

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

In re BURGESS BIOPOWER, LLC, <i>et al.</i> ¹ Debtors.	Chapter 11 Case No. 24-10235 (LSS) (Jointly Administered) Related to D.I. 411
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**DEBTORS’ OBJECTION TO MOTION OF THE CITY OF BERLIN FOR (I) AN
ALLOWED ADMINISTRATIVE EXPENSE CLAIM FOR PROPERTY TAXES
PURSUANT TO SECTION 503(b) OF THE BANKRUPTCY CODE, (II) AN ORDER
COMPELLING THE IMMEDIATE PAYMENT OF PAST DUE POST-PETITION
PROPERTY TAXES AND (III) GRANTING RELATED RELIEF**

Burgess BioPower, LLC (“Burgess”) and Berlin Station, LLC (“Berlin Station”), the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), hereby submit this objection (the “Objection”) to *Motion of the City of Berlin for (I) an Allowed Administrative Expense Claim for Property Taxes Pursuant to Section 503(b) of the Bankruptcy Code, (II) an Order Compelling the Immediate Payment of Past Due Post-Petition Property Taxes and (III) Granting Related Relief [D.I. 411]* (the “Motion”). In support of the Objection, the Debtors rely on the *Declaration of Dean Vomero In Support of Debtors’ Objection to Motion of the City of Berlin for (I) an Allowed Administrative Expense Claim for Property Taxes Pursuant to Section 503(b) of the Bankruptcy Code, (II) an Order Compelling the Immediate Payment of Past Due Post-Petition Property Taxes and (III) Granting Related Relief* (the “Vomero Declaration”), filed contemporaneously herewith and incorporated herein by reference, and respectively state as follows:

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

INTRODUCTION

1. The Motion filed by the City of Berlin (the “City”) is premature as well as factually and legally incorrect. Berlin Station (the only taxpayer) intends to pay its legitimately assessed or negotiated tax obligations at the appropriate time and consistent with Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”) and applicable New Hampshire state law, but the payments on the Motion are either not properly assessed or ineligible for payment outside of a confirmed plan. Indeed, the proposed *First Amended Joint Chapter 11 Plan for Burgess BioPower, LLC and Berlin Station, LLC* [D.I. 311-1] (the “Plan”) provides for the payment of pre- and postpetition taxes in accordance with the Bankruptcy Code. The City, however, demands that the Debtors pay prepetition obligations in advance of a confirmed plan as well as payment of postpetition obligations without substantiating the valuation method used to calculate them, *see* Motion at 15-16 – a valuation very much in dispute as the Debtors work toward a confirmable plan. In short, the City seeks to circumvent the Bankruptcy Code by demanding payment of prepetition taxes that are clearly prepetition obligations² and to collect potentially postpetition taxes that have not been properly assessed. The City has, therefore, failed to establish its entitlement to payment of those taxes as of yet under the Bankruptcy Code and New Hampshire state law.

2. Moreover, the Motion is essentially a plan objection dressed up as a demand for payment of alleged administrative expenses: the City appears to be arguing that that Debtors cannot pay their go-forward tax obligations. To the extent that the City claims that the Plan is not feasible (*see* Motion at ¶ 10), that argument is premature, and the Motion should be denied on that basis.

² The Debtors reserve all rights to assert that by demanding payment of prepetition amounts, the City has not properly moved for relief from the automatic stay.

3. The City's claim against Berlin Station is comprised of two separate asserted tax obligations. The first is a claim for approximately \$573,300 for 2023 taxes purportedly owed pursuant to the prepetition PILOT Agreement (as defined below) (the "2023 REC Taxes"). As set forth in more detail below, the 2023 REC Taxes clearly arose prepetition. As such, they are at best a Section 507(a)(8) prepetition priority tax claim against Berlin Station and, therefore, are not payable until confirmation of the Plan or later, as provided under 11 U.S.C. § 507(a)(8). To the extent that the 2023 REC Taxes are secured under New Hampshire law, as the City seems to argue, the Motion is not the correct procedural avenue to assert payment and any such argument may not be supportable under section 545 of the Code as discussed below. In any event, if the claim for the 2023 REC Taxes is secured, the Plan makes provision for payment of allowed, secured claims.

