IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SALEM HARBOR POWER DEVELOPMENT LP (f/k/a Footprint Power Salem Harbor Development LP), *et al.*,[1]	Case No. 22-10239 (MFW)
	(Jointly Administered)
Debtors.	**Hearing Date: July 19, 2022 at 10:30 a.m. (ET)** **Objection Deadline: July 12, 2022 at 4:00 p.m. (ET)**

DEBTORS' MOTION FOR AN ORDER (A) APPROVING SETTLEMENT AGREEMENT BETWEEN DEBTOR SALEM HARBOR POWER DEVELOPMENT LP AND THE OFFICE OF ENFORCEMENT OF THE FEDERAL ENERGY REGULATORY COMMISSION AND (B) GRANTING RELATED RELIEF

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully represent as follows in support of this motion (this "Motion"):

RELIEF REQUESTED

1. By this Motion, pursuant to sections 105(a) and 363 of title 11 of the United States Code (the "Bankruptcy Code") and rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtors request entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), (a) approving the settlement agreement (the "Settlement Agreement")[2] by and among Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) ("DevCo"), a Debtor in these chapter 11 cases,

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) (1360); Highstar Salem Harbor Holdings GP, LLC (f/k/a Highstar Footprint Holdings GP, LLC) (2253); Highstar Salem Harbor Power Holdings L.P. (f/k/a Highstar Footprint Power Holdings L.P.) (9509); Salem Harbor Power FinCo GP, LLC (f/k/a Footprint Power Salem Harbor FinCo GP, LLC) (N/A); Salem Harbor Power FinCo, LP (f/k/a Footprint Power Salem Harbor FinCo, LP) (9219); and SH Power DevCo GP LLC (f/k/a Footprint Power SH DevCo GP LLC) (9008). The location of the Debtors' service address is: c/o Tateswood Energy Company, LLC, 480 Wildwood Forest Drive, Suite 475, Spring, Texas 77380.

[2] A copy of the Settlement Agreement is attached as **Exhibit 1** to the Proposed Order.

and the Office of Enforcement (the "OE") of the Federal Energy Regulatory Commission ("FERC") and (b) granting related relief. In further support of this Motion, the Debtors also submit the *Declaration of John R. Castellano in Support of Debtors' Motion for an Order (A) Approving Settlement Agreement Between Debtor Salem Harbor Power Development LP and the Office of Enforcement of the Federal Energy Regulatory Commission and (B) Granting Related Relief*, attached hereto as **Exhibit B** (the "Castellano Declaration").

JURISDICTION AND VENUE

2. The Court has jurisdiction over these chapter 11 cases and this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and, pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Debtors consent to entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue of these chapter 11 cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

3. The statutory and legal predicates for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rule 9019.

BACKGROUND

A. General Background

4. On March 23, 2022 (the "Petition Date"), the Debtors each commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code.

5. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. To date, no trustee, examiner, or statutory committee has been appointed in these chapter 11 cases.

6. Information regarding the Debtors' business and capital structure and the circumstances leading to the commencement of these chapter 11 cases is set forth in the *Declaration of John R. Castellano in Support of Chapter 11 Petitions and First Day Pleadings* [D.I. 9] (the "First Day Declaration"), filed on the Petition Date.

7. On June 27, 2022, the Debtors filed the *Joint Chapter 11 Plan of Salem Harbor Power Development LP and Its Debtor Affiliates* [D.I. 270] (as amended, supplemented, or otherwise modified from time to time, the "Plan") and the *Disclosure Statement for Joint Chapter 11 Plan of Salem Harbor Power Development LP and Its Debtor Affiliates* [D.I. 271] (as amended, supplemented, or otherwise modified from time to time, the "Disclosure Statement").[3]

B. The FERC Investigation

8. As further described in the First Day Declaration, DevCo owns and operates a 674 MW natural gas-fired combined-cycle electric power plant (the "Facility") located in Salem, Massachusetts, which became operational in 2018. DevCo generates revenue by selling energy, capacity, and ancillary services from the Facility through ISO New England Inc. ("ISO-NE"), the not-for-profit organization that manages New England's electrical grid and its competitive wholesale market. DevCo generates "energy revenues" by selling its electricity into the ISO-NE wholesale market through scheduled services offered by its energy manager, and it also receives

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or the Disclosure Statement, as applicable.

so-called "capacity revenues" through its participation in ISO-NE's forward capacity market (the "Forward Capacity Market"). Through its participation in forward capacity auctions, DevCo obtains commitments to produce energy over a specified period of time, regardless of whether energy is actually needed or produced, in exchange for capacity revenues from ISO-NE. In connection with the development and construction of the Facility, ISO-NE provided the Debtors with a capacity award (the "Capacity Award") for the five (5) year period of June 1, 2017, through May 31, 2022. The award was a key incentive for the development of the Facility. In order to remain eligible for the Capacity Award, the Facility was required to become operational by no later than May 31, 2017 (the "Commercial Operation Date"). Ultimately, the Facility did not meet this deadline, and in October 2017, the OE commenced a non-public investigation into the Facility's participation in the Forward Capacity Market (the "Investigation").

9. On August 27, 2020, the OE presented its preliminary findings regarding the Investigation to DevCo, which included five (5) separate alleged violations. Among other things, the OE alleged that DevCo violated the ISO-NE Transmission, Markets, and Services Tariff (the "Tariff") and FERC's Market Behavior Rules due to DevCo's alleged failure to provide accurate and complete critical path schedule updates to ISO-NE. The OE's preliminary findings alleged that the Facility's critical path schedule updates did not include all information relevant to ISO-NE's evaluation of the feasibility of the Facility and its ability to meet the Commercial Operation Date. The OE also alleged that the Facility engaged in a fraudulent scheme to deceive ISO-NE and the market into believing that the Facility would comply with the Commercial Operation Date and to ensure that the Facility would receive the Capacity Award. The OE further alleged that this "scheme" violated FERC's Anti-Manipulation Rule.

10. On February 8, 2021, DevCo provided a comprehensive response to the OE, which rebutted each of the OE's preliminary findings. Among other things, DevCo argued that its actions, decisions, communications, and notifications concerning the development of the Facility were at all times compliant with FERC's regulations and applicable ISO-NE Tariff provisions.

11. In November 2021, the OE notified DevCo that the OE had received authority from FERC to enter into settlement discussions with DevCo in an effort to resolve the Investigation, and the parties subsequently entered into a tolling agreement to facilitate such discussions. The Debtors endeavored to keep the OE apprised of its restructuring efforts prior to the Petition Date in connection with the parties' settlement discussions, and they have continued to cooperate in good faith following the commencement of these chapter 11 cases. Over the past eight (8) months, DevCo and the OE have engaged in extensive good faith, arm's-length negotiations regarding a settlement of the Investigation and potential causes of action arising therefrom.

12. As of the date hereof, FERC has not issued a show cause order against DevCo, and DevCo fully contests all allegations raised by the OE against DevCo. DevCo has reserved all rights to formally contest the OE's allegations in litigation, if necessary, to the extent the Court does not approve the relief requested herein.

THE SETTLEMENT AGREEMENT

13. Following eight (8) months of good-faith negotiations, DevCo and the OE have agreed to resolve and settle the Investigation on the terms and conditions set forth in the Settlement Agreement. The salient terms of the Settlement Agreement are as follows:[4]

[4] This summary is for informational purposes only and is not intended to modify in any way the terms and conditions of the Settlement Agreement. To the extent that there is any inconsistency between the terms described herein and the terms of the Settlement Agreement, the terms of the Settlement Agreement shall control.

- FERC shall have a $17.1 million civil penalty claim and an approximately $26.7 million disgorgement claim against DevCo (together, the "Monetary Claims"). As part of its preliminary findings, the OE initially asserted claims that, if successfully prosecuted by the OE in all respects, could amount to approximately $208.2 million in civil penalty assessment and disgorgement orders against DevCo. Accordingly, the Monetary Claims amount to approximately one-fifth of the total monetary exposure initially asserted by the OE pursuant to its preliminary findings. The significant reduction in the amount of the Monetary Claims reflects, among other things, the OE's recognition that the acts and omissions of other parties in interest contributed to certain of the alleged harm.

- The Monetary Claims will be classified as General Unsecured Claims under the Plan and will be allowed claims entitled to the treatment afforded to such claims. FERC will not need to file a proof of claim in these chapter 11 cases.

- One (1) of the five (5) alleged violations included in the OE's preliminary findings, including allegations of market manipulation and fraud, will no longer be alleged or otherwise pursued by the OE. The OE's agreement to not further pursue such allegations forecloses the OE's ability to assert that any such allegations give rise to non-dischargeable claims in these chapter 11 cases. Removing the risk of potential non-dischargeable claims in these chapter 11 cases is a material benefit to the Debtors' estates because, to the extent the OE could establish the existence of any non-dischargeable claims, there would be substantial risk that the Debtors would be unable to confirm a chapter 11 plan. Additionally, all outstanding inquiries and investigations that the OE may have against DevCo shall be resolved pursuant to and/or in connection with the Settlement Agreement.

- So long as the Plan is consistent with and implements the Settlement Agreement, the OE shall not object to or otherwise oppose confirmation of the Plan unless, in the OE's sole discretion, such objection is appropriate to preserve and/or exercise FERC's police or regulatory powers.

- Upon the effective date of the Settlement Agreement, FERC shall be prohibited from holding DevCo, DevCo as reorganized pursuant to the Plan ("Reorganized DevCo"), or any of their respective current and former officers, managers, directors, limited partners, general partners, equity holders (regardless of whether such interests are held directly or indirectly), principals, members, predecessors, successors, assigns, subsidiaries, employees, agents, consultants, or representatives, each strictly in their capacity as such, liable for any and all administrative or civil claims arising out of the conduct covered by the Investigation, including, but not limited to, conduct addressed and stipulated to in the Settlement Agreement, which occurred on or before the effective date of the Settlement Agreement.

- Reorganized DevCo shall submit an annual compliance monitoring report to the OE for two (2) years following the effective date of the Settlement Agreement in accordance with the terms of the Settlement Agreement.

- DevCo or Reorganized DevCo (as applicable) shall, to the extent reasonably practicable, cooperate with and not take any actions to impede the OE in any enforcement action or proceeding concerning other individuals or entities related to the subject matter of the Investigation that the OE may commence.

14. The Debtors have determined in the exercise of their business judgment that the terms of the Settlement Agreement are fair and reasonable and in the best interests of the Debtors and their estates. The Debtors' compromise with the OE is a critical component of the comprehensive restructuring embodied in the Plan. Approval of the Settlement Agreement offers a favorable resolution to the Investigation and forecloses what could have otherwise resulted in a costly and arduous litigation process at the expense of the Debtors' creditors, and avoids the risks associated with the potential of non-dischargeable claims, which if established would impede the Debtors' ability to confirm a chapter 11 plan. Approval of the Settlement Agreement will not only benefit the Debtors, but it will also maximize value for all stakeholders under the Plan by reducing the total amount of FERC's potential monetary claims and consensually resolving claims that the OE may argue are otherwise non-dischargeable.

15. On June 27, 2022, FERC issued an order approving the Settlement Agreement. The effectiveness of the Settlement Agreement is conditioned on the Court's approval of DevCo's entry into the Settlement Agreement without material modification.

BASIS FOR RELIEF REQUESTED

16. Bankruptcy Rule 9019(a) provides that "[o]n motion by the trustee and after a hearing, the [C]ourt may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). The settlement of time-consuming and burdensome litigation, especially in the bankruptcy context, is encouraged. *See In re Penn Cent. Transp. Co.*, 596 F.2d 1102, 1113 (3d Cir. 1979) ("The Court has recognized that '[i]n administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial

and reasonable doubts.'") (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

17. To approve a settlement, a bankruptcy court must determine that such settlement is in the best interest of a debtor's estate. *Law Debenture Trust Co. of New York v. Kaiser Aluminum Corp.* (*In re Kaiser Aluminum Corp.*), 339 B.R. 91, 95–96 (D. Del. 2006). In addition, the Third Circuit has enumerated the following four-factor test to be used in deciding whether a settlement should be approved: (a) the probability of success in litigation; (b) the likely difficulties in collection; (c) the complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and (d) the paramount interest of creditors. *Will v. Northwestern Univ.* (*In re Nutraquest, Inc.*), 434 F.3d 639, 644 (3d Cir. 2006) (citing *Myers* v. *Martin* (*In re Martin*), 91 F.3d 389, 393 (3d Cir. 1996)).

18. The United States District Court for the District of Delaware has explained that a court's ultimate inquiry is whether a settlement "is fair, reasonable, and in the interest of a [debtor's] estate." *In re Marvel Ent. Grp., Inc*., 222 B.R. 243, 249 (D. Del. 1998) (quoting *In re Louise's, Inc.,* 211 B.R. 798, 801 (D. Del. 1997)). In determining the fairness and equity of a compromise in bankruptcy, the Third Circuit has stated that it is important that the bankruptcy court "apprise[] itself of all facts necessary to form an intelligent and objective opinion of the probabilities of ultimate success should the claims be litigated, and estimate[] the complexity, expense and likely duration of such litigation, and other factors relevant to a full and fair assessment of the [claims]." *Matter of Penn Cent. Transp. Co.*, 596 F.2d 1127, 1146 (3d Cir. 1979).

19. Approval of a proposed settlement is within the "sound discretion" of the bankruptcy court. *See In re Neshaminy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa. 1986).

The bankruptcy court should not substitute its judgment for that of the debtor. *Id.* The Court "need not be convinced that the settlement is the best possible compromise. The [C]ourt need only conclude that the settlement falls within the reasonable range of litigation possibilities somewhere above the lowest point in the range of reasonableness." *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 833 (Bankr. D. Del. 2008); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 77–78 (Bankr. D. Del. 2012) ("In analyzing the compromise or settlement agreement under the *Martin* factors, courts should not have a 'mini-trial' on the merits, but rather should canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." (internal quotes omitted)). The Court is not to decide numerous questions of law or fact raised by litigation, but, rather, should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness. *See In re W.T. Grant & Co.*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 22 (1983); *see also Official Comm. of Unsecured Creditors v. CIT Grp./Bus. Credit Inc.* (*In re Jevic Holding Corp.*), 787 F.3d 173, 180 (3d Cir. 2015); *Mangano v. Warriner* (*In re ID Liquidation One, LLC*), 555 Fed. App'x 202, 207 (3d Cir. 2014); *In re Sea Containers Ltd.*, 2008 WL 4296562, at *5 (Bankr. D. Del. Sept. 19, 2008).

