IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	**Chapter 11**
BURGESS BIOPOWER, LLC, ET AL.	**Case No. 24-10235 (LSS)**
Debtor.	
	Ref. Nos. 205, 311-1

THE UNITED STATES OF AMERICA'S RESERVATION OF RIGHTS AND LIMITED OBJECTION TO THE DEBTORS' PLAN AND SALE MOTION

The United States of America (the "United States") preserves its rights and objects to the First Amended Joint Chapter 11 Plan of Burgess BioPower, LLC and Berlin Station, LLC (Dkt No. 311-1), and to the Motion for Entry of (A) an Order (I) Approving Bid Procedures Relating to the Sale of All or Substantially All of the Debtors' Assets, (II) Scheduling a Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice of Sale by Auction, (IV) Establishing Procedures for the Assumption and/or Assumption and Assignment of Contracts and Leases and Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief; and (B) an Order (I) Authorizing a Sale of Assets Outside the Ordinary Course of Business, (II) Authorizing the Sale Free and Clear of All Liens, Claims, Encumbrances and Interests, (III) Authorizing the Assumption and/or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief (Dkt No. 205), and in support thereof, states the following:

Preliminary Statement

1. The United States has provided reservation of rights language that is being negotiated with the parties in this case. Should the parties agree to insert that language into the confirmation order and sale order it will resolve the United States' limited objection to both the

sale and plan confirmation. However, as the parties have not formally accepted the language, the United States files this limited objection in an abundance of caution.

Factual Background

2. On February 8, 2024 (the "Petition Date"), the debtors Burgess BioPower, LLC ("Burgess") and Berlin Station, LLC ("Berlin," and collectively, the "Debtors") filed voluntary petitions for bankruptcy under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

3. The Debtors own and operate power plant facilities subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

4. Debtor Burgess also holds one wireless license, call sign WQUF897 (the "FCC License"), issued and regulated by the Federal Communications Commission (the "FCC"). The FCC License is a private radio license which is used for day-to-day business operations. As a license holder, Burgess is regulated by the FCC.

5. On February 29, 2024, the Debtors filed the Motion for Entry of (A) an Order (I) Approving Bid Procedures Relating to the Sale of All or Substantially All of the Debtors' Assets, (II) Scheduling a Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice of Sale by Auction, (IV) Establishing Procedures for the Assumption and/or Assumption and Assignment of Contracts and Leases and Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief; and (B) an Order (I) Authorizing a Sale of Assets Outside the Ordinary Course of Business, (II) Authorizing the Sale Free and Clear of All Liens, Claims, Encumbrances and Interests, (III) Authorizing the Assumption and/or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief (the "Sale Motion").

6. On March 25, 2024, the Court approved the bid procedures. The Debtors are considering both a sale of assets and a reorganization as a means of exiting bankruptcy.

7. On April 11, 2024, the Debtors filed the First Amended Joint Chapter 11 Plan of Burgess BioPower, LLC and Berlin Station, LLC (the "Plan"). A hearing on confirmation of the Plan and approval of a sale is set for June 6, 2024.

Relevant Statutes and Regulations

8. Generally, the Debtors operate a highly-regulated business and have health and safety regulatory obligations to the United States, including, without limitation, FERC and the FCC.

9. Section 203 of the Federal Power Act (the "FPA") requires that a public utility obtain FERC's authorization prior to selling, leasing or disposing of its jurisdictional facilities or any part of the facilities with a value more than $10,000,000. 16 U.S.C. § 824b. 18 C.F.R. part 33 provides the regulations regarding applications to sell, lease, or dispose of such facilities.

10. Any issuance of securities of a public utility similarly requires prior FERC approval. 16 U.S.C. § 824c; *see also* 18 C.F.R. part 34.

11. The FCC exercises its regulatory authority pursuant to the Communications Act of 1934 (as amended, the "FCC Act") which is codified in Title 47 of the United States Code. 47 U.S.C. § 151.

12. Debtor, as an FCC licensee, must comply with regulatory requirements for operation and transfer of an FCC license. "Congress has granted the FCC the authority to regulate the use of the public airwaves in the United States, which includes the exclusive right to grant a license to use the airwaves and to approve any transfer of a license by a licensee." *In re TerreStar Networks, Inc.*, 457 B.R. 254, 262 (Bankr. S.D.N.Y. 2011).