4. The second component of the City's tax claim is for \$825,000 of alleged *ad valorem* taxes supposedly assessed on or about June 4, 2024 (the "Ad Valorem Taxes"). The City does not indicate for what tax year the *Ad Valorem* Taxes are due, making it difficult for the Debtors to assess whether they are a pre- or postpetition obligation. Even giving the City the benefit of the doubt, and deeming the *Ad Valorem* Taxes to be postpetition, they are not yet payable because those taxes are not based on a proper valuation of the Debtors' property in accordance with New Hampshire state law. The City also contends that the *Ad Valorem* Taxes are somehow reasonable because its utility assessor determined that Berlin Station's taxable property has a value of an astounding \$120 million, which would result in a much greater tax liability of \$3,872,400 (Motion at ¶ 40 n.5). Without disclosing confidential information of the sales and marketing processes and confidential discussions with potential buyers and plan sponsors, a fair and robust sale process was run by skilled professionals, and if there were a

buyer willing to pay \$120 million for the Debtors' assets, a motion to approve that sale would already be before the Court. The City has provided no basis for this valuation and concurrent liability or its alternative tax liability of \$825,000. As set forth in the Vomero Declaration, none of the City's valuations are supported by the Debtors' sales and marketing process. As such, its demand for payment of a claim based on an unsupported valuation fails.

5. Despite alleging that the City is "in the dark" (*id.* at ¶ 1) and incurred attorney fees which should be paid by the estates, as explained below the Debtors have been very forthcoming with the City. The City itself admits in the Motion that the City negotiated with the Debtors and their Senior Secured and DIP Lenders (*id.*), were in "close communication with the Debtors and the DIP Lenders regarding the Debtors' current and future property taxes" (*id.* at ¶ 6), and received confidential information from the Debtors during these negotiations (*id.* at ¶ 30 n.3).

6. Like the City, the Debtors would have preferred a swifter process for their prompt exit from chapter 11, and are working diligently toward that end. But for the City to represent that the Debtors have left them in the dark is inaccurate at best. Nor are the Debtors unsympathetic to the alleged fiscal needs of a city with whom they have had a strong partnership for many years. But the City's fiscal needs do not create a basis for deviating from the priorities, timeframes, and burdens of proof prescribed by the Bankruptcy Code. The Debtors will pay the 2023 REC Taxes and the *Ad Valorem* Taxes when such amounts are agreed to and/or allowed pursuant to the claims administration process, as permitted by the Bankruptcy Code, and as provided by the Plan. There is no basis in the Bankruptcy Code for specialized, expedited relief for the City, and therefore the Motion must be denied.

BACKGROUND

A. The PILOT Agreement

7. On or about August 30, 2011, the City and Berlin Station entered into that certain Payment in Lieu of Tax Agreement (the “PILOT Agreement”). Under the PILOT Agreement, in lieu of the City’s *ad valorem* tax, Berlin Station agreed to pay (i) a minimum or base tax as set forth in a table of payments contained in Section 3 of the PILOT Agreement (the “Base Tax”); and (ii) an additional tax based on a percentage of gross revenue from the sale of certain Renewable Energy Credits (“RECs”), as specified in Section 6 of the PILOT Agreement. PILOT Agreement at §§ 3-6.³

8. The term of the PILOT Agreement began with the tax year starting April 1, 2011 and would have run through the tax year starting April 1, 2033 (which tax year would end on March 31, 2033). *Id.* at § 2. Base Tax payments were paid for each year in two installments: one in June (which covered the period April 1 through September 30 of that tax year) and a second in December (which covered the period October 1 through March 31 of that tax year). *See id.* at § 3. In this fashion, each Base Tax payment installment included an “in arrears” component and a “prepaid” component.⁴

9. Most recently, Berlin Station paid an \$800,000 installment payment in December 2023, which covered October 1, 2023 through March 31, 2024. *See id.* It is undisputed that Berlin Station made that payment. That December 2023 payment, like all other Base Tax installments under the PILOT Agreement, covered taxes attributable to months which occurred before the installment payment was made (here, October through December 2023) and months

³ The City has appended a copy of the PILOT Agreement as Exhibit A to the Motion.