20. Further, the Bankruptcy Code authorizes the use and disposition of property outside the ordinary course of business with court approval and a valid business reason after notice and a hearing. 11 U.S.C. § 363(b)(1). It is well established in this jurisdiction that a debtor may use property of the estate outside the ordinary course of business with a valid business reason. *See, e.g.*, *Martin*, 91 F.3d at 395 (noting that under normal circumstances, courts defer to a debtor's business judgment concerning use of property under section 363(b) when there is a legitimate business justification). Moreover, section 105(a) of the Bankruptcy Code provides that a bankruptcy court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). For the reasons outlined herein and in

the Castellano Declaration, the Debtors believe that entering into and performing under the Settlement Agreement reflects a sound business purpose and represents a valid exercise of the Debtors' business judgment. Accordingly, the Debtors should be authorized to perform under the Settlement Agreement pursuant to sections 105(a) and 363(b) of the Bankruptcy Code.

21. In the Debtors' business judgment, the resolution embodied in the Settlement Agreement is in the best interest of the Debtors, their estates, and other parties in interest and falls well within the range of reasonableness. The Settlement Agreement is the result of nearly eight (8) months of good faith, arm's-length negotiation among the Debtors and the OE. During this time, the Debtors and their advisors—including independent regulatory counsel—met with representatives from the OE on at least twelve (12) occasions and exchanged multiple proposals, each of which was carefully evaluated by the Debtors and their advisors. The Debtors believe that the Settlement Agreement ultimately agreed to by the parties reflects the best possible terms under the circumstances and will afford the Debtors a true fresh start with respect to compliance and regulatory matters. Among other things, the Settlement Agreement eliminates one (1) of the OE's five (5) initial allegations, including allegations that could have given rise to non-dischargeable claims, significantly reduces DevCo's monetary exposure by over $164.4 million, and classifies and treats FERC's Monetary Claims as General Unsecured Claims under the Plan. Accordingly, the Debtors respectfully submit that entry into the Settlement Agreement will benefit the Debtors and all parties in interest and is in the best interest of the Debtors' estates.

22. The Settlement Agreement also satisfies the four-factor *Martin* test. ***First***, with respect to the probability of success in litigating the potential claims subject to settlement, while the Debtors are confident in their position, they believe there is inherent risk in any litigation.

Additionally, even if the Debtors were successful in such litigation, the negative publicity could jeopardize the Debtors' ability to continue operating in the Forward Capacity Market—a critical component of the Debtors' business—and compromise the Debtors' future operations. ***Second***, even if the Debtors were to litigate the issues to a favorable conclusion, they will have expended significant resources—which the Debtors do not believe would be prudent in light of their current financial condition and limited liquidity. ***Third***, in the absence of a settlement, the Debtors would likely be subject to an administrative proceeding or civil action carrying considerable expense, risk, and delay. The OE's preliminary findings involve highly technical and unpredictable legal issues, and would require costly briefing and discovery. Such litigation would pose needless expense on the Debtors' estates and distract the Debtors from their restructuring efforts at this critical juncture. Among other things, the potential non-dischargeability of certain of the OE's alleged claims would likely be the subject of considerable litigation and would pose a material risk that the Debtors could be unable to confirm a chapter 11 plan if the OE were to prevail. Accordingly, initiation of any proceeding at this time would greatly undermine the Debtors' restructuring efforts and could potentially jeopardize the Debtors' ability to emerge from chapter 11. ***Finally***, the Settlement Agreement is in the paramount interest of the Debtors' creditors. The compromise set forth in the Settlement Agreement is an essential piece of the Debtors' overall restructuring and will eliminate costly litigation among the parties and instead distribute the savings to creditors under the Plan. Additionally, the Settlement Agreement reduces FERC's potential claims in these chapter 11 cases by nearly eighty percent (80%), thereby increasing the relative value available for all other holders of General Unsecured Claims under the Plan. In short, the Settlement Agreement not only benefits the Debtors and their estates, but it will

also maximize value for the Debtors' stakeholders and is a key component of the comprehensive restructuring embodied in the Plan.

23. In light of the foregoing benefits to the Debtors' estates, the Debtors submit that the Settlement Agreement is fair and reasonable under the circumstances, and entry into the Settlement Agreement is a valid and reasonable exercise of their business judgment. Accordingly, the Settlement Agreement satisfies the standards for approving settlements under Bankruptcy Rule 9019 and the requirements of sections 105(a) and 363(b) of the Bankruptcy Code, and should be approved.

NOTICE

24. Notice of this Motion will be provided to: (a) the U.S. Trustee (Attn: Joseph Cudia); (b) the holders of the thirty (30) largest unsecured claims on a consolidated basis against the Debtors; (c) the Internal Revenue Service; (d) the United States Attorney's Office for the District of Delaware; (e) counsel to the Prepetition Agent; (f) the Environmental Protection Agency and similar state agencies for states in which the Debtors conduct business; (g) the Federal Energy Regulatory Commission; and (h) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

[*Remainder of page intentionally left blank.*]

WHEREFORE, the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: June 28, 2022
Wilmington, Delaware

Respectfully submitted,

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Andrew L. Magaziner

Pauline K. Morgan (No. 3650)
Andrew L. Magaziner (No. 5426)
Katelin A. Morales (No. 6683)
Timothy R. Powell (No. 6894)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: pmorgan@ycst.com
amagaziner@ycst.com
kmorales@ycst.com
tpowell@ycst.com

- and -

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

Brian S. Hermann (admitted *pro hac vice*)
John T. Weber (admitted *pro hac vice*)
Alice Nofzinger (admitted *pro hac vice*)
1285 Avenue of the Americas
New York, New York 10019
Tel: (212) 373-3000
Fax: (212) 757-3990
Email: bhermann@paulweiss.com
jweber@paulweiss.com
anofzinger@paulweiss.com

Counsel to the Debtors and Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SALEM HARBOR POWER DEVELOPMENT LP (f/k/a Footprint Power Salem Harbor Development LP), *et al.*,[1]	Case No. 22-10239 (MFW)
	(Jointly Administered)
Debtors.	**Hearing Date: July 19, 2022 at 10:30 a.m. (ET)** **Objection Deadline: July 12, 2022 at 4:00 p.m. (ET)**

NOTICE OF MOTION

TO: (A) THE U.S. TRUSTEE (ATTN: JOSEPH CUDIA); (B) THE HOLDERS OF THE THIRTY (30) LARGEST UNSECURED CLAIMS ON A CONSOLIDATED BASIS AGAINST THE DEBTORS; (C) THE INTERNAL REVENUE SERVICE; (D) THE UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF DELAWARE; (E) COUNSEL TO THE PREPETITION AGENT; (F) THE ENVIRONMENTAL PROTECTION AGENCY AND SIMILAR STATE AGENCIES FOR STATES IN WHICH THE DEBTORS CONDUCT BUSINESS; (G) THE FEDERAL ENERGY REGULATORY COMMISSION; AND (H) ANY PARTY THAT HAS REQUESTED NOTICE PURSUANT TO BANKRUPTCY RULE 2002

PLEASE TAKE NOTICE that Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) and its debtor affiliates in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors"), have filed the attached *Debtors' Motion for an Order (A) Approving Settlement Agreement Between Salem Harbor Power Development LP and the Office of Enforcement of the Federal Energy Regulatory Commission and (B) Granting Related Relief* (the "Motion").

PLEASE TAKE FURTHER NOTICE that any objections or responses to the relief requested in the Motion must be filed on or before **July 12, 2022 at 4:00 p.m. (ET)** (the "Objection Deadline") with the United States Bankruptcy Court for the District of Delaware, 824 N. Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, copies of any responses or objections to the Motion must be served upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) (1360); Highstar Salem Harbor Holdings GP, LLC (f/k/a Highstar Footprint Holdings GP, LLC) (2253); Highstar Salem Harbor Power Holdings L.P. (f/k/a Highstar Footprint Power Holdings L.P.) (9509); Salem Harbor Power FinCo GP, LLC (f/k/a Footprint Power Salem Harbor FinCo GP, LLC) (N/A); Salem Harbor Power FinCo, LP (f/k/a Footprint Power Salem Harbor FinCo, LP) (9219); and SH Power DevCo GP LLC (f/k/a Footprint Power SH DevCo GP LLC) (9008). The location of the Debtors' service address is: c/o Tateswood Energy Company, LLC, 480 Wildwood Forest Drive, Suite 475, Spring, Texas 77380.

PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON **JULY 19, 2022 AT 10:30 A.M. (ET)** BEFORE THE HONORABLE MARY F. WALRATH IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 N. MARKET STREET, 5TH FLOOR, COURTROOM NO. 4, WILMINGTON, DELAWARE 19801.

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS OR RESPONSES TO THE MOTION ARE TIMELY FILED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED THEREIN WITHOUT FURTHER NOTICE OR A HEARING.

Dated: June 28, 2022
Wilmington, Delaware

Respectfully submitted,

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Andrew L. Magaziner

Pauline K. Morgan (No. 3650)
Andrew L. Magaziner (No. 5426)
Katelin A. Morales (No. 6683)
Timothy R. Powell (No. 6894)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: pmorgan@ycst.com
amagaziner@ycst.com
kmorales@ycst.com
tpowell@ycst.com

- and -

**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**

Brian S. Hermann (admitted *pro hac vice*)
John T. Weber (admitted *pro hac vice*)
Alice Nofzinger (admitted *pro hac vice*)
1285 Avenue of the Americas
New York, New York 10019
Tel: (212) 373-3000
Fax: (212) 757-3990
Email: bhermann@paulweiss.com
jweber@paulweiss.com
anofzinger@paulweiss.com

*Counsel to the Debtors and
Debtors in Possession*

EXHIBIT A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: SALEM HARBOR POWER DEVELOPMENT LP (f/k/a Footprint Power Salem Harbor Development LP), *et al.*,[1] Debtors.	Chapter 11 Case No. 22-10239 (MFW) (Jointly Administered) **Docket Ref No.___**

ORDER (A) APPROVING SETTLEMENT AGREEMENT BETWEEN DEBTOR SALEM HARBOR POWER DEVELOPMENT LP AND THE OFFICE OF ENFORCEMENT OF THE FEDERAL ENERGY REGULATORY COMMISSION AND (B) GRANTING RELATED RELIEF

Upon consideration of the motion (the "Motion")[2] of the Debtors, pursuant to sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rule 9019, for the entry of an order (a) approving the settlement agreement (the "Settlement Agreement") by and among Debtor Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) ("DevCo") and the Office of Enforcement (the "OE") of the Federal Energy Regulatory Commission ("FERC"), a copy of which is attached hereto as **Exhibit 1**, and (b) granting related relief; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) (1360); Highstar Salem Harbor Holdings GP, LLC (f/k/a Highstar Footprint Holdings GP, LLC) (2253); Highstar Salem Harbor Power Holdings L.P. (f/k/a Highstar Footprint Power Holdings L.P.) (9509); Salem Harbor Power FinCo GP, LLC (f/k/a Footprint Power Salem Harbor FinCo GP, LLC) (N/A); Salem Harbor Power FinCo, LP (f/k/a Footprint Power Salem Harbor FinCo, LP) (9219); and SH Power DevCo GP LLC (f/k/a Footprint Power SH DevCo GP LLC) (9008). The location of the Debtors' service address is: c/o Tateswood Energy Company, LLC, 480 Wildwood Forest Drive, Suite 475, Spring, Texas 77380.

[2] All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

and 1409; and due and proper notice of the Motion and the hearing thereon having been given as set forth in the Motion; and such notice having been adequate and appropriate under the circumstances; and it appearing that no other or further notice need be provided; and this Court having reviewed the Motion and the Castellano Declaration; and upon the record of these chapter 11 cases; and it appearing that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and all parties in interest; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Settlement Agreement attached hereto as **Exhibit 1** is approved in its entirety pursuant to sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rule 9019.

3. DevCo is authorized to enter into the Settlement Agreement with the OE, and to take any and all actions necessary and appropriate to consummate the Settlement Agreement, including, without limitation, executing and delivering any documents, agreements, or instruments, as may be necessary or appropriate to implement the Settlement Agreement.

4. This Order and the Settlement Agreement shall be binding on the Debtors (including DevCo) and FERC (including the OE), any of the foregoing parties' successors and/or assigns, and all other creditors and parties in interest in these chapter 11 cases (including, without limitation, any trustee, statutory committee, or examiner appointed in these chapter 11 cases or any chapter 7 trustee, or any other person, party, or entity, in any jurisdiction anywhere in the world, directly or indirectly).

5. The terms of the Settlement Agreement shall control to the extent that there is any inconsistency between the terms described in the Motion and the terms of the Settlement Agreement.

6. The provisions of this Order and the Settlement Agreement, as applicable, and any actions taken pursuant hereto or thereto shall survive the entry of any order: (a) confirming any chapter 11 plan, (b) converting the chapter 11 cases to chapter 7 cases, or (c) dismissing the chapter 11 cases. The terms and provisions of this Order and the Settlement Agreement shall continue in full force and effect notwithstanding the entry of any of the foregoing orders.

7. The automatic stay in these chapter 11 cases is hereby modified solely to the extent necessary to permit the implementation of the terms of the Settlement Agreement.

8. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

9. This Court shall retain jurisdiction with respect to all matters arising from or related to the interpretation, implementation, and enforcement of this Order and the Settlement Agreement.

EXHIBIT 1

Settlement Agreement

179 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Allison Clements, Mark C. Christie,
and Willie L. Phillips.

Salem Harbor Power Development LP Docket No. IN18-8-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued June 27, 2022)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Salem Harbor Power Development LP (DevCo). This order is in the public interest because the Agreement resolves on fair and equitable terms Enforcement's investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2021), into DevCo's receipt of capacity payments from ISO-New England Inc. (ISO-NE) for DevCo's New Salem Harbor Generating Station project (Project) during the 2017-18 Capacity Commitment Period (CCP), a period during which the Project had neither been built nor commenced commercial operation.

2. On March 23, 2022, DevCo and five of its affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (Chapter 11 Cases). Subject to limitations of the Bankruptcy Code and in accordance with the treatment afforded to Allowed General Unsecured Claims pursuant to a plan to be approved by the Bankruptcy Court in the Chapter 11 Cases, DevCo agrees to: (a) pay a civil penalty of $17,100,000 to the United States Treasury; (b) disgorge $26,693,237.67 in profits, and (c) be subject to compliance monitoring as described in the Agreement. DevCo stipulates to the facts set forth in Section II of the Agreement, but neither admits nor denies the alleged violations in Section III, which involve conduct occurring from April 2016 through March 2017 (Relevant Period).