13. FCC Act section 310(d) and the FCC's regulations at 47 C.F.R. § 1.948, require (i) a regulated entity that holds a license to obtain prior FCC approval for a proposed transfer of that license or a proposed transfer of control of itself and (ii) a regulated entity in control of an FCC licensee to obtain prior FCC approval of a proposed transfer of control of the FCC licensee, whether such transfer is voluntary or involuntary, direct or indirect, and irrespective of whether the regulated entity possesses any other FCC license or authorization.

Objection to Confirmation of the Plan

Legal Standard

14. In order to confirm a chapter 11 plan, the plan must comply with sections 1123 and 1129 of the Bankruptcy Code. Section 1123(a)(5) requires adequate means for a plan's implementation, including the transfer or sale of property. Section 1129(a)(1) requires that a plan comply with the applicable provisions of the Bankruptcy Code, and section 1129(a)(3) requires that a plan be proposed in good faith and "not by any means forbidden by law."

1. Debtors, like their non-debtor counterparts, must operate within the confines of the law. 28 U.S.C. § 959(b) requires that the Debtors comply with applicable non-bankruptcy law during their cases. *See Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Prot.*, 474 U.S. 494, 502 (1986) ("Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law."); *see also In re American Coastal Energy Inc.*, 399 B.R. 805, 810 (Bankr. S.D. Tex. 2009) ("Bankruptcy debtors are no different from any citizen in that they must comply with state and federal laws."); *In re H.L.S. Energy Co., Inc.*, 151 F.3d 434, 438 (5th Cir. 1998). Courts have interpreted 28 U.S.C. § 959(b) to apply to compliance obligations under federal laws. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665-66 (2019) (noting that a 28 U.S.C. § 959(b) requires a trustee to manage the estate "in accordance

with applicable law" in a trademark case); *Norris Square Civic Ass'n v. Saint Mary Hosp.*, 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) ("28 U.S.C. § 959(b) requires a debtor to conform with applicable federal, state, and local law in conducting its business").

Argument

17. The Plan does not adequately ensure that the Debtors, Reorganized Debtors, Wind-Down Debtors and/or Purchaser properly transfer property subject to FERC and FCC regulation. The Plan also generally contains release and injunction provisions that are broader than what the Bankruptcy Code allows. The Plan also fails to preserve the United States' rights, including actions against third-parties and setoff and recoupment, and improperly expands the Court's powers under 11 U.S.C. § 525 and 28 U.S.C. § 1334.

18. The Plan and ballots for solicitation allow creditors to opt out of third-party releases. Because the United States has not received any ballots, it must object to third party releases in this pleading as contrary to law, as no curative language has yet to be agreed upon.

A. The United States Objects and Opts Out of the Plan's Releases and Injunctions

19. In Article VIII, the Plan contains numerous release and injunction provisions, including third-party releases. In *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), the Third Circuit held that, at a minimum, third-party releases must be "fair . . . and given in exchange for reasonable consideration," as well as "necess[ary]" to the "success of the [debtor's] reorganization." *Id*. at 213-15; *see also* 11 U.S.C. § 524(e). The Debtors have not demonstrated that the Plan's third-party releases meet these requirements.[1]

[1] The Supreme Court is deciding whether third-party releases such as the ones in the Plan are permissible under the Bankruptcy Code. *Harrington v. Purdue Pharma L.P.*, No. 23-124 (S. Ct., argued Dec. 4, 2023).

20. The United States has not received a ballot in this case; thus, for the avoidance of doubt, the United States opts out and objects to the release and injunction provisions.

21. The Plan contains numerous provisions that affect the United States' rights and defenses with respect to third parties, and as such, the United States' reservation of rights language must be included prior to confirmation.

B. The Plan Does Not Specifically Preserve All Regulatory Authority of the United States

22. Generally, the Plan does not preserve the regulatory rights and administrative processes of governmental units, and contains provisions that may allow the Debtors, Reorganized Debtors or Wind-Down Debtors to skirt federal law. While the Plan discusses the FERC transfer process, there is no specific provision requiring that any transfer must first obtain FERC approval. For example, Article IV.C.4 permits the Reorganized Debtors to issue new securities, but it fails to preserve FERC's right to approve this action pursuant to 16 U.S.C. § 824c and 18 C.F.R. part 34. Neither does the Plan preserve the FCC's regulatory authority in requiring the Debtors to obtain its consent prior to the transfer of any license. Such reservations must be included for the Plan to satisfy the requirements of sections 1123 and 1129. Additionally, Article IX.B of the Plan allows the Debtors to waive any conditions precedent to the Plan Effective Date, including obtaining required regulatory authorizations. This is contrary to federal law and, at a minimum, section 365(c) of the Bankruptcy Code, as the United States' approval to the Plan's contemplated transactions is required.