⁴ By way of example, with respect to the Base Tax for 2011, the first installment was due June 2011 and covered taxes for the period April 1, 2011 through September 30, 2011. *Id.* at § 2. The second installment was due December 2011 and covered October 1, 2011 through March 31, 2012. *See id.* at §§ 2, 3. The first installment for the 2012 tax year was due June 2012, which covered April 1, 2012 through September 30, 2012. *See id.*

that had not yet occurred (here, January through March 2024). In other words, the December 2023 Base Tax payment prepaid taxes through March 31, 2024, including almost two months of postpetition taxes. Indeed, Berlin Station's books and records reflect that it had prepaid its taxes, which are amortized to expense. Vomero Declaration at ¶ 3.

10. In addition to the Base Tax payments set out in Section 3 of the PILOT Agreement, Section 6 prescribes additional tax payments calculated as a percentage of the revenue Berlin Station receives from the sale of certain RECs. PILOT Agreement at § 6. While the City notes that the tax formula for a payment equal to 15% of the gross revenue per year for actual sales of RECs is capped at 100,000 RECs per year (Motion at ¶ 28), it neglects to include in the Motion that the City is only entitled to a tax on sales in excess of all RECs purchased by PSNH (which were also capped) up to the maximum of 100,000 RECs. PILOT Agreement at § 6. This omission is important because the amount of RECs from which the City's additional tax would be calculated under Section 6 of the PILOT Agreement would not be determined until after the PSNH REC sales reached their cap. Section 6 requires that, commencing in tax year 2019, Berlin Station make these additional tax payments "for six months in arrears on July 15th of each year for the previous six months, and January 15 of each year for the previous six months." *Id.* Therefore, Berlin Station's January 15, 2024 tax payment obligation for RECs was for taxes incurred prepetition from Berlin Station's sale of certain RECs between July 2023 and December 2023.

B. Rejection of the Power Purchase Agreement

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

12. On February 28, 2024, the Court entered the *Order (I) Authorizing the Debtors to Reject the Power Purchase Agreement and Option Agreement with Public Service Company of New Hampshire (D/B/A Eversource Energy) and (II) Granting Related Relief* [D.I. 203], which, *inter alia*, rejected the Amended and Restated Power Purchase Agreement dated May 18, 2011 with Public Service Company of New Hampshire (the “Power Purchase Agreement”) as of February 28, 2024. Rejection of the Power Purchase Agreement is tantamount to a prepetition breach of the Power Purchase Agreement and the parties thereto are no longer performing obligations under the Power Purchase Agreement.

13. The PILOT Agreement provides that “[i]f the [Power Purchase Agreement] is terminated at any time, this Agreement shall terminate as of the same date. If Berlin Station and the City [] are unable to renegotiate this PILOT agreement, the Berlin Station Property [as defined in the PILOT Agreement] shall thereafter be assessed in accordance with the ordinary assessment procedures applicable to other properties in the City.” PILOT Agreement at § 5.

C. Negotiations with the City

14. The Debtors are fully aware of the need to either negotiate a new PILOT agreement with the City or be subject to a properly assessed *ad valorem* tax. Indeed, the Debtors and their agents have been attempting for months to negotiate a new PILOT agreement with the City. The Debtors prepared presentations and, despite the City’s contention to the contrary, have provided the City with financial and valuation information about the Debtors on a confidential basis and have proposed offers to the City to resolve their tax obligations. Vomero Declaration at ¶ 9. Similarly, representatives on behalf of the Debtors’ Secured Lenders and DIP Lenders, who would become the owners of the reorganized entities under the stand-alone plan, have participated in these negotiations with the City. *Id.* at ¶ 10.

15. The Debtors understand the need to provide updated information regarding their financial condition and valuation to the relevant decision makers at the City. In fact, the Debtors have had multiple conversations with the City, including presentations as to valuation of the Debtors' property. *See id.* at ¶ 9. However, as the Debtors have repeatedly explained to the City, the Debtors cannot provide such financial and valuation information on a non-confidential basis to the City because such an action could materially and irreparably harm the Debtors' business, their chapter 11 bankruptcy estates, the sale process, and the proposed reorganization. In particular, the City, which is subject to New Hampshire's Right to Know Law (New Hampshire's state law analog to the federal Freedom of Information Act), may be required to disclose information the Debtors exchange with the City to the public pursuant to state law. The disclosure of such information could have dire consequences while the Debtors have an ongoing sale process.⁵

16. Moreover, the Debtors have tried to conduct negotiations on a businessperson-to-businessperson basis. It was the City who insisted that its lawyers must be present and that communications go through its lawyers and not amongst the Debtors' and the City's businesspeople. *Id.* at ¶ 11. Thus, if the City has incurred significant legal expenses, that is a consequence of the City's own actions.