I. Facts

Enforcement and DevCo stipulated to the following facts in the Agreement:

A. Background

3. DevCo is a Delaware Limited Partnership that developed and owns the Project in Salem, MA. DevCo was created by initial developers of the Project (Initial Developers), who later sold their controlling equity interests in DevCo. Some of the Initial Developers contracted with DevCo through an affiliated company to provide certain services to complete development of the Project. The majority of that work was performed by a regulatory lawyer with experience in the ISO-NE market (AMA Contractor).

4. DevCo applied for Market-Based Rate Authority from the Commission on November 29, 2016, and the Commission granted that authority on February 23, 2017.

5. ISO-NE is a Delaware non-profit corporation headquartered in Holyoke, Massachusetts. ISO-NE is a "public utility" authorized by the Commission to operate the electric grid, administer the wholesale electric markets, and conduct power system planning for the region spanning Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and most of Maine.

B. The ISO-NE Capacity Market and Relevant ISO-NE Tariff Provisions

6. The ISO-NE Tariff requires ISO-NE to monitor a capacity project's construction progress after the sponsor of that project receives a Capacity Supply Obligation (CSO) in ISO-NE's Forward Capacity Market (FCM). This monitoring obligation is accomplished, in part, through review of a project sponsor's Critical Path Schedule (the CPS) reporting, which serves to update ISO-NE on a project's schedule. Under the ISO-NE Tariff, ISO-NE is obligated to monitor new resources' compliance with the CPS requirements until those resources either achieve commercial operation or withdraw from the FCM. ISO-NE's System Planning Department, and specifically the Resource Adequacy subgroup, is responsible for that monitoring. ISO-NE's Director of System Planning oversaw that monitoring work during the Relevant Period.

7. The specific CPS reporting requirements, and ISO-NE's monitoring of CPS reporting, are outlined in the ISO-NE Tariff. ISO-NE Tariff Section III.13.3.2 requires the project sponsor to submit reports on project construction progress throughout the CPS monitoring process. Those reports, which DevCo was obligated to submit monthly, were required to include a "complete updated version of the critical path schedule" pursuant to ISO-NE Tariff Section III.13.3.2.1, including dates for specific CPS monitoring milestones. At the beginning of the Relevant Period, DevCo had three remaining CPS milestones: Major Equipment Testing, Commissioning, and Commercial Operation Date (*i.e.*, the date on which a project commences commercial operation, COD). In its CPS

reports submitted throughout the Relevant Period, DevCo committed to meet the first two milestones by May 30, 2017, and COD by May 31, 2017.

8. ISO-NE Tariff Section III.13.3.2.3 requires project sponsors to include in its CPS narratives:

> [A]ny other information regarding the status or progress of the project or any of the project milestones that might be relevant to the ISO's evaluation of the feasibility of the project being built in accordance with the critical path schedule or the feasibility that the project will meet the requirement that the project achieve Commercial Operation no later than the start of the relevant Capacity Commitment Period.

9. To facilitate CPS reporting, ISO-NE created a web-based reporting tool called the Forward Capacity Tracking System (FCTS). FCTS includes a database form for sponsors to enter proposed milestone dates and schedules for their Critical Path Schedules and a text box for them to enter narratives explaining the schedules and providing relevant information regarding construction progress and likelihood of on-time completion.

10. Pursuant to ISO-NE Tariff Section III.13.3.3, if a project sponsor proposes to change any milestone date, ISO-NE must consult with that sponsor and then determine a new milestone date.

11. If ISO-NE's consultation and determination process results in a COD later than the start of the CCP, the ISO-NE Tariff offers two alternatives: (a) the sponsor can cover (*i.e.*, buy out of) its CSO for the portion of the CCP for which it will be delayed (ISO-NE Tariff Section III.13.3.4(a)); or (b) absent such covering by the sponsor, ISO-NE must submit an ISO demand bid (mandatory demand bid) into the third and final annual reconfiguration auction (ARA3) on the sponsor's behalf to buy out of the CSO for the full year of the project's CSO (ISO-NE Tariff Section III.13.3.4(b)).

12. DevCo understood that an ISO-NE mandatory demand bid in ARA3 would result in DevCo losing a substantial share of its capacity payments for the 2017-2018 CCP.

13. ISO-NE Tariff section III.13.4.2 requires that: "No later than 15 days before the offer and bid deadline for an annual reconfiguration auction, the ISO shall notify each resource of the amount of capacity that it may offer or bid in that auction, as calculated pursuant to this Section III.13.4.2." ISO-NE refers to those amounts of capacity as qualified capacity (QC) values. ISO-NE Tariff Sections III.13.4.2.1.2.2.1(b) and III.13.4.2.1.2.2.2(b) describe how QC amounts must be calculated by ISO-NE for new generating resources that have not yet achieved commercial operation. Specifically, new generating resources receive an ARA3 QC value equal to the amount they clear in the FCA if they meet three requirements: (a) the resource is being monitored by the ISO

pursuant to its CPS monitoring provisions (in Section III.13.3); (b) the resource has a COD prior to the start of its relevant CCP; and (c) the project sponsor has met all of the ISO's financial assurance requirements.

14. ISO-NE used FCTS data to generate a draft list of resources for which it needed to submit a mandatory demand bid in ARA3. That list was reviewed, sometimes modified, and ultimately approved manually by ISO-NE System Planning personnel before it was submitted to the ISO's Market Operations Group as inputs to the ARA3.

C. New Salem Harbor Generating Station

15. The Project is a 674-megawatt (MW) combined-cycle natural gas generating facility that was built on the site of a retired generation station in Salem, MA.

16. In December 2014, DevCo engaged an energy and construction company, Iberdrola Energy Projects, Inc. (Iberdrola), to design and build the Project pursuant to a turnkey Engineering, Procurement, and Construction Agreement (EPC Agreement). The EPC Agreement gave Iberdrola complete control over all aspects of construction as long as it met a schedule of benchmarks set out in the EPC Agreement. One of those was a benchmark called "Substantial Completion," which was similar to ISO-NE's COD milestone but required additional work beyond commercial operation. Iberdrola provided estimates for both COD and Substantial Completion in its status updates to DevCo, scheduling them to occur on the same day or on adjacent days. DevCo individuals often referred to the two benchmarks interchangeably when discussing the schedule internally.

D. Information Available to DevCo and Used to Draft ISO-NE CPS Reports

17. Although Iberdrola controlled all aspects of construction, DevCo and its leadership had numerous sources of detailed information regarding construction progress and delays.

18. Iberdrola provided multi-hundred page written construction updates to DevCo every month. Those updates and associated presentations by Iberdrola to DevCo covered key events, engineering progress, procurement progress, construction progress, status of sub-contracts, quality reports, look-aheads to the next month, progress curve graphs, and detailed milestone schedules, among other key topics. They also included analyses of the critical paths (*i.e.*, the longest sequence of dependent events or tasks that must be completed to finish the Project). Starting even before the Relevant Period, Iberdrola's schedules indicated that if any task on the critical path was delayed, Project completion would be delayed.

19. DevCo's analysts reviewed the schedules that Iberdrola submitted in its written monthly reports to see how realistic they were and developed their own independent assessment of the Project's status.

20. DevCo hired a project manager (DevCo's Project Manager) to oversee Iberdrola's work. DevCo's Project Manager visited the Project site regularly and provided regular detailed status updates to DevCo leadership.

21. DevCo's Project Manager, along with others working for DevCo and the AMA Contractor attended formal monthly construction status meetings with Iberdrola, in which Iberdrola provided comprehensive status updates. Those individuals also regularly attended other, less formal meetings with Iberdrola and made site visits, and DevCo leadership received detailed minutes of weekly and monthly construction progress meetings with Iberdrola.

22. The AMA Contractor drafted initial versions of DevCo's monthly CPS report narratives based on the information presented in those meetings and associated documents, supplemented with information gained through conversations he had over the preceding month. The AMA Contractor emailed the draft narratives to DevCo's senior leadership, consultants, and DevCo's Project Manager for review and approval before submitting them to ISO-NE.

E. DevCo's Failure to Report Project Delays

23. Beginning in April 2016, DevCo learned that engineering, procurement, and subcontractor management issues had delayed construction of the Project. DevCo discussed those delays extensively, both internally and with Iberdrola. It provided some, but not all, of the information regarding delays to ISO-NE.

24. Beginning in May 2016, DevCo's Project Manager presented to the DevCo Board progress graphs prepared by Iberdrola demonstrating that the anticipated rate of progress at the Project had fallen below the rate that would be necessary to complete the Project on time (*i.e.*, the Project no longer was tracking on time to meet the COD). The Board discussed those graphs and, according to DevCo's Project Manager, was alarmed by the lack of progress they showed. The Board and other DevCo officials also discussed delays associated with Iberdrola's procurement difficulties and problems with its subcontractors.

25. DevCo sent multiple letters to Iberdrola in the summer of 2016, identifying delays and raising significant concerns regarding Iberdrola's ability to complete the Project according to the schedule in the EPC Agreement. DevCo's Project Manager later testified that "[I]t is clear that the COD date had slipped . . . starting in August of 2016."

26. Nevertheless, the CPS narratives that DevCo submitted to ISO-NE through August 2016 of the Relevant Period were virtually devoid of information, and they represented that the "project continues to track on time." Those narratives did not include any mention or details regarding the status of the Project and Iberdrola's delays.

27. Iberdrola submitted revised Project construction schedules to DevCo starting in September 2016.

28. At the September 6, 2016 meeting of the DevCo Board, DevCo's Project Manager reported that Iberdrola had fallen even further behind and predicted a one-to-two-month delay in the Substantial Completion Date if it did not change course. A few days later, on September 9, 2016, Iberdrola sent to DevCo a 132-page revised schedule delaying COD by nearly three months (to August 28, 2017, with Substantial Completion occurring the day before), blaming its delays on labor shortages and a lack of worker productivity. DevCo refused to accept the new schedule and demanded that Iberdrola find a way to meet the May 31, 2017 Substantial Completion Date.

29. In early October 2016, the DevCo Board discussed the Project schedule that Iberdrola had submitted in September, specifically noting that Iberdrola had delayed the Substantial Completion Date by 88 days.

30. On October 7, 2016, DevCo submitted to ISO-NE its CPS report addressing September 2016. That report retained May 31, 2017 as the anticipated COD on the FCTS web form, notwithstanding the new schedule that DevCo had received from Iberdrola. The narrative accompanying that submission referred to a post-May 31, 2017 COD, disclosing that Iberdrola had experienced labor issues with the Project and that if those issues continued, "contractual Substantial Completion of the Project could potentially be delayed from May 31, 2017 to as late as August 27, 2017" but that "dates as early as July 7, 2017 have been discussed." The narrative continued: "[DevCo] notes that [Iberdrola's] notice relates to contractual Substantial Completion, not Commercial Operation under the ISO-NE Tariff. As a result, it is possible that the Commercial Operation Date for tariff and operational purposes could precede the date on which [Iberdrola] satisfies its contractual obligation to achieve Substantial Completion."

31. The next month, an internal DevCo briefing document from November 2016 reported that "[o]ur 'best guess' potential slip date could be October–November 2017." The independent engineer for the financial institutions that had lent money to the Project expressed serious doubts regarding Iberdrola's latest schedule, writing to the lenders: "We are also not convinced that [Iberdrola]'s 8/27/17 completion date is achievable, much less an outside date." DevCo's Project Manager pushed back, writing that Iberdrola could take "extraordinary steps" to achieve the May 31, 2017 COD and asked him to wait until March 2017 before advising DevCo's lenders that May 31, 2017 had become unachievable. Shortly thereafter, on November 7, 2016, Iberdrola submitted its monthly report covering October to DevCo, moving both COD and Substantial Completion to September 4, 2017, due to "low productivity in piping works."

32. DevCo submitted its CPS report to ISO-NE addressing November 2016 on December 7, 2016. As with its previous reports, this one retained May 31, 2017 as the anticipated COD in the FCTS web form. Its narrative noted that DevCo was working with Iberdrola to gauge the impact of labor issues, that Iberdrola informed DevCo that it anticipates an additional delay of eleven days in achieving contractual Substantial Completion, and that "[Iberdrola] now takes the position that it will achieve contractual Substantial Completion on September 7, 2017." The report then qualified the certainty of the delays by stating that "[DevCo] and [Iberdrola] continue to meet in the hope of mitigating these construction related delays and improving the date of contractual Substantial Completion."

33. On December 12, 2016, a few days after DevCo submitted that CPS report, Iberdrola sent a written report with yet another revised schedule. The new revised schedule delayed both the COD and the Substantial Completion Date to September 19, 2017.

34. On December 13, 2016, the day after Iberdrola delivered the revised schedule pushing back the COD to September 19, 2017, a key Iberdrola manager asked DevCo's Project Manager what the last date was that Iberdrola could complete the Project, adding that they were working on a plan to finish the Project in September or October 2017. On December 22, 2016, Iberdrola informed DevCo in a meeting that it was planning to move the COD to October 14, 2017. DevCo was skeptical that Iberdrola could meet the deadlines that Iberdrola was proposing and began conducting additional independent evaluations of the schedules and relevant data.

35. DevCo filed its CPS report for January 2017 on February 17, 2017. As before, the report retained May 31, 2017 as the anticipated COD in the FCTS web form but again referred to a delayed COD in the narrative, stating: "At this point, [DevCo] does not anticipate that after the [Iberdrola] schedule is fully vetted, that the date for contractual substantial completion will be materially later than the date previously discussed in our narratives." The latest date previously discussed in DevCo's narratives was September 7, 2017.

36. On January 11, 2017, Iberdrola submitted a new detailed schedule to DevCo, delaying Substantial Completion to October 14, 2017, and COD to October 16, 2017. From January 16 through 18, DevCo and Iberdrola met for three days of workshops to evaluate the feasibility of this new schedule. At the end of those workshops, DevCo determined that more time was required to complete construction and that the October 14, 2017 Substantial Completion Date was "not even close to being realistic."

37. Demand bids for ARA3 were due on March 3, 2017. DevCo had not covered any portion of its 674 MW CSO for the CCP.

38. On March 7, 2017, which was after the date by which demand bids were due for ARA3, DevCo submitted its February CPS report and changed its COD in the FCTS web form to October 14, 2017. ISO-NE did not submit a demand bid on DevCo's behalf into ARA3.

