other capacity supply auction, marketplace, or agreement and, (ii) as such, is receiving compensation pursuant to this capacity supply obligation by ISO-NE via the ISO-NE settlement process governed by the ISO-NE Documents.
- 1.10 “Change in Law” means that any applicable law, rule, or regulation is changed (whether directly or indirectly by pre-emption, displacement or substitution) or any new applicable law, rule, or regulation is enacted or promulgated subsequent to the Effective Date.
- 1.11 “Claim” has the meaning set forth in Section 13.3.
- 1.12 “Code” means Internal Revenue Code of 1954, as amended from time to time.
- 1.13 “Credit Rating” means, with respect to any entity, the rating then assigned to such entity’s unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issues rating by S&P, Moody’s or any other rating agency agreed by the Parties.
- 1.14 “Cumulative Factor” means as defined in Section 6.1.4.
- 1.15 “Cumulative Reduction” means as defined in Section 6.1.4.

- 1.16 “Delivery Point” means the Interconnection Point, as defined in the Interconnection Agreement.
- 1.17 “Effective Date” has the meaning set forth in the preamble.
- 1.18 “Energy” means electric energy, as such term is defined in the ISO-NE Documents, generated by the Facility which is delivered to PSNH at the Delivery Point..
- 1.19 “Environmental Attributes” means any and all generation attributes under any and all international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable, now or in the future, to the favorable generation or environmental attributes of the Facility or the Products produced by the Facility during the Term including: (a) any such credits, certificates, benefits, offsets and allowances computed on the basis of the Facility’s generation using renewable technology or displacement of fossil-fuel derived or other conventional energy generation; (b) any GIS Certificates issued in connection with Energy generated by the Facility; and (c) any voluntary emission reduction credits obtained or obtainable by Seller in connection with the generation of Energy by the Facility; provided, however, that Environmental Attributes shall not include Tax/Grant Benefits.
- 1.20 “EPT” means Eastern Prevailing Time.
- 1.21 “Facility” means Seller’s plant for generating electricity as described in Appendix A.
- 1.22 “FERC” means the Federal Energy Regulatory Commission.
- 1.23 “Force Majeure” has the meaning set forth in Section 14.1.
- 1.24 “GIS” means the New England Power Pool General Information System, which includes a generation information database and certificate system, operated by NEPOOL, its designee or successor entity, that identifies generation attributes of MWhs of energy accounted for in such system, and any successor to such system.
- 1.25 “GIS Certificate” means an electronic certificate created pursuant to the Operating Rules of the GIS or any successor thereto to represent the generation attributes of each MWh of Energy generated within the ISO-NE control area and the generation attributes of certain Energy imported into the ISO-NE control area.
- 1.26 “GIS Forward Certificate Transfer System” means the mechanism specified in the operating rules of the GIS system to effect transfers of GIS Certificates in advance of their creation.
- 1.27 “Good Industry Practices” means any of the practices, methods, and acts engaged in or approved by a significant portion of the electric generation industry with respect to producing electricity from the Facility. Good Industry Practices shall also include

- any of the practices, methods, and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been reasonably expected to accomplish the desired result at a reasonable cost. Such practices, methods and acts must comply fully with applicable laws and regulations, good business practices, economy, reliability, safety, environmental protection, and expedition, having due regard for current editions of the National Electrical Safety Code and other applicable electrical safety and maintenance codes and standards, and manufacturer's warranties and recommendations. Good Industry Practices are not intended to be the optimum practice, method, or act to the exclusion of all others, but rather to be a spectrum of acceptable practices, methods, or acts generally accepted in the electrical generation industry in the United States.
- 1.28 "In-Service Date" means the date on which Seller declares the Facility as in service for purposes of qualification for the Code and the Facility is capable of regular commercial operation with a predictable daily dispatch. Seller shall provide PSNH with notice of the actual In-Service Date within fifteen (15) days of such date.
- 1.29 "Interconnecting Utility" means Public Service Company of New Hampshire (or its successor in interest) in its capacity as a party to the Interconnection Agreement.
- 1.30 "Interconnection Agreement" means the Interconnection Agreement by and between Seller and the Interconnecting Utility and/or the ISO-NE as the same may be amended from time to time.
- 1.31 "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law in transactions involving entities having the same characteristics as the Parties.
- 1.32 "Investment Grade Rating" means a Credit Rating of "Baa3" or better from Moody's, "BBB-" or better from S&P or Fitch, or an equivalent Credit Rating by another nationally recognized rating service reasonably acceptable to the Party accepting a guaranty of the obligations of the other Party. If there are split ratings, the lowest of the Credit Ratings will apply.
- 1.33 "ISO New England Inc." or "ISO-NE" means ISO New England Inc., its successor, or any other independent system operator or regional transmission organization for New England.
- 1.34 "ISO-NE Documents" means all tariffs, rules and procedures adopted by NEPOOL, ISO-NE, or the RTO, and governing wholesale power markets and transmission in New England, as such tariffs, rules and procedures may be amended from time to time, including but not limited to, the ISO-NE Tariff, the ISO-NE Operating Procedures (as defined in the ISO-NE Tariff), the ISO-NE Planning Procedures (as defined in the ISO-NE Tariff), the Transmission Operating Agreement (as defined in the ISO-NE Tariff), the Participants Agreement, the manuals, procedures and

business process documents published by ISO-NE via its web site and/or by its e-mail distribution to appropriate NEPOOL participants and/or NEPOOL committees, as amended, superseded or restated from time to time.

- 1.35 “ISO-NE Energy Price” means the hourly Day-Ahead ISO-NE locational marginal price at the pricing location designated for the Facility within the ISO-NE settlement and billing systems of the ISO-NE market system, or such successor energy price or other prices in effect from time to time which include all equivalent price components as the current LMP.
- 1.36 “ISO-NE Tariff” means the ISO New England Inc. Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3, as may be amended from time, or any successor tariff accepted by FERC.
- 1.37 “kW” means a kilowatt.
- 1.38 “kWh” means a kilowatt hour.
- 1.39 “LMP” means Locational Marginal Price.
- 1.40 “MW” means a megawatt.
- 1.41 “MWh” means a megawatt hour.
- 1.42 “Market Rule 1” means Section III of the ISO-NE Tariff, or any successor agreement accepted or approved by FERC.
- 1.43 “NEPOOL” means the New England Power Pool, the power pool created by and operated pursuant to the provisions of the RNA, or any successor or replacement organization(s).
- 1.44 “NHPUC” means the New Hampshire Public Utilities Commission or its successor.
- 1.45 “NHPUC Order” means Order No. 25, 213, dated April 18, 2011 issued by the NHPUC.
- 1.46 “New England Control Area” means as defined in the ISO Tariff.
- 1.47 “New England Markets” means as defined in Section I of the ISO Tariff.
- 1.48 “NH Class I Renewable Energy Credits” or “NH Class I RECs” means REC produced or, in the event of a Change of Law that would have been produced, by the Facility pursuant to its qualification as a renewable energy source as defined in the NH Class I Renewable Statutes at NH RSA § 362-F, as in effect on the Effective Date, and regardless of any subsequent Change in Law.
- 1.49 “Operating Year” means the twelve (12) consecutive calendar months starting on the first day of the calendar month following the In-Service Date and each subsequent

- twelve (12) consecutive calendar month period; provided that the first Operating Year shall also include the days in the prior month on and after the In-Service Date.
- 1.50 “Participants Agreement” means the “Participants Agreement among ISO New England Inc. as the Regional Transmission Organization for New England and the New England Power Pool and the entities that are from time to time parties hereto constituting the Individual Participants” dated as of February 1, 2005, as may be amended from time to time, or any successor thereto accepted by FERC.
- 1.51 “Person” means a natural person, a corporation, partnership, limited liability company, trust or any other organization or entity however organized.
- 1.52 “Pool Transmission Facility” or “PTF” means as defined in Section II of the ISO Tariff.
- 1.53 “Products” means the following items to be produced by the Facility: (i) any electrical product or service that is recognized and compensated pursuant to the ISO-NE Tariff from time to time, including but not limited to Energy, Capacity, Ancillary Services, and (ii) any Renewable Products. Products do not include any Tax/Grant Benefits.
- 1.54 “Project Site” has the meaning set forth in Appendix A.
- 1.55 “Purchase Option Agreement” means the agreement described in Appendix B hereto.
- 1.56 “Qualified Institution” shall mean a commercial bank or trust company organized under the laws of the United States or a political subdivision thereof, with (i) a Credit Rating of at least (a) “A” by S&P and “A2” by Moody’s, if such entity is rated by both S&P and Moody’s or (b) “A” by S&P or “A2” by Moody’s, if such entity is rated by either S&P or Moody’s but not both, and (ii) having a capital surplus of at least Ten Billion Dollars (\$10,000,000,000).
- 1.57 “RNA” means the New England Power Pool Second Restated NEPOOL Agreement dated as of September 1, 1971, as amended and restated from time to time, governing the relationship among the NEPOOL Participants, or any successor agreement.
- 1.58 “Renewable Energy Certificates” and “RECs” means any certificate, either paper, electronic, or any other form (including a NEPOOL GIS Certificate) that can be used to transfer rights to Environmental Attributes produced by the Facility under any Renewable Portfolio Standard.
- 1.59 “Renewable Portfolio Standard” means New Hampshire RSA Chapter 362-F, and any other statute, law, regulation or order promulgated by any legislative and/or regulatory authority pertaining to similar renewable energy source requirements.
- 1.60 “Renewable Products” means RECs and any other Environmental Attributes.
- 1.61 “Renewable Products Payment” means the alternative compliance payment schedule set forth under NH RSA § 362-F for RECs produced by NH Class I Renewables, as

adjusted from time to time, *provided* that if there is a Change in Law with respect to NH RSA § 362-F and/or the New Hampshire statute is pre-empted by later federal law, Parties will use good faith efforts to revise the Renewable Products Payment to conform to the value of any replacement payment available following such Change in Law, consistent with the provisions of Section 23 of this Agreement; and *provided further*, that for the Term, the Renewable Products Payment shall not be less than the alternative compliance payment schedule (including future adjustments) set forth under NH RSA § 362-F:10 for RECs produced by NH Class I Renewables as in effect on the date hereof, and as construed by the NHPUC Order for years after 2025.

- 1.62 “Scheduled Operation Date” means the date set forth in Section 5.2.
- 1.63 “Schiller Station” means as defined in Section 6.1.2(a)(ii).
- 1.64 “Seller Required Approvals” means approvals from (i) the NHPUC to the extent applicable to Seller’s ability to operate within New Hampshire; (ii) approval of the New Hampshire Site Evaluation Committee, together with related New Hampshire agency permits and approvals.
- 1.65 “Site” means the real estate on which the Facility is located.
- 1.66 “Site Owner” means any entity holding fee interest title in or to any portion of the Site and improvements thereon.
- 1.67 “Tax” or “Taxes” means all taxes that are currently or may in the future be assessed on any products or services that are the subject of this Agreement.
- 1.68 “Tax/Grant Benefits” means any production tax credits, investment tax credits, grants in lieu of tax credits, fuel subsidies or other non-tax cash grants or subsidies, credits or benefits that may be available with respect to the Facility pursuant to the Code or other federal or state law, including but not limited to production tax credits pursuant to Section 45 of the Code, and investment tax credits or grants available under Section 48 of the Code; provided, however, that any marketable, recurring attribute resulting from Facility production that is not listed above shall not be deemed a Tax/Grant Benefit. For the avoidance of confusion, any marketable Environmental Attribute, known today or created in the future, resulting from production of the Facility (as opposed to any tax benefit or a one-time credit or grant) is not and shall not be considered to be a Tax/Grant Benefit but instead is a Product.
- 1.69 “Term” means the period set forth in Section 2.1.
- 1.70 “Wood Price Adjustment” and “WPA” are defined in Section 6.1.2(a)(ii).

## ARTICLE 2. TERM OF AGREEMENT

- 2.1 **Term.** This Agreement shall be binding as of the Effective Date and remain in effect thereafter through twenty (20) Operating Years from the In-Service Date (“Term”).

- 2.2 **In-Service Date.** Seller shall provide to PSNH, subject to PSNH approval, a plan for testing and startup of the Facility at least thirty (30) days prior to the dates upon which Seller tests the Facility in order to establish the In-Service Date. PSNH shall have the right to be present at the Site during start-up and testing (subject to all safety procedures in effect at the Site), and/or to receive documentary evidence of the Facility's operation.
- 2.3 Following the end of the Term or otherwise upon termination of this Agreement, the Parties hereto shall have no further obligations hereunder, except as otherwise expressly provided herein or to the extent necessary to enforce the rights and obligations of the Parties arising under this Agreement before the end of the Term and except as provided below in Section 2.4 and in Article 7, Right of First Refusal and Purchase Option.
- 2.4 If ownership and/or operating control of the Facility is transferred to a third party, then Seller shall include or cause to be included as part of the transfer and sale agreement with the third party the obligation that the new owner and/or the new operator shall assume all of the rights and obligations of Seller set forth in this Agreement.

### ARTICLE 3. FACILITY

- 3.1 **Description.** The Facility is as described in Exhibit A, Description of Facility.
- 3.2 **Primary Energy Source.** Seller shall ensure that the Facility shall use Biomass Fuel as its primary energy source.
- 3.3 **Qualifying Facility.** Facility shall acquire its status as a "qualifying facility" pursuant to 18 C.F.R. Part 292 prior to the In-Service Date and maintain such status throughout the Term.

### ARTICLE 4. PREREQUISITES FOR PURCHASES

- 4.1 PSNH's obligation to begin the purchase of Products is contingent upon the satisfaction of all the following conditions:
- 4.1.1 Execution of an Interconnection Agreement by the applicable parties and, if required, FERC acceptance and approval of the Interconnection Agreement under Section 205 of the Federal Power Act;
- 4.1.2 PSNH has received evidence to its reasonable satisfaction that Seller has obtained all permits, licenses, approvals and other governmental authorizations needed to commence commercial generation of Products, including certification to produce NH Class I RECs;
- 4.1.3 PSNH has received from the NHPUC a final, nonappealable decision acceptable to PSNH in its sole discretion, approving and allowing for full cost recovery of the rates, terms and conditions of this Agreement;



- 4.1.4 The Parties shall execute as of the In-Service Date, a Purchase Option Agreement that is acceptable to PSNH in its sole discretion in the form as set forth in Appendix B hereto, to be recorded, and PSNH shall have been issued a title insurance policy insuring its rights under the Purchase Option Agreement. The Purchase Option Agreement will provide that the Site Owner (as defined therein) may terminate the Purchase Option Agreement if this Agreement is terminated by Seller by reason of a PSNH Event of Default under Section 12.1.1 hereunder. If the Purchase Option Agreement is terminated for any other reason, PSNH may immediately terminate this Agreement without further liability.

## **ARTICLE 5. PURCHASE AND SALE OF POWER**

- 5.1 Subject to the terms and conditions of this Agreement, Seller shall sell and deliver and PSNH shall purchase and accept delivery of one hundred percent (100%) of the Products produced by the Facility.
- 5.2 The original "Scheduled Operation Date" of the Facility is June 1, 2014. Seller agrees to give notice to PSNH at the end of each calendar quarter of any change in this date and of progress in obtaining permits and constructing the Facility.
- 5.3 Seller shall deliver the Energy to PSNH at the Delivery Point.
- 5.4 Prior to the In-Service Date and satisfaction of the Prerequisites for Purchases listed in Article 4, but subsequent to the execution of an Interconnection Agreement, Seller shall sell and PSNH shall purchase one hundred percent (100%) of the Products generated during this period, including Products generated pursuant to such Facility testing, at the prices set forth in Section 6.1.1.
- 5.5 Following the In-Service Date and subject to the satisfaction of the Prerequisites for Purchases listed in Article 4, throughout the Term, Seller shall deliver to PSNH one hundred percent (100%) of the Products and PSNH shall purchase the Products at the prices set forth in Section 6.1.2.

## **ARTICLE 6. PRICING**

- 6.1 The price to be paid by PSNH to Seller for the Products shall be as follows:
- 6.1.1 For Products purchased pursuant to Section 5.4:
- (a) All Products except Capacity and NH Class I RECs: PSNH shall pay to Seller the product of the ISO-NE Energy Price and the hourly quantity (MWh) of delivered Energy for its receipt of all Products (including other Renewable Products) except Capacity and NH Class I RECs;
  - (b) Capacity: PSNH shall pay to Seller any capacity revenues assigned to the Facility and paid to PSNH by ISO-NE or other compensation realized by PSNH for Capacity from the Facility; and

- (c) NH Class I RECs: PSNH will pay to Seller the product of thirty-five dollars (\$35.00) and the hourly quantity (MWh) of delivered Energy that qualifies to receive NH Class I RECs or upon other mutually agreeable conditions that certify that NH Class I RECs have been delivered to PSNH.