17. Despite these efforts, the Debtors, their lenders, and the City have not yet reached an agreement to resolve the Debtors' tax obligations.

18. At the same time, the Debtors and their lenders are also negotiating with a potential plan sponsor and have yet to schedule a confirmation hearing pending the outcome of those discussions.

⁵ Left unsaid in the Motion is the fact that the City, through its attorneys, sent substantial, onerous diligence requests to the Debtors while refusing to execute nondisclosure agreements sufficient to protect the Debtors' sale and plan processes.

19. On June 4, 2024, the City purported to issue the Debtors a real estate tax bill in the amount of \$825,000 (the “June 2024 Tax Bill”), demanding payment by July 8, 2024. *See* Vomero Declaration at ¶ 6 & Exhibit A. This June 2024 Tax Bill is different than the tax bill appended as Exhibit B (the “Unissued June 2024 Tax Invoice”) to the *Declaration of Phil Warren in Support of the City of Berlin’s for [sic] (I) an Allowed Administrative Expense Claim for Property Taxes Pursuant to Section 503(b) of the Bankruptcy Code, (II) an Order Compelling Immediate Payment of Past Due Post-Petition Property Tax and (III) Granting Related Relief* [D.I. 422] (the “Warren Declaration”), which was filed fifteen days after the Motion was filed and two days prior to the Objection deadline. *See* Vomero Declaration at ¶ 7. Neither the June 2024 Tax Bill nor the Unissued June 2024 Tax Invoice provide sufficient detail explaining how the City derived the amount of \$825,000.⁶ In the Motion, the City acknowledges that this real estate tax bill was not assessed based on the actual value of the Debtors’ property. *See* Motion at ¶ 40 n. 5 (“This bill was calculated on the best information available, since the prior year’s tax bill was not an *ad valorem* tax bill.”). The Warren Declaration is equally ambiguous. *See* Warren Declaration at ¶ 18 n.4. Rather, the June 2024 Tax Bill and the Unissued June 2024 Tax Invoice appear to be for half of the total amount of base tax payments Berlin Station would have owed under the PILOT Agreement in tax year 2024 (April 1, 2024 through March 31, 2025). *See* PILOT Agreement at § 3 (requiring Berlin Station to pay \$800,000 and \$850,000 in June 2024 and December 2024, respectively).

⁶ The City appears to have assessed the \$825,000 based on a \$61,338,290.00 valuation of the Debtors’ property. *See id.* at ¶ 6 & Exhibit A. Without revealing confidential information, it is worth noting that the Debtors’ fair and robust sale process has not yielded a valuation consistent with the City’s \$61,338,290.00 valuation. *Id.* at ¶ 8.

ARGUMENT

20. The Motion seeks entry of an order, pursuant to 11 U.S.C. § 503(b), that the Court order the Debtors to pay to the City approximately \$1.39 million of property taxes, together with all additional applicable charges under New Hampshire law, within seven days; order the Debtors to pay to the City all subsequent property taxes as they come due; and that the City be granted a priority administrative claim in the amount of \$1.39 million, together with all additional applicable charges under New Hampshire law. Motion at 15-16. The City is not entitled to any of the relief sought in the Motion.

I. The PILOT Agreement is Not in Effect

21. The City argues the PILOT Agreement was terminated as of February 28, 2024, the date on which the Court authorized the rejection of the Power Purchase Agreement. *See* Motion at ¶¶ 5, 8, 35; PILOT Agreement at § 5. Consequently, the City argues, in the absence of a future agreement, the Debtors must be taxed pursuant to New Hampshire’s *ad valorem* taxation procedures for taxes due after February 28, 2024. The Debtors agree that Berlin Station’s tax liability should either be by agreement with the City or be properly assessed pursuant to New Hampshire’s *ad valorem* taxation procedures.