39. DevCo witnesses testified that an ISO-NE employee advised DevCo not to propose a change to the COD Milestone date in the FCTS web form prior to the due date for ARA3 demand bids because doing so would result in ISO-NE submitting an ARA3 demand bid on DevCo's behalf. DevCo witnesses also testified to their understanding that ISO-NE staff and Senior Management had determined by the end of 2016 that ISO-NE was not going to submit a demand bid into ARA3 on DevCo's behalf, as long as DevCo did not change its COD in the FCTS web form by the bidding deadline for ARA3. Contemporaneous documents created during the Relevant Period reference similar advice, as well as advice regarding the contents of DevCo's narratives, purportedly provided by ISO-NE staff. DevCo claims to have followed that advice.

F. Termination of the EPC Agreement, Arbitration, and Bankruptcy

40. DevCo terminated its EPC Agreement with Iberdrola on April 15, 2018, and it retained a replacement contractor to complete the construction of the Project. The Project achieved commercial operation after a full year of delay in June 2018.

41. ISO-NE paid DevCo $104,843,399.33 in capacity payments during the year that the Project was not operational (June 1, 2017 through May 31, 2018), resulting in a net financial benefit of $80,079,713 to DevCo from the decision to not submit the mandatory ISO-NE demand bid on DevCo's behalf, starting on June 1, 2017.

42. On April 20, 2018, Iberdrola filed for arbitration of claims arising from alleged breaches of the EPC Agreement, and DevCo filed counterclaims, including ones addressing Project delays. The arbitration panel awarded Iberdrola $236,404,377 in damages, plus interest and fees. A New York State trial court confirmed that award on December 23, 2021.

43. On March 23, 2022, the Debtors commenced the Chapter 11 Cases in the Bankruptcy Court. The Chapter 11 Cases are ongoing as of the date of this Order.

G. Investigation

44. During the summer of 2017, the ISO-NE Independent Market Monitor (IMM) began an inquiry into DevCo's receipt of capacity payments during the 2017-18 CCP. It formally referred the matter to Enforcement in the fall of 2017.

45. DevCo cooperated throughout Enforcement's Investigation.

II. Violations

A. Failure to Provide Updated Critical Path Schedules

46. Enforcement found that from September 2016 through February 2017, DevCo failed to provide "complete updated version[s] of [its] critical path schedule" as required by sections III.13.3.2 and III.13.3.2.1 of the ISO-NE Tariff. The updated Critical Path Schedules that it submitted to ISO-NE through the FCTS system did not incorporate the new schedules that it had received from Iberdrola.

47. According to the Agreement, Iberdrola provided updated schedules to DevCo on at least four occasions during that period: September 9, 2016 (delaying COD to 8/28/17); November 7, 2016 (delaying COD to 9/4/17); December 12, 2016 (delaying COD to 9/19/17); and January 11, 2017 (delaying COD to 10/16/17). DevCo did not provide complete updated schedules to ISO-NE in any format. Enforcement found that, in its CPS narratives, DevCo referenced potential changes to the contractual Substantial Completion Date provided in Iberdrola's revised schedules but did not provide ISO-NE the schedules themselves or the COD, Commissioning, or Major Equipment Testing dates listed in those schedules. Enforcement found that instead of providing the "complete updated version of the critical path schedule," as the Tariff required, DevCo consistently entered an old schedule into the FCTS web form, claiming that the Project would meet the Major Equipment Testing and Commissioning milestones by May 30, 2017 and COD by May 31, 2017.

B. Failure to Provide Relevant Information to ISO-NE

48. Section III.13.3.2.3 of the ISO-NE Tariff requires DevCo to include in its CPS narratives:

> [A]ny other information regarding the status or progress of the project or any of the project milestones that might be relevant to the ISO's evaluation of the feasibility of the project being built in accordance with the critical path schedule or the feasibility that the project will meet the requirement that the project achieve Commercial Operation no later than the start of the relevant Capacity Commitment Period.

49. Enforcement found that the narratives that DevCo submitted between May 2016 and March 2017 made false claims regarding the Project's schedule trajectory and omitted numerous important and relevant details regarding the status of the Project and Iberdrola's delays.

50. Enforcement also found that from June through August 2016, DevCo represented in its narratives that the "project continues to track on time" even though DevCo knew that it was not.

51. Enforcement also found that DevCo's CPS narratives failed to include relevant information demonstrating that the Project likely would not be commercial prior to the start of its CCP. Enforcement found that the narratives that DevCo filed in May through August 2016 were virtually devoid of information, and they omitted highly relevant information. The CPS narratives that DevCo submitted in the late summer and fall of 2016 continued to omit key information regarding delays and the likelihood that the Project would be completed on time.

52. Enforcement found that DevCo disclosed some delays to ISO-NE (providing notice to ISO-NE that the Project was going to be delayed), but these disclosures included caveats that were not reflected in Iberdrola's schedules. DevCo offered general references to delays and conveyed Iberdrola's revised Substantial Completion milestone dates. However, Enforcement found that ISO-NE Tariff Section 13.3.2.3 obligated DevCo to provide more than mere notice; it was required to provide information relevant to ISO-NE's evaluation of the feasibility of the Project: (i) being built in accordance with its CPS; and (ii) meeting its May 31, 2017 COD.

C. Violation of the Commission's Duty of Candor Rule

53. Section 35.41(b) of the Commission's regulations requires all Sellers to "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with . . . Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences." DevCo became a "Seller" when it applied for Market-Based Rate Authority on November 29, 2016. For reasons explained previously,[1] Enforcement found that the CPS narratives that DevCo submitted during the Relevant Period were inaccurate and misleading and omitted material information regarding Project delays. In addition, Enforcement found that DevCo's reporting of the dates for Major Equipment Testing, Commissioning, and COD milestones were not fulsome or forthcoming. Enforcement found that DevCo failed to exercise due diligence to ensure the accuracy of the information contained in those submissions. Therefore, Enforcement found that the CPS submissions that DevCo made during the Relevant Period after it became a Seller violated section 35.41(b).

[1] *See supra* PP 49-52.

III. Stipulation and Consent Agreement

54. Enforcement and DevCo have resolved Enforcement's investigation by means of the attached Agreement.

55. DevCo stipulates to the facts set forth in Section II of the Agreement, but neither admits nor denies the alleged violations in Section III.

56. Subject to limitations of the Bankruptcy Code and in accordance with the treatment afforded to Allowed General Unsecured Claims pursuant to a plan to be approved by the Bankruptcy Court in the Chapter 11 Cases, DevCo agrees to: (a) pay a civil penalty of $17,100,000 to the United States Treasury; (b) disgorge $26,693,237.67 in profits, and (c) be subject to compliance monitoring as described in the Agreement.

57. ISO-NE is directed to distribute the disgorgement *pro rata* to network load, subject to limitations of the Bankruptcy Code and the orders of the Bankruptcy Court.

IV. Determination of Appropriate Sanctions and Remedies

58. In recommending the appropriate remedy, Enforcement considered the roles that multiple individuals and entities played in ISO-NE not submitting a demand bid on DevCo's behalf into ARA3. Neither the Agreement nor this Order asserts violations by any individual or any entity other than DevCo. However, the Commission reserves its right to make a determination as to the facts or issues of law that might give rise to any violation by any other such individual or entity.

59. Enforcement also considered the factors described in the Revised Policy Statement on Penalty Guidelines.[2]

60. The Commission concludes that DevCo's civil penalty is consistent with the Revised Policy Statement on Penalty Guidelines and that the Agreement is a fair and equitable resolution of the matters concerned. The Agreement is in the public interest, as it reflects the nature and seriousness of the conduct and recognizes the specific considerations stated above and in the Agreement. The Agreement also reflects DevCo's limited ability to pay a settlement in bankruptcy.

61. The Commission directs DevCo to make the civil penalty and disgorgement payments as required by the Agreement, subject to limitations of the Bankruptcy Code and the orders of the Bankruptcy Court.

---

[2] *Enforcement of Statutes, Orders, Rules, and Regulations*, Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (2010).

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission. Commissioner Danly is not participating.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Salem Harbor Power Development LP Docket No. IN18-8-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

1. The Office of Enforcement ("Enforcement") of the Federal Energy Regulatory Commission (the "Commission") and Salem Harbor Power Development LP ("DevCo") enter into this Stipulation and Consent Agreement (this "Agreement") to resolve a nonpublic, formal investigation ("Investigation") conducted by Enforcement pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2021). Enforcement's Investigation concerns DevCo's New Salem Harbor Generating Station project (the "Project") and DevCo's receipt of capacity payments from ISO-New England Inc. ("ISO-NE") for the 2017-18 Capacity Commitment Period of June 1, 2017 through and including May 31, 2018 (the "CCP"), before the Project had been built or commenced commercial operation.

2. The Project was a new supply resource in ISO-NE with a Capacity Supply Obligation ("CSO") in ISO-NE for the CCP. Construction and other delays prevented the Project from commencing commercial operation and supplying capacity at the start of the CCP, as required by the ISO-NE Tariff. In fact, the Project did not commence commercial operation until June 1, 2018, a full year after it was required to do so. Despite being a full year late and not fully covering (*i.e.*, buying out of) its CSO in the manner required by the ISO-NE Tariff, ISO-NE paid DevCo more than $100 million in capacity payments for the CCP.

3. DevCo stipulates to the facts set forth in Section II, but neither admits nor denies the alleged violations in Section III, which involve conduct occurring from April 2016 through March 2017 (the "Relevant Period").

4. On March 23, 2022, DevCo and five of its affiliates (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") thereby commencing the Debtors' chapter 11 case (the "Chapter 11 Cases"), and the Chapter 11 Cases are ongoing as of the date hereof. The Chapter 11 Cases are jointly administered under the caption *In re Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP), et al.,* Case No. 22-10239 (Bankr. D. Del. (MFW)) (Jointly Administered). On April 20, 2022, the Debtors filed with the Bankruptcy Court the *Joint Chapter 11 Plan of Salem Harbor*

Power Development LP and Its Debtor Affiliates [D.I. 128] (as amended, modified or otherwise supplemented from time to time, the "Plan").[1] Subject to limitations of the Bankruptcy Code and in accordance with the treatment afforded to Allowed General Unsecured Claims pursuant to the Plan, DevCo agrees to: (a) pay a civil penalty of $17.1 million to the United States Treasury; (b) disgorge $26,693,237.67 in profits, and (c) be subject to compliance monitoring as described below. For the avoidance of doubt, the amounts referenced in clauses (a) and (b) of the preceding sentence shall constitute Allowed General Unsecured Claims in the Chapter 11 Cases and shall be treated consistent with all other Allowed General Unsecured Claims in the Chapter 11 Cases pursuant to the Plan.

II. STIPULATIONS

Enforcement and DevCo hereby stipulate and agree to the following facts.

A. Background

5. DevCo is a Delaware Limited Partnership that developed and owns the Project in Salem, MA. DevCo was created by the initial developers of the Project (the "Initial Developers"). The Initial Developers sold their controlling equity interests in DevCo to affiliates of an investment fund (the "Fund Entities") in January 2015, and the Initial Developers maintained subordinated equity interests in DevCo. Consequently, during the Relevant Period, the controlling equity interests in DevCo were owned by the Fund Entities, and certain representatives of the Fund Entities were appointed as members of the Board of Managers of DevCo's governing body (the "DevCo Board"). DevCo applied for Market-Based Rate Authority from the Commission on November 29, 2016, and was granted that authority on February 23, 2017. The Initial Developers retained their subordinated ownership interest in the Project and entered into a contract to provide certain services to DevCo to complete the development of the Project.

6. ISO-NE is a Delaware non-profit corporation headquartered in Holyoke, Massachusetts. ISO-NE is authorized by the Commission to operate the electric grid, administer the wholesale electric markets, and conduct power system planning for the region spanning Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and most of Maine.

B. The ISO-NE Capacity Market and Relevant ISO-NE Tariff Provisions

7. The ISO-NE Tariff requires ISO-NE to monitor a capacity project's construction progress after the sponsor of that project receives a CSO in ISO-NE's Forward Capacity Market ("FCM"). This monitoring obligation is accomplished, in part, through review of

[1] Capitalized terms used herein, but not otherwise defined shall have the meaning ascribed to such terms in the Plan or in the ISO-NE Tariff.

a project sponsor's Critical Path Schedule (the "CPS") reporting, which serves to update the ISO-NE on a project's schedule. ISO-NE is obligated by the ISO-NE Tariff to monitor new resources' compliance with the CPS requirements until those resources either achieve commercial operation or withdraw from the FCM. ISO-NE's System Planning Department, and specifically the Resource Adequacy subgroup, is responsible for that monitoring. ISO-NE's Director of System Planning oversaw that work during the Relevant Period.

8. The specific CPS reporting requirements, and ISO-NE's monitoring of CPS reporting, are outlined in the ISO-NE Tariff. ISO-NE Tariff Section III.13.3.2 requires the project sponsor to submit reports on project construction progress throughout the CPS monitoring process. Those reports, which DevCo was obligated to submit monthly, were required to include a "complete updated version of the critical path schedule" pursuant to ISO-NE Tariff Section III.13.3.2.1, including dates for specific CPS monitoring milestones. At the beginning of the Relevant Period, DevCo had three remaining CPS milestones: Major Equipment Testing, Commissioning, and Commercial Operation Date (i.e., the date on which a project commences commercial operation, "COD"). In its CPS reports submitted throughout the Relevant Period, DevCo committed to meet the first two milestones by May 30, 2017, and COD by May 31, 2017.

9. ISO-NE Tariff Section III.13.3.2.3 requires project sponsors to include in its CPS narrative:

> [A]ny other information regarding the status or progress of the project or any of the project milestones that might be relevant to the ISO's evaluation of the feasibility of the project being built in accordance with the critical path schedule or the feasibility that the project will meet the requirement that the project achieve Commercial Operation no later than the start of the relevant Capacity Commitment Period.

10. To facilitate CPS Reporting, ISO-NE created a web-based reporting tool called the Forward Capacity Tracking System (FCTS). FCTS includes a database form for sponsors to enter proposed milestone dates and schedules for their Critical Path Schedules and a text box for them to enter narratives explaining the schedules and providing relevant information regarding construction progress and likelihood of on-time completion.

11. Pursuant to ISO-NE Tariff Section III.13.3.3, if a project sponsor proposes to change any milestone date, ISO-NE must consult with that sponsor and then determine a new milestone date.

