

**REED SMITH LLP**

599 Lexington Avenue, Floor 22

New York, New York 10022

Telephone: (212) 521-5400

Facsimile: (212) 521-5450

Alissa K. Piccione

Email: apiccione@reedsmith.com

*Attorneys for Vestas Chile Turbinas Eólicas Limitada*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re**

**INVERSIONES LATIN AMERICA POWER LTDA.,  
et al.,<sup>1</sup>**

**Debtors.**

**Chapter 11**

**Case No. 23-11891 (JPM)**

**(Jointly Administered)**

**LIMITED OBJECTION TO AND RESERVATION OF RIGHTS CONCERNING  
DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY  
OF THE DISCLOSURE STATEMENT AND (II) CONFIRMING THE PLAN**

Vestas Chile Turbinas Eólicas Limitada (“Vestas”), by and through its undersigned counsel, files this limited objection and reservation of rights (this “Limited Objection”) to and concerning the Debtors’ motion [ECF No. 13] (the “Motion”) for entry of an order (i) approving the adequacy of the disclosure statement [ECF No. 12] (the “Disclosure Statement”) and (ii) confirming the joint chapter 11 plan [ECF Nos. 11, 26, & 59] (the “Plan”).<sup>2</sup> In support of this Limited Objection, Vestas states as follows:

<sup>1</sup> The Debtors, together with each Debtor’s Chilean identification number are: Inversiones Latin America Power Ltda. (76.299.635-9); San Juan S.A. (76.319.883-9); and Norvind S.A. (76.919.070-8). The location of the corporate headquarters and the service address for Inversiones Latin America Power Ltda. is Cerro El Plomo 5680, Oficina 1202, Las Condes, Santiago, Chile.

<sup>2</sup> Capitalized terms used but not otherwise defined in this Limited Objection have the meanings given to them in the Motion or Disclosure Statement, as applicable.

### **PRELIMINARY STATEMENT**

As described more fully in the Disclosure Statement and other filings with this Court, Vestas has two, prepetition contracts (together and as amended, the “O&M Agreements”) with Debtors San Juan and Norvind, respectively. (*See, e.g.*, Disclosure Stmt. at 16–17). As Vestas understands it, the Plan will authorize San Juan and Norvind to assume and potentially assign the O&M Agreements if the Plan is confirmed. (*See, e.g.*, Plan § 5.1).

Generally, Vestas supports the Debtors’ Plan and intends to cooperate as necessary to facilitate the Debtors’ timely exit from chapter 11. Nonetheless, Vestas respectfully submits that the Plan should not be confirmed until, at a minimum, further information is provided regarding the assumption of the O&M Agreements and related issues. Or, alternatively, the Court should condition its approval on the Debtors providing that information and modifying the Plan, if needed, to harmonize the Plan’s assumption provisions with the Bankruptcy Code. Moreover, should any default (or further default, as the case may be) occur under the O&M Agreements between now and the Plan Effective Date, Vestas’s right to the legally required “cure amount” from the applicable Debtors is expressly reserved.

### **LIMITED OBJECTION**

Vestas does not oppose the Debtors assuming the O&M Agreements, which are executory contracts, if the Debtors do so in accordance with section 365 of the Bankruptcy Code. Pursuant to section 365(b)(1), at the time of assumption, the debtor must cure all pre- and post-petition defaults under the contract (unless otherwise excepted) and provide adequate assurance of future performance. *See* 11 U.S.C. § 365(b)(1), (2).

Neither the Plan nor any related filings, however, provide a proposed Cure for Vestas or any counterparty to the Debtors’ executory contracts. The Plan merely says that “the amount and

timing of any such Cure [shall be] dictated by the underlying agreement and the Debtors' ordinary course of business." (*See* Plan § 5.2). It is entirely possible, however, that the parties may disagree over the Cure amount—even if they agree that the Cure should be “dictated by the underlying agreement”. Moreover, the Plan seems to require counterparties to raise the Cure dispute before the Debtors may have proposed a Cure amount. (*See id.* (“Any such request that is not timely filed [by the Plan objection deadline] shall be disallowed and forever barred, estopped, and enjoined from assertion.”)).