II. The City is Not Entitled to Current Payment of Any Taxes

22. The City requests the immediate payment of approximately \$1.39 million in tax payments which consists of \$573,300 (characterized by the City as the “2023 REC Taxes”) and \$825,000 of *ad valorem* taxes assessed on or about June 4, 2024. Motion at ¶ 8. As set forth in the Vomero Declaration, the Debtors dispute the amount of the REC Taxes. The amount of 2023 REC Taxes owed per Berlin Station’s books and records is \$561,033.34. Vomero Declaration at ¶ 12. No matter the amount, however, the City is not entitled to payment on them at present.

a. The 2023 REC Taxes

23. The “2023 REC Taxes,” as the City characterizes them in the Motion, accrued in 2023 prior to the Petition Date under the PILOT Agreement. *See* Motion at ¶¶ 30 & n.3, 31, 49; PILOT Agreement at § 6 (providing that payments under Section 6 of the PILOT Agreement are for RECs sold during the previous six months). The 2023 REC Taxes, pursuant to the terms of the PILOT Agreement, became payable January 15, 2024, prior to the Petition Date, for the sale of certain RECs between July and December 2023, also before the Petition Date. *Id.* Thus, the 2023 REC Taxes were both accrued and assessed prepetition.

24. Assuming the 2023 REC Taxes claim is unsecured, at best, that claim constitutes a priority tax claim under 11 U.S.C. § 507(a)(8).⁷ Unsecured tax claims that accrue prepetition but for which the payment liability is not due until postpetition are Section 507(a)(8) priority tax claims. 11 U.S.C. § 507(a)(8); *see also Int’l Tobacco Partners, Ltd. v. United States Dep’t of Agric. (In re Int’l Tobacco Partners, Ltd.)*, 468 B.R. 582, 602 (Bankr. E.D.N.Y. 2012). Section 507(a)(8) claims must be paid in full, but can be satisfied over time through regular cash installment payments over a period not to exceed five years, provided that such treatment is not less favorable to the most favorably treated unsecured, nonpriority claim. 11 U.S.C. § 1129(a)(9)(C).

25. The Plan provides that to the extent the City’s claim constitutes an Allowed Priority Tax Claim under 11 U.S.C. § 507(a)(8), the City will receive treatment consistent with 11 U.S.C. § 1129(a)(9). Plan at § II(E).⁸

⁷ As discussed in paragraph 29, *infra*, even if the 2023 REC Taxes claim is secured, prepetition secured claims need to be addressed in accordance with the Plan.

⁸ The City’s claim that it “is still in the dark about how the Debtors and Lenders plan to pay for the City’s property taxes” is meritless. *See* Motion at ¶ 1; *see also id.* at ¶ 3. The Plan discloses the Debtors’ proposed treatment of the City’s claim to the extent the City’s claim is deemed an allowed administrative expense, an allowed priority tax claim, a secured claim, or an unsecured claim.

26. The City nevertheless notes that Berlin Station has historically paid REC taxes accrued during the prior tax year the following June, and argues that this practice renders the 2023 REC Taxes postpetition taxes afforded administrative expense priority treatment under 11 U.S.C. §§ 503(b)(1)(B)(i), 507(a)(1). Motion at ¶¶ 8, 31-32, 33. Section 503(b)(1)(B)(i) of the Bankruptcy Code, which is reserved for “taxes ‘incurred’ postpetition,” *West Virginia State Dep’t of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.)*, 37 F.3d 982, 984 (3d Cir. 1994) (citations omitted), provides: “(b) After notice and a hearing, there shall be allowed administrative expenses ... including – (1)(B) any tax – incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title.” 11 U.S.C. § 503(b)(1)(B)(i). “The determination of when a state tax is incurred is governed by state law.” *Columbia Gas*, 37 F.3d at 984 (citations omitted).

27. New Hampshire municipalities have no statutory right to assess taxes on REC payments; it is by virtue of Berlin Station’s agreement with the City in the PILOT Agreement that the City is entitled to any share of Berlin Station’s REC payments at all. The Court should thus look to the terms of the PILOT Agreement to determine when the 2023 REC Taxes were “incurred.” Under its plain terms, the 2023 REC Taxes were payable on January 15, 2024, for Berlin Station’s sale of RECs for the preceding 6-month period (July through December 2023). PILOT Agreement at § 6. Thus, whether the Court construes the 2023 REC Taxes being “incurred” during the second half of the 2023 calendar year when Berlin Station was selling the RECs that gave rise to the 2023 REC Taxes, or the date in which the PILOT Agreement establishes that the 2023 REC Taxes are due, the 2023 REC Taxes were indisputably incurred prior to the Petition Date, and therefore cannot be afforded Section 503(b)(1)(B)(i) treatment.