6.1.2 For Products purchased pursuant to Section 5.5:

- (a) Subject to Section 6.1.4(c) below, all Products except Capacity and NH Class I RECs will be compensated for by multiplying the Adjusted Base Price in \$/MWh by the hourly quantity (MWh) of delivered Energy:
  - (i) The base Energy purchase price (the “Base Price”) shall be equal to \$69.80/MWh.
  - (ii) Beginning with the start of the first full calendar quarter following the In-Service Date, and thereafter on the start of each calendar quarter, the Base Price will be adjusted up or down by the “Wood Price Adjustment” or “WPA”. The WPA will reflect the difference between the actual average \$/ton Biomass Fuel cost that PSNH paid for Biomass Fuel at its Schiller station facility (“Schiller Station”) during the immediately preceding calendar quarter compared to \$30/ton. This difference (whether positive or negative) in \$/ton will be multiplied by a factor of 1.6 tons/MWh and added to the Base Price. If PSNH (i) materially changes the quality composition of its Biomass Fuel from that utilized by the Schiller Station in calendar year 2008 (by, for example, utilizing lower grade biomass, construction/demolition wastes or co-firing with fossil fuels), or (ii) effectively realizes a material discount or subsidy on its fuel purchases (whether directly or through reduced fuel prices reflecting upstream subsidies) and such discount or subsidy does not provide for similar savings to the Facility’s cost of fuel, or (iii) PSNH ceases burning Biomass Fuel at Schiller Station or Schiller Station is not operational, then, for those periods during which either condition (i), (ii) or (iii) is in effect, the WPA shall be based on the difference between the actual average \$/ ton cost of Biomass Fuel at the Facility and \$30/ton, subject to PSNH’s audit and independent review of the reasonableness of such actual costs. Thus, as of the start of each calendar quarter, such adjustment (the “Adjusted Base Price”) shall be computed as follows:

$$\text{Wood Price Adjustment (WPA)} = 1.6 \times [\text{actual average } \$/\text{ton} \text{ minus } \$30/\text{ton}]$$

$$\text{Adjusted Base Price } (\$/\text{MWh}) = \text{Base Price} + \text{WPA}$$

- (b) Capacity: PSNH shall pay for Capacity from the Facility as follows:
- (i) For the first two (2) Operating Years: \$2.95 per kW-month of Capacity.
  - (ii) For the next three (3) Operating Years: \$4.25 per kW-month of Capacity.
  - (iii) For each subsequent Operating Year, the Capacity Price shall be increased by \$0.15 per kW-month.
  - (iv) Notwithstanding (i) and (ii) above, any payments for Capacity prior to June 2014 shall be in accordance with the provisions of Section 6.1.1(b).
- (c) NH Class I RECs:

PSNH shall pay to Seller the following amounts for NH Class I RECs upon delivery of NH Class I RECs into the PSNH NEPOOL GIS account or upon other mutually agreeable conditions that certify that NH Class I RECs have been delivered to PSNH:

- (i) For NH Class I RECs that are generated pursuant to Facility operation during the first two (2) Operating Years of the Term, PSNH shall pay the product of (i) fifty percent (50%) of the Renewable Products Payment that is applicable to the period during which the NH Class I REC was generated and (ii) the quantity of NH Class I RECs delivered during that period.
- (ii) For NH Class I RECs that are generated pursuant to Facility operation during Operating Years three (3) through seven (7) of the Term, PSNH shall pay the product of (i) eighty percent (80%) of the Renewable Products Payment that is applicable to the period during which the NH Class I REC was generated and (ii) the quantity of NH Class I RECs delivered during that period.
- (iii) For NH Class I RECs that are generated pursuant to Facility operation during Operating Years eight (8) through twelve (12) of the Term, PSNH shall pay the product of (i) 75% of the Renewable Products Payment that is applicable to the period during which the NH Class I REC was generated and (ii) the quantity of NH Class I RECs delivered during that period.
- (iv) For NH Class I RECs that are generated pursuant to Facility operation during Operating Years thirteen (13) through seventeen (17) of the Term, PSNH shall pay the product of (i) seventy percent (70%) of the Renewable Products Payment that is applicable to the period during which the NH Class I REC was

generated and (ii) the quantity of NH Class I RECs delivered during that period.

- (v) Thereafter for the balance of the Term, PSNH shall pay the product of (i) fifty percent (50%) of the applicable Renewable Products Payment that is applicable to the period during which the NH Class I REC was generated and (ii) the quantity of NH Class I RECs delivered during that period.

6.1.3 Limitations on Purchase/Sale Obligations. In any Operating Year during the Term, PSNH shall not be obligated to purchase by reason of this Agreement in excess of 400,000 NH Class I RECs (with such figure for the first Operating Year multiplied by the Adjustment Percentage). Any NH Class I RECs produced by the Facility and not delivered to PSNH hereunder may be sold by Seller under other arrangements. In each Operating Year except the final Operating Year, for Energy deliveries in excess of 500,000 MWh (with such figure for the first Operating Year multiplied by the Adjustment Percentage), an “Excess MWh Adjustment” will be calculated. The Excess MWh Adjustment shall equal the quantity of excess Energy multiplied by the difference between (i) the Average LMP Price and (ii) the weighted average Adjusted Base Price for MWh of Energy paid for at the Adjusted Base Price during such Operating Year. The Excess MWh Adjustment, whether positive or negative, will be divided into three (3) equal portions and included on the Seller’s invoice for each of the first three (3) billing months of the subsequent Operating Year. A negative Excess MWh Adjustment will be administered as a credit to PSNH, i.e. it will reduce payments due to Seller pursuant to Section 6.1.2(a). A positive Excess MWh Adjustment will be administered as an additional charge to PSNH, i.e. it will increase the payments due to Seller pursuant to Section 6.1.2(a). Notwithstanding this Section 6.1.3, during the final Operating Year of the Term, under no circumstances will PSNH purchase in excess of 500,000 MWh by reason of this Agreement.

6.1.4 Cumulative Factor.

- (a) For each MWh of Energy delivered during the Term of this Agreement, a negative or positive adjustment shall be determined. When the Adjusted Base Price (in \$/MWh) in effect during an hour exceeds the ISO-NE Energy Price in that hour, the hourly negative adjustment shall equal the delivered MWhs multiplied by the difference between the ISO-NE Energy Price and the Adjusted Base Price. When the Adjusted Base Price (in \$/MWh) is less than the ISO-NE Energy Price, the hourly positive adjustment shall equal the delivered MWhs multiplied by the difference between the ISO-NE Energy Price and the Adjusted Base Price. These negative and positive adjustments will be continuously aggregated to determine a cumulative net negative adjustment or net positive adjustment for the purpose of adjusting the price of any Facility purchase option by PSNH pursuant to Article 7 hereof, if exercised. At any point in time, the cumulative value of these adjustments is defined as the “Cumulative

Factor”. At any point in time, a net negative Cumulative Factor value is termed a “Cumulative Reduction”. A Cumulative Reduction will serve to reduce the purchase price of the Facility as provided in the Purchase Option Agreement. A net positive Cumulative Factor will bestow no rights or obligations on either Party to this Agreement.

- (b) Following each Operating Year, the value of any Excess MWh Adjustment, as defined in Section 6.1.3, whether positive or negative, will be used to adjust the Cumulative Factor determined pursuant to section 6.1.4(a), to ensure that the Cumulative Factor reflects only those Energy purchases made at this Agreement’s Adjusted Base Price (effectively, after the Excess MWh Adjustment).
- (c) Notwithstanding Section 6.1.2 above, if at the end of any Operating Year other than the last Operating Year during the Term, there exists a Cumulative Reduction in excess of One Hundred Million Dollars (\$100,000,000), such excess (“Excess Cumulative Reduction”) will be credited against amounts otherwise due for Energy delivered to PSNH during the subsequent Operating Year until such Excess Cumulative Reduction is eliminated. To effect such credit, in each month during the subsequent Operating Year, one twelfth (1/12th) of the Excess Cumulative Reduction (“Monthly Energy Credit”) shall be deducted by PSNH from the Seller’s invoice, up to the full amount of the payment due to Seller pursuant to Section 6.1.2(a), and any excess over that amount shall carry forward to the following month to the Monthly Energy Credit. If, at the end of the Operating Year subsequent to the year during which there was an Excess Cumulative Reduction, any such amount remains, it shall be deducted by PSNH from the Seller’s invoice in the next Operating Year in the same manner described above. If upon expiration of the Term PSNH does not purchase the Facility, Seller shall reimburse PSNH the value of any Excess Cumulative Reduction.

6.2 PSNH will have no claims to any Tax/Grant Benefits.

## **ARTICLE 7. RIGHT OF FIRST REFUSAL AND PURCHASE OPTION**

### **7.1 Right of First Refusal.**

- 7.1.1 If at any time Seller desires to sell for cash, cash equivalents or any other form of consideration all or any part of the Facility (except with respect to a sale/leaseback financing or similar project financing or re-financing) pursuant to a bona fide offer (or a proposed offer) of purchase to or from a third party (the “Proposed Transferee”), Seller shall submit a written offer (the “Offer”) to sell and assign all or such portion of the Facility, including any associated interests or rights in the Site and/or Facility Product delivery arrangements, described in the Offer (the “Offered Assets”) to PSNH or such Affiliate of PSNH designated by PSNH (collectively, “PSNH” for the purposes of this Article 7), on terms and conditions, including price, not less favorable to PSNH

than those on which the Seller proposes to sell such Offered Assets to the Proposed Transferee. The Offer shall disclose the identity of the Proposed Transferee, describe the Offered Assets proposed to be sold and any terms and conditions, including price, of the proposed sale. The Offer shall state that PSNH may acquire the Offered Assets, for the price and upon the other terms and conditions, including deferred payment (if applicable), set forth therein during the 180-day period after the delivery of the Offer by the Seller (the “Offer Period”).

7.1.2 If PSNH does not purchase all or part of the Offered Assets, the unpurchased portion of the Offered Assets may be sold by Seller at any time within twelve (12) months after the date that PSNH declined the Offer or failed to close on the Offer. Any such sale shall be to the Proposed Transferee, at not less than the price and upon other terms and conditions, if any, not more favorable to the Proposed Transferee than those specified in the Offer. Any Offered Assets not sold within such twelve (12) month period shall continue to be subject to the requirements of a prior offer pursuant to this Article 7. Pursuant to the provisions of Section 2.4, the new owner of the purchased Offered Assets shall assume all rights and obligations of Seller as set forth in this Agreement, including those with respect to the Cumulative Reduction, including any prior balance thereof accumulated prior to such sale.

7.1.3 If PSNH determines during the Offer Period that it does not desire to acquire the Offered Assets, PSNH shall so notify the Seller. The Offered Assets may be sold by the Seller pursuant to Section 7.1.2 above.

## 7.2 Purchase Option Agreement.

7.2.1 PSNH shall have the exclusive right to purchase the Facility and all other real, personal and intangible property associated with the Facility and its operations in accordance with the Purchase Option Agreement. Seller shall cause the Site Owner and any successor(s) thereto, other entities that may hold ownership interests in the Facility, any financial lessor of the Offered Assets and any lender holding a security interest in the Facility to agree to the terms of the Purchase Option Agreement as a condition to any sale, financing, refinancing or financial sale/leaseback of the Facility. Further, upon notice to Seller, PSNH may transfer its rights under the Purchase Option Agreement to any PSNH Affiliate or other third party, inclusive of all PSNH rights under the Purchase Option Agreement. In connection with any sale made pursuant to the Purchase Option Agreement, Seller shall convey, or cause to be conveyed, the Facility and all related assets free of material financing liens.

## **ARTICLE 8. ADMINISTRATIVE COSTS; CHANGE IN REGULATION/LAW**

8.1 **Administrative Costs.** Seller is responsible for all costs and administrative burdens of qualifying the Facility to participate in the ISO-NE markets and to participate in or qualify for any program(s) designed to document and/or provide for the sale and transfer of the Facility’s Products established by any of the New England States

and/or the federal government from time to time. Seller also agrees, promptly following receipt by Seller of a written request from PSNH, to make commercially reasonable efforts to apply to other programs for the purpose of increasing the value of the Products to PSNH, in whole or in part, pursuant to the terms of this Agreement; *provided*, that such obligation does not require Seller to pursue or remain involved in litigation, assume new capital or operational obligations, amend or terminate other Product sales arrangements for NH Class I RECs, or otherwise do more than make and pursue such qualification applications; *provided further*, that if a Change in Law (as hereinafter defined) occurs that would require Seller to make a capital expenditure, to incur any expense, to incur any liability, or to increase operating costs for the Facility in order to continue to produce Renewable Products or for Seller to transfer the Renewable Products to PSNH, at PSNH's sole option so long as PSNH, in a manner reasonably acceptable to Seller, agrees to compensate Seller for all such capital expenditures, costs, losses and expenses and agrees to bear such liabilities, Seller shall (a) take such actions, as reasonably requested by PSNH, and (b) execute such documents as necessary to convey to PSNH the Renewable Products, in a form reasonably acceptable to Seller. If a Change in Law occurs where Seller realizes the monetary value of any Renewable Products obligated to be delivered to PSNH hereunder, and Seller is unable to transfer such Renewable Products to PSNH notwithstanding PSNH's request to transfer such Renewable Products to PSNH and PSNH's willingness to bear any liabilities incurred by Seller or compensate Seller for any expenses, losses or costs as provided above, Seller shall, within thirty (30) days of actual receipt, pay to PSNH the amount that Seller actually receives (net of any costs, taxes or expenses Seller incurs to receive such amounts) as a result of its ownership of the Renewable Products within a reasonable time after such amounts are paid to Seller. Subject to the reimbursement obligations of PSNH with respect to such efforts, Seller shall use commercially reasonable efforts to realize any such monetary value.

**ARTICLE 9. CONSTRUCTION, OPERATION AND MAINTENANCE OF THE FACILITY:  
THE OPERATOR**

- 9.1 Seller shall construct, operate and maintain the Facility using Good Industry Practices.
- 9.2 Seller shall construct, operate and maintain the Facility so that it obtains and retains its eligibility to produce NH Class I RECs, subject to the provisions of Section 8.1.
- 9.3 PSNH and Seller will be jointly responsible for administrative actions required to obtain the recognition of Capacity for the Facility within the ISO-NE market. Seller shall not be required to participate in any FCM auction process, nor will Seller be compensated for any Capacity until such Capacity is recognized by ISO-NE per Section 1.9. For the avoidance of doubt, neither Party will hold the other Party liable for any damages related to the degree to which the Facility's capability is recognized as Capacity by ISO-NE. PSNH will have no obligation to make any Capacity payments to Seller unless and until the Facility's capability satisfies the definition of Capacity in Section 1.9.