23. Similarly, the Plan's release and injunction provisions in Article VIII are broader than what section 1141 permits. Section 1141 does not authorize the discharge of non-monetary or regulatory obligations. 11 U.S.C. § 1141(d)(1) (authorizing discharge of prepetition debts). Article VIII.A. provides that the Plan will discharge or release "Causes of Action," "liabilities,"

"obligations," "remedies," "actions," "liabilities," and "rights." These provisions violate sections 1141(d)(1) and 1129(a)(1) because they seek to discharge regulatory obligations owed to the United States—more than is allowed by the Bankruptcy Code, which limits a discharge to debts. Regulatory authority cannot be discharged and must be preserved.

C. The Plan May Recharacterize Federal Interests in Violation of the Bankruptcy Code

24. Article V deals with the assumption, assignment or rejection of contracts and leases. It relies on the Plan's definition of "Assumed Executory Contracts and Unexpired Leases List," which, in turn, relies on documents that may be "amended from time to time." Art. I.A. Thus, the United States cannot know before confirmation if any contracts or leases will be listed that may not be contracts or leases, or even assets of the Debtors. Also, Article IV.C.7 states that the Debtors' prepetition and acquired property and Causes of Action shall vest in the Reorganized Debtors free and clear of all encumbrances, and states that the Reorganized Debtors may operate their businesses without the restrictions of the Bankruptcy Code or rules—in direct contradiction to section 1129(a)(1) and (3). The Plan does not define "property," and so it is unclear what federal interests may be incorrectly viewed as property by the Debtors. Thus, the Plan would improperly allow federal interests to be transferred or used by the Reorganized Debtors in business operations where the Bankruptcy Code and/or non-bankruptcy law would prohibit it.

25. Such overbroad provisions may result in the Plan incorrectly characterizing interests as contracts or assets when they are neither. Thus, confirmation must be denied unless the Plan reserves the United States' rights regarding the Plan's characterization of any federal interests.

D. The Plan Impermissibly Allows the Debtors to Circumvent Federal Law

26. Article V authorizes the Debtors to take necessary actions with respect to assumption, assignment or rejection, but does not preserve counterparty rights and defenses authorized by the Bankruptcy Code. Under section 365(c)(1), the Debtors are prohibited from assumption if federal law prevents it without consent. *See In re West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) ("[Section 365(c)(1)'s prohibition against] assumption of contracts is applicable to any contract subject to a legal prohibition against assignment."); *see also In re Pa. Peer Rev. Org., Inc.*, 50 B.R. 640, 645 (Bankr. M.D. Pa. 1985) (Anti-Assignment Act made a government contract unassumable pursuant to section 365(c)(1)). In addition to specific statutes governing highly-regulated commercial activity, 41 U.S.C. § 6305 prohibits a party awarded a federal contract from transferring it. *In re West Elecs., Inc.*, 852 F.2d at 83-84.

27. Specifically, Article V.A.1 and A.2 authorize an assumption of contracts and leases by the Debtors or an assignment to the Purchaser pursuant to the terms of such contracts and leases, as modified by the Plan or court orders. This provision fails to provide that an assumption or assignment must comply with section 365(c) and applicable non-bankruptcy law.[2] Moreover, Article V.B permits the Debtor to add contracts and leases to the assumed contract list prior to the Plan Effective Date. In such a scenario, the United States may not even know if any federal contracts will be slated for assumption, and, in any event, its consent rights to such assumption and assignment are not preserved.

28. Article V.D states that assumption and/or assignment "shall result in the full release and satisfaction of any Claims or defaults, whether monetary or non-monetary, including defaults

[2] The terms of a federal contract or lease may not necessarily contain all terms regarding its assumption (novation) or assignment. Federal statutes may apply, such as 41 U.S.C. § 6305.

of provisions restricting the change of control or ownership interest composition." This provision runs afoul of the restrictions in section 365(c) and is impermissible.