28. Despite its position to the contrary in the Motion, the City has taken the position before this Court that the 2023 REC Taxes were incurred prepetition when it filed its proof of claim in the Chapter 11 Cases on April 12, 2024. The City submitted a proof of claim against the Debtors' estates in the amount of \$4,445,700, of which the City claimed \$573,300, or the amount the City claims is due for the 2023 REC Taxes, was necessary to cure a prepetition default. *See* Claim Nos. 10013 & 10014.

29. The City conclusorily argues that the 2023 REC Taxes are secured by a first-position lien on the taxable property of the Debtors. Motion at ¶ 30. The issues of whether the City has a properly perfected security interest, whether that security interest is a first priority interest, and whether it is subject to avoidance under Section 545 of the Bankruptcy Code is not procedurally before this Court, and the Debtors reserve the right to object to the City's claim on those and any other bases. Nevertheless, to the extent this Court finds that the City has a secured claim (which is not procedurally before this Court), the City will receive payment in full in cash up to the value of its collateral on account of the 2023 REC Taxes on the Plan Effective Date (as that term is defined in the Plan). Plan at § III(B)(1).

30. Because the 2023 REC Taxes accrued prepetition, those taxes cannot be afforded administrative expense priority treatment under 11 U.S.C. § 507(a)(2), and, at best, are to be afforded priority tax claim treatment under 11 U.S.C. § 507(a)(8).⁹ The earliest a priority tax claim is due is upon confirmation. Accordingly, the Motion must be denied to the extent it requests the immediate payment of the 2023 REC Taxes.

⁹ Even if the 2023 REC Taxes claim could be afforded administrative expense priority treatment, the Plan provides that all administrative expenses will be paid "on the Plan Effective Date" or "no later than thirty days" after the claim is allowed. Plan at § II(A). And to the extent the 2023 REC Taxes are secured claims, they will be paid in accordance with the Plan. *See supra* ¶ 29.

b. The Ad Valorem Taxes

31. The City also seeks immediate payment of the June 2024 Tax Bill, which assessed \$825,000 in *ad valorem* taxes on June 4, 2024, payable by July 8, 2024. The City maintains that these *ad valorem* taxes were incurred postpetition by the Debtors' estates, and therefore they are entitled to administrative expense treatment.

32. The City does not explain how it arrived at its assessment. In Paragraph 8 of the Motion, the City writes: "Consistent with the [PILOT Agreement] and salient New Hampshire law, the City issued an estimated first-half tax bill in June, 2024 in the amount of \$825,000." Motion at ¶ 8. In Footnote 5 of the Motion, the City writes that the bill "was calculated on the best information available" and makes a veiled reference to a "discounted cash flow analysis." *See id.* at ¶ 40 n.5. Whether the City based the June 2024 *ad valorem* taxes upon the PILOT Agreement or unspecified "information" or "discounted cash flow analysis," the City has not established that the Debtors' estates have incurred \$825,000 of *ad valorem* taxes. The Warren Declaration provided yet another interpretation and a different tax bill, the Unissued June 2024 Invoice, *see* Exhibit B to Warren Declaration, which was insufficient to satisfy the City's burden in the Motion.

33. To complicate matters further, neither of such tax bills are clear as to what taxable period they cover, and whether the bill covers prepetition or postpetition periods. The June 2024 Tax Bill states that it is for "PROPERTY TAX AND CREDITS" for "Total **2023** Tax Bill" in the amount of \$1,650,000. *See* Vomero Declaration at ¶ 6 & Exhibit A (emphasis added). The Warren Declaration, in contrast, states that "the City issued its tax bill **for the first half of 2024** in June, 2024 in the amount of \$825,000." *See* Warren Declaration at ¶ 18 (emphasis added). This indicates that the City is seeking payment for taxes from January 1 through June 30, 2024,

which includes the period of January 1, 2024 through March 31, 2024, a period that was already prepaid by the Debtors in December 2023. *See* Vomero Declaration at ¶ 3.¹⁰

34. “The general level of assessment for a given tax year represents the proportion of fair market value at which property in the municipality is generally assessed for tax purposes.” *Appeal of City of Berlin*, 274 A.3d 546, 551 (N.H. 2022). The City acknowledges that there has been no valuation of the Debtors’ property.¹¹ Motion at ¶ 40 n.5. Without such a valuation, the City cannot substantiate that the Debtors’ estates incurred taxes pursuant to New Hampshire’s *ad valorem* taxation procedure.