- 9.4 Every day (including weekends and holidays) by 9:00 a.m. EPT, Seller must provide to PSNH an estimated hourly schedule of deliverables for the following day, *except that* Seller may provide such schedule for weekends and holidays on the preceding Business Day.
- 9.5 Prior to October 1 of each year, Seller shall submit to PSNH for review and comment by PSNH an initial schedule of expected electricity delivery levels for the twelve (12) month period beginning with January of the following year. The schedule shall state the estimated times of operation, amounts of electricity production, number of anticipated shutdowns and reductions of output and the reasons therefore, and the dates and durations of scheduled maintenance, including a specification of maintenance requiring shutdown or reduction in output of the Facility. Subject to the requirements of Good Industry Practices, Seller shall not schedule routine maintenance of the Facility during the months of January, February, June, July or August, and shall consult with PSNH at least thirty (30) days prior to removing the Facility from service for routine maintenance. Seller is required at all times to comply with any outage scheduling procedures or requirements of ISO-NE or successor organization. Seller shall:
- 9.5.1 Consider requests by PSNH for revisions to the schedule within sixty (60) days from PSNH's receipt of the initial schedule, and subsequently advise PSNH of any changes in plan for conducting maintenance that would require an outage expected to be of greater than one (1) week's duration; and
- 9.5.2 Make all reasonable efforts, consistent with Good Industry Practices, to accommodate any additional changes in the initial schedule requested by PSNH; *provided, however*, that any such changes shall not be expected to reduce the total expected deliveries from the Facility.
- 9.6 Seller shall provide to any relevant person any information that may be required about the Facility's operations from time to time by NEPOOL or ISO-NE.
- 9.7 For the purpose of any bidding and administrative actions associated with NEPOOL or ISO-NE, PSNH shall be considered the Lead Participant as such term is defined by those organizations. The Parties will cooperate and work in good faith to establish mutually acceptable bidding procedures.
- 9.8 If the Facility is required to curtail deliveries of any Products pursuant to the Interconnection Agreement or ISO-NE notifications, Seller shall be entitled to effect such curtailment and PSNH shall have no obligation to pay for any Products that would have been delivered by Seller during such periods for which Seller has curtailed deliveries. PSNH shall have no obligation to accept or pay for any Products associated with energy deliveries in excess of the level to which Seller curtailed its deliveries during such periods, but PSNH shall pay Seller for any Products delivered up to the level to which Seller curtailed during such periods.
- 9.9 Subject only to Good Industry Practices, during any period in which ISO-NE or NEPOOL notifies or causes Seller to be notified that the Facility should operate in a



manner to mitigate other operational or electrical problems (such as maintenance, voltage deficiency, or transmission or distribution line loading problems) on ISO-NE's or NEPOOL's electrical system, Seller shall use all reasonable efforts (including, but not limited to, delaying routine maintenance, curtailing output, or increasing output) to comply with ISO-NE or NEPOOL requests to mitigate such operational or electrical problem. PSNH shall have no obligation to pay for any Products associated with energy deliveries in excess of the level to which Seller was requested to curtail its deliveries pursuant to this Section 9.8. Seller shall also be liable to pay any and all penalties, fines, sanctions, etc. imposed by ISO-NE, NEPOOL, NERC, FERC or any similar or successor organization related to any Facility-related non-compliance with the rules and requirements or such organizations. To the extent any of these penalties, fines, or sanctions are initially assessed to PSNH pursuant to PSNH's role as the purchaser of Products from the Facility or as the Lead Participant for the Facility (as defined in the ISO-NE Documents), PSNH will reduce the Seller's next monthly invoice by the amount of such penalties, fines or sanction or shall otherwise transfer the monetary obligation to Seller.

#### **ARTICLE 10. BILLING AND PAYMENT**

- 10.1 PSNH or Interconnecting Utility, as applicable, shall be the designated meter reader by ISO-NE and read Seller's meters.
- 10.2 Not later than five (5) Business Days following the end of each calendar month, PSNH shall read the Seller's meters installed as described in the Interconnection Agreement, calculate a monthly invoice for the applicable Products, and provide this information to Seller within ten (10) days of such reading. Seller shall then return to PSNH the approved invoice for payment and PSNH shall make payments to Seller electronically in immediately available funds for the total amount due within twenty-three (23) days of the meter reading date or ten (10) days of Seller's return to PSNH of the approved invoice, whichever is later; *provided, however*, that payments for NH Class I RECs will occur upon delivery into the PSNH NEPOOL GIS account, or upon other mutually agreeable conditions that certify that any and all NH Class I RECs have been delivered to PSNH. To the extent that PSNH is not satisfied that delivery of any Products has occurred, including but not limited to the satisfactory delivery of Renewable Products, PSNH shall reduce payments in an amount equal to the value of the non-delivered Products.
- 10.3 The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing under this Agreement and the Interconnection Agreement to each other on the same date, in which case all amounts owed by each Party to the other Party during the monthly billing period under this Agreement and/or the Interconnection Agreement, including any related damages, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it. If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period, including, but not limited to, any related damage amounts, interest, and payments or credits, that Party shall pay such sum in full when due, subject to the provisions

addressing disputed amounts set forth in Section 10.5. Except as set forth above in this Section 10.4, all payments hereunder shall be made without set-off or deduction.

- 10.4 Any payment not made by the date required by this Agreement shall bear interest from the date on which such payment was required to have been made through and including the date such payment is actually received at an annual rate equal to the Interest Rate.
- 10.5 If either Party disputes the amount of any bill, it shall so notify the other Party in writing. Each Party receiving a bill shall pay to the other Party any undisputed amount of the bill or charges when due. The disputed amount may, at the discretion of the paying Party, be held by that Party until the dispute has been resolved; provided that the paying Party shall be responsible to pay interest at the Interest Rate on any withheld amounts that are determined to have been properly billed. The disputed amount may be held by the paying Party provided that the paying Party or its guarantor, if applicable, has an Investment Grade Rating, or by a Qualified Institution if the paying Party or its guarantor, if applicable, does not have such a rating. Neither Party shall have the right to challenge any monthly bill or to bring any court or administrative action of any kind questioning the propriety of any bill after a period of twenty-four (24) months from the date the bill was delivered to the Party required to make payment thereunder; provided, however, that in the case of a bill based on estimates, such twenty-four month period shall run from the due date of the final adjusted bill.

#### **ARTICLE 11. INTERCONNECTION AND DELIVERY**

- 11.1 This Agreement does not provide for any electric service by PSNH to Seller. If Seller requires any electric services from PSNH and is legally entitled to such service from PSNH, Seller shall receive such service in accordance with PSNH's applicable electric tariffs or, if no currently existing tariff is applicable, by special contract subject to the approval of the NHPUC.
- 11.2 Seller shall be responsible for any and all costs, charges and expenses associated with the Facility in connection with transmission and distribution interconnection, service and delivery charges, including all related ISO-NE administrative fees.
- 11.3 In addition to the provisions of Section 6.1.3 and Section 12.2.1, for any period during which PSNH does not fulfill its purchase obligations hereunder for any reason, Seller may freely sell (subject to all applicable laws and regulations) any or all of the Facility's Products produced during such period to one or more third parties until such time as PSNH resumes purchases hereunder.

#### **ARTICLE 12. EVENTS OF DEFAULT; REMEDIES**

- 12.1 **Events of Default.** An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

- 12.1.1 such Party fails to pay an amount due by the due date, and such failure is not remedied within seven (7) Business Days after notice by the other Party; *provided, however*, is such Party fails to remedy payment and such failure is caused not (even in part) by the unavailability of funds but is caused solely by a technical or administrative error, then such Party shall have an additional three (3) Business Days to pay the amount due after notice of failure to remedy by the other Party.
- 12.1.2 any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated and the effect of such misrepresentation is not remedied within thirty (30) days after notice by the other Party; provided that, if any such representation or warranty cannot be made true or cured by the Defaulting Party within such 30-day period with exercise of reasonable due diligence, and if the Defaulting Party within such period submits for the Non-Defaulting Party's approval a plan reasonably designed to correct the default within a reasonable additional period of time, then, unless the Non-Defaulting Party reasonably refuses to approve such plan, an Event of Default shall not exist unless and until the Defaulting Party fails to diligently pursue such cure or fails to cure such default within the additional period of time specified by the plan; provided further that, if the Non-Defaulting Party reasonably refuses to approve such plan, the Defaulting Party shall have at least, but no more than, one hundred eighty (180) days after the date of initial notice from the Non-Defaulting Party to cure the default;
- 12.1.3 the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default) if such failure is not remedied within thirty (30) Business Days after notice by the other Party; provided that, if any such default cannot be cured by the Defaulting Party within such 30-day period with exercise of reasonable due diligence, and if the Defaulting Party within such period submits for the Non-Defaulting Party's approval a plan reasonably designed to correct the default within a reasonable additional period of time, then, unless the non-Defaulting Party reasonably refuses to approve such plan, an Event of Default shall not exist unless and until the Defaulting Party fails to diligently pursue such cure or fails to cure such default within the additional period of time specified by the plan; provided further that, if the Non-Defaulting Party reasonably refuses to approve such plan, the Defaulting Party shall have at least, but no more than, one hundred eighty (180) days after the date of initial notice from the Non-Defaulting Party to cure the default;
- 12.1.4 such Party becomes or is made subject to a reorganization or liquidation proceeding administered pursuant to the U.S. Bankruptcy Code, whether pursuant to a voluntary or involuntary petition; or
- 12.1.5 such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving

or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party.

## 12.2 Rights of Non-Defaulting Party

12.2.1 If an Event of Default as set forth in this Article 12 with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the “Non-Defaulting Party”) shall have the right to notify the Defaulting Party and (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective as an early termination date of this Agreement, and/or (ii) withhold any payments due to the Defaulting Party under this Agreement, and/or (iii) suspend performance.

12.2.2 Upon an Event of Default, the Non-Defaulting Party, in addition to the rights described in specific sections of this Agreement, and except to the extent specifically limited by this Agreement, may exercise, at its election, any rights or remedies it may have at law or in equity, including but not limited to monetary compensation for damages, injunctive relief and specific performance.

## 12.3 Other Termination Rights

12.3.1 **Seller’s Right to Terminate.** This Agreement may be terminated by Seller at any time prior to the In-Service Date in the event that Seller decides to cancel the Project because Seller is unable to procure and have delivered to the Project Site all of the equipment and materials required to construct and operate the Facility at a total installed cost consistent with Seller’s budgeted costs on an economically feasible basis with a return on its total investment in the Facility satisfactory to Seller in Seller’s sole discretion; *provided, however*, that in such event, Seller shall notify PSNH that Seller is irrevocably terminating Facility development and/or construction, whereupon this Agreement shall terminate without further obligation of either Party except with respect to any PSNH purchase option or right set forth in Article 7; *provided further, however*, that if Seller or an Affiliate of or successor to Seller recommences development and/or construction of the Facility within a twelve-month period from the date of such notice to PSNH, then this Agreement may be reinstated at PSNH’s sole option and shall be in full force and effect upon such reinstatement.

12.3.2 **PSNH’s Right to Terminate.** PSNH may, at its sole option and discretion, terminate this Agreement if (i) Seller announces its plans to permanently shut down the Facility, or (ii) if the In-Service Date is not achieved by December 31, 2014, unless otherwise ordered by the NHPUC or unless the Parties otherwise agree in writing; provided that if the In-Service Date is not achieved by June 1, 2014, then Seller shall pay to PSNH damages equal to \$500 per day for each day after June 1, 2014 that the In-Service date is not achieved; and *provided further*, that the June 1, 2014 and December 31, 2014 dates shall be extended day for day for any delays in obtaining any PSNH approvals under

Sections 4.1.3 or 4.1.4 above and beyond the date that is the 180<sup>th</sup> day following the date of the Original PPA (i.e., June 8, 2010), but in no event shall any such extension be beyond December 31, 2015, or (iii) Seller fails after the In-Service Date to deliver any Products to the Delivery Point that are required to be delivered hereunder for a period of twelve (12) consecutive months; *provided* that in each case PSNH shall give Seller notice of such termination within ten (10) Business Days after such date; and *further provided* that the twelve (12) month period referred to in subsection (iii) shall be extended for any period that Seller was unable to deliver Products to PSNH in whole or in part as a result of the occurrence of a Force Majeure event; and *further provided* that any PSNH purchase option or right set forth in Article 7 shall survive such termination.

## 12.4 Termination Liability

- 12.4.1 If, prior to the In-Service Date, PSNH terminates this Agreement pursuant to Section 12.3.2 or Seller terminates this Agreement pursuant to Section 12.3.1, then neither Party shall have any liability to the other Party pursuant to this Agreement and the Parties shall be released and discharged from any obligations arising or accruing hereunder from and after the date of such termination and shall not incur any additional liability to each other as a result of such termination; provided that such termination shall not discharge or relieve either Party from any obligation that has accrued prior to such termination or from its obligations under certain other provisions of this Agreement as provided in Section 26.5.
- 12.4.2 Further, if Seller terminates this Agreement pursuant to Section 12.3.1 before the In-Service Date or if PSNH terminates this Agreement pursuant to Section 12.3.2 then, for a period of two (2) years following delivery of notice by Seller to PSNH of the termination of this Agreement neither Seller, its Affiliates, successors nor assigns shall: (i) seek to sell, or to sell, any electricity from an electric generating facility on the Project Site to a third person without PSNH's consent; or (ii) be entitled to enter into a long term power sales agreement for the sale of any Products and/or Renewable Energy Certificates from an electric generating facility on the Project Site with any entity other than PSNH; provided, that the foregoing restrictions shall terminate if Seller has offered in writing to PSNH during such period to reinstate this Agreement or enter into a new agreement on the same terms and conditions as this Agreement and PSNH has not agreed in writing to reinstate this Agreement or enter into such a new agreement within ninety (90) days following the receipt by PSNH of such offer.
- 12.4.3 If, following the In-Service Date, either Party terminates this Agreement pursuant to Section 12.2, both Parties shall be discharged from all further obligation under the terms of this Agreement, except (i) any liability which may have been incurred before the date of such termination and any liability on account of such termination, including without limitation the obligation to pay for Products delivered prior to any such termination and/or for all direct

damages incurred by the Non-Defaulting Party on account of any termination for default, which obligations shall survive the termination of this Agreement (ii) any PSNH purchase option set forth in Article 7, Right of First Refusal and Purchase Option, and (iii) any liability which survives termination of this Agreement.

### **ARTICLE 13. TITLE AND RISK OF LOSS; TAXES; INDEMNIFICATION**

- 13.1 **Title and Risk of Loss.** Title to and risk of loss related to the Products delivered hereunder shall transfer from Seller to PSNH at the Delivery Point. Seller warrants that it will deliver to PSNH the Products free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.
- 13.2 **Taxes.** With the exception of any sales or gross receipts Taxes that are required by applicable law to be paid by PSNH, Seller shall pay or cause to be paid all present and future Taxes, fees and levies on or with respect to the sale of the Products prior to the Delivery Point. PSNH shall pay or cause to be paid all present and future Taxes, fees and levies on or with respect to the purchase of the Products at, from and after the Delivery Point, other than ad valorem, franchise or income taxes which are related to the sale of the Products and are, therefore, the responsibility of Seller. Each Party shall use reasonable efforts to administer this Agreement and implement its provisions in accordance with the intent of the Parties to minimize the imposition of Taxes, fees and levies.
- 13.3 **Indemnification.** On and after the Effective Date, Seller and PSNH shall each, to the extent permitted by law, indemnify, defend and hold the other, its members, officers, employees and agents (including but not limited to affiliates and contractors and their employees), harmless from and against all liabilities, damages, losses, penalties, claims, demands, suits and proceedings of any nature whatsoever for personal injury (including death) or property damage or otherwise asserted by a third party (a "Claim") that arises from or out of any event or circumstance first occurring or existing during the period when control and title to the Products is vested in such Party or which is in any manner connected with the performance of this Agreement by such Party, except to the extent that such Claim may be attributable to the gross negligence or willful misconduct of the Party seeking to be indemnified.
- 13.4 Either Party may be involved in an action and intend to seek indemnity under this Article 13 from the other Party. If so, the Party seeking indemnity must give prompt notice of the pendency of the action to the other Party. Whether or not notice is given, any Party from whom indemnity might be sought may, but need not, participate in the action for which the indemnity is requested with separate counsel and may assert all defenses available to it.

### **ARTICLE 14. FORCE MAJEURE**

- 14.1 Each Party shall conform to Good Industry Practice in performing its obligations hereunder. Neither Party shall be considered to be in default with respect to any

obligation hereunder if prevented or delayed in a material respect from fulfilling such obligation by fire, strikes or other labor difficulties, casualties, civil or military authority, civil disturbance or riot, war, acts of God, acts of public enemy, drought, earthquake, flood, explosion, hurricane, lightning, landslide, or similar cataclysmic occurrence, or if NEPOOL or ISO-NE experiences unplanned-for emergency system conditions, including but not limited to a shortage of available electric generating capacity or an insufficiency of transmission or distribution facilities required for the delivery of Products, such that NEPOOL or ISO-NE either must suspend the supply of one or more of the Products or must curtail or interrupt all or a portion of the Products, or other event beyond the reasonable control of the Party affected (“Force Majeure”); *provided, however*, that the price or pricing structure of any Product or any applicable fuel or energy source shall not be considered a Force Majeure event.

14.2 If either Party is rendered wholly or partly unable to perform its obligations under this Agreement because of Force Majeure, that Party shall be excused from whatever performance is affected by the Force Majeure to the extent so affected; *provided, that* payments due hereunder from either Party to the other when due shall not be excused by Force Majeure (unless the Party’s inability to pay arises from a Force Majeure event affecting such Party’s payment mechanism or the banking system as a whole); *and provided, further*, that:

- (a) The non-performing Party promptly, but in no case later than five (5) Business Days after the occurrence of the Force Majeure, gives the other Party notice describing the particulars of the occurrence describing, in detail, the nature, extent and expected duration of the Force Majeure;
- (b) The suspension of performance shall be of no greater scope, and of no longer duration, than is reasonably required by the Force Majeure; and
- (c) The non-performing Party uses commercially reasonable efforts to remedy its inability to perform.