Based on Vestas's books and records, Vestas does not believe that there are any defaults under the O&M Agreements that the Debtors are obligated to cure; however, because of the accelerated nature of these proceedings, Vestas was required to make that assessment quickly. Accordingly, the Debtors should provide a proposed Cure rather than have Vestas speculate as to the amount the Debtors intend to pay. Even if the Debtors' proposed Cure is \$0, the Debtors should advise Vestas of such proposed Cure (or lack thereof) before the Plan is confirmed. Likewise, the proposed assumption procedures under the Plan or proposed confirmation order should ensure that any cure amounts that accrue following the Debtors' determination of the Cure will nonetheless be paid on or shortly after the Plan Effective Date.

The Plan does not state (at least not expressly) that the assumed contracts will be assigned. The Plan, however, purports to render all anti-assignment, change in control, and *ipso facto* clauses (collectively, the “Clauses”) in such contracts void. (*See* Plan § 5.1). Putting aside that the Debtors fail to acknowledge any exceptions under the Bankruptcy Code and applicable law to the general rule that these Clauses cannot be enforced against a bankruptcy debtor, *see, e.g.*, 11 U.S.C. § 365(c), (e)(2), the Debtors seem to be extending bankruptcy protections to non-debtors outside of

bankruptcy, such as the reorganized Debtors and future assignees. The Debtors, however, cannot have it both ways.

If the Debtors intend to assign the O&M Agreements during these chapter 11 cases notwithstanding any anti-assignment clauses, then: (i) such assignment must be of all provisions of the O&M Agreements, *see Wash. Town Ctr. LLC v. Jersey Mkts. of Wash. Twp., LLC (In re Great Atl. & Pac. Tea Co.)*, No. 22-CV-4825 (KMK), 2023 U.S. Dist. LEXIS 173036, at \*19 (S.D.N.Y. Sep. 27, 2023) (“The law is clear that a debtor who assumes a lease or other executory contract assumes the contract cum onere, without any diminution in its obligations or impairment of the rights of the lessor [or non-debtor counterparty] in the present or the future.”); and (ii) Vestas will be entitled to information identifying the assignee and demonstrating that the assignee has the wherewithal to perform under the O&M Agreements. *See* 11 U.S.C. § 365(f)(2).<sup>3</sup> If, however, the Debtors do not intend to assign while in bankruptcy and in accordance with the requirements of the Bankruptcy Code, then the reorganized Debtors or assignees shall be subject to all provisions of the O&M Agreements, including, without limitation the anti-assignment and change-in-control provisions. Vestas requests that the Debtors provide clarity regarding potential assignment and their basis for affording non-debtor assignees the same protections afforded to debtors under the Bankruptcy Code.

As stated above, Vestas does not believe that there are any defaults under the O&M Agreements. In turn, Vestas does not believe that any default rate interest (as provided for under the O&M Agreements) would have accrued since the Petition Date. However, the Plan provides that “[u]nless ordered by the Bankruptcy Court, postpetition interest shall not accrue or be paid on

---

<sup>3</sup> If the Debtors do intend to assign the O&M Agreements in bankruptcy, Vestas reserves its right to assert that its consent to such assignment is required. Among other things, the O&M Agreements contain non-exclusive licenses.

Claims, and no Holder shall be entitled to interest accruing on or after the Petition Date on any claim or right.” Plan § 7.4. To the extent that this provision would be deemed to apply to any cure claim, in an abundance of caution, Vestas reserves its right to a full Cure, including default rate interest that accrued post-petition because of monetary defaults. *See In re Golden Seahorse LLC*, 652 B.R. 593, 609 (Bankr. S.D.N.Y. 2023) (“[T]he Court concludes that § 365(b)(2)(D) creates a single cure exception, excusing penalty rates and provisions triggered by nonmonetary defaults. It does not also create an exception for penalty rates that arise from monetary defaults.”).

### **RESERVATION OF RIGHTS**

Vestas reserves all of its rights, remedies, claims, and defenses. Without limiting the foregoing, Vestas reserves its right to supplement this Limited Objection in any respect and assert its right to a Cure or additional Cure amounts.

### **CONCLUSION**

Vestas is hopeful that the Debtors will address and resolve these issues before the confirmation hearing. In an abundance of caution, however, Vestas respectfully requests that the Court not confirm the Plan until the assumption procedures are clarified and, as applicable, modified to meet the requirements of the Bankruptcy Code.

Dated: December 28, 2023  
New York, New York

### **REED SMITH LLP**

/s/ Alissa K. Piccione  
Alissa K. Piccione  
599 Lexington Avenue  
New York, NY 10022  
Telephone: (212) 521-5400  
Facsimile: (212) 521-5450  
Email: apiccione@reedsmith.com

*Counsel for Vestas Chile Turbinas Eólicas Limitada*