12. If the ISO-NE's consultation and determination process results in a COD later than the start of the CCP, the ISO-NE Tariff offers two alternatives: (a) the sponsor can cover (*i.e.*, buy out of) its CSO for the portion of the CCP for which it will be delayed (ISO-NE

Tariff Section III.13.3.4(a)); or (b) absent such covering by the sponsor, ISO-NE must submit an ISO demand bid (mandatory demand bid) into the third and final annual reconfiguration auction ("ARA3") on the sponsor's behalf to buy out of the CSO for the full year of the project's CSO (ISO-NE Tariff Section III.13.3.4(b)).

13. ISO-NE Tariff section III.13.4.2 requires that: "No later than 15 days before the offer and bid deadline for an annual reconfiguration auction, the ISO shall notify each resource of the amount of capacity that it may offer or bid in that auction, as calculated pursuant to this Section III.13.4.2." ISO-NE refers to those amounts of capacity as qualified capacity (QC) values. ISO-NE Tariff Sections III.13.4.2.1.2.2.1(b) and III.13.4.2.1.2.2.2(b) describe how QC amounts must be calculated by ISO-NE for new generating resources that have not yet achieved commercial operation. Specifically, new generating resources receive an ARA3 QC value equal to the amount they clear in the FCA if they meet three requirements: (a) the resource is being monitored by the ISO pursuant to its CPS monitoring provisions (in Section III.13.3); (b) the resource has a COD prior to the start of its relevant CCP; and (c) the Project Sponsor has met all of the ISO's financial assurance requirements.

14. ISO-NE used FCTS data to generate a draft list of resources for which it needed to submit a mandatory demand bid in ARA3. That list was reviewed, sometimes modified, and ultimately approved manually by ISO-NE System Planning personnel before it was submitted to the ISO's Market Operations Group as inputs to the ARA3.

C. New Salem Harbor Generation Station

15. The Project is a 674-megawatt (MW) combined-cycle natural gas generating facility that was built on the site of a retired generation station in Salem, MA.

16. DevCo executed an asset management agreement with an affiliate of the Initial Developers to provide various administrative services to DevCo during the Relevant Period (the "Asset Manager"). The Asset Manager's representative that performed the majority of work under the asset management agreement to DevCo (the "AMA Contractor") was an experienced regulatory lawyer with substantial experience in the ISO-NE market.

17. The AMA Contractor served as DevCo's main contact with ISO-NE and was responsible for communicating project updates to ISO-NE and reporting ISO-NE developments to DevCo. He drafted DevCo's CPS reports and discussed drafts of those reports with ISO-NE's Director of System Planning and others. The AMA Contractor consulted on the day-to-day affairs of the Project under the asset management agreement with DevCo.

18. Prior to selling their Equity Interest to the Fund Entities, the Initial Developers hired another consultant to provide regulatory expertise and to help manage issues with

ISO-NE (the "ISO-NE Consultant"). The ISO-NE Consultant has held leadership positions with the New England Power Pool and has relationships with ISO-NE staff, including its System Planning Department. The ISO-NE Consultant's responsibilities for the AMA Contractor and DevCo included reviewing and commenting on draft CPS submissions, submitting final CPS reports and dates into ISO-NE's FCTS system, and communicating with ISO-NE employees regarding the Project. The ISO-NE Consultant provided those services throughout the Relevant Period.

19. In December 2014, DevCo engaged a large energy and construction company, Iberdrola Energy Projects, Inc. ("Iberdrola"), to design and build the project pursuant to a turnkey Engineering, Procurement, and Construction Agreement (the "EPC Agreement"). The EPC Agreement gave Iberdrola complete control over all aspects of construction as long as it met a schedule of benchmarks set out in the EPC Agreement. One of those was a benchmark called "Substantial Completion," which was similar to ISO-NE's COD milestone but required additional work beyond commercial operation. Iberdrola provided estimates for both COD and Substantial Completion in its status updates to DevCo, scheduling them to occur on the same day or on adjacent days. DevCo individuals often referred to the two benchmarks interchangeably when discussing the schedule internally.

D. Information Available to DevCo and Used to Draft ISO-NE CPS Reports

20. Although Iberdrola controlled all aspects of construction, DevCo and its leadership had numerous sources of detailed information regarding construction progress and delays.

21. Of particular significance, Iberdrola provided multi-hundred page written construction updates to DevCo every month. Those updates and associated presentations by Iberdrola to DevCo covered key events, engineering progress, procurement progress, construction progress, status of sub-contracts, quality reports, look-aheads to the next month, progress curve graphs, and detailed milestone schedules, among other key topics. They also included analyses of the critical paths (*i.e.*, the longest sequence of dependent events or tasks that must be completed to finish the project). Starting even before the Relevant Period, Iberdrola's schedules indicated that if any task on the critical path was delayed, project completion would be delayed.

22. DevCo took notice of those updates. DevCo's analysts reviewed the schedules that Iberdrola submitted in its written monthly reports to see how realistic they were and developed their own independent assessment of the Project's status.

23. DevCo hired a project manager ("DevCo's Project Manager") to oversee Iberdrola's work. DevCo's Project Manager visited the Project site regularly and provided regular detailed status updates to DevCo leadership.

24. In addition, DevCo hired an outside construction expert ("DevCo's Construction Consultant") as a senior advisor to DevCo. DevCo's Construction Consultant's responsibilities included tracking the construction progress and providing updates to DevCo, serving as DevCo's eyes and ears at project meetings (including CPS calls with ISO-NE), and reviewing and providing input on CPS narratives.

25. DevCo's Project Manager, along with others working for DevCo and the AMA Contractor attended formal monthly construction status meetings with Iberdrola, in which Iberdrola provided comprehensive status updates. Those individuals also regularly attended other, less formal meetings with Iberdrola and made site visits, and DevCo leadership received detailed minutes of weekly and monthly construction progress meetings with Iberdrola.

26. The AMA Contractor drafted initial versions of DevCo's monthly CPS report narratives based on the information presented in those meetings and associated documents, supplemented with information gained through conversations he had over the preceding month. The AMA Contractor emailed the draft narratives to DevCo's senior leadership, consultants, and DevCo's Project Manager for review and approval.

E. Spring and Summer 2016: DevCo Recognizes Lack of Progress Necessary to Meet Project Construction Schedule

27. In mid-April 2016, approximately a year before the Project was supposed to be commercial and offer its capacity and energy into ISO-NE's markets, Iberdrola terminated the main engineering subcontractor for the Project. The firm that it engaged as a replacement had to recreate many of the engineering drawings from scratch, which created substantial delays in the procurement and installation of key parts. DevCo's leadership discussed these engineering delays at meetings of the DevCo Board and elsewhere. At the May 2016 meeting of the DevCo Board, DevCo's Project Manager presented graphs demonstrating that engineering work on key systems had become delayed by three to four months.

28. DevCo's Project Manager also presented progress graphs prepared by Iberdrola demonstrating that, by May 2016, the anticipated rate of progress had fallen below the rate that would be necessary to complete the Project on time (*i.e.*, the Project no longer was tracking on time). DevCo's Project Manager presented such progress graphs in subsequent monthly meetings of the DevCo Board, and each showed the rate of progress falling further and further behind. Notwithstanding Iberdrola's repeated claims to be able to recover delays, the DevCo Board was alarmed by this development.

29. At these meetings of the DevCo Board, DevCo's Project Manager also discussed delays associated with procurement difficulties and Iberdrola's problematic management of its subcontractors.

30. In early June 2016, Iberdrola informed DevCo that continued difficulties with another subcontractor had exacerbated construction issues and that engineering delays had forced it to delay a key internal milestone (First Fire, the first time that the turbine was to be started) by six weeks. Internal DevCo emails around that time, which took into account those subcontractor delays, estimated only a 50-50 chance that Iberdrola would be able to meet the May 31, 2017 Substantial Completion Date.

31. On June 28, 2016, DevCo sent Iberdrola a letter listing dozens of project activities that were delayed. The letter concluded that the May 31, 2017 Substantial Completion Date was in jeopardy and demanded that Iberdrola submit a new schedule to recover that date. Iberdrola never provided that recovery schedule, and the two companies then had numerous meetings regarding this schedule dispute. At one such meeting, Iberdrola said that the company was "not interested" in spending additional money to recover the various milestones in the Project schedule. DevCo's leadership expressed skepticism that Iberdrola would ever be able to get the Project back on track.

32. In mid-August 2016, DevCo sent Iberdrola a letter expressing concerns that Iberdrola was planning to complete a large portion of the remaining work at the back end of the construction schedule, requiring Iberdrola to hire a large number of additional workers and creating additional risks that the Project would not be completed on time.

33. DevCo's Project Manager later testified:

> [I]t is clear that the COD date had slipped . . . starting in August of 2016. So we already knew that was not going to be May 31st of 2017 as of August of 2016. So I think it was evident to everybody involved that it had slipped, and it slipped again every month thereafter based on the monthly progress schedule that [Iberdrola] was producing.

34. From June through August 2016, DevCo wrote in its CPS narratives submitted to ISO-NE that the "project continues to track on time." The narratives did not include any mention or details regarding the status of the project and Iberdrola's delays.

35. While ISO-NE lacked the full set of information regarding construction progress and delays that was available to DevCo in the spring and summer of 2016, ISO-NE became aware that construction progress had started to fall behind schedule. For example, after a May 2016 visit to the Project site by ISO-NE staff, ISO-NE's Director of System Planning reported to ISO-NE Senior Management that she believed that a key intermediate construction benchmark scheduled for January 2017, which already had slipped by a month, was not "realistic" and would "slip" by another month.

36. Acknowledging Project delays and the possibility that ISO-NE might be forced to submit an ISO demand bid into ARA3 on DevCo's behalf if the delays continued, ISO-NE's Director of System Planning proposed using a "FCTS workaround" that she had

created for such late projects. The workaround required that sponsors of such projects maintain a timely COD (*i.e.*, before the start of the CCP) in FCTS, as long as that COD was not impossible, while the sponsors worked on covering their CSO for the period of the CCP that they expected to be late (*i.e.*, up to their actual COD). As she explained in an internal ISO-NE May 2016 email to ISO-NE Senior Management:

> Just wanted to remind everyone, that we have had Projects late in the past and we have provisions under CPS monitoring to allow new resources who are late 1-2 (or even three) months to retain their CSO for a majority of the CCP; thus not being entered into ARA3 by the ISO as part of an ISO Demand Bid. More specifically, when this has happened in the past, the project sponsor needs to identify the new expected in service date as part of their CPS *narrative* but enter 5/31 in FCTS. This avoids the ISO demand bid being triggered. In the narrative, the project sponsor would explain how the CSO would be covered. Then, we in SP review and either accept/deny the CPS.

37. Then, specifically addressing the possibility that the Project might be late, ISO-NE's Director of System Planning added that if DevCo did not actually cover its CSO for the period of its delay in COD, ISO-NE would submit a demand bid on its behalf into ARA3.

F. Fall and Winter 2016-17 – Iberdrola Submits Revised Schedules with Delayed COD

38. At the September 6, 2016 meeting of the DevCo Board, DevCo's Project Manager reported that Iberdrola had fallen even further behind and predicted a one-to-two-month delay in the Substantial Completion Date if it did not change course. A few days later, on September 9, 2016, Iberdrola sent to DevCo a 132-page revised schedule delaying COD by nearly three months (to August 28, 2017, with Substantial Completion occurring the day before), blaming its delays on labor shortages and a lack of worker productivity.

39. Iberdrola presented the new schedule in the written monthly progress report and meeting between the companies in September 2016, providing detailed dates for hundreds of tasks on the schedule leading up to the delayed COD. By this point, the two companies were firmly engaged in a contractual dispute regarding whether DevCo would pay more money to get the project back on track or, alternatively, whether Iberdrola would bear the risk of delay in the form of liquidated damages. DevCo refused to accept the new schedule and demanded that Iberdrola find a way to meet the May 31, 2017 Substantial Completion Date.

40. In early October 2016, the DevCo Board discussed the Project schedule that Iberdrola had submitted in September, specifically noting that Iberdrola had delayed the Substantial Completion Date by 88 days.

1. October 2016 — ISO-NE and DevCo Discuss Construction Delays and the "FCTS Workaround"

41. On October 7, 2016, DevCo submitted to ISO-NE its CPS report addressing progress in September 2016. That report retained May 31, 2017 as the anticipated COD on the FCTS web form, notwithstanding the new schedule that DevCo had received from Iberdrola, and the narrative accompanying that submission referred to a post-May 31, 2017 COD. More specifically, the narrative disclosed that Iberdrola had experienced labor issues with the Project and that if those issues continued, "contractual Substantial Completion of the Project could potentially be delayed from May 31, 2017 to as late as August 27, 2017" but that "dates as early as July 7, 2017 have been discussed." The narrative continued: "[DevCo] notes that [Iberdrola's] notice relates to contractual Substantial Completion, not Commercial Operation under the ISO-NE Tariff. As a result, it is possible that the Commercial Operation Date for tariff and operational purposes could precede the date on which [Iberdrola] satisfies its contractual obligation to achieve Substantial Completion."

42. The AMA Contractor had discussed a draft of this narrative with ISO-NE's Director of System Planning prior to its submission over the phone. Contemporaneous with that communication, the AMA Contractor reported to DevCo leadership via email that "[s]he is fine with our narrative and just encouraged me to put in a few 'potential's' [*sic*] to make clear this [delay] is not a foregone conclusion." The AMA Contractor further noted that ISO-NE's Director of System Planning "will manage the information internally and very much appreciated the heads up that allows her to do so." The AMA Contractor added that ISO-NE's Director of System Planning "characterized this as 'no big deal,'" and "[h]aving worked in plant maintenance and construction for years, she is not phased by these short term potential delays."

43. The AMA Contractor closed his email by noting "[s]he again reiterated that we need to keep COD at May 31 in the FCTS (ISO-NE online system) even while giving the more detailed narrative." In other words, ISO-NE's Director of System Planning reminded the AMA Contractor to not propose a changed COD milestone date in the FCTS system.

44. During investigative testimony, the AMA Contractor expanded on this sentence in the email, testifying that ISO-NE's Director of System Planning told the AMA Contractor: "Remember, you're going to leave the dates as May 31st unless we talk about it and we tell you that you need to change it." The AMA Contractor's understanding, based on discussions with ISO-NE's Director of System Planning was that "if you change the date in FCTS . . . the computers take over and things happen automatically [with respect to an ARA3 demand bid]" rather than talking through the information with ISO-NE and letting ISO-NE "make an independent determination of what actions are appropriate."