14.3 Neither Party shall be required to settle any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, is contrary to its interest, it being understood and agreed that the settlement of strikes, walkouts, lockouts or other labor disputes shall be entirely within the discretion of the Party having such difficulty.

## **ARTICLE 15. LIMITATION OF LIABILITIES**

15.1 Neither Party shall be liable to the other Party in connection with this Agreement for any special, indirect, incidental, consequential, punitive or exemplary damages of any kind, including but not limited to loss of use, and lost profits (past or future), by statute, in tort or contract, under any indemnity provision, or otherwise.

## ARTICLE 16. REPRESENTATIONS AND WARRANTIES

16.1 Seller hereby represents and warrants to PSNH as follows:

- 16.1.1 Seller has full power and authority to execute and deliver this Agreement, and Seller shall continue to have full power and authority to perform its obligations hereunder, and to consummate the transactions contemplated hereby during the Term of this Agreement. The execution and delivery of this Agreement by Seller and the consummation by it of the transactions contemplated hereby have been duly and validly authorized by all necessary action required on its part and this Agreement has been duly and validly executed and delivered by Seller. For the Term of this Agreement, Seller agrees that this Agreement shall constitute Seller's legal, valid and binding agreement, enforceable against Seller in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium or other similar laws affecting or relating to enforcement of creditors' rights generally and general principles of equity (regardless of whether enforcement is considered in a proceeding at law or in equity).
- 16.1.2 Neither the execution and delivery of this Agreement by Seller nor the consummation by Seller of the transactions contemplated hereby during the Term of this Agreement will (i) conflict with or result in any breach or violation of any provision of the enabling legislation, bylaws, certificate of formation, LLC agreement, and any other applicable governing or formation documents of Seller, (ii) result in a default (or give rise to any right of termination, consent, cancellation or acceleration) under any of the terms, conditions or provisions of any note, bond, mortgage, indenture, material agreement or other instrument or obligation to which Seller is a party or by which it may be bound, except for such defaults (or rights of termination, cancellation or acceleration) as to which requisite waivers or consents have been obtained; or (iii) constitute violations of any law, regulation, order, judgment or decree applicable to Seller.
- 16.1.3 Except for the Seller Required Approvals, which Approvals Seller agrees to obtain in order to satisfy the Prerequisites for Purchases set forth in Article 4, no consent or approval of, filing with, or notice to, any governmental authority by or for Seller is necessary for the execution and delivery of this Agreement by it, or the consummation by it of the transactions contemplated hereby.
- 16.1.4 Seller agrees that during the Term of this Agreement, Seller shall comply with any and all filing and notice requirements, conditions or orders made part of, included with or subsequently added to Seller Required Approvals. Seller further agrees, during the Term of this Agreement, to fully comply with its organizational and governing documents and determinations of any governmental instrumentality applicable to Seller.



16.2 PSNH hereby represents and warrants to Seller as follows:

- 16.2.1 PSNH is a corporation organized and validly existing under the laws of the State of New Hampshire.
- 16.2.2 PSNH has full corporate power and authority to execute and deliver this Agreement, and PSNH shall continue to have full power and authority, to perform its obligations hereunder and to consummate the transactions contemplated hereby during the Term of this Agreement. Upon the fulfillment of all of the prerequisites for purchases set forth in Article 4, the execution and delivery of this Agreement by PSNH and the consummation by it of the transactions contemplated hereby have been duly and validly authorized by all necessary corporate action required on its part and this Agreement has been duly and validly executed and delivered by PSNH. For the Term of this Agreement, PSNH agrees that this Agreement shall constitute PSNH's legal, valid and binding agreement of PSNH, enforceable against PSNH in accordance with its respective terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium or other similar laws affecting or relating to enforcement of creditors' rights generally and general principles of equity (regardless of whether enforcement is considered in a proceeding at law or in equity).
- 16.2.3 Subject to any required FERC acceptance and approval of the Interconnection Agreement under the Federal Power Act and FERC's Rules of Practice and Procedure, neither the execution and delivery of this Agreement by PSNH, nor the consummation by PSNH of the transactions contemplated hereby during the Term of this Agreement will (i) conflict with or result in any breach or violation of any provision of the certificate of incorporation or bylaws of PSNH, (ii) result in a default (or give rise to any right of termination, consent, cancellation or acceleration) under any of the terms, conditions or provisions of any note, bond, mortgage, indenture, material agreement or other instrument or obligation to which PSNH is a party or by which it may be bound, except for such defaults (or rights of termination, cancellation or acceleration) as to which requisite waivers or consents have been obtained; or (iii) constitute violations of any law, regulation, order, judgment or decree applicable to PSNH.
- 16.2.4 Except for any required FERC acceptance and approval of the Interconnection Agreement under the Federal Power Act and FERC's Rules of Practice and Procedure and except for the NHPUC final decision referenced in Section 4.1.3, no consent or approval of, filing with, or notice to, any governmental authority by or for PSNH is necessary for the execution and delivery of this Agreement by it, or the consummation by it of the transactions contemplated hereby.

## ARTICLE 17. ASSIGNMENT

- 17.1 This Agreement shall inure to the benefit of and shall be binding upon the Parties and their respective successors and assigns. Except as specified below and in Article 7, the rights and obligations of the Parties to this Agreement may not be assigned by

either Party without the prior written consent of the other Party, which consent shall not unreasonably be withheld, conditioned, delayed or denied; provided, however, that no assignment authorized pursuant to this Article 17 shall release the Assigning Party from any of its obligations under this Agreement unless a written release is executed by the non-assigning Party in the non-assigning Party's sole discretion. As a condition of its consent, any person to whom an assignment is made shall be required to demonstrate, to the reasonable satisfaction of the non-assigning Party, that it is capable of fulfilling the assigning Party's obligations hereunder.

- 17.2 Notwithstanding Section 17.1, PSNH shall have the right to assign, without the consent of Seller and without recourse to PSNH, all or any part of PSNH's interest and obligations hereunder to any regulated affiliated New Hampshire electricity distribution company of equivalent or better creditworthiness.
- 17.3 Notwithstanding Section 17.1, Seller shall have the right to assign, without the consent of PSNH, its rights and interests hereunder, including any right to receive payments under this Agreement, to any bank, insurance company, capital fund or similar financial institution or entity providing financing to Seller (including a sale/leaseback financing), *provided that* no such assignment shall relieve Seller of responsibility or liability for the due performance of this Agreement. PSNH agrees, upon receipt of a written request from Seller, to execute a commercially reasonable consent to any such collateral assignment by Seller providing for, among other things, simultaneous notices to Facility capital providers, a right (but not obligation) of such capital providers to cure any Seller default hereunder, and the directing of payments due Seller hereunder directly to such capital providers.
- 17.4 Any purported assignment not in compliance with this Article 17 shall be null and void.
- 17.5 **Assignment.** PSNH hereby consents to the assignment by LBB of all right, title and interest of LBB in and to the Original PPA to Seller. PSNH and Seller hereby amend and restate the Original PPA, the terms of which are superseded in their entirety by the terms of this Agreement.

## ARTICLE 18. TRANSFER OF OWNERSHIP

- 18.1 Except in connection with a sale/leaseback financing in which Seller remains in control of Facility operations, during the Term hereof, Seller shall not sell or transfer ownership of the Facility without prior written approval of PSNH, which approval shall not be unreasonably withheld or delayed so long as the purchasing entity agrees to assume and be bound by the terms of this Agreement.

## ARTICLE 19. AUDIT RIGHTS

- 19.1 PSNH and Seller shall each have the right throughout the Term and for a period of three (3) years following the end of the Term, upon reasonable prior notice, to audit copies of relevant portions of the books and records of the other Party to the limited extent necessary to verify the basis for any claim by a Party for payment from the

other Party or to determine a Party's compliance with the terms of this Agreement. The Party requesting the audit shall pay the other Party's reasonable costs allocable to such audit.

## ARTICLE 20. GOVERNMENT ACTIONS

- 20.1 Seller and PSNH shall at all times comply with all valid and applicable federal, state and local laws, rules, regulations and orders in connection with the performance of their respective obligations under this Agreement.
- 20.2 Seller shall use commercially reasonable efforts to obtain and retain any permits, licenses, approvals or other governmental authorizations required for the construction and operation of the Facility and Seller's performance pursuant to this Agreement for the Term. PSNH shall cooperate with Seller to obtain and retain such permits, licenses, approvals and authorizations to the extent reasonably requested by Seller, but only to the extent that PSNH does not incur any unreasonable costs in connection with that cooperation.

## ARTICLE 21. NOTICES

- 21.1 All notices, including communications and statements which are required or permitted under the terms of this Agreement, shall be in writing, except as otherwise provided or as reasonable under the circumstances. Service of a notice may be accomplished and will be deemed to have been received by the recipient Party on the day of delivery if delivered by personal service, on the day of confirmed receipt if delivered by telegram, registered or certified commercial overnight courier, or registered or certified mail or on the day of transmission if sent by telecopy or email with evidence of receipt obtained, to each Party at the following addresses:

To PSNH: Public Service of New Hampshire  
Public Service Company of New Hampshire  
PSNH - Energy Park  
780 N. Commercial Street  
P. O. Box 330  
Manchester, NH 03105-0330  
Attn.: Manager, Supplemental Energy Sources Department  
Phone: (603) 634-2931  
Fax: (603) 634-2449  
Email: psnhsesd@psnh.com

With an additional notice to Buyer of an Event of Default to:

Public Service Company of New Hampshire  
PSNH - Energy Park  
780 N. Commercial Street  
Manchester, New Hampshire 03101  
Attention: Assistant General Counsel  
Fax: (603) 634-2438  
Phone: (603) 634-3355

To Seller: Berlin Station, LLC  
c/o Cate Street Capital, Inc.  
One Cate Street  
Portsmouth, New Hampshire 03801-7108  
Phone: (603) 319-4400  
Fax: (603) 584-1315

- 21.2 The designation of such persons and/or address may be changed at any time by either Party upon notice given pursuant to the requirements of this Section.

## ARTICLE 22. GOVERNING LAW; VENUE

- 22.1 **Governing Law.** Interpretation and performance of this Agreement shall be in accordance with, and shall be controlled by, (i) the laws of the State of New Hampshire other than any conflicts of law provision, the effect of which would be to apply the substantive law of a state other than the State of New Hampshire to the governance and construction of this Agreement; (ii) Part II of the Federal Power Act, 16 U.S.C. §§824d *et seq.*; (iii) Part 35 of Title 18 of the Code of Federal Regulations, 18 C.F.R. §§ 35 *et seq.*; and (iv) present and future laws and present and future regulations or orders properly issued by local, state, or federal bodies having jurisdiction over the matters set forth herein.
- 22.2 **Venue.** Subject to Article 25, Dispute Resolution, any dispute arising out of this Agreement shall be brought in a court of competent jurisdiction located in Manchester in the State of New Hampshire. Each Party irrevocably waives any objection which it may have to the venue of any proceeding brought in any such court and waives any claim that such proceedings have been brought in an inconvenient forum.

## ARTICLE 23. CHANGE IN LAW

- 23.1 **Change in Law.** If, during the Term, a Change in Law occurs or any of the ISO-NE Documents are changed, resulting in elimination of or a material adverse affect upon a material right or obligation of a Party, then unless such Change in Law is otherwise specifically addressed herein, the Parties will negotiate in good faith in an attempt to amend this Agreement to incorporate such changes as they mutually deem necessary to reflect the Change in Law or the change in any ISO-NE Documents. The intent of

the Parties is that any such amendment reflects, as closely as possible, the intent and substance of the economic bargain before the Change in Law or the change in any ISO-NE Documents. If the Parties are unable to reach agreement on such an amendment, the Parties agree to resolve the matter pursuant to the terms of Article 25 of this Agreement.

#### **ARTICLE 24. FERC AND NHPUC REVIEW; CERTAIN COVENANTS AND WAIVERS**

- 24.1 It is the intention of the Parties that neither Seller nor PSNH shall have the unilateral right to make a filing with FERC under any section of the Federal Power Act, or with the NHPUC, seeking to change the charges or any other terms or conditions set forth in this Agreement for any reason. The preceding sentence shall not prevent (i) either Party from participating in or initiating any proceeding at FERC concerning a change to the ISO-NE Documents that impact this Agreement or (ii) PSNH from seeking NHPUC review and/or approval of any material discretionary actions to be taken by PSNH in performing under this Agreement, such as PSNH's exercise or transfer of the Purchase Option Agreement, transfer of the Cumulative Reduction, transfer of the Right of First Refusal, or incurrence of expenditures under Article 8 hereof.
- 24.2 It is the intention of the Parties that any authority of FERC or the NHPUC to change this Agreement shall be strictly limited to that authority which applies when the Parties have irrevocably waived their right to seek to have FERC or the NHPUC change any term of this Agreement.
- 24.3 FERC Standard of Review; Certain Covenants and Waivers.
- 24.3.1 Absent the agreement of all Parties to a proposed change, the standard of review for changes to any section of this Agreement specifying the pricing or other material economic terms and conditions agreed to by the Parties herein, whether proposed by a Party, a non-party or FERC acting sua sponte, shall solely be the "public interest" application of the "just and reasonable" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 128 S.Ct. 2733 (June 26, 2008) (the "*Mobile-Sierra*" doctrine).
- 24.3.2 The Parties, for themselves and their successors and assigns, (i) agree that the "public interest" standard of review shall apply to any proposed changes in any other documents, instruments or other agreements executed or entered into by the Parties in connection with this Agreement, and (ii) hereby expressly and irrevocably waive any rights they can or may have to the application of any other standard of review, including the "just and reasonable" standard.
- 24.3.3 Notwithstanding the foregoing Sections 24.3.1 and 24.3.2, to the fullest extent permitted by applicable law, each Party, for itself and its successors and assigns,

hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under §§ 205 and/or 206 of the Federal Power Act or otherwise, to seek to obtain from FERC, or to support another in obtaining, by any means, directly or indirectly (through complaint, investigation or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, or support another in obtaining, an order from FERC changing any section of this Agreement specifying the pricing, charges, classifications or other economic terms and conditions agreed to by the Parties. It is the express intent of the Parties that, to the fullest extent permitted by applicable law, the “sanctity of contract” principles acknowledged by FERC in its Notice of Proposed Policy Statement (issued August 1, 2002) in Docket No. PL02-7-000, Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities, shall prevail, notwithstanding any changes in applicable law or markets that may occur. In the event it were to be finally determined that applicable law precludes one or both Parties from waiving its rights to seek changes from FERC to its market-based power sales contracts (including entering into covenants not to do so) then this Section 24.3.3 shall not apply, *provided that*, consistent with Section 24.3.1, neither Party shall seek any such changes except under the “public interest” standard of review and otherwise as set forth in Section 24.3.1.

- 24.3.4 The Parties agree that in the event that any portion of this Section 24.3 is determined to be invalid, illegal or unenforceable for any reason, the remaining provisions of Section 24.3 shall be unaffected and unimpaired thereby, and shall remain in full force and effect, to the fullest extent permitted by applicable law.

## **ARTICLE 25. DISPUTE RESOLUTION**

- 25.1 **Negotiation Between Executives.** The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any Party may give the other Party notice of any dispute not resolved in the normal course of business. Such notice shall include: (a) a statement of that Party’s position and a summary of arguments supporting that position; and (b) the name and title of the executive who will be representing that Party and of any other person who will accompany the executive (“Initial Notice”). Within five (5) Business Days after delivery of the Initial Notice, the receiving Party shall respond with: (a) a statement of that Party’s position and a summary of arguments supporting that position; and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within ten (10) Business Days after delivery of the Initial Notice, the executives of both Parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as

compromise and settlement negotiations for purposes of applicable rules of evidence.