29. Article IV.A.2 provides that the Debtors, Reorganized Debtors and Wind-Down Debtors may take any necessary action to effectuate the restructuring transaction, including "transfer, assignment, assumption, or delegation of any asset, property, right. Liability, debt, or obligation on terms consistent with the terms of the Plan . . ." Art. IV.A.2(b). Article IV.A.2(e) also authorizes the parties to perform "dispositions, transfers," and the like as necessary to effectuate the restructuring, outside the bounds of the Bankruptcy Code and applicable non-bankruptcy law.

30. As discussed above, Article IV.C.7 mandates that property and Causes of Action shall vest in the Reorganized Debtors free and clear of all encumbrances, and purports to allow the Reorganized Debtors to operate their businesses without the restrictions of the Bankruptcy Code or rules despite the Plan's expansion of the Court's jurisdiction. Such overbroad provisions allow the parties to restructure the Debtors free from restrictions of both the Bankruptcy Code and non-bankruptcy law provisions, allowing the parties to avoid federal law regarding vesting their property and operating their business.

31. Even in a wind down, Article IV.B.4 allows the Wind-Down Debtors to receive the assets free and clear of all encumbrances, without the restrictions of sections 365(c) and 363(f). This is another example of the Plan's impermissible expansion of what the Bankruptcy Code permits.

32. Finally, Article V.F. appears to allow the Debtors and Reorganized Debtors to treat postpetition contracts or leases as prepetition contracts and leases. This treatment is wholly

unsupported by the Bankruptcy Code, is a gross expansion of its authority, and in direct contradiction to section 1129.

33. For these reasons the Plan should not be confirmed without the addition of the United States' reservation of rights language.

E. The Plan Impermissibly Expands 11 U.S.C. § 525

34. In Article VIII.B, the Plan provides certain protections under section 525 of the Bankruptcy Code. However, these provisions go beyond what the Bankruptcy Code permits.

35. Article VIII.B states, in part, that no party shall "discriminate against the Reorganized Debtors or Wind-Down Debtor(s) . . . or deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, the Reorganized Debtors or Wind-Down Debtor(s) . . . or another *Person* with whom the Reorganized Debtors or Wind-Down Debtor(s), as applicable, have been associated, solely because the relevant Debtor has been a debtor . . . was insolvent before the commencement of or during the Debtors' Chapter 11 Cases, or did not pay a debt that is discharged." Plan, Art. VIII.B (emphasis added).

36. The Plan's definition of "Person" includes entities such as associations, joint ventures, limited liability companies, governmental units, among others, and is thus broader than that in section 101(41) of the Bankruptcy Code, which, in turn, broadens the provisions of section 525. The United States cannot be restricted beyond the scope of section 525.

37. For this reason, too, the Plan should not be confirmed without the addition of the United States' reservation of rights language.

F. The Plan Impermissibly Expands the Court's Jurisdiction

38. The United States objects to Article XI of the Plan to the extent that it provides for jurisdiction beyond 28 U.S.C. § 1334. While "the bankruptcy court plainly [may retain] jurisdiction to interpret and enforce its own prior orders," *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009), it may not divest other courts of their concurrent jurisdiction to interpret bankruptcy court orders. For example, if the United States, post-confirmation, asserts liabilities in a non-bankruptcy court of competent jurisdiction, that court may hear and determine all issues raised in the action, including whether the defendant can rely on the confirmation order in its defense. Adjudication of such a defense is a proceeding over which the bankruptcy court, as a unit of the district court, has "original but not exclusive jurisdiction." 28 U.S.C. § 1334(b) (emphasis added); *see also Stern v. Marshall*, 131 S. Ct. 2594 (2011); *In re Mystic Tank Lines Corp*., 544 F.3d 524, 528-29 (3d Cir. 2008) ("No provision of the Bankruptcy Code requires the Bankruptcy Court to hear all 'related to' claims . . . the only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.'") (citing *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987)); *In re Combustion Eng'g, Inc*., 391 F.3d 190, 224-225 (3d Cir. 2004), *as amended* (Feb. 23, 2005) ("Section 105(a) permits a bankruptcy court to 'issue any order, process or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code. But as the statute makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction.").

39. In sum, the Plan contains numerous provisions that impermissibly authorizes actions beyond what the Bankruptcy Code allows and which may violate federal law, 28 U.S.C. § 959(b) and 11 U.S.C. § 1129(a)(3).

40. For these same reasons, and as discussed further below, the contemplated sale cannot be approved without the United States' rights being reserved.

