# UNITED STATES
# SECURITIES AND EXCHANGE COMMISSION
**WASHINGTON, D.C. 20549**

# FORM 10-Q

☒ **QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

**For the quarterly period ended April 30, 2020**

**OR**

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

**For the transition period from to**

**Commission file number: 1-14204**

# FUELCELL ENERGY, INC.

**(Exact name of registrant as specified in its charter)**

| **Delaware** | **06-0853042** |
|---|---|
| **(State or other jurisdiction of incorporation or organization)** | **(I.R.S. Employer Identification No.)** |
| **3 Great Pasture Road Danbury, Connecticut** | **06810** |
| **(Address of principal executive offices)** | **(Zip Code)** |

**Registrant's telephone number, including area code: (203) 825-6000**

Securities registered pursuant to Section 12(b) of the Act:

| **Title of each class** | **Trading Symbol(s)** | **Name of each exchange on which registered** |
|---|---|---|
| Common stock, par value $0.0001 per share | FCEL | The Nasdaq Stock Market LLC (Nasdaq Global Market) |

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer", "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act.

| | | | |
|---|---|---|---|
| Large accelerated filer | ☐ | Accelerated filer | ☐ |
| Non-accelerated filer | ☒ | Smaller reporting company | ☒ |
| Emerging growth company | ☐ | | |

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

Number of shares of common stock, par value $0.0001 per share, outstanding as of June 5, 2020: 211,058,085

**FUELCELL ENERGY, INC.**

**FORM 10-Q**

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**FUELCELL ENERGY, INC.**
**Consolidated Balance Sheets**
**(Unaudited)**
**(Amounts in thousands, except share and per share amounts)**

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| **ASSETS** | | |
| Current assets: | | |
| Cash and cash equivalents, unrestricted | $ 29,087 | $ 9,434 |
| Restricted cash and cash equivalents - short-term | 8,082 | 3,473 |
| Accounts receivable, net | 6,117 | 3,292 |
| Unbilled receivables | 7,475 | 7,684 |
| Inventories | 54,945 | 54,515 |
| Other current assets | 5,672 | 5,921 |
| Total current assets | 111,378 | 84,319 |
| Restricted cash and cash equivalents - long-term | 36,250 | 26,871 |
| Inventories - long-term | 9,018 | 2,179 |
| Project assets | 153,874 | 144,115 |
| Property, plant and equipment | 38,530 | 41,134 |
| Operating lease right-of-use assets, net | 10,051 | - |
| Goodwill | 4,075 | 4,075 |
| Intangible assets | 20,615 | 21,264 |
| Other assets | 10,850 | 9,489 |
| Total assets | $ 394,641 | $ 333,446 |
| **LIABILITIES AND STOCKHOLDERS' EQUITY** | | |
| Current liabilities: | | |
| Current portion of long-term debt | $ 13,834 | $ 21,916 |
| Current portion of operating lease liabilities | 770 | - |
| Accounts payable | 13,567 | 16,943 |
| Accrued liabilities | 10,905 | 11,452 |
| Deferred revenue | 12,629 | 11,471 |
| Preferred stock obligation of subsidiary | 899 | 950 |
| Total current liabilities | 52,604 | 62,732 |
| Long-term deferred revenue | 29,907 | 28,705 |
| Long-term preferred stock obligation of subsidiary | 16,420 | 16,275 |
| Long-term operating lease liabilities | 9,716 | - |
| Long-term debt and other liabilities | 176,821 | 90,140 |
| Total liabilities | 285,468 | 197,852 |
| Redeemable Series B preferred stock (liquidation preference of $64,020 as of April 30, 2020 and October 31, 2019) | 59,857 | 59,857 |
| Total equity: | | |
| Stockholders' equity: | | |
| Common stock ($0.0001 par value); 225,000,000 shares authorized as of April 30, 2020 and October 31, 2019; 211,052,401 and 193,608,684 shares issued and outstanding as of April 30, 2020 and October 31, 2019, respectively | 21 | 19 |
| Additional paid-in capital | 1,180,042 | 1,151,454 |
| Accumulated deficit | (1,130,009) | (1,075,089) |
| Accumulated other comprehensive loss | (738) | (647) |
| Treasury stock, Common, at cost (34,194 and 42,496 shares as of April 30, 2020 and October 31, 2019, respectively) | (437) | (466) |
| Deferred compensation | 437 | 466 |
| Total stockholders' equity | 49,316 | 75,737 |
| Total liabilities and stockholders' equity | $ 394