- 25.2 Mediation. If the dispute has not been resolved by negotiation within twenty (20) Business Days of the disputing Party's Initial Notice, or if the Parties failed to meet within five (5) Business Days of the delivery of the Initial Notice, the Parties shall endeavor to settle the dispute by mediation under the then-current CPR Mediation Procedure. Unless otherwise agreed, the Parties will select a mediator from the CPR Panels of Distinguished Neutrals.
- 25.3 Arbitration. Except in cases where the dispute is subject to NHPUC and/or FERC jurisdiction, any dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which has not been resolved by one of the non-binding procedures set forth in Sections 25.1 and 25.2 within thirty (30) Business Days of the delivery of Initial Notice, shall be finally resolved by binding arbitration in accordance with the then-current CPR Rules for Non-Administered Arbitration (the "CPR Rules") by a sole arbitrator, for disputes involving amounts in the aggregate under three million dollars (\$3,000,000), or three arbitrators, for disputes involving amounts in the aggregate equal to or greater than three million dollars (\$3,000,000), of whom each Party shall designate one in accordance with the "screened" appointment procedure provided in Rule 5.4 of the CPR Rules; *provided, however,* that if either Party will not participate in a non-binding procedure, the other may initiate arbitration before expiration of the above period. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, with appeals limited to the grounds expressed therein, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be Manchester, New Hampshire. The arbitrator(s) are not empowered to award damages in excess of compensatory damages and each Party expressly waives and forgoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.
- 25.4 The fees and expenses associated with mediation and arbitration, including the costs of arbitrators, shall be divided equally between the Parties. Each Party shall be responsible for its own legal fees, including but not limited to attorney fees. The Parties may, by written agreement signed by both Parties, alter any time deadline, location(s) for meeting(s), or procedure outlined herein or in the CPR Rules. The procedure specified herein shall be the sole and exclusive procedure for the resolution of disputes arising out of or related to this Agreement. To the fullest extent permitted by law, any resolution, mediation or arbitration proceeding and the settlement or arbitrator's award shall be maintained in confidence by the Parties.
- 25.5 **WAIVER OF JURY TRIAL. EACH PARTY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF, RESULTING FROM OR IN ANY WAY RELATING TO THIS AGREEMENT.**

## ARTICLE 26. MISCELLANEOUS

- 26.1 **Confidentiality.** The terms of this Agreement, and any other information exchanged by PSNH and Seller relating to this Agreement, shall not be disclosed to any person not employed or retained by the PSNH or Seller or their Affiliates, except to the extent disclosure is (1) required by law, required to be made to any governmental authority for obtaining any approval, permits and licenses, or making any filing in connection therewith, required by the Interconnection Agreement or delivered by Seller to ISO-NE or to any Person exercising authority over Seller or the Facility for the purpose of maintaining the safety or reliability of the electric system into which the Energy output is delivered, (2) reasonably deemed by the disclosing Party to be required to be disclosed in connection with a dispute between or among the Parties, or the defense of any litigation or dispute, or any financing related to the Facility, (3) otherwise permitted by consent of the other Party, which consent shall not be unreasonably withheld, (4) required to be made in connection with regulatory proceedings (including proceedings relating to FERC, the United States Securities and Exchange Commission or any other federal, state or provincial regulatory agency) or pursuant to the rules or regulations of any stock exchange to which a Party or any of its Affiliates are bound. In the event disclosure is made pursuant to this provision, the Parties shall use reasonable efforts to minimize the scope of any disclosure and have the recipients maintain the confidentiality of any documents or confidential information covered by this provision, including, if appropriate, seeking a protective order or similar mechanism in connection with any disclosure. This provision shall not apply to any information that was or is hereafter in the public domain (except as a result of a breach of this provision). The Parties specifically agree that any press release or other public statement that addresses specific commercial terms of this Agreement shall be mutually agreed upon and the text thereof approved by the Parties.
- 26.2 **Project Financial Information.** Seller agrees to provide project financial information related to the Facility as reasonably requested from time to time by PSNH in order to meet PSNH's FASB, SEC and FERC accounting and reporting requirements.
- 26.3 **Severability.** The provisions of this Agreement are severable. To the extent that any provision hereof is determined to be invalid pursuant to any applicable statute or rule of law, such invalidity shall not affect any other provision hereof, and this Agreement shall be interpreted as if such invalid provision were not a part hereof.
- 26.4 **Waiver.** No waiver by either Party of the performance of any obligation under this Agreement or with respect to any default or any other matter arising in connection with this Agreement shall be deemed a waiver with respect to any subsequent performance, default or matter.
- 26.5 **Survivability.** This Agreement shall survive termination, expiration, cancellation, suspension, or completion of the agreements set forth herein to the extent necessary to allow for final accounting, final billing, billing adjustments, resolution of any billing dispute, resolution of any court or administrative proceeding and final



payments. All billing verification rights and confidentiality obligations shall survive for two (2) years beyond the applicable terms, and indemnification provisions shall survive for the full statutory period allowable by applicable law.

- 26.6 **No Duty to Third Parties.** Nothing in this Agreement nor any action taken hereunder is intended to or shall be construed to create any duty, liability or standard of care to or from any person not a Party to this Agreement. However, lenders to the Seller or to the Facility may have the option to perform certain Seller obligations as defined more fully under the terms of the financing documents related to the Facility.
- 26.7 **Amendment.** No amendment of all or any part of this Agreement shall be valid unless it is reduced to writing and signed by both Parties and, in the case of a material amendment, approved by the NHPUC.
- 26.8 **Complete and Full Agreement.** This Agreement sets forth the entire agreement of the Parties with respect to the subject matter herein, and takes precedence over all prior understandings between the Parties, and binds and inures to the benefit of the Parties, their successors and assigns.
- 26.9 **Counterparts.** Any number of counterparts of this Agreement may be executed and each shall have the same force and effect as the original.

IN WITNESS WHEREOF, PSNH and Seller have caused this Agreement to be executed by their respective duly authorized officers as of the date first above written.

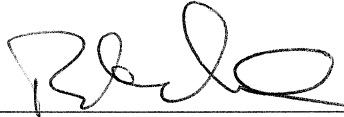
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: \_\_\_\_\_  
 Name: Gary A. Long  
 Title: President and Chief Operating Officer

BERLIN STATION, LLC

By: Robert Desrochers  
 Name: ROBERT DESROCHERS  
 Title: VP of Ops Manager Core Street Capital Inc.

LIDLAW BERLIN BIOPOWER, LLC

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

Name: ROBERT DESROIS

Title: Manager

**APPENDIX A**

**DESCRIPTION OF FACILITY**

The Facility will be located at the former Fraser Paper Mill located at Commercial Street in Berlin, NH (the “Project Site”). The Facility is expected to utilize Biomass Fuel as its primary fuel. The Facility will be designed and operated as a NH Class I renewable energy source.

## APPENDIX B

### FORM OF PURCHASE OPTION AGREEMENT

This PURCHASE OPTION AGREEMENT (this "Option Agreement") is made as of \_\_\_\_\_, 20\_\_ (the "Effective Date") by and between **Public Service Company of New Hampshire**, a New Hampshire corporation ("PSNH"), **Berlin Station, LLC**, a Delaware limited liability company ("Site Owner" or "Berlin Station"), and **Burgess Biopower, LLC**, a Delaware limited liability company ("Burgess"). PSNH, Site Owner and Burgess (together with their respective successors and assigns) are the "Parties" and each individually is a "Party" to this Option Agreement.

#### RECITALS:

A. Site Owner is developing a biomass fueled electric generating facility having a gross generating capacity output of approximately 70 megawatts (the "Facility") located on an approximately sixty-two (62) acre site in Berlin, New Hampshire, as more particularly described in Exhibit "A" attached hereto and made a part hereof (the "Facility Site"). For purposes of this Option Agreement, the Facility Site includes all land described in Exhibit "A" and all easements, rights and other real estate interests appurtenant thereto, whether now owned or hereafter acquired by Site Owner, for the use or benefit of the Facility Site and the Facility, and the Facility includes all equipment, generators, boilers, transformers, switching equipment, transmission lines, and other fixtures, trade fixtures, together with articles of personal property necessary to or convenient for the operation of the Facility.

B. Site Owner is the sole owner in fee simple of the Facility Site and the Facility under the deed or deeds recorded in the Coos County Registry of Deeds at Book 1265, Page 1025. The Facility Site is a separate tax and zoning lot (or lots) on the zoning and tax assessment records of the City of Berlin, designated as Tax Map: 129, Parcel: 54.01, 54.001.

C. Burgess is the lessee of the Facility Site and the Facility.

D. Burgess and Site Owner anticipate that subsequent to the execution and recording of this Option Agreement, Site Owner will continue to be the sole owner in fee simple of, and will lease the Facility and Facility Site to Burgess under a sale/leaseback financing arrangement, with all such arrangements being expressly made subject and subordinate to PSNH's rights hereunder.

E. PSNH, LBB and Berlin Station, LLC have entered into a certain Amended and Restated Power Purchase Agreement dated as of May 18, 2011 (the "Amended PPA") under which PSNH has agreed to purchase the Facility output conditioned upon, among other things, the execution and recording of this Option Agreement.

NOW THEREFORE, in consideration of PSNH's promises to purchase the "Products" (as defined in the PPA) of the Facility at the prices and under the terms of the Amended PPA, and other good and valuable consideration, the Parties agree as follows:

1. **Grant of Option.** Site Owner hereby grants to PSNH, and its successors and assigns, for the fixed period co-extensive with the fixed period of the twenty (20) "Operating Years" from the "In-Service Date" (as defined under the Amended PPA), an exclusive, irrevocable option (the "Option") to purchase the Facility and the Facility Site (together, the "Facility Assets") within the Option Exercise Period hereafter stated and subject to the purchase conditions and terms hereafter stated. Upon the exercise of the Option by PSNH, this Option Agreement shall constitute the agreement of sale and purchase between the Parties with respect to the Facility Assets. Burgess hereby takes and confirms notice of the Option as an interest in the Facility and Facility Site that is prior in right to any leasehold or other estate granted to Burgess by Site Owner.

2. **Option Exercise Period and Termination.**

(a) Except as otherwise provided herein, the "Option Exercise Period" shall commence on the date that is the day after the 20<sup>th</sup> anniversary date of the designated "In-Service Date" under the Amended PPA and shall extend for one hundred and twenty (120) days. This Option Agreement shall terminate upon the expiration or termination of the Option Exercise Period; provided that if the Option is exercised as provided herein within the Option Exercise Period, then this Option Agreement shall remain in effect to the extent necessary to complete the transactions contemplated hereunder.

(b) Notwithstanding the forgoing, Site Owner may terminate this Option Agreement and the Option without further obligation of any Party at any time subsequent to a valid termination of the Amended PPA by Berlin Station pursuant to Section 12.1.1 of the Amended PPA. This Option Agreement shall otherwise remain in full force and effect as set forth in Section 2(a) above.

3. **Exercise of Option.** In order to exercise the Option, PSNH shall provide a written notice to the Site Owner (or any successor thereof of record) within the Option Exercise Period, which notice shall include a statement of the value of the Cumulative Reduction (as defined in the Amended PPA) existing as of the date of expiration or termination of the Amended PPA. PSNH shall provide such information as Site Owner shall reasonably request supporting the calculation of the Cumulative Reduction. Any disagreement between the Parties as to the calculation of such Cumulative Reduction value will be resolved as per Section 12 below, but no such request for supporting information or dispute shall negate the effectiveness of PSNH's notice of the exercise of the Option. If PSNH exercises the Option within the Option Exercise Period, then the Parties will use diligent and good faith efforts to close on the transfer of the Facility Assets to PSNH as soon as reasonably practicable, and in no case later than one hundred eighty (180) days from PSNH's notice exercising the Option.

**4. Purchase Price.**

(a) The "Purchase Price" for the Facility Assets pursuant to the Option shall equal (i) the fair market value of the Facility Assets as of commencement of the Option Exercise Period (assuming the Facility Assets are sold free of all financing liens and encumbrances) less (ii) any Cumulative Reduction value (expressed as a positive number for purposes of this calculation), provided that the Purchase Price shall not be less than zero.

(b) If the Parties are unable to establish a mutually-agreeable fair market valuation for the Facility Assets within the first twenty (20) days after the exercise of the Option, then PSNH and Site Owner shall each select two (2) qualified independent commercial appraisers to provide a fair market valuation of such Facility Assets. The highest and lowest of the resulting four (4) appraisal valuations shall be discarded, and the remaining two (2) valuations shall be averaged to arrive at a binding fair market value for the Facility Assets as soon as practicable (and no later than 70 days after the exercise of the Option). Any disputed and unresolved issues, other than establishment of the Purchase Price, shall be submitted for dispute resolution in accordance with Section 12 below. The appraisals shall be based on the value of the highest and best use of the Facility Assets for their then existing use as an electric generating facility (whether as an operational facility or otherwise), and will not take into account the existence of this Option Agreement, the status or value of the Amended PPA, or the Cumulative Reduction.

**5. Due Diligence, Inspection and Investigation.**

(a) At any time during the Option Exercise Period, at the request of PSNH, or its duly authorized agents, contractors or consultants, Site Owner and Burgess will promptly provide PSNH with access to all documents and records in their possession regarding the Facility Assets and their operation, including (but not limited to) permits, licenses, contracts, leases, project documents, material warranties, operational reports, invoices, financial statements, operational books and records, maintenance and repair records, property tax bills, surveys, agreements with governmental agencies, environmental site assessments, engineering studies or reports, plans, and other documents or reports of whatever nature or description and relating to the Facility Assets and reasonably required by PSNH to evaluate the condition of, title to, and operational economics of the Facility Assets.

(b) At any time during the Option Exercise Period, PSNH, or its duly authorized agents, contractors or consultants, at its own expense may enter and inspect, examine, test and assess the Facility Assets, including, but not limited to, the soil, subsoil, topography, existing fill, drainage, surface and groundwater quality, air and water rights, availability of utilities, zoning, legal compliance, access, suitability, assessments, encroachments, environmental matters, flood plain analysis, wetland requirements, title matters, taxes and all other inspections deemed necessary, desirable or appropriate by PSNH, and Site Owner and Burgess shall fully cooperate with PSNH in promptly providing access to the Facility Assets for such purposes.

(c) In making any entry pursuant to paragraph (b) above, PSNH and its agents, employees, contractors and representatives shall: (i) enter upon the Facility and the Facility Site at their own risk; (ii) conduct all activities on the Facility and the Facility Site in such a way as to minimize damage to the Facility Assets or disruption of Facility operations, indemnify Site Owner and Burgess for any actual damages caused by entry activities and remedy the effects of such entry on the Facility and Facility Site; and (iii) conduct all activities on the Facility and the Facility Site under commercially appropriate liability insurance and at the sole cost and expense of PSNH. Each of Burgess and Site Owner shall cause its officers, employees and any other person operating or otherwise in possession of the Facility Assets to provide entry to the Facility and the Facility Site to PSNH and its duly authorized agents, contractors and consultants, for the purposes described in this Option Agreement.

(d) Notwithstanding anything to the contrary contained in this Option Agreement, PSNH reserves the right to review and consider the results of its due diligence inspections and investigations of the Facility Assets, and to determine whether and to what extent the results of same are satisfactory to PSNH, or not, in its sole and absolute discretion.

## **6. Title and Title Insurance.**

(a) Concurrently with the execution of this Option Agreement and a recording of a memorandum thereof, Site Owner and Burgess, at their sole cost and expense, shall be required to obtain and provide to PSNH a policy of title insurance issued by a nationally recognized title insurance company, in form and content acceptable to PSNH insuring PSNH's interest in and under this Option Agreement as of the Effective Date, free of all secured lending arrangements, mortgages, leaseholds and other liens and encumbrances upon the Facility and Facility Site as of the Effective Date, and subject only to those existing easements, covenants and restrictions of record as PSNH shall determine after suitable review and in its sole discretion are acceptable as necessary or appropriate to operate or maintain the Facility on the Facility Site, will not materially interfere with or restrict such operation or maintenance, or are otherwise acceptable (the "Permitted Encumbrances"). The amount of such title insurance shall be Forty Seven Million Dollars (\$47,000,000), and shall include an endorsement to coverage affirmatively insuring the Option Agreement and PSNH's interest thereunder against unenforceability or other loss due to or resulting from violation of the New Hampshire Rule Against Perpetuities. A Commitment of Title Insurance shall be provided to PSNH prior to execution of this Option Agreement and the recording of a memorandum thereof, to allow for PSNH's suitable review to determine compliance with this provision.