G. The Plan Does Not Preserve the United States' Rights of Setoff and Recoupment

41. In article VI.I of the Plan, the Debtors' setoff and recoupment rights are preserved. That same provision, however, strips those rights of creditors or other parties, including the United States, even if such setoff rights were preserved in a proof of claim, which is inconsistent with governing law.

42. Confirmation of a plan does not extinguish setoff claims when they are timely asserted. *In re Continental Airlines*, 134 F.3d 536, 542 (3d Cir. 1998). Like other creditors, the United States has the common law right to setoff mutual debts. "The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 239 (1947) (citing *Gratiot v. United States*, 40 U.S. (15 Pet) 336, 370, 10 L.Ed. 759 (1841)); *see also Amoco Prod. Co. v. Fry*, 118 F.3d 812, 817 (D.C. Cir. 1997). This right – "which is inherent in the federal government – is broad and 'exists independent of any statutory grant of authority to the executive branch.'" *Marre v. United States*, 117 F.3d 297, 302 (5th Cir. 1997) (quoting *United States v. Tafoya*, 803 F.2d 140 (5th Cir. 1986)). Hence, the United States can setoff mutual prepetition debts and claims as well as postpetition debts and claims. *Zions First Nat'l Bank, N.A. v. Christiansen Bros*. (*In re Davidson Lumber Sales, Inc.*), 66 F.3d 1560, 1569 (10th Cir. 1995); *Palm Beach County Bd. of Pub. Instruction (In re Alfar Dairy, Inc.)*, 458 F.2d 1258, 1262 (5th Cir.), *cert. denied*, 409 U.S. 1048 (1972); *Mohawk Indus., Inc. v. United States (In re Mohawk Indus., Inc.)*, 82 B.R. 174, 178-79 (Bankr. D. Mass. 1987).

43. The Plan's failure to preserve these rights renders it non-confirmable. Such treatment is impermissible, because Section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy as it exists outside bankruptcy, *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995), neither expanding nor constricting it, *United States v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998). "[T]he government of the United States suffers no special handicap under § 553 of the Bankruptcy Code," *id*. at 1103, that alters this principle. Moreover, because "[s]etoff occupie[s] a favored position in our history of jurisprudence," *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent "the most compelling circumstances." *Niagara Mohawk Power Corp. v. Utica Floor Maintenance, Inc. (In re Utica Floor Maintenance, Inc.*), 41 B.R. 941, 944 (N.D.N.Y. 1984); *see also New Jersey Nat'l Bank v. Gutterman (In re Applied Logic Corp.)*, 576 F.2d 952 (2d Cir. 1978) ("The rule allowing setoff ... is not one that courts are free to ignore when they think application would be unjust."). Compelling circumstances generally entail criminal conduct or fraud by the creditor. *In re Whimsy, Inc.*, 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here, and accordingly, the Plan must provide for and preserve the United States' setoff rights. Failure to do so violates section 1129(a)(1), as the Plan does not comply with "the applicable provisions of this title."

44. Here, the United States' claims bar date of August 6, 2024 has not passed. As such, the United States has not had the time required by the Code to discover claims which could be set off prior to confirmation. The Plan's attempt to foreclose the United States' ability to preserve its setoff rights in a proof of claim violates section 1129(a)(1) and (3). To the extent the Plan cuts off the United States' right to file a proof of claim within the section 502(b)(9)(A) timeframe mandated by Congress, it violates the Bankruptcy Code and the order setting claims bar dates

45. Similarly, recoupment is unaffected by discharge. *Megafoods Stores, Inc. v. Flagstaff Realty Assocs.* (*In re Flagstaff Realty Assocs.*), 60 F.3d 1031, 1035-36 (3rd Cir. 1995) (holding that recoupment survives discharge following confirmation and implementation of chapter 11 plan even if creditor did not object to plan or seek a stay pending appeal); *see also Beaumont v. Dep't of Veteran Affairs* (*In re Beaumont*), 586 F.3d 776 (10th Cir. 2009); *Saif Corp. v. Harmon* (*In re Harmon*), 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995) ("Because recoupment only reduces a debt as opposed to constituting an independent basis for a debt, it is not a claim in bankruptcy, and is therefore unaffected by the debtor's discharge.").

46. The Plan's impairment of the United States' rights of setoff and recoupment is impermissible and inequitable. For this reason, confirmation should be denied if the United States' reservation of rights language is not included.