35. Because there has been no proper valuation of the Debtors’ property for that time period as required by New Hampshire state law, the City has not yet properly assessed the Debtors for taxes incurred postpetition.

36. In sum, any payments accrued under the PILOT Agreement were incurred prepetition, and therefore fall outside of the scope of the Section 503(b)(1)(B)(i)’s administrative expense priority treatment. Rather, they should be paid, if allowed, pursuant to a confirmed chapter 11 plan. With respect to the June 2024 Tax Bill or the Unissued June 2024 Invoice, the lion’s share was prepaid prepetition, and the City is not entitled to assess taxes on the same period a second time. To the extent the City seeks payment of any amounts covered by the June 2024 Tax Bill or the Unissued June 2024 Invoice that were not prepaid, those amounts represent an arbitrary valuation of the Debtors’ property, have not been properly assessed or substantiated, and therefore are not collectable under New Hampshire state law.

¹⁰ This period also includes at least 39 days that occurred prepetition, but those were prepaid in December 2023. *See id.*

¹¹ The Debtors are currently marketing their assets for sale. Requiring the Debtors to incur expenses to value their property in the midst of a sale process would not be beneficial to the Debtors’ estates and could chill the bidding process.

CONCLUSION

37. The Debtors have always been responsible tax-paying citizens of the City. They are not in bankruptcy by choice; indeed, the same economic circumstances which ail the City plague the Debtors. The Debtors and their lenders continue to negotiate with a plan sponsor to restructure their businesses and emerge from bankruptcy as a successful enterprise that can pay its taxes and otherwise satisfy the Debtors' obligations to their estates. In the interim, the City's requested relief is not supported by the Bankruptcy Code or New Hampshire state law, and therefore the Motion must be denied.

WHEREFORE, the Debtors respectfully request that the Court deny the Motion and grant such other and further relief as the Court may deem just and proper.

Dated: August 23, 2024

/s/ Katharina Earle

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

In re

BURGESS BIOPOWER, LLC, *et al.*¹

Debtors.

Chapter 11

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

**DECLARATION OF DEAN VOMERO IN SUPPORT OF DEBTORS' OBJECTION TO
MOTION OF THE CITY OF BERLIN FOR (I) AN ALLOWED ADMINISTRATIVE
EXPENSE CLAIM FOR PROPERTY TAXES PURSUANT TO SECTION 503(b) OF
THE BANKRUPTCY CODE, (II) AN ORDER COMPELLING THE IMMEDIATE
PAYMENT OF PAST DUE POST-PETITION PROPERTY TAXES AND (III)
GRANTING RELATED RELIEF**

I, Dean Vomero, of full age, hereby declare as follows:

1. I am the Chief Restructuring Officer of Berlin Station, LLC ("Berlin Station") and Burgess BioPower, LLC ("Burgess"), the above-captioned debtors and debtors in possession (collectively, the "Debtors") in the above-captioned cases (collectively, the "Chapter 11 Cases"). I am also the Founding Member and Managing Director of Applied Business Strategy LLC ("Applied Business"). The Debtors engaged Applied Business, effective October 27, 2023, to provide turnaround management and contingency-planning advisory services, and I was appointed to be the Chief Restructuring Officer of the Debtors, effective October 27, 2023.

2. I am authorized by the Debtors to submit this declaration in support of the Debtors' objection (the "Objection") to the *Motion of the City of Berlin for (I) an Allowed Administrative Expense Claim for Property Taxes Pursuant to Section 503(b) of the Bankruptcy*

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

Code, (II) an Order Compelling the Immediate Payment of Past Due Post-Petition Property Taxes and (III) Granting Related Relief [D.I. 411].

3. Berlin Station's books and records indicate that Berlin Station pre-paid its *ad valorem* taxes which were amortized to expense. It appears based on Berlin Station's books and records and the terms of the PILOT Agreement (as that term is defined in the Objection) that the December 2023 tax payment satisfied Berlin Station's tax obligations through March 2024.

4. Berlin Station typically pays the REC taxes owed under section 6 of the PILOT Agreement (as that term is defined in the Objection) in June for RECs sold the prior calendar year. For example, Berlin Station paid its REC taxes for RECs sold in calendar year 2022 in June 2023.