(b) All secured lending arrangements, mortgages, leaseholds and other liens and encumbrances upon the Facility Site and other Facility Assets as of the Effective Date shall be discharged or fully subordinated to PSNH's rights under this Option Agreement. Subsequent to the Effective Date, Site Owner may grant or allow, without PSNH's consent but with notice to PSNH, any mortgage, security interest, leasehold, or other lien, encumbrance, or conveyance of or upon the Facility Assets that it determines

necessary or appropriate in connection with the financing and operations of the Facility Assets (the "Subsequent Encumbrances"); *provided*, that all such Subsequent Encumbrances shall remain subject and subordinate to the prior Option rights of PSNH hereunder. PSNH may require that the holder of any Subsequent Encumbrance confirm PSNH's prior rights hereunder. PSNH will not unreasonably withhold its consent to the subordination of its rights hereunder to a Subsequent Encumbrance that is not a mortgage, grant of any security interest, leasehold or other similar lien, and is necessary or appropriate to operate or maintain the Facility Assets, such as third party utility or service easements. Nothing in this Option Agreement shall act as a restraint on the sale or transfer of the Facility Assets; *provided*, that any such sale or transfer shall remain expressly subject to PSNH's rights hereunder, which rights shall be binding on any subsequent owner of any Facility Asset.

(c) During the Option Exercise Period, PSNH shall be entitled, at its sole cost and expense, to examine the title to the Facility Assets and to obtain a commitment from a title insurance company acceptable to PSNH evidencing satisfactory title vested in the Site Owner as of the effective date thereof, and pursuant to which such title insurance company agrees to issue to PSNH, in form and content acceptable to PSNH, an owner's policy of title insurance, for an amount not less than the Purchase Price to be determined hereunder, at standard premium rates, and subject only to the standard policy coverage terms, conditions, exceptions and exclusions, but excepting the Permitted Encumbrances and those new or additional existing easements, covenants and restrictions of record, if any, as PSNH shall determine after suitable review in its sole discretion are acceptable as necessary or appropriate to operate or maintain the Facility on the Facility Site, will not materially interfere with or restrict such operation or maintenance, or are otherwise acceptable (the "Additional Permitted Encumbrances").

**7. Conveyance of Title.** At closing on transfer of the Facility Assets pursuant to an exercise of the Option, Site Owner shall cause to be executed and delivered to PSNH or its successor or assignee a quitclaim deed or deeds, and such assignments, bills of sale and other customary conveyance documents, all in form and content acceptable to PSNH and its title insurer, as are necessary for conveying good and insurable title to the Facility Assets free from all defects, liens, security interests, easements, restrictions, covenants, encroachments, and any other encumbrances, except: (i) real estate taxes and assessments not yet due and payable; (ii) the Permitted Encumbrances and the Additional Permitted Encumbrances, if any; and (iii) such other matters as may be consented to or waived in writing by PSNH at any time prior to such closing. In connection with any such closing, Site Owner and/or Burgess shall cause to be transferred to PSNH (to the extent assignable or transferable) by such transfer instruments as shall in form and content be acceptable to PSNH all other personal and intangible property held or controlled by either of them with respect to the Facility or Facility Site, including but not limited to permits, authorizations, exemptions, agreements, vehicles, tools, inventory and spare parts. All Facility Assets will be transferred on an "as is" basis without warranties as to physical condition.



**8. Closing Expenses and Apportionments.**

(a) All real estate and personal property taxes and assessments, including all unpaid portions of any general or special assessments, levied or assessed against the Facility and the Facility Site ("Taxes"), shall be apportioned between the Parties as of the closing in accordance with closing practice in Coos County, New Hampshire.

(b) Unless otherwise specified herein, all Taxes that are the subject of a statutory lien on the Facility or the Facility Site as of the closing shall be paid by the Site Owner.

(c) Site Owner shall pay for (i) costs to discharge or clear any unpermitted liens or encumbrances, (ii) the costs of any appraisals it is required to provide under Section 5(b); (iii) the costs of its own legal and accounting fees; (iv) one half of the NH Real Estate Transfer Tax; and (v) all fees and costs associated with the transfer or assignment of all permits, licenses and approvals then in effect with respect to the Facility and its operations ("Facility Authorizations").

(d) PSNH shall pay for (i) one half of the NH Real Estate Transfer Tax, (ii) closing title searches and title insurance premium for any Owner's Policy, (iii) the costs of any appraisals it is required to provide under Section 5(b); (iv) the costs of its own legal and accounting fees; and (v) the cost of obtaining any authorization required for PSNH to exercise the Option and take assignment of the Facility Assets, including any assigned Facility Authorizations.

**9. Representations, Warranties, and Covenants of the Parties.** Each Party hereby represents and warrants to the other Parties as follows as of the Effective Date:

(a) Such Party is not a party to any contract or agreement of any kind whatsoever, written or verbal, which would materially impair its ability to comply with the terms of this Option Agreement.

(b) The Party is a duly formed legal entity, validly existing under the laws of the state of its formation, is qualified to do business in the state of New Hampshire, and has all requisite power and authority to enter into this Option Agreement and to render the performance contemplated hereby.

(c) This Option Agreement is the valid and binding obligation of the Party, enforceable in accordance with its terms.

**10. Binding Effect, Assignments.** The terms, covenants and conditions of this Option Agreement shall be binding upon and enforceable by the successors and assigns of the Parties. PSNH may assign its rights hereunder to any third party at any time upon prior written notice to Site Owner and Burgess, such written notice to include a written confirmation of acceptance by the assignee. PSNH may record a memorandum evidencing any such assignment.

11. **Governing Law.** This Option Agreement shall be governed in all respects by the laws of the State of New Hampshire. Any rule against perpetuities under New Hampshire law shall not apply to this Option Agreement.

12. **Dispute Resolution.**

(a) **Negotiation Between Executives.** The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Option Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any Party may give the other Party notice of any dispute not resolved in the normal course of business. Such notice shall include: (a) a statement of that Party's position and a summary of arguments supporting that position; and (b) the name and title of the executive who will be representing that Party and of any other person who will accompany the executive ("Initial Notice"). Within seven (7) days after delivery of the Initial Notice, the receiving Party shall respond with: (a) a statement of that Party's position and a summary of arguments supporting that position; and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within fifteen (15) days after delivery of the Initial Notice, the executives of both Parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

(b) **Mediation.** If the dispute has not been resolved by negotiation within thirty (30) days of the disputing Party's Initial Notice, or if the Parties failed to meet within seven (7) days of the delivery of the Initial Notice, the Parties shall endeavor to settle the dispute by mediation under the then-current CPR Mediation Procedure. Unless otherwise agreed, the Parties will select a mediator from the CPR Panels of Distinguished Neutrals.

(c) **Arbitration.** Any dispute arising out of or relating to this Option Agreement, including the breach, termination or validity thereof, which has not been resolved by one of the non-binding procedures set forth above within forty five (45) days of the delivery of Initial Notice, shall be finally resolved by binding arbitration in accordance with the then-current CPR Rules for Non-Administered Arbitration (the "CPR Rules") by a sole arbitrator, for disputes involving amounts in the aggregate under three million dollars (\$3,000,000), or three arbitrators, for disputes involving amounts in the aggregate equal to or greater than three million dollars (\$3,000,000), of whom each Party shall designate one in accordance with the "screened" appointment procedure provided in Rule 5.4 of the CPR Rules; *provided, however*, that if either Party will not participate in a non-binding procedure, the other may initiate arbitration before expiration of the above period. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, with appeals limited to the grounds expressed therein, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction

thereof. The place of arbitration shall be Manchester, New Hampshire. The arbitrator(s) are not empowered to award damages in excess of compensatory damages and each Party expressly waives and forgoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.

The fees and expenses associated with mediation and arbitration, including the costs of arbitrators, shall be divided equally between the Parties. Each Party shall be responsible for its own legal fees, including but not limited to attorney fees. The Parties may, by written agreement signed by all Parties, alter any time deadline, location(s) for meeting(s), or procedure outlined herein or in the CPR Rules. The procedure specified herein shall be the sole and exclusive procedure for the resolution of disputes arising out of or related to this Option Agreement. To the fullest extent permitted by law, any resolution, mediation or arbitration proceeding and the settlement or arbitrator's award shall be maintained in confidence by the Parties.

(d) **WAIVER OF JURY TRIAL. EACH PARTY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF, RESULTING FROM OR IN ANY WAY RELATING TO THIS AGREEMENT.**

13. **Notices.** Any and all notices required to be delivered hereunder shall be deemed properly given if delivered personally, sent by overnight courier or mailed by registered or certified mail, return receipt requested,

To Site Owner:

Berlin Station, LLC (Delaware LLC)  
c/o Cate Street Capital, Inc  
One Cate Street, Suite 100  
Portsmouth, NH 03801  
Phone: (603) 319-4400  
Fax: (603) 584-1315

with a copy to:

Murray Plumb & Murray  
Attention: Christopher Branson  
75 Pearl Street  
Portland, ME 04104  
Fax: (207) 773-8023

To PSNH:

PSNH - Energy Park  
780 N. Commercial Street  
P. O. Box 330

Manchester, NH 03105-0330  
Attn.: Manager, Supplemental Energy Sources Department  
Phone: (603) 634-2931  
Fax: (603) 634-2449  
Email: psnhsesd@psnh.com

with an additional notice to Buyer of an Event of Default to:

Public Service Company of New Hampshire  
PSNH - Energy Park  
780 N. Commercial Street  
Manchester, New Hampshire 03101  
Attention: Assistant General Counsel  
Fax: (603) 634-2438  
Phone: (603) 634-3355

To Burgess Biomass:

c/o Cate Street Capital, Inc  
One Cate Street, Suite 100  
Portsmouth, NH 03801  
Phone: (603) 319-4400  
Fax: (603) 584-1315

or to a Party at such address as may be given by notice in accordance with this Section.

14. **Recorded Memorandum.** The Parties agree to execute and record in the Coos County Registry of Deeds a Memorandum of this Option Agreement in the form attached hereto as Exhibit "B".

15. **Termination and Release.** If the Option Term expires or is terminated without PSNH exercising the Option, PSNH agrees to execute and deliver to Burgess and Site Owner an instrument in recordable form confirming the expiration of the Option.

16. **Confirmations.** Each Party hereto will provide the other with such written confirmations as the requesting Party may reasonably request from time to time, including but not limited to the status of title, counterparties to any Subsequent Encumbrances, and the value of any Cumulative Reduction.

17. **Preservation of Facility Assets.** Burgess and Site Owner agree that on and after the Effective Date of this Option Agreement and continuing to either the termination of the Option Exercise Period if the Option is not exercised by PSNH, or to date of closing if so exercised, (i) to keep and maintain the Facility Assets in a functioning operating condition and in a good state of maintenance and repair, subject to reasonable and normal usage and necessary or required maintenance or repair outages, (ii) not to commit or allow waste or other deterioration of the Facility Assets, (iii) not to suffer or allow the creation or existence of any liens or other encumbrance upon the Facility Assets for mechanics lien claims or any unpaid real property taxes or

municipal assessments or charges of any kind, and (iv) and to promptly cause the removal or discharge of any such liens or other encumbrances at any time they may arise.

IN WITNESS WHEREOF, PSNH, Burgess, and Site Owner have caused this Agreement to be executed by their respective duly authorized officers as of the date first above written.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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

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

Title: \_\_\_\_\_

BURGESS BIOPOWER, LLC

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

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

Title: \_\_\_\_\_

BERLIN STATION, LLC

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

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

Title: \_\_\_\_\_

Exhibit "A"  
Legal Description of Facility Site

**PARCEL ONE**

A certain tract or parcel of land with buildings and improvements thereon located on the east side of the Androscoggin River, on the west side of Hutchins Street and on the north sides of Coos Street and Community Street in Berlin, Coos County, State of New Hampshire, being shown as **Tax Map 129, Parcel 54.001** on a plan of land entitled "Survey Plat Lands of North American Dismantling Corp. Tax Map 129, Parcel 54.001 and White Mountain Energy, LLC Tax Map 129, Parcel 54.01 Berlin, New Hampshire", dated December 12, 2008 as prepared by York Land Services, LLC, Plan No, 08-045A and recorded as Plan No. 3217, (the "Plan"), being bounded and described as follows:

Beginning at an iron pin marking the most northerly corner of land conveyed to White Mountain Energy, LLC as described in Coos County Registry of Deeds, Volume 1064, Page 249, being near the easterly bank of the Androscoggin River, 119.82 feet northerly of Community Street; thence

Along Public Service Company of New Hampshire the following two courses:

1. N40°33'28"E a distance of 232.47 feet to an iron pin.
2. N35°25'38"W a distance of 32 feet to a point on the east shore of the Androscoggin River; thence

Easterly along the east shore of the Androscoggin River a distance of approximately 2380 feet to a point; thence

S 60°57'44"E along other land of North American Dismantling Corporation a distance of 50 feet to an iron pin; thence continuing

S 60°57'44"E along other land of North American Dismantling Corporation a distance of 1071.24 feet to a point on the westerly sideline of Hutchins Street witnessed by an iron pin with YLS cap, found flush lying S60°57'44"E 0.11 feet distant; thence

Southerly along the westerly sideline of Hutchins Street the following nine courses:

1. Arc of a curve to the right having a length of 37.64 feet to a point; said curve having a radius of 460.00 feet and a long chord of S45°00'49"W, 37.63 feet.
2. S47°21'29"W a distance of 357.82 feet to a point.
3. Arc of a curve to the left having a length of 306.71 feet to a point; said curve having a radius of 2030.11 feet and a long chord of S43°01'47"W, 306.42 feet.
4. S38°42'06"W a distance of 164.40 feet to a point.

5. Arc of a curve to the right having a length of 402.00 feet to a point; said curve having a radius of 594.99 feet and a long chord of S58°03'24"W, 394.40 feet.
6. S77°24'43"W a distance of 374.08 feet to a point.
7. Arc of a curve to the left having a length of 318.73 feet to a point; said curve having a radius of 2030.00 feet and a long chord of S72°54'51"W, 318.40 feet.
8. S68°24'58"W, a distance of 204.80 feet to a point.
9. Arc of a curve to the right having a length of 185.16 feet to a point; said curve having a radius of 270.00 feet and a long chord of S88°03'43"W, 181.55 feet; thence

N72°17'31"W along the northerly sideline of Coos Street a distance of 635.75 feet to a point; thence

Northerly, along the arc of a curve to the right having a length of 37.96 feet to a point; said curve having a radius of 20.00 feet and a long chord of N17°55'12"W, 32.51 feet; thence

N36°27'07"E along the easterly sideline of Community Street and the westerly sideline of the former B&M Railroad a distance of 193.50 feet to an iron pin; thence

N30°58'35"W a distance of 224.19 feet to an iron pin; thence

N80°26'37"W along the northerly sideline of Community Street a distance of 150.30 feet to an iron pin; thence

Along White Mountain Energy property the following three courses:

1. N12°18'02"E a distance of 128.05 feet to a point.
2. N77° 41'58"W a distance of 229.83 feet to an iron pin.
3. N49° 28'23"W a distance of 85.21 feet, to the point of beginning.

## PARCEL TWO

A certain tract or parcel of land with buildings and improvements thereon located on the east side of the Androscoggin River, on the west side of Hutchins Street and on the north sides of Coos Street and Community Street in Berlin, Coos County, State of New Hampshire, being shown as **Tax Map 129, Parcel 54.01** on a plan of land entitled "Survey Plat Lands of North American Dismantling Corp. Tax Map 129, Parcel 54.001 and White Mountain Energy, LLC Tax Map 129, Parcel 54.01 Berlin, New Hampshire", dated December 12, 2008 as prepared by York Land Services, LLC, Plan No, 08-045A and recorded as Plan No. 3217, (the "Plan"), being bounded and described as follows:

Commencing at the southwesterly corner of the lot on the northerly side of Community Street on the easterly side of the Androscoggin River; thence

N 40°33'28"E along land of Public Service Company of New Hampshire for 119.82 feet to an iron pin, said pin also marks the beginning point of Parcel One described above; thence

Along North American Dismantling Corporation property the following three courses:

1. S 49°28'23"E a distance of 85.21 feet, to a point.
2. S 77°41'58"E a distance of 229.83 feet to an iron pin.
3. S 12°18'02"W a distance of 128.05 feet to an iron pin on the northerly sideline of Community Street; thence

Westerly along the northerly sideline of Community Street the following nine courses:

1. N 80°26'37"W a distance of 45.46 feet to a point
2. N 40°52'51"E a distance of 17.33 feet to a point
3. N 80°50'40"W a distance of 53.50 feet to a point
4. N 80°31'58"W a distance of 69.28 feet to a point
5. N 80°27'54"W a distance of 47.42 feet to a point
6. N 72°30'00"W a distance of 41.75 feet to a point
7. N 59°33'54"W a distance of 28.05 feet to a point
8. N 50°09'33"W a distance of 58.82 feet to a point
9. N 48°55'11"W a distance of 38.96 feet to a point of beginning.