45. At the end of October 2016, a DevCo representative emailed DevCo leadership to relay a request from the ISO-NE New Generation Group, a different part of ISO-NE tasked with ensuring that ISO-NE would be ready to incorporate the Project into the grid as soon as it became commercial. He wrote that the New Generation Group needed an updated set of New Generation milestones (which were related to, but different from, the CPS milestones). ISO-NE Consultant responded that he "would not change [a specific milestone] date unless we can justify why that does[n]'t [a]ffect the 5/31 [COD] date. The ISO has been clear that while we should submit CPS narratives describing issues that could [a]ffect COD we shouldn't trigger a discussion about the need to cover by submitting []new dates that tie to COD or change the COD until we are certain of a change." Likewise, DevCo's Construction Consultant advised that the New Generation milestones "should be consistent with the monthly updates we are providing ISO-NE [(in the CPS reports)]."

2. November 2016 – Further Delays to DevCo's Schedule and Additional ISO-NE Advice " Regarding "FCTS Workaround"

46. ISO-NE's Director of System Planning spoke by phone with the AMA Contractor on November 3, 2016, and the AMA Contractor told ISO-NE's Director of System Planning that "no [CPS] milestones have slipped from the last report"—referring to the previous month's CPS narrative that referenced dates as late as August 27, 2017. The AMA Contractor did say that if they did not find additional welders soon, the Project's COD might slip by a month or two.

47. ISO-NE followed up with DevCo representatives the next day. ISO-NE's Director of System Planning summarized that follow-up conversation for ISO-NE Senior Management as follows: "[t]he only new information we received is that Iberdrola is working toward hiring a second contractor to assist with the necessary welding;" however, multiple people's notes demonstrate they discussed much more in that conversation. In actuality, they discussed a strategy through which DevCo would maintain its COD of May 31, 2017 in FCTS until February 2017 even though current projections from Iberdrola were showing a COD "as late as August 27, 2017." They discussed how changing the May 31 COD would result in an ARA3 demand bid and that DevCo needed to "[g]et past March 2017" (which is when demand bids were due for ARA3) and that DevCo just needed to *try* to cover its CSO in late spring 2017 for the portion of the year in which it would be late (as opposed to actually covering its CSO prior to ARA3).

48. During this same time period, DevCo and the financial institutions that had extended loans to the Project were receiving additional information demonstrating that the Project was going to be late. An internal DevCo briefing document reported that "[o]ur 'best guess' potential slip date could be October–November 2017." The independent engineer for DevCo's lenders expressed serious doubts regarding Iberdrola's

latest schedule, writing to the lenders: "We are also not convinced that [Iberdrola]'s 8/27/17 completion date is achievable, much less an outside date." DevCo's Project Manager pushed back, writing that Iberdrola could take "extraordinary steps" to achieve the May 31, 2017 COD and asked him to wait until March 2017 before advising DevCo's lenders that May 31, 2017 had become unachievable. DevCo's Project Manager's optimism soon was undermined by Iberdrola's monthly report to DevCo covering October (submitted on November 7, 2016), in which it moved both COD and Substantial Completion to September 4, 2017, due to "low productivity in piping works."

49. In late November 2016, the independent engineer recounted in an email his conversation with DevCo's lenders regarding the significance of using ISO-NE's "FCTS Workaround":

> Essentially I was told that they are aware that the Project could be 3 months late; however, they have developed a strategy in communication with [the Fund Entities] and, as reported by [the Fund Entities], recommended by their contact at ISO NE. Essentially they want to stick with the party line that the Guaranteed Substantial Completion Date (5/31/2017) is possible, until it is absolutely certain that it is not possible. They are hoping that the [Guaranteed Substantial Completion Date] does not become impossible until sometime (even shortly) after the ISO NE spring 2017 Auction, expected to be in Mid-March 2017. They are aware that it is more likely that there will be a delay, but want to cling to the [Guaranteed Substantial Completion Date] unless it is absolutely not possible to achieve.
>
> The Lenders have already put their full loan amounts into the Project and the Project is now being built with equity contributions, so it appears the concern is that if the Project notifies the ISO early, the ISO may be forced to take action (make them sell their capacity contract in the extreme case) that would harm all stakeholders; therefore the stakeholders are trying to postpone any action by the ISO until absolutely necessary. . . .

50. An analysis prepared by one of DevCo's lenders around that time further characterized conversations between ISO-NE and DevCo regarding the "FCTS Workaround": "Changing the critical path date could have far-reaching repercussions that both the project and the ISO would prefer to avoid if at all possible," and "[a]s long as catching up with the target completion date remains *possible*, the project and the ISO will agree to maintain the critical path date at 5/31/2017."

3. December 2016 – CPS Report, Further Schedule Delays, ISO-NE Internal Agreement to Not Submit an ISO Demand Bid, and Further Guidance Provided Regarding Internal ISO-NE Procedures

51. DevCo submitted its CPS report to ISO-NE regarding its November progress on

December 7, 2016. As with its previous reports, this one retained May 31, 2017 as the anticipated COD in the FCTS web form. Its narrative noted that DevCo was working with Iberdrola to gauge the impact of labor issues, that Iberdrola informed DevCo that it anticipates an additional delay of eleven days in achieving contractual Substantial Completion, and that "[Iberdrola] now takes the position that it will achieve contractual Substantial Completion on September 7, 2017." The report then qualified the certainty of the delays by stating that "[DevCo] and [Iberdrola] continue to meet in the hope of mitigating these construction related delays and improving the date of contractual Substantial Completion."

52. The AMA Contractor discussed a draft of this narrative with ISO-NE's System Planning Department prior to filing the report and had a follow-up phone conversation with ISO-NE's System Planning group two days after filing. Following that second call on December 9, 2016, ISO-NE's Director of System Planning sent an email to ISO-NE Senior Management, copying others in System Planning, in which ISO-NE's Director of System Planning noted DevCo's delays but recommended keeping DevCo's COD of May 31, 2017 in FCTS, so as to avoid the ISO-NE Tariff obligation to submit an ISO demand bid on DevCo's behalf into ARA3:

> Optimistically they continue to target June 1, 2017 but . . . due to the initial issues with acquiring the necessary welders, [Asset Manager's Company] believes there may be delays into late August/early September (worst case). We discussed the need to cover, even if in part should they continue to have issues. I do believe every effort is being made to improve the schedule and address the welder issues, and do not want to change their in-service date of 5/31/2017 because it will trigger submission of a Demand Bid in ARA3 to shed the entire CSO for the CCP. In my opinion, they will likely be late but not significantly.

53. Unlike ISO-NE's Director of System Planning's prior internal description in May 2016, this description of the "FCTS Workaround" was not premised on the sponsor covering its CSO—indeed, the final window for DevCo to cover its CSO before ARA3 had already passed two days before the December 9 call and ISO-NE staff and Senior Management knew that DevCo had not yet covered its CSO.

54. ISO-NE's General Counsel at the time agreed with ISO-NE's Director of System Planning's recommendation to refrain from submitting an ISO demand bid on DevCo's behalf into ARA3, writing: "As for [DevCo], putting the entire year into ARA3 at this point doesn't make sense, but in the next couple of months we should have a meeting to assure we are all comfortable." ISO-NE's Director of System Planning later claimed that this email from the ISO's General Counsel provided "direction" to not submit an ISO demand bid during the March 2017 ARA3. During testimony, the ISO's General Counsel disagreed with this characterization of his email but testified that he agreed with

the "business decision" to not submit the demand bid. The ISO's General Counsel and the ISO-NE Vice President of System Planning also testified that they did not understand the mechanics of the so-called "FCTS Workaround" at the time.

55. A few days after DevCo submitted its December CPS report covering November 2016, Iberdrola sent a written report with yet another revised schedule. The new revised schedule delayed both the COD and the Substantial Completion Date to September 19, 2017.

56. The day after Iberdrola delivered the revised schedule pushing back the COD to September 19, 2017, a key Iberdrola manager asked DevCo's Project Manager what the last date was that Iberdrola could complete the Project, adding that they were working on a plan to finish the Project in September or October 2017. The next week, Iberdrola informed DevCo in a meeting that it was planning to move the COD to October 14, 2017. DevCo was skeptical that Iberdrola could meet the deadlines that Iberdrola was proposing and began conducting additional independent evaluations of the schedules and relevant data.

57. On December 29, 2016, ISO-NE's Director of System Planning and ISO-NE Consultant discussed scheduling issues and the internal ISO-NE ARA3 process by phone. ISO-NE's Director of System Planning explained that the ISO-NE's System Planning Department internally "finished" its ARA3 qualification process on February 16, 2017, fifteen days before the ARA, and issued ARA3 QC values (the amount of capacity that each resource may bid or offer into ARA3) to market participants on that date. According to ISO-NE Consultant, ISO-NE's Director of System Planning also told him that ISO-NE had some "flexibility" in its obligation to submit an ISO demand bid for DevCo into ARA3 if it appeared that the Project would be delayed for less than one year.

4. January 2017 – Discussions Inside ISO-NE and DevCo's Receipt of Further-Delayed Schedule

58. In early January 2017, one of ISO-NE's Director of System Planning's direct reports sent an internal email to ISO-NE Senior Management and others, claiming that DevCo was back on track to meet the May 31, 2017 COD: "[DevCo] reached out to us last week with an update on their progress. They informed us that they are still on track to be online by the start of the CCP. . . . I will be providing you with more details on their December CPS update once we receive it early next week." This ISO-NE employee later testified that the Director of System Planning had instructed her to send that email and she had no memory of any such conversation with DevCo.

59. A few days after the internal ISO-NE email from the ISO-NE's Director of System Planning's direct report, DevCo submitted its January 7 CPS report confirming ongoing delays in its schedule. Nevertheless, two members of ISO-NE Senior Management testified that as a result of the factually-unsupported email from ISO-NE's Director of

System Planning's direct report, they believed that DevCo would likely meet its COD.

60. In mid-January, another ISO-NE employee (who is a member of the New Generation Group) forwarded to ISO-NE's System Planning an email update she had received regarding DevCo's schedule, writing: "I received this update on [DevCo] today. Just want to make sure that you know that they may not making [*sic*] their 6/1/17 date." Her email attached a schedule update that DevCo had provided showing delays in the New Generation Group milestone dates. There is no evidence that ISO-NE's System Planning made any effort to investigate or follow-up on this information. To the contrary, ISO-NE's System Planning dismissed her concerns and informed her that it was "closely monitoring" DevCo's schedule.

61. On January 11, 2017, Iberdrola submitted a new detailed schedule to DevCo, delaying Substantial Completion to October 14, 2017, and COD to October 16, 2017. From January 16 through 18, DevCo and Iberdrola met for three days of intense workshops to evaluate the feasibility of this new schedule. At the end of those workshops, DevCo determined that more time was required to complete construction and that the October 14, 2017 Substantial Completion Date was "not even close to being realistic."

5. February 2017 – DevCo Discloses New Schedule to ISO-NE and System Planning Does Not Submit ISO Demand Bid

62. On February 6, 2017, DevCo asked to move an ISO-NE New Generation Group call (in which they would have had to provide their new milestone dates, including a delayed COD) from February 8 to February 17 (one day after the date that ISO-NE's Director of System Planning had identified to the ISO-NE Consultant as the deadline for ISO-NE's System Planning Department to finish its ARA3 qualifications). ISO-NE's Director of System Planning testified that she had suggested that DevCo request such a delay because the ISO-NE Consultant told her that DevCo did not yet have new schedule dates from Iberdrola. The AMA Contractor testified that he discussed rescheduling the New Generation Group call with ISO-NE's Director of System Planning so that other ISO-NE staff outside of System Planning who were not involved in making the determination of whether ISO-NE would submit a demand bid into ARA3 for the Project would not get involved in the ARA3 issue.

63. The next day, on February 7, 2017, ISO-NE's Director of System Planning and the AMA Contractor discussed DevCo's forthcoming CPS report covering January 2017 and the Project's ongoing delays. During that conversation, ISO-NE's Director of System Planning relayed that ISO-NE Senior Management "know[s] where things stand," and noted that her group was endeavoring to prevent others at ISO-NE from "sniffing around" and trying to force ISO-NE to submit an ISO demand bid on DevCo's behalf into ARA3.

64. DevCo filed its CPS report later that day. As before, the report retained May 31, 2017 as the anticipated COD in the FCTS web form but again referred to a delayed COD in the narrative, stating: "At this point, [DevCo] does not anticipate that after the [Iberdrola] schedule is fully vetted, that the date for contractual substantial completion will be materially later than the date previously discussed in our narratives." The latest date previously discussed in DevCo's narratives was September 7, 2017.

65. On February 8, 2017, DevCo's Project Manager emailed DevCo's Construction Consultant, admitting that the May 31, 2017 COD was impossible.

66. On February 16, 2017, ISO-NE issued its qualified capacity values for ARA3. It assigned the Project a qualified capacity of 674 MW—a value that necessarily assumes that the Project would be on-time for its May 31, 2017 COD.

67. On the morning of February 17, 2017, the AMA Contractor emailed DevCo's new milestone dates to ISO-NE's Director of System Planning. Among other changes, the AMA Contractor disclosed that the Project's COD was going to be pushed to the end of September/the beginning of October.

68. From February 17, 2017, when ISO-NE received DevCo's new COD and scheduling dates, through March 3, 2017, the due date for ARA3 demand bids, ISO-NE Senior Management discussed the ARA3 issue. In the course of those discussions, the ISO-NE's Director of System Planning admitted that since 2010, System Planning had exercised its judgment in not entering a non-commercial FCM resource (such as the Project) into ARA3 if they were going to be a few months late. On March 2, 2017, System Planning and senior members of the ISO-NE Legal Department met with ISO-NE's Chief Operating Officer to discuss issues surrounding the Project's delays. ISO-NE did not change its decision to not submit a demand bid on DevCo's behalf into ARA3.

69. Demand bids for ARA3 were due on March 3, 2017. DevCo had not covered any portion of its 674 MW CSO for the CCP.

70. On March 7, 2017, which was after the date by which demand bids were due for ARA3, DevCo submitted its CPS report and finally changed its COD in the FCTS web form to October 14, 2017. The ISO-NE Consultant testified that sometime between February 16 (when ISO-NE issued DevCo's ARA3 qualified capacity value of 674 MW) and ARA3 (March 1–3), ISO-NE's Director of System Planning instructed him to submit DevCo's COD change in the FCTS web form at the *end* of the March 2017 CPS submission window (which spanned the first five business days of the month), because changing the COD prior to the auction could cause FCTS to prepare an ISO demand bid for the Project.

G. Termination of the EPC Agreement, Arbitration, and Bankruptcy

71. DevCo terminated its EPC Agreement with Iberdrola on April 15, 2018, and it retained a replacement contractor to complete the construction of the Project. The Project achieved commercial operation after a full year of delay in June 2018.

72. ISO-NE paid DevCo $104,843,399.33 in capacity payments during the year that the Project was not operational, resulting in a net financial benefit of $80,079,713 to DevCo from the decision to not submit the mandatory ISO-NE demand bid on DevCo's behalf, starting on June 1, 2017.

73. On April 20, 2018, Iberdrola filed for arbitration of claims arising from alleged breaches of the EPC Agreement, and DevCo filed counterclaims, including ones addressing Project delays.

74. After lengthy proceedings, the arbitration panel faulted both DevCo and Iberdrola for the Project delays, writing:

> The evidence demonstrated that IEP seriously underbid the EPC Contract, and it never recovered from that self-inflicted financial harm. Compounding that initial error, IEP's performance of each of the Project phases – design, contracting, procurement, and execution – was marked by IEP's blunders, including poor subcontracting and labor practices/assumptions, poor performance by its most critical design and construction subcontractors, and project management shortfalls. In our view, IEP would have faced substantial challenges and financial losses even if it was dealing with an ideal owner – one who was cooperative, forthcoming, and responsible.

75. While the arbitration panel concluded that "the evidence clearly showed" that delays in completing the power generation portion of the Project were "substantially impacted" by the engineering and subcontractor management issues discussed above, it ultimately concluded that DevCo had breached the EPC Agreement by, among other things, wrongfully terminating Iberdrola, and it awarded Iberdrola $236,404,377 in damages, plus interest and fees. A New York State trial court confirmed that award on December 23, 2021.

76. On March 23, 2022, the Debtors commenced the Chapter 11 Cases in the Bankruptcy Court. The Chapter 11 Cases are ongoing as of the date of this Agreement.

H. Investigation

77. During the summer of 2017, the ISO-NE Independent Market Monitor (IMM) began an internal and external inquiry into DevCo's receipt of capacity payments during

the 2017-18 CCP. It formally referred the matter to Enforcement in the fall of 2017.

78. DevCo cooperated throughout the Investigation.

III. VIOLATIONS

Enforcement characterizes the violations as follows:

A. Failure to Provide Updated Critical Path Schedules

79. Enforcement has concluded that from September 2016 through February 2017, DevCo failed to provide "complete updated version[s] of [its] critical path schedule" as required by sections III.13.3.2 and III.13.3.2.1 of the ISO-NE Tariff. The updated Critical Path Schedules that it submitted to ISO-NE through the FCTS system did not incorporate the new schedules that it had received from Iberdrola.

80. Iberdrola provided updated schedules to DevCo on at least four occasions during that period: September 9, 2016 (delaying COD to 8/28/17); November 7, 2016 (delaying COD to 9/4/17); December 12, 2016 (delaying COD to 9/19/17); and January 11, 2017 (delaying COD to 10/16/17). DevCo did not provide complete updated schedules to ISO-NE in any format. In its narratives, it referred in a misleading way to problems that had the potential to delay the schedule, suggesting that the delays were less certain than they were. DevCo also referenced potential changes to the contractual Substantial Completion Date but did not provide ISO-NE the schedules themselves or the COD, Commissioning, or Major Equipment Testing dates listed in those schedules. Instead of providing the "complete updated version of the critical path schedule," as the Tariff required, DevCo consistently entered an old schedule into the FCTS web form, claiming that the Project would meet the Major Equipment Testing and Commissioning milestone by May 30, 2017 and COD by May 31, 2017.

81. Contemporaneous documents report that ISO-NE's Director of System Planning advised DevCo to retain the incorrect May 31, 2017 COD in the FCTS web form unless that COD became "impossible" even after it appeared that the true COD would be later (this "possible/impossible" threshold does not appear in the ISO-NE Tariff). DevCo's failure to provide an updated schedule could be characterized as a consequence of DevCo following the advice of an ISO-NE employee—at least prior to the COD becoming impossible. Whether or not that is an accurate characterization, such an explanation cannot excuse DevCo's violations. DevCo's main contacts with ISO-NE, the AMA Contractor and the ISO-NE Consultant, were sophisticated regulatory experts who were experienced with ISO-NE compliance matters. DevCo and its consultants knew or should have known that they were not complying with its Tariff obligations when they acted upon advice, as described in contemporaneous documents, from ISO-NE's Director of System Planning. In any event, notwithstanding any advice that may have been given by an ISO employee, market participants always have an obligation to make independent

assessments of tariff and other regulatory requirements and must ensure that they comply with those requirements.

B. Failure to Provide Relevant Information to ISO-NE

82. Section III.13.3.2.3 of the ISO-NE Tariff requires DevCo to include in its CPS narratives:

> [A]ny other information regarding the status or progress of the project or any of the project milestones that might be relevant to the ISO's evaluation of the feasibility of the project being built in accordance with the critical path schedule or the feasibility that the project will meet the requirement that the project achieve Commercial Operation no later than the start of the relevant Capacity Commitment Period.

83. The narratives that DevCo submitted between May 2016 and March 2017 made false claims regarding the Project's schedule trajectory and omitted numerous important and relevant details regarding the status of the Project and Iberdrola's delays.

84. First, from June through August 2016, DevCo represented in its narratives that the "project continues to track on time" even though DevCo knew that it was not. Multiple DevCo witnesses testified that the Project was not tracking on time when DevCo included that sentence in its CPS reports.

85. Second, DevCo's CPS narratives failed to include relevant information demonstrating that the Project likely would not be commercial prior to the start of its CCP. The narratives that it filed in May through August 2016 were virtually devoid of information, and they omitted highly relevant information, such as the termination of the Project's engineering subcontractor and resulting engineering delays, difficulties with other subcontractors, and the demands that DevCo had made for a recovery schedule from Iberdrola.

86. The CPS narratives that DevCo submitted in the late summer and fall of 2016 continued to omit key information regarding delays and the likelihood that the Project would be completed on time. For example, the narrative addressing August 2016 failed to disclose the likely schedule impacts of Iberdrola's decision to back-load work and that key DevCo representatives had concluded that the May 31, 2017 COD was in jeopardy.

87. DevCo disclosed some delays to ISO-NE, but these disclosures included caveats that were not reflected in Iberdrola's schedules. For example, the narrative that it submitted in October 2016 reported that "contractual Substantial Completion of the project could potentially be delayed from May 31, 2017 to as late as August 27, 2017." The narrative then caveated that disclosure by stating that DevCo has been discussing

"Substantial Completion dates as early as July 7, 2017," and noting that "[Iberdrola]'s notice relates to contractual Substantial Completion, not Commercial Operation under the ISO-NE Tariff" and "it is possible" that COD for Tariff purposes could precede that date. However, the 132-page revised schedule that Iberdrola submitted to DevCo definitively moved Substantial Completion and COD to August 27 and August 28, 2017, respectively. It did not indicate that those milestones "could potentially be delayed . . . as late as" and did not leave open the possibility of a July 7, 2017 date. Finally, there was no basis for DevCo to cite the Substantial Completion Date with the caveat that COD *could* precede Substantial Completion when Iberdrola's schedule explicitly stated that COD would be August 28, 2017.

88. DevCo provided notice to ISO-NE that the Project was going to be delayed. As previously described, DevCo offered general references to delays and conveyed Iberdrola's revised Substantial Completion milestone dates. However, ISO-NE Tariff Section 13.3.2.3 obligated DevCo to provide much more than mere notice; it was required to provide information relevant to ISO-NE's evaluation of the feasibility of the Project: (i) being built in accordance with its CPS; and (ii) meeting its May 31, 2017 COD.

C. Violation of the Commission's Duty of Candor Rule

89. Section 35.41(b) of the Commission's regulations requires all Sellers to "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with . . . Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences." DevCo became a "Seller" when it applied for Market-Based Rate Authority on November 29, 2016. For reasons explained previously, the CPS narratives that DevCo submitted during the Relevant Period were inaccurate and misleading and omitted material information regarding Project delays. In addition, the dates for Major Equipment Testing, Commissioning, and COD milestones were not fulsome or forthcoming. Enforcement concludes that DevCo failed to exercise due diligence to ensure the accuracy of the information contained in those submissions. Therefore, the CPS submissions that DevCo made during the Relevant Period after it became a Seller violated section 35.41(b).

IV. REMEDIES AND SANCTIONS

90. For purposes of settling any and all claims, civil and administrative disputes and proceedings arising from or related to DevCo's conduct reviewed in Enforcement's Investigation, DevCo agrees with the facts as stipulated in Section II of this Agreement, but it neither admits nor denies the violations described in Section III of this Agreement. DevCo further agrees to undertake obligations set forth in the following paragraphs.

91. In identifying the appropriate civil penalty and disgorgement, Enforcement

recognizes that DevCo is not the only individual or entity whose conduct contributed to the market harm resulting from the matters encompassed by this Investigation.

A. Civil Penalty

92. DevCo agrees that the Commission shall have an Allowed General Unsecured Claim against DevCo's chapter 11 estate (the "DevCo Estate") in the amount of $17,100,000.00, corresponding to a $17,100,000.00 civil penalty (the "Civil Penalty Claim").

B. Disgorgement

93. DevCo agrees that the Commission shall have an Allowed General Unsecured Claim against the DevCo Estate in the amount of $26,693,237.67, corresponding to disgorgement of $26,693,237.67 in profits received through DevCo's participation in the FCM (the "Disgorgement Claim" and, together with Civil Penalty Claim, the "Settlement Amount Claim").

94. The Settlement Amount Claim will receive treatment consistent with all other Allowed General Unsecured Claims against the DevCo Estate pursuant to the Plan, regardless of whether the Commission votes on the Plan or files a proof of claim in the Chapter 11 Cases. Distribution from the DevCo Estate on account of the Civil Penalty Claim shall be made to the United States Treasury, and distribution on account of the Disgorgement Claim shall be made to ISO-NE for the benefit of harmed ISO-NE Market Participants upon approval by Enforcement of ISO-NE's plan for doing so.

C. Compliance

95. DevCo as reorganized pursuant to the Plan ("Reorganized DevCo") shall submit an annual compliance monitoring report to Enforcement for two years following the Agreement Effective Date. The first report shall be submitted no later than thirty (30) days after the first anniversary of the Agreement Effective Date. The second report shall be submitted no later than thirty (30) days after the second anniversary of the Agreement Effective Date.

96. Each compliance monitoring report from Reorganized DevCo shall: (a) identify any known violations of the Federal Power Act ("FPA") or Commission regulations during the applicable period, including a description of the nature of the violation and the steps that were taken to rectify the situation; (b) describe all compliance measures and procedures related to compliance with the FPA and Commission regulations that Reorganized DevCo instituted or modified during the applicable period; and (c) describe all Commission-related compliance training that Reorganized DevCo administered during the applicable period, including the dates such training occurred, the topics covered, and the procedures used to confirm which personnel attended.

97. Each compliance monitoring report shall also include an affidavit executed by an officer of Reorganized DevCo stating that it is true and accurate to the best of his/her knowledge.

98. Upon request by Enforcement, Reorganized DevCo shall provide to Enforcement documentation supporting the contents of its reports.

V. TERMS

99. DevCo and Enforcement agree that the Settlement Amount Claim shall be treated consistent with all other Allowed General Unsecured Claims against DevCo pursuant to the Plan without the Commission needing to file a Proof of Claim in the Chapter 11 Cases, or vote on the Plan.

100. The effective date of this Agreement ("Agreement Effective Date") shall be the earliest date on which both of the following have occurred: (a) the Commission has issued a final order approving this Agreement without material modification; and (b) the Bankruptcy Court has issued a final order approving this Agreement without material modification.

101. DevCo shall make all filings reasonably necessary to secure approval of this Agreement by the Bankruptcy Court in the Chapter 11 Cases. As soon as reasonably practicable, the Debtors shall file a motion, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, with the Bankruptcy Court seeking approval of this Agreement (the "9019 Motion"). Prior to filing the 9019 Motion with the Bankruptcy Court, the Debtors shall provide Enforcement reasonable opportunity to review and comment on the 9019 Motion and the proposed order of the Bankruptcy Court approving the relief requested in the 9019 Motion. DevCo and Enforcement shall provide all necessary cooperation to one another to ensure approval of this Agreement by the Bankruptcy Court and the Commission including, without limitation, defending the Agreement against any objections. DevCo shall cooperate with Enforcement to ensure that the terms of this Agreement are effectuated in the Plan and in the Confirmation Order.

102. Upon entry of an order of the Bankruptcy Court approving this Agreement, DevCo's or Reorganized DevCo's, as applicable, failure to comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the FPA, 16 U.S.C. § 792, et seq., and may subject DevCo or Reorganized DevCo, as applicable, and any other successor companies, to additional action under the enforcement and penalty provisions of the FPA.

103. Neither Enforcement nor the Debtors shall object to, or withdraw, the 9019 Motion so long as it and its proposed order are consistent with and implement the terms of this Agreement. So long as the plan is consistent with and implements this Agreement, Enforcement shall not object to or otherwise oppose confirmation of the Plan

unless, in Enforcement's sole discretion, such objection is appropriate to preserve and/or exercise the Commission's police or regulatory powers. Nothing in this Agreement shall prohibit, limit or affect in any way the interests, claims, rights, and/or defenses of the United States of America other than Enforcement. For the avoidance of doubt, the United States of America, including Enforcement and the Commission, shall be deemed to opt-out of the third-party releases contained in the Plan and shall not be a Releasing Party.

104. Upon the Agreement Effective Date, this Agreement shall forever bar the Commission from holding DevCo, Reorganized DevCo, or any of their respective current and former officers, managers, directors, limited partners, general partners, equity holders (regardless of whether such interests are held directly or indirectly), principals, members, predecessors, successors, assigns, subsidiaries, employees, agents, consultants, representatives, each strictly in their capacity as such, liable for any and all administrative or civil claims arising out of the conduct covered by the Investigation, including, but not limited to, conduct addressed and stipulated to in this Agreement, which occurred on or before the Agreement Effective Date.

105. In the event that a trustee or examiner is appointed in the Chapter 11 Cases or the Chapter 11 Cases are converted to cases under chapter 7 of the Bankruptcy Code, this Agreement shall be binding on such trustee, examiner, or a chapter 7 trustee and this Agreement shall remain effective and binding on DevCo in the event its Chapter 11 Cases are dismissed.

106. This Agreement binds DevCo, Reorganized DevCo, and its agents, successors, and assignees. This Agreement does not create any additional or independent obligations on DevCo or Reorganized DevCo, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in this Agreement.

107. In connection with the civil penalty and disgorgement provided for herein, DevCo agrees that the Commission's order approving this Agreement without material modification shall be a final and unappealable order assessing a civil penalty under § 316(A)(b) of the FPA, 16 U.S.C. § 825o-1(b). DevCo or Reorganized DevCo, as applicable, waives findings of fact and conclusions of law, rehearing of any Commission order approving this Agreement without material modification, and judicial review by any court of any Commission order approving this Agreement without material modification.

108. This Agreement may be modified only if in writing and signed by Enforcement and DevCo or Reorganized DevCo, as applicable. Prior to the Agreement Effective Date, no modification will be effective unless any approval of the Commission and Bankruptcy Court that may be required with respect to such modification has been received. On and after the Agreement Effective Date, no modification will be effective unless any approval

of the Commission that may be required with respect to such modification has been received.

109. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, manager, employee, officer, director, agent or representative of Enforcement or DevCo has been made to induce the signatories or any other party to enter into the Agreement.

110. Unless the Commission and the Bankruptcy Court issue orders approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor DevCo shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and DevCo.

111. DevCo, or Reorganized DevCo, as applicable, to the extent reasonably practicable shall cooperate with, and not take any actions to impede Enforcement in any enforcement action or proceeding concerning any other individuals or entities related to the subject matter of this Investigation.

112. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts the Agreement on the entity's behalf.

113. The undersigned representative of DevCo affirms that he or she has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his or her knowledge, information and belief, and that he or she understands that the Agreement is entered into by Enforcement in express reliance on those representations.

114. This Agreement may be executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and Accepted:

___ _____

Janel Burdick
Director, Office of Enforcement
Federal Energy Regulatory Commission

Date: __June 15, 2022_____

John Castellano
Chief Restructuring Officer
Salem Harbor Power Development LP

Date: _____June 15, 2022_____

Document Accession #: 20220627-3065 Filed Date: 06/27/2022

Document Content(s)

EXHIBIT B

Castellano Declaration

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SALEM HARBOR POWER DEVELOPMENT LP (f/k/a Footprint Power Salem Harbor Development LP), *et al.*,[1]	Case No. 22-10239 (MFW)
	(Jointly Administered)
Debtors.	

DECLARATION OF JOHN R. CASTELLANO IN SUPPORT OF DEBTORS' MOTION FOR AN ORDER (A) APPROVING SETTLEMENT AGREEMENT BETWEEN DEBTOR SALEM HARBOR POWER DEVELOPMENT LP AND THE OFFICE OF ENFORCEMENT OF THE FEDERAL ENERGY REGULATORY COMMISSION AND (B) GRANTING RELATED RELIEF

Pursuant to 28 U.S.C. § 1746, I, John R. Castellano, do hereby declare, under penalty of perjury, the following to the best of my information, knowledge, and belief:

1. I am the Chief Restructuring Officer for Salem Harbor Power Development LP ("DevCo"), a Delaware limited partnership, and its debtor affiliates (each, a "Debtor" and, collectively, the "Debtors"). I am over the age of 18 and authorized to submit this declaration (this "Declaration") on behalf of the Debtors in the above-captioned chapter 11 cases (the "Chapter 11 Cases"). If called as a witness, I would testify competently to the facts set forth in this Declaration.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) (1360); Highstar Salem Harbor Holdings GP, LLC (f/k/a Highstar Footprint Holdings GP, LLC) (2253); Highstar Salem Harbor Power Holdings L.P. (f/k/a Highstar Footprint Power Holdings L.P.) (9509); Salem Harbor Power FinCo GP, LLC (f/k/a Footprint Power Salem Harbor FinCo GP, LLC) (N/A); Salem Harbor Power FinCo, LP (f/k/a Footprint Power Salem Harbor FinCo, LP) (9219); and SH Power DevCo GP LLC (f/k/a Footprint Power SH DevCo GP LLC) (9008). The location of the Debtors' service address is: c/o Tateswood Energy Company, LLC, 480 Wildwood Forest Drive, Suite 475, Spring, Texas 77380.

2. I submit this Declaration in support of the *Debtors' Motion for an Order (A) Approving Settlement Agreement Between Debtor Salem Harbor Power Development LP and the Office of Enforcement of the Federal Energy Regulatory Commission and (B) Granting Related Relief* (the "Motion").[2] I am authorized to submit this Declaration on behalf of the Debtors.

3. Except as otherwise indicated, all facts set forth in this Declaration are based upon my personal knowledge, my discussions with the Debtors' asset manager and advisors, my review of relevant documents, or my opinion, based upon my experience and knowledge of the Debtors' operations and financial condition. In making this Declaration, I have relied in part on information and materials that the Debtors' personnel, agents, and advisors have gathered, prepared, verified, and provided to me, in each case, under my supervision, at my direction, and for my use in preparing this Declaration.

Background and Qualifications

4. I am a Managing Director with AP Services, LLC ("APS"), the Debtors' financial advisor. In November 2021, the Debtors engaged an affiliate of APS to provide certain financial advisory services. In December 2021, I was appointed Chief Restructuring Officer of DevCo and each of the other Debtors and, in connection therewith, APS was retained by the Debtors to provide interim management services, which engagement supersedes and replaces the prior engagement of APS's affiliate.

5. I hold a bachelor's degree in Accounting from DePaul University and a master's degree in Management, Finance, and Strategy from the Kellogg School of Management at Northwestern University. I have nearly thirty (30) years of industry experience, with areas of expertise in business plan development, contingency planning, and creditor negotiations. In

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

addition, I have over 25 years of financial restructuring and bankruptcy-related experience and over 24 years of experience with APS. I have served as a Managing Director in APS's Turnaround & Restructuring Group since 2007. Prior to joining APS, I worked at Ernst & Young LLP in its Assurance practice as an auditor, and in its Consulting practice focusing on restructuring advisory services.

6. As a result of my role and experience with the Debtors, my review of relevant documents, and my discussions with members of the Debtors' asset manager, Tateswood Energy Company, LLC, and other individuals who manage the Debtors' day-to-day business operations and affairs, I am familiar with the Debtors' day-to-day operations, business affairs, and books and records.

Background Relevant to the Settlement Agreement

7. DevCo owns and operates a 674 MW natural gas-fired combined-cycle electric power plant (the "Facility") located in Salem, Massachusetts, which became operational in 2018. DevCo generates revenue by selling energy, capacity, and ancillary services from the Facility through ISO New England Inc. ("ISO-NE"), the not-for-profit organization that manages New England's electrical grid and its competitive wholesale market. DevCo generates "energy revenues" by selling its electricity into the ISO-NE wholesale market through scheduled services offered by its energy manager, and it also receives so-called "capacity revenues" through its participation in ISO-NE's forward capacity market (the "Forward Capacity Market"). Through its participation in forward capacity auctions, DevCo obtains commitments to produce energy over a specified period of time, regardless of whether energy is actually needed or produced, in exchange for capacity revenues from ISO-NE. In connection with the development and construction of the Facility, ISO-NE provided the Debtors with a capacity award (the "Capacity Award") for the five

(5) year period of June 1, 2017, through May 31, 2022. The award was a key incentive for the development of the Facility. In order to remain eligible for the Capacity Award, the Facility was required to become operational by no later than May 31, 2017 (the "Commercial Operation Date"). Ultimately, the Facility did not meet this deadline, and in October 2017, the OE commenced a non-public investigation into the Facility's participation in the Forward Capacity Market (the "Investigation").

8. On August 27, 2020, the OE presented its preliminary findings regarding the Investigation to DevCo, which included five (5) separate alleged violations. Among other things, the OE alleged that DevCo violated the ISO-NE Transmission, Markets, and Services Tariff (the "Tariff") and FERC's Market Behavior Rules due to DevCo's alleged failure to provide accurate and complete critical path schedule updates to ISO-NE. The OE's preliminary findings alleged that the Facility's critical path schedule updates did not include all information relevant to ISO-NE's evaluation of the feasibility of the Facility and its ability to meet the Commercial Operation Date. The OE also alleged that the Facility engaged in a fraudulent scheme to deceive ISO-NE and the market into believing that the Facility would comply with the Commercial Operation Date and to ensure that the Facility would receive the Capacity Award. The OE further alleged that this "scheme" violated FERC's Anti-Manipulation Rule.

9. On February 8, 2021, DevCo provided a comprehensive response to the OE, which rebutted each of the OE's preliminary findings. Among other things, DevCo argued that its actions, decisions, communications, and notifications concerning the development of the Facility were at all times compliant with FERC's regulations and applicable ISO-NE Tariff provisions.

10. In November 2021, the OE notified DevCo that the OE had received authority from FERC to enter into settlement discussions with DevCo in an effort to resolve the

Investigation, and the parties subsequently entered into a tolling agreement to facilitate such discussions. The Debtors endeavored to keep the OE apprised of its restructuring efforts prior to the Petition Date in connection with the parties' settlement discussions, and they have continued to cooperate in good faith following the commencement of these Chapter 11 Cases. Over the past eight (8) months, DevCo and the OE have engaged in extensive good faith, arm's-length negotiations regarding a settlement of the Investigation and potential causes of action arising therefrom.

11. As a result of such negotiations, DevCo and the OE have agreed to resolve and settle the Investigation on the terms and conditions set forth in the settlement agreement (the "Settlement Agreement"), a copy of which is attached as **Exhibit 1** to the Proposed Order, which is attached as **Exhibit A** to the Motion. The Motion includes a summary of the key terms of the Settlement Agreement.

12. As of the date hereof, it is my understanding that FERC has not issued a show cause order against DevCo, and DevCo fully contests all allegations raised by the OE against DevCo. I further understand that DevCo has reserved all rights to formally contest the OE's allegations in litigation, if necessary, to the extent the Court does not approve the relief requested herein.

Best Interests of the Debtors and Their Estates

13. Based upon information provided by the Debtors and their advisors and my personal involvement, I believe that the compromise embodied in the Settlement Agreement is in the best interests of the Debtors, their estates, and other parties in interest and falls well within the range of reasonableness. The Settlement Agreement is the result of nearly eight (8) months of good faith, arm's-length negotiation among the Debtors and the OE. During this time, the Debtors'

advisors—including independent regulatory counsel—met with representatives from the OE on at least twelve (12) occasions and exchanged multiple proposals, each of which was carefully evaluated by the Debtors and their advisors. It is my belief that the Settlement Agreement ultimately agreed to by the parties reflects the best possible terms under the circumstances and will afford the Debtors a true fresh start with respect to compliance and regulatory matters.

14. It is my understanding that, among other things, the Settlement Agreement (a) eliminates one (1) of the OE's five (5) initial allegations, including allegations that could have given rise to non-dischargeable claims, (b) significantly reduces DevCo's potential monetary exposure by over $164.4 million, and (c) classifies and treats FERC's Monetary Claims as General Unsecured Claims under the Plan. I further believe that the Debtors' compromise with the OE is also a critical component of the comprehensive restructuring embodied in the Plan. I believe approval of the Settlement Agreement offers a favorable resolution to the Investigation and forecloses what could have otherwise resulted in a costly and arduous litigation process at the expense of the Debtors' creditors. I have also been advised that entry into the Settlement Agreement avoids the risks associated with the potential for non-dischargeable claims, which if established may impede the Debtors' ability to confirm a chapter 11 plan. I believe that approval of the Settlement Agreement will not only benefit the Debtors, but it will also maximize value for all stakeholders under the Plan by reducing the total amount of FERC's potential monetary claims and consensually resolving claims that the OE may argue are otherwise non-dischargeable. Accordingly, I believe that entry into the Settlement Agreement will benefit the Debtors and all parties in interest and is in the best interest of the Debtors' estates.

15. In addition, based on discussions with the Debtors' counsel, I further understand that the Settlement Agreement also satisfies the four-factor *Martin* test. ***First***, with

respect to the probability of success in litigating the potential claims subject to settlement, while the Debtors are confident in their position, I believe there is inherent risk in any litigation. Additionally, even if the Debtors were successful in such litigation, I believe the negative publicity could jeopardize the Debtors' ability to continue operating in the Forward Capacity Market—a critical component of the Debtors' business—and compromise the Debtors' future operations. ***Second***, even if the Debtors were to litigate the issues to a favorable conclusion, they will have expended significant resources—which I do not believe would be prudent in light of the Debtors' current financial condition and limited liquidity. ***Third***, in the absence of a settlement, I understand the Debtors would likely be subject to an administrative proceeding or civil action carrying considerable expense, risk, and delay. The OE's preliminary findings involve highly technical and unpredictable legal issues, which I am advised would require costly briefing and discovery. I believe such litigation would pose needless expense on the Debtors' estates and distract the Debtors from their restructuring efforts at this critical juncture. I am advised that, among other things, the potential non-dischargeability of certain of the OE's alleged claims would likely be the subject of considerable litigation and could pose a material risk to the Debtors' ability to confirm a chapter 11 plan if the OE were to prevail. Accordingly, I believe removing the risk of potential non-dischargeable claims in these chapter 11 cases is a material benefit to the Debtors' estates. ***Finally***, I believe the Settlement Agreement is in the paramount interest of the Debtors' creditors. The compromise set forth in the Settlement Agreement is an essential piece of the Debtors' overall restructuring. I believe it will eliminate costly litigation among the parties and instead distribute the savings to creditors under the Plan. In addition, I understand the Settlement Agreement reduces FERC's potential claims in these chapter 11 cases by nearly eighty percent (80%), thereby increasing the relative value available for all other holders of General Unsecured Claims under the

Plan. As part of its preliminary findings, the OE initially asserted claims that, if successfully prosecuted by the OE in all respects, could amount to approximately $208.2 million in civil penalty assessment and disgorgement orders against DevCo. I understand that the significant reduction in the amount of the Monetary Claims reflects, among other things, the OE's recognition that the acts and omissions of other parties in interest contributed to certain of the alleged harm. In short, I believe the Settlement Agreement not only benefits the Debtors and their estates, but it will also maximize value for the Debtors' stakeholders and is a key component of the comprehensive restructuring embodied in the Plan.

16. In light of the foregoing benefits to the Debtors' estates, I believe that the Settlement Agreement is fair and reasonable under the circumstances, and entry into the Settlement Agreement is a valid and reasonable exercise of the Debtors' business judgment.

[*Remainder of page intentionally left blank.*]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: June 28, 2022
Chicago, Illinois

/s/ *John R. Castellano*
John R. Castellano
Chief Restructuring Officer