5. The Debtors have paid the City's (as that term is defined in the Objection) water bill, which is between \$50,000 and \$60,000, every month.

6. A true and correct copy of a real estate tax bill the Debtors received on or about June 12, 2024 is appended hereto as Exhibit A.

7. I have reviewed the Warren Declaration (as that term is defined in the Objection). The Debtors never received a copy of the tax bill appended to the Warren Declaration as Exhibit B.

8. The tax bill appended to the Warren Declaration as Exhibit B imputes a valuation of the Debtors' property of \$61,338,290.00. It would not be in the best interests of the Debtor's estates to reveal confidential information of the sales and marketing processes and negotiations with bidding parties, however, at the very least that process has established that the City's proposed valuation for the taxable property is not consistent.

9. In negotiations with the City, the Debtors have prepared presentations and have provided the City with financial and valuation information about the Debtors on a confidential basis. The Debtors have proposed offers to the City to resolve their tax obligations.

10. The Debtors' Secured Lenders and DIP Lenders have participated in negotiations with the City to resolve the Debtors' tax obligations. Potential plan sponsors have also expressed an interest in negotiating with the City directly.

11. The City has requested that its lawyers be present during the parties' negotiations and that negotiations proceed through its lawyers.

12. According to Berlin Station's books and records, the amount of 2023 REC Taxes (as that term is defined in the Objection) Berlin Station owes is \$561,033.34.

Pursuant to section 1746 of title 28 of the United States Code, I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 23, 2024

Berlin Station LLC

By: /s/ Dean Vomero
Dean Vomero, Chief Restructuring Officer

Burgess BioPower, LLC

By: /s/ Dean Vomero
Dean Vomero, Chief Restructuring Officer

BILL DATE 6/4/2024
 INVOICE # 2024-1-392234

Map-Lot: 000129-000054-000001
 1 - COMMUNITY STREET

ASSESSED VALUE AND EXEMPTIONS

Land	0.00	Gross Value	51,338,290.00
Building	1,338,290.00	Exemptions	0.00
		Net Value	<u>51,338,290.00</u>

Tax Rate Information		
Municipal	11.58	\$710,297.00
Local Educ	11.13	\$682,695.00
County	2.96	\$181,561.00
State Educ	1.23	\$75,446.00
Total	26.90	1,650,000.00

PROPERTY TAX AND CREDITS

Total 2023 Tax Bill: \$1,650,000.00

REAL ESTATE TAX BILL

**CITY OF BERLIN
 TAX COLLECTOR**

168 Main Street
 Berlin, NH 03570
 (603) 752-6350

*** No changes to AutoPay ***

BERLIN STATION, LLC
 BURGESS BIOPOWER BERLIN STATIO
 631 US HIGHWAY 1, STE 300
 N. PALM BEACH, FL 33408-4620

Total 1/2 of Last Year's Rate: \$825,000.00

Less Prepayments - \$0.00

Net Due By: 7/8/2024 \$825,000.00

Unpaid balances accrue interest at 8% per annum after due date.

BILL DATE 6/4/2024
 INVOICE # 2024-1-392234

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INFORMATION TO TAXPAYERS: RSA: 76:11- a Information Required. The tax bill which is sent to every person taxed, as provided in RSA 76:11, shall show the rate for municipal, school and county taxes separately, the assessed valuation of all lands and buildings for which said person is being taxed, and the right to apply in writing to the selectmen or assessors for an abatement of the tax assessed as provided under RSA 76:16.

If you are elderly, disabled, blind, a veteran or veteran's spouse, or unable to pay taxes due to poverty or other good cause, you may be eligible for tax exemption, credit, abatement or deferral. For details and application information, contact the Assessors Office, 168 Main St., Berlin, NH 03570 (603)752-5245.

Please Make Checks Payable to: City of Berlin Tax Collector and submit to the City of Berlin, Tax Collector, 168 Main Street, Berlin, NH 03570. If payment is made by mail: 1. Return bottom portion of tax bill and enclose stamped self-addressed envelope for return of a receipt. If this is paid by check or money order it is not considered paid until check or money order is cleared.

Payment of this bill does not prevent the collection of previous unpaid taxes, nor does an error in the name of the person taxed prevent collection. Office Hours: Monday – Friday 8:30 a.m. to 4:30 p.m. Tax Collector Information (603) 752-6350.

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