Shown to contain 0.96 acre, more or less. See also "Site Plan, Cluster Rule/Energy Project, White Mountain Energy, LLC, Community Street, Berlin, New Hampshire" prepared by York Land Service, LLC recorded at the Coos County Registry of Deeds as Plan #1960 (the "Site Plan").

Parcels One and Two combined, contain a total of 62.0 acres, more or less, TOGETHER WITH the rights and benefits granted under an Easement Agreement for Railroad Spur Track from North American Dismantling Corp. to PJPD Holdings, LLC dated December 23, 2008 and recorded with the Coos County Registry of Deeds at Book 1265, Page 1016, and being depicted on Plan No. 3218.

TOGETHER WITH AND SUBJECT TO the rights and benefits granted under the Amendment and Restatement of Easement and Shared Use Agreement for Water Distribution System and Filtration Plant between North American Dismantling Corp., PJPD Holdings, LLC, and Fraser N.H., LLC dated December 23, 2008 and recorded with the Coos County Registry of Deeds at Book 1265, Page 981.

Meaning and intending to describe a portion of the premises described in the deed of Fraser N.H., LLC to North American Dismantling Corp., dated October 3, 2006 and recorded with the Coos County Registry of Deeds at Book 1190, Page 932; and the same premises conveyed to White Mountain Energy, LLC by deed of Fraser N.H., LLC dated December 19, 2003 and recorded with the Coos County Registry of Deeds at Book 1064, Page 249.



Reference is also made to the plan of land entitled, "Minor Lot Line Adjustment between properties of North American Dismantling Corp., Tax Map 129, Parcel 54.001 and White Mountain Energy, LLC, Tax Map 129, Parcel 54.01, Berlin, New Hampshire", dated October 1, 2007, revised March 12, 2008, and recorded at Coos County Registry of Deeds as Plan No. 3101.

Further meaning and intended to describe the same premises conveyed by North American Dismantling Corporation and White Mountain Energy, LLC to PJPD Holdings, LLC by Quitclaim Deed dated December 23, 2008 and recorded with the Coos County Registry of Deeds at Book 1265, Page 1025, subject to the reservations contained in said Deed.

Exhibit "B"  
Form of Memorandum of Purchase Option

**MEMORANDUM OF PURCHASE OPTION**

This MEMORANDUM OF PURCHASE OPTION (this "Memorandum") is made as of the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between **Berlin Station, LLC**, a Delaware limited liability company ("Site Owner") having an office and mailing address at \_\_\_\_\_, \_\_\_\_\_ and **Burgess Biopower, LLC**, a Delaware limited liability company ("Burgess") having an office and mailing address at \_\_\_\_\_, \_\_\_\_\_, and **Public Service Company of New Hampshire**, a New Hampshire corporation ("Option Holder") having a mailing address at \_\_\_\_\_.

**W I T N E S S E T H:**

**WHEREAS**, Site Owner is the owner of certain real property located in the City of Berlin, Coos County, New Hampshire located on Cumberland Street and more particularly described in Exhibit A attached hereto and made a part hereof (the "Option Property"); and

**WHEREAS**, Site Owner is the owner of a biomass powered electrical generation facility including buildings, improvements, fixtures, and other property interests located on or at the Option Property (the "Option Facilities") and Burgess is the lessee of the Facility Site and the Facility; and

**WHEREAS**, Site Owner and Burgess have granted to Option Holder the exclusive right and option (the "Option") to purchase the Option Property and the Option Facilities and associated personal and intangible property on the terms and conditions stated in a Purchase Option Agreement dated \_\_\_\_\_, 20\_\_\_, (the "Option Agreement"); and

**NOW, THEREFORE**, the parties hereto agree that subject to the complete terms and conditions of the Option Agreement, they wish to give notice as a matter of public record of the following matters regarding the Option Agreement:

1. **Option Property.** The Option Property is a parcel of approximately 62 acres in the City of Berlin, Coos County, New Hampshire as more particularly described in Exhibit A hereto, which parcel constitutes Parcel No. \_\_\_\_\_ on the City of Berlin property tax records. The Option Facilities include the electric generation plant located on the Option Property, together with all associated real, personal and intangible property.
2. **Option Term.** The Option Agreement became effective on \_\_\_\_\_, 20\_\_\_. The Option may be exercised at any time beginning on \_\_\_\_\_, and ending on \_\_\_\_\_, 20\_\_ ("Option Exercise Period"). If the Option is not exercised by PSNH or its assignee within the Option Exercise Period, the Option expires.

3. **Complete Terms of Option.** This Memorandum is not intended to set forth all of the terms of the Option Agreement, and reference is hereby made thereto for all of the terms. In the event of conflict between the terms of the Option Agreement and this Memorandum, the terms of the Option Agreement shall control. All provisions of the Option Agreement are incorporated herein by this reference as though fully set forth.

4. **Execution in Counterparts.** This Memorandum may be executed in any number of counterparts, all of which together shall constitute a single instrument, and it shall not be necessary that any counterpart be signed by all the parties hereto.

**IN WITNESS WHEREOF**, the parties have caused this Memorandum to be executed by their respective duly authorized officers or representatives as of the date above first written.

**Berlin Station, LLC**  
a Delaware limited liability company

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

**Burgess Biopower, LLC**  
a Delaware limited liability company

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

**Public Service Company of New Hampshire**  
a New Hampshire corporation

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

[ACKNOWLEDGEMENTS]

EXHIBIT A  
"Option Property"

PARCEL ONE

A certain tract or parcel of land with buildings and improvements thereon located on the east side of the Androscoggin River, on the west side of Hutchins Street and on the north sides of Coos Street and Community Street in Berlin, Coos County, State of New Hampshire, being shown as **Tax Map 129, Parcel 54.001** on a plan of land entitled "Survey Plat Lands of North American Dismantling Corp. Tax Map 129, Parcel 54.001 and White Mountain Energy, LLC Tax Map 129, Parcel 54.01 Berlin, New Hampshire", dated December 12, 2008 as prepared by York Land Services, LLC, Plan No, 08-045A and recorded as Plan No. 3217, (the "Plan"), being bounded and described as follows:

Beginning at an iron pin marking the most northerly corner of land conveyed to White Mountain Energy, LLC as described in Coos County Registry of Deeds, Volume 1064, Page 249, being near the easterly bank of the Androscoggin River, 119.82 feet northerly of Community Street; thence

Along Public Service Company of New Hampshire the following two courses:

3. N40°33'28"E a distance of 232.47 feet to an iron pin.
4. N35°25'38"W a distance of 32 feet to a point on the east shore of the Androscoggin River; thence

Easterly along the east shore of the Androscoggin River a distance of approximately 2380 feet to a point; thence

S 60°57'44"E along other land of North American Dismantling Corporation a distance of 50 feet to an iron pin; thence continuing

S 60°57'44"E along other land of North American Dismantling Corporation a distance of 1071.24 feet to a point on the westerly sideline of Hutchins Street witnessed by an iron pin with YLS cap, found flush lying S60°57'44"E 0.11 feet distant; thence

Southerly along the westerly sideline of Hutchins Street the following nine courses:

10. Arc of a curve to the right having a length of 37.64 feet to a point; said curve having a radius of 460.00 feet and a long chord of S45°00'49"W, 37.63 feet.
11. S47°21'29"W a distance of 357.82 feet to a point.
12. Arc of a curve to the left having a length of 306.71 feet to a point; said curve having a radius of 2030.11 feet and a long chord of S43°01'47"W, 306.42 feet.
13. S38°42'06"W a distance of 164.40 feet to a point.

14. Arc of a curve to the right having a length of 402.00 feet to a point; said curve having a radius of 594.99 feet and a long chord of S58°03'24"W, 394.40 feet.
15. S77°24'43"W a distance of 374.08 feet to a point.
16. Arc of a curve to the left having a length of 318.73 feet to a point; said curve having a radius of 2030.00 feet and a long chord of S72°54'51"W, 318.40 feet.
17. S68°24'58"W, a distance of 204.80 feet to a point.
18. Arc of a curve to the right having a length of 185.16 feet to a point; said curve having a radius of 270.00 feet and a long chord of S88°03'43"W, 181.55 feet; thence

N72°17'31"W along the northerly sideline of Coos Street a distance of 635.75 feet to a point; thence

Northerly, along the arc of a curve to the right having a length of 37.96 feet to a point; said curve having a radius of 20.00 feet and a long chord of N17°55'12"W, 32.51 feet; thence

N36°27'07"E along the easterly sideline of Community Street and the westerly sideline of the former B&M Railroad a distance of 193.50 feet to an iron pin; thence

N30°58'35"W a distance of 224.19 feet to an iron pin; thence

N80°26'37"W along the northerly sideline of Community Street a distance of 150.30 feet to an iron pin; thence

Along White Mountain Energy property the following three courses:

4. N12°18'02"E a distance of 128.05 feet to a point.
5. N77° 41'58"W a distance of 229.83 feet to an iron pin.
6. N49° 28'23"W a distance of 85.21 feet, to the point of beginning.

## PARCEL TWO

A certain tract or parcel of land with buildings and improvements thereon located on the east side of the Androscoggin River, on the west side of Hutchins Street and on the north sides of Coos Street and Community Street in Berlin, Coos County, State of New Hampshire, being shown as **Tax Map 129, Parcel 54.01** on a plan of land entitled "Survey Plat Lands of North American Dismantling Corp. Tax Map 129, Parcel 54.001 and White Mountain Energy, LLC Tax Map 129, Parcel 54.01 Berlin, New Hampshire", dated December 12, 2008 as prepared by York Land Services, LLC, Plan No, 08-045A and recorded as Plan No. 3217, (the "Plan"), being bounded and described as follows:

Commencing at the southwesterly corner of the lot on the northerly side of Community Street on the easterly side of the Androscoggin River; thence

N 40°33'28"E along land of Public Service Company of New Hampshire for 119.82 feet to an iron pin, said pin also marks the beginning point of Parcel One described above; thence

Along North American Dismantling Corporation property the following three courses:

4. S 49°28'23"E a distance of 85.21 feet, to a point.
5. S 77°41'58"E a distance of 229.83 feet to an iron pin.
6. S 12°18'02"W a distance of 128.05 feet to an iron pin on the northerly sideline of Community Street; thence

Westerly along the northerly sideline of Community Street the following nine courses:

10. N 80°26'37"W a distance of 45.46 feet to a point
11. N 40°52'51"E a distance of 17.33 feet to a point
12. N 80°50'40"W a distance of 53.50 feet to a point
13. N 80°31'58"W a distance of 69.28 feet to a point
14. N 80°27'54"W a distance of 47.42 feet to a point
15. N 72°30'00"W a distance of 41.75 feet to a point
16. N 59°33'54"W a distance of 28.05 feet to a point
17. N 50°09'33"W a distance of 58.82 feet to a point
18. N 48°55'11"W a distance of 38.96 feet to a point of beginning.

Shown to contain 0.96 acre, more or less. See also "Site Plan, Cluster Rule/Energy Project, White Mountain Energy, LLC, Community Street, Berlin, New Hampshire" prepared by York Land Service, LLC recorded at the Coos County Registry of Deeds as Plan #1960 (the "Site Plan").

Parcels One and Two combined, contain a total of 62.0 acres, more or less, TOGETHER WITH the rights and benefits granted under an Easement Agreement for Railroad Spur Track from North American Dismantling Corp. to PJPD Holdings, LLC dated December 23, 2008 and recorded with the Coos County Registry of Deeds at Book 1265, Page 1016, and being depicted on Plan No. 3218.

TOGETHER WITH AND SUBJECT TO the rights and benefits granted under the Amendment and Restatement of Easement and Shared Use Agreement for Water Distribution System and Filtration Plant between North American Dismantling Corp., PJPD Holdings, LLC, and Fraser N.H., LLC dated December 23, 2008 and recorded with the Coos County Registry of Deeds at Book 1265, Page 981.

Meaning and intending to describe a portion of the premises described in the deed of Fraser N.H., LLC to North American Dismantling Corp., dated October 3, 2006 and recorded with the Coos County Registry of Deeds at Book 1190, Page 932; and the same premises conveyed to White Mountain Energy, LLC by deed of Fraser N.H., LLC dated December 19, 2003 and recorded with the Coos County Registry of Deeds at Book 1064, Page 249.

Reference is also made to the plan of land entitled, "Minor Lot Line Adjustment between properties of North American Dismantling Corp., Tax Map 129, Parcel 54.001 and White Mountain Energy, LLC, Tax Map 129, Parcel 54.01, Berlin, New Hampshire", dated October 1, 2007, revised March 12, 2008, and recorded at Coos County Registry of Deeds as Plan No. 3101.

Further meaning and intended to describe the same premises conveyed by North American Dismantling Corporation and White Mountain Energy, LLC to PJPD Holdings, LLC by Quitclaim Deed dated December 23, 2008 and recorded with the Coos County Registry of Deeds at Book 1265, Page 1025, subject to the reservations contained in said Deed.

**FIRST AMENDMENT TO AMENDED AND RESTATED  
POWER PURCHASE AGREEMENT**

This **FIRST AMENDMENT TO THE AMENDED AND RESTATED POWER PURCHASE AGREEMENT** (this “**First Amendment**”) is entered into as of November 19, 2019, by and between and PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (“**PSNH**”), and BERLIN STATION, LLC (“**Berlin Station**”). PSNH and Berlin Station are individually referred to herein as a “**Party**” and are collectively referred to herein as the “**Parties**.”

**WHEREAS**, PSNH and Berlin Station executed that certain Amended and Restated Power Purchase Agreement, dated as of May 18, 2011 (the “**Agreement**”).

**WHEREAS**, in 2018 N.H. Laws, Chapter 340 (a.k.a. SB 577), the Legislature enacted into law the finding that, “The general court finds that the continued operation of the Burgess BioPower plant in Berlin is important to the energy infrastructure of the state of New Hampshire and important for the attainment of renewable energy portfolio standard goals of fuel diversity, capacity, and sustainability.” *See*, Section 340:1.

**WHEREAS**, 2018 N.H. Laws, 340:2,I required the New Hampshire Public Utilities Commission to “amend its Order No. 25,213 (Docket DE 10-195) to suspend the operation of the cap on the cumulative reduction factor as set forth on page 97 of its Order for a period of 3 years from the date the operation of the cap would have otherwise taken effect.”

**WHEREAS**, by Order No. 26,198 dated December 5, 2018, the New Hampshire Public Utilities Commission amended its Order No. 25,213 to include the following provision: “Amendment made December 5, 2018, as required by Laws of 2018, ch.340: Operation of the cap shall be suspended for three years from the date on which the cumulative amount reaches \$100 million.”

**WHEREAS**, PSNH and Berlin Station desire to amend the Agreement as provided herein to effectuate the findings of the general court and the action of the New Hampshire Public Utilities Commission.

**NOW, THEREFORE**, in consideration of the premises and of the mutual agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

**1. DEFINITIONS**

Any capitalized terms used in this First Amendment and not defined herein shall have the same meaning as ascribed to such terms in the Agreement.

**2. AMENDMENTS**

(a) Section 6.1.4(c) of the Agreement shall be restated as follows:



Notwithstanding Section 6.1.2 above, beginning with the Operating Year ending on November 30, 2022, if at the end of any Operating Year other than the last Operating Year during the Term, there exists a Cumulative Reduction in excess of One Hundred Million Dollars (\$100,000,000), such excess (“Excess Cumulative Reduction”) will be credited against amounts otherwise due for Energy delivered to PSNH during the subsequent Operating Year until such Excess Cumulative Reduction is eliminated. To effect such credit, in each month during the subsequent Operating Year, one twelfth (1/12th) of the Excess Cumulative Reduction (“Monthly Energy Credit”) shall be deducted by PSNH from the Seller’s invoice, up to the full amount of the payment due to Seller pursuant to Section 6.1.2(a), and any excess over that amount shall carry forward to the following month to the Monthly Energy Credit. If, at the end of the Operating Year subsequent to the year during which there was an Excess Cumulative Reduction, any such amount remains, it shall be deducted by PSNH from the Seller’s invoice in the next Operating Year in the same manner described above. If upon expiration of the Term PSNH does not purchase the Facility, Seller shall pay PSNH the amount of any Excess Cumulative Reduction.