Objection to Sale Motion

Legal Standard

47. A debtor must comply with applicable non-bankrutcy law during its bankruptcy case as required by 28 U.S.C. § 959(b). Also, a sale of assets "free and clear" of all "interests in property" pursuant to section 363(f) of the Bankruptcy Code requires the debtor to satisfy one of five enumerated subsections. 11 U.S.C. § 363(f)(11) – (5).

Argument

48. First, as discussed above, 28 U.S.C. § 959(b) requires that the Debtors comply with applicable non-bankruptcy law during their cases. Debtors cannot sell any assets or assign any contract or lease without complying with applicable non-bankruptcy law, as required by section 959(b) and sections 365(c)(1) and 363(f).

49. Therefore, the Sale Motion cannot be approved unless it preserves the United States' regulatory approval rights with respect to the highly-regulated assets at issue here.

50. For the same reasons as discussed above, the United States' consent rights in section 365(c) cannot be extinguished in an order authorizing the sale of assets and assumption and assignment of contracts and leases.

51. Second, section 363(f) cannot strip away a debtor's obligations to comply with federal law, as such obligations are not "interests in property." Even if section 363(f) could apply, none of the five enumerated subsections are met here.

52. The Debtors' and Purchaser's obligations to obtain regulatory consent prior to the sale of any assets is not an "interest in property." *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289 (3d Cir. 2003) (interests include obligations that may flow from ownership of the property sold). Here, the requirement to obtain approval from FERC, the FCC, and any other regulator arises from the FPA, the FCC Act and their implementing regulations, and not from the assets being sold. Thus, statutory compliance requirements are not "interests in property" pursuant to section 363(f).

53. Even if section 363(f) could apply to the Debtors' and Purchasers' obligations to comply with their regulatory obligations, the Debtors have not satisfied any of section 363(f)(1) through (5). There is no applicable, non-bankruptcy law that permits the sale free and clear of regulatory obligations—in fact, the FPA and FCC Act specifically forbid any such sale without regulatory compliance. 11 U.S.C. § 363(f)(1).

54. The United States does not consent pursuant to section 363(f)(2), and the FPA and FCC Act's sale approval requirements are not liens on the property pursuant to section 363(f)(3).

55. No bona fide dispute as to the regulatory obligations exists as required by section 363(f)(4). The Plan's discussion of the FERC transfer process demonstrates that the Debtors do not dispute the FPA's requirements.

56. The United States cannot be compelled to accept money in lieu of the Debtors' requirements to obtain the United States' consent to a sale of regulated assets. 11 U.S.C. § 363(f)(5). The FPA, FCC Act and other applicable laws do not authorize the substitution of money for statutory requirements. Common sense dictates that no monetary claim can adequately take the place of legal requirements, especially in the realm of health and safety.

57. Finally, the proposed sale cannot extinguish setoff or recoupment rights. As discussed above, section 553 preserves setoff rights, and recoupment, as a defense to payment, is not an interest in property subject to section 363(f). *Foldger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 261 (3d Cir, 2000).

58. Moreover, according to the APA attached to the Sale Motion, the transaction does not include a sale of tax refunds or other potential payments from the United States. *See* Sale Motion, APA § 2.2(o), (generally). As such, any debts the United States could potentially owe the Debtors will remain in the estate after the sale and will be available to be set off against any claims of the United States against the Debtors. Extinguishing setoff rights in this situation would not benefit the Purchaser and would work an inequitable windfall to the Debtors.

59. For the foregoing reasons, the Sale Motion should be denied unless the order includes the United States' reservation of rights language.

Objection to Waiver of Stay of Order

60. Due to the numerous objections described above, Article XII.A of the Plan, which authorizes an immediate binding effect is not warranted or just. The Plan's objectionable

provisions, if approved by the court, may harm the United States and its ability to implement its policies and programs and safeguard the public health, safety and welfare. Thus, the United States must be given time to appeal the confirmation order.

Reservation of Rights

The United States reserves all rights to amend or supplement this objection and otherwise protect its claims and interests in this case.

Conclusion

For the foregoing reasons, the Court should not confirm the Plan unless modifications are made to protect the rights of the United States consistent with the foregoing objections.

Dated: May 29, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

/s/ *Leah V. Lerman*
KIRK MANHARDT
MARCUS S. SACKS
LEAH V. LERMAN (Fed. Bar No. 28669)
Civil Division
U. S. Department of Justice
P. O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 307-0452 (telephone)
(202) 514-9163 (facsimile)
Email: Leah.V.Lerman@usdoj.gov