(b) PROPERTY TAX RESOLUTION

To resolve an outstanding matter regarding amounts owed by Berlin Station (“Seller”) to PSNH (“Buyer”) for real property in the City of Berlin subject to that city’s assessment of property taxes, a new Section 9.10 shall be included in the Agreement as follows:

Pursuant to Section 12.4 of the “Standard Large Generator Interconnection Agreement” (“LGIA”) pertaining to Berlin Station, the parties agree to resolve a billing dispute in the following manner. Per the LGIA, Seller is responsible for reimbursing Buyer for property taxes allocable to the Generator Interconnection Related Upgrade (“GIRU”). For purposes of allocating property taxes assessed upon Buyer by the City of Berlin, this allocation shall be made by multiplying the total taxes assessed by the City by the percentage that the net book value of the GIRU facilities represents to the Buyer’s total net book value of assets subject to property taxation by the City. Notwithstanding the provisions of the LGIA, any determination whether the assessment of taxes by the City should be challenged or abated shall be made solely by Buyer and the costs of any such challenge or abatement request will be borne solely by Buyer. In the event that any such challenge or abatement results in a reduction to the taxes assessed on the Buyer’s property by the City, the Seller shall receive its proportionate share of such tax reduction in the same manner as taxes were originally allocated. Buyer shall provide Seller with an invoice statement annually stating the amount of the tax and any applicable abatement reductions. Property taxes or credits due and owing to Buyer under this provision shall be collected by Buyer by deductions or credits by Buyer from or to the Seller’s invoices for Energy purchased under the Agreement. Property taxes or credits due will be divided into appropriate monthly

payments, with each such monthly payment deducted from or credited to Seller's respective monthly invoices for Energy. In the event that Energy charges are not sufficient to offset the full amount of tax payments due to Buyer, Seller shall promptly pay the amount due upon receipt of an invoice from Buyer.

### 3. MISCELLANEOUS

(a) Per RSA 374:57, PSNH must furnish a copy of this First Amendment to the New Hampshire Public Utilities Commission upon its execution. This First Amendment is conditioned upon and shall not become effective unless and until the New Hampshire Public Utilities Commission approves this First Amendment without material modification or conditions with findings that PSNH's decision to enter into this First Amendment is reasonable and in the public interest, and that PSNH shall be allowed to recover all costs of the amended Agreement from customers via a non-bypassable rate mechanism; which approval shall be final and not subject to appeal or rehearing and shall be acceptable to PSNH in its sole discretion (the "Amendment Regulatory Approval").

(b) Except as herein provided, the Agreement shall remain unchanged and in full force and effect. On and after the date the Amendment Regulatory Approval becomes final (as set forth in (a), above), this First Amendment shall constitute a part of the Agreement and every reference in the Agreement to the term "Agreement" shall be deemed to mean the Agreement, as amended by this First Amendment.

(c) If this First Amendment becomes final after December 1, 2019, then the total amount of any Monthly Energy Credits that have been deducted from Seller's invoices during thirty-six (36) months following the initial occurrence of the Excess Cumulative Reduction shall be refunded to Seller and the amount of such refund shall be added to the Cumulative Reduction fund balance.

(d) This First Amendment may be amended and its provisions and the effects thereof waived only by a writing executed by the Parties.

(e) If any term or provision of this First Amendment or the interpretation or application of any term or provision to any prior circumstance is held to be unenforceable, illegal or invalid by a court or agency of competent jurisdiction, the remainder of this First Amendment and the interpretation or application of all other terms or provisions to Persons or circumstances other than those which are unenforceable, illegal or invalid shall not be affected thereby, and each term and provision shall be valid and be enforced to the fullest extent permitted by law so long as all essential terms and conditions of this First Amendment for both Parties remain valid, binding and enforceable and have not been declared to be unenforceable, illegal or invalid by a court or agency of competent jurisdiction.

(f) Any number of counterparts of this First Amendment may be executed, and each shall have the same force and effect as an original. Facsimile signatures hereon or on any notice or other instrument delivered under this First Amendment shall have the same force and effect as original signatures.

(g) Interpretation and performance of this First Amendment shall be in accordance with, and shall be controlled by, the laws of the State of New Hampshire (without regard to its principles of conflicts of law).

(h) This First Amendment shall be binding upon, shall inure to the benefit of, and may be performed by, the successors and assignees of the Parties permitted under the Agreement.

**IN WITNESS WHEREOF**, each of PSNH and Berlin Station has caused this First Amendment to be duly executed on its behalf as of the date first above written.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

By: 

Name: James G. Daly  
Title: VP, Energy Supply

**BERLIN STATION, LLC**

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

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

Title: \_\_\_\_\_

(g) Interpretation and performance of this First Amendment shall be in accordance with, and shall be controlled by, the laws of the State of New Hampshire (without regard to its principles of conflicts of law).

(h) This First Amendment shall be binding upon, shall inure to the benefit of, and may be performed by, the successors and assignees of the Parties permitted under the Agreement.

**IN WITNESS WHEREOF**, each of PSNH and Berlin Station has caused this First Amendment to be duly executed on its behalf as of the date first above written.

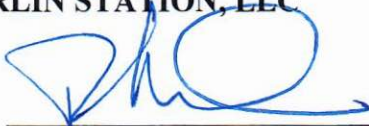
**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

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

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

Title: \_\_\_\_\_

**BERLIN STATION, LLC**

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

Name: ROBERT DeRosier

Title: Director

SECOND AMENDMENT TO AMENDED AND  
RESTATED POWER PURCHASE AGREEMENT

August \_\_, 2022

**SECOND AMENDMENT TO AMENDED AND RESTATED  
POWER PURCHASE AGREEMENT**

This **SECOND AMENDMENT TO THE AMENDED AND RESTATED POWER PURCHASE AGREEMENT** (this “**Second Amendment**”) is entered into as of August 18, 2022, by and between and PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (“**PSNH**”), and BERLIN STATION, LLC (“**Berlin Station**”). PSNH and Berlin Station are individually referred to herein as a “**Party**” and are collectively referred to herein as the “**Parties**.”

**WHEREAS**, following approval by the New Hampshire Public Utilities Commission (“Commission”) in Order 25,213 in Docket DE 10-195, PSNH and Berlin Station executed that certain Amended and Restated Power Purchase Agreement, dated as of May 18, 2011 (the “**Original PPA**”).

**WHEREAS**, in 2018 N.H. Laws, Chapter 340 (a.k.a. SB 577), the Legislature enacted into law the finding that, “The general court finds that the continued operation of the Burgess BioPower plant in Berlin is important to the energy infrastructure of the state of New Hampshire and important for the attainment of renewable energy portfolio standard goals of fuel diversity, capacity, and sustainability.” Section 271:1.

**WHEREAS**, 2018 N.H. Laws, 340:2,I required the Commission to “amend its Order No. 25,213 (Docket DE 10-195) to suspend the operation of the cap on the cumulative reduction factor as set forth on page 97 of its Order for a period of 3 years from the date the operation of the cap would have otherwise taken effect.”

**WHEREAS**, by Order No. 26,198 dated December 5, 2018, the Commission amended its Order No. 25,213 to include the following provision: “Amendment made December 5, 2018, as required by Laws of 2018, ch.340: Operation of the cap shall be suspended for three years from the date on which the cumulative amount reaches \$100 million.”

**WHEREAS**, on November 19, 2019, Parties executed and delivered that certain First Amendment to Amended and Restated Power Purchase Agreement (the “First Amendment”), which was subsequently filed with the Commission in Docket DE 19-142 to implement SB 577 and amend the terms of the Original PPA (the Original PPA, as amended by the First Amendment, the “**Agreement**”).

**WHEREAS**, by Order No. 26,333 dated February 18, 2020, the Commission approved cost recovery for PSNH during the cap suspension, and approved the First Amendment in Docket DE 19-142.

**WHEREAS**, 2022 N.H. Laws, 275 (a.k.a. SB 271), the Legislature enacted into law the finding that, “the continued operation of the Burgess BioPower plant in Berlin: (a) is desirable to the energy infrastructure of the state of New Hampshire; (b) is a source of indigenously-sourced, reliable baseload power that contributes to regional fuel security and reliability of the regional electricity grid; (c) is important for the attainment of renewable energy portfolio



standard goals of fuel diversity, capacity, sustainability and energy independence; (d) is significant to the continued health of New Hampshire's forests; (e) provides valuable support to the timber industry; and (f) is a contributor of jobs and to the economy of both the North Country and the state as a whole." 2022 N.H. Laws, 275:1.

**WHEREAS**, 2022 N.H. Laws, 275 required the Commission to "reopen its Docket DE 10-195 and forthwith revise its Order No. 25,213 and its Order No. 26,198 and Order No. 26,333" and further requires the Commission "to extend the suspension of the operation of the cap on the cumulative reduction factor as set forth on page 97 of Order No. 25,213 for an additional period of one year from the date the operation of the cap would have otherwise taken effect under Order No. 25,213 and Order No. 26,198 and Order No. 26,333 in Docket DE 19-142 regarding cost recovery for costs in excess of the cap to apply during the additional period in which the cap is extended." 2022 N.H. Laws, 275:1.

**WHEREAS**, on August 11, 2022, the Commission issued Order No. 26,665, modifying its Order No. 25,213 and its Order No. 26,198 and Order No. 26,333, consistent with the legislation, and directed PSNH to submit the appropriate updates and changes to the Agreement for review and approval in a new Commission docket.

**WHEREAS**, PSNH and Berlin Station desire to amend the Agreement as provided herein to effectuate the findings of the Legislature in 2022 N.H. Laws, 275 and Commission Order 26,665.

**NOW, THEREFORE**, in consideration of the premises and of the mutual agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

**1. DEFINITIONS**

Any capitalized terms used in this Second Amendment and not defined herein shall have the same meaning as ascribed to such terms in the Agreement.

**2. AMENDMENT**

(a) Section 6.1.4(c) of the Agreement shall be restated as follows:

Notwithstanding Section 6.1.2 above, beginning with the Operating Year ending on November 30, 2023, if at the end of any Operating Year other than the last Operating Year during the Term, there exists a Cumulative Reduction in excess of One Hundred Million Dollars (\$100,000,000), such excess ("Excess Cumulative Reduction") will be credited against amounts otherwise due for Energy delivered to PSNH during the subsequent Operating Year until such Excess Cumulative Reduction is eliminated. To effect such credit, in each month during the subsequent Operating Year, one twelfth (1/12th) of the Excess Cumulative Reduction ("Monthly Energy Credit") shall be deducted by PSNH from the Seller's invoice, up to the full amount of the payment due to Seller pursuant to Section 6.1.2(a), and any excess over that

amount shall carry forward to the following month to the Monthly Energy Credit. If, at the end of the Operating Year subsequent to the year during which there was an Excess Cumulative Reduction, any such amount remains, it shall be deducted by PSNH from the Seller's invoice in the next Operating Year in the same manner described above. If upon expiration of the Term PSNH does not purchase the Facility, Seller shall pay PSNH the amount of any Excess Cumulative Reduction.

### 3. MISCELLANEOUS

(a) Per RSA 374:57, PSNH must furnish a copy of this Second Amendment to the Commission upon its execution. This Second Amendment is conditioned upon and shall not become effective unless and until the New Hampshire Public Utilities Commission approves this Second Amendment without material modification or conditions with findings that PSNH's decision to enter into this Second Amendment consistent with a legislative mandate is reasonable and in the public interest, and that PSNH shall be allowed to recover all costs of the amended Agreement from customers via the non-bypassable rate mechanism of the Chapter 340 adder of PSNH's Stranded Cost Recovery Charge; which approval shall be final and not subject to appeal or rehearing and shall be acceptable to PSNH in its sole discretion (the "Amendment Regulatory Approval").

(b) Except as herein provided, the Agreement shall remain unchanged and in full force and effect. On and after the date the Amendment Regulatory Approval becomes final (as set forth in (a), above), this Second Amendment shall constitute a part of the Agreement and every reference in the Agreement to the term "Agreement" shall be deemed to mean the Agreement, as amended by this Second Amendment.

(c) If this Second Amendment becomes final after December 1, 2022, then the total amount of any Monthly Energy Credits that have been deducted from Seller's invoices during thirty-six (36) months following the initial occurrence of the Excess Cumulative Reduction shall be refunded to Seller and the amount of such refund shall be added to the Cumulative Reduction fund balance.

(d) This Second Amendment may be amended and its provisions and the effects thereof waived only by a writing executed by the Parties.

(e) If any term or provision of this Second Amendment or the interpretation or application of any term or provision to any prior circumstance is held to be unenforceable, illegal or invalid by a court or agency of competent jurisdiction, the remainder of this Second Amendment and the interpretation or application of all other terms or provisions to Persons or circumstances other than those which are unenforceable, illegal or invalid shall not be affected thereby, and each term and provision shall be valid and be enforced to the fullest extent permitted by law so long as all essential terms and conditions of this Second Amendment for both Parties remain valid, binding and enforceable and have not been declared to be unenforceable, illegal or invalid by a court or agency of competent jurisdiction.



(f) Any number of counterparts of this Second Amendment may be executed, and each shall have the same force and effect as an original. Facsimile signatures hereon or on any notice or other instrument delivered under this Second Amendment shall have the same force and effect as original signatures.

(g) Interpretation and performance of this Second Amendment shall be in accordance with, and shall be controlled by, the laws of the State of New Hampshire (without regard to its principles of conflicts of law).

(h) This Second Amendment shall be binding upon, shall inure to the benefit of, and may be performed by, the successors and assignees of the Parties permitted under the Agreement.

**IN WITNESS WHEREOF**, each of PSNH and Berlin Station has caused this Second Amendment to be duly executed on its behalf as of the date first above written.

**PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE**

By: 

Name: James G Daly\_\_\_\_\_

Title: Vice President Energy Supply\_\_\_\_

**BERLIN STATION, LLC**

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

Name: John Halle\_\_\_\_\_

Title: Director \_\_\_\_\_

# **Exhibit B**

HUNTON  
ANDREWS KURTH

HUNTON ANDREWS KURTH LLP  
60 STATE STREET  
SUITE 2400  
BOSTON, MASSACHUSETTS 02109

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January 25, 2024

***Via Overnight and Electronic Mail***

Carol J. Holahan, Esq.  
Foley Hoag, LLP  
Seaport West  
155 Seaport Boulevard  
Boston, MA 02210-2600  
cholahan@foleyhoag.com

Re: Notice of Breach of Power Purchase Agreement  
Initial Notice of Dispute Pursuant to Articles 10.5 and 25.1

Dear Ms. Holahan:

Please be advised that this firm represents Public Service Company of New Hampshire d/b/a Eversource (“Eversource”) in connection with the billing dispute between Eversource and Berlin Station, LLC (“Berlin Station”) and Burgess BioPower, LLC (“Burgess BioPower”) (collectively, the “Berlin Parties”) under the Amended and Restated Power Purchase Agreement by and between Eversource, Berlin Station, and Laidlaw Berlin Biopower, LLC dated May 18, 2011 (the “PPA”). I am writing in response to the Notice of Breach issued by the Berlin Parties to Eversource dated January 23, 2024.

Pursuant to Article 10.3 of the PPA, Eversource is entitled to net and recoup the deferred Excess Cumulative Reduction (“ECR”) Amount against all amounts owed by Eversource, including, but not limited to, any amounts owed for New Hampshire Class I Renewable Energy Credits (“RECs”) and/or Capacity. Nothing in Article 6.1.4(c)—or elsewhere in the PPA—prohibits Eversource from netting and recouping payments due for New Hampshire Class I RECs and/or Capacity against the outstanding ECR balance owed pursuant to Article 10.3. Thus, Eversource denies that it owes the Berlin Parties \$3,685,958.55 for New Hampshire Class I RECs during the current billing cycle, and therefore further denies that it has failed to make payment of the same when due. Note that consistent with PPA Article 12.1.1 it is clear such exercise of Eversource’s contractual right to deduct the disputed amount does not constitute a failure to make payment and/or an Event of Default.

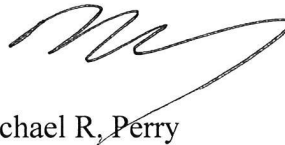
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In light of the parties' disagreement on this issue, this letter serves as Eversource's formal Initial Notice of Dispute pursuant to Articles 10.5 and 25.1 of the PPA. Undersigned counsel, along with James G. Daly, Vice President – Energy Supply, will be representing Eversource in the parties negotiations concerning this dispute. As required by Section 25.1, kindly provide the Berlin Parties' response to this Initial Notice within five (5) business days of receipt hereof.

Thank you for your attention to this matter.

Sincerely,



Michael R. Perry

cc: Timothy N. Cronin, Esq.  
[timothy.cronin@eversource.com](mailto:timothy.cronin@eversource.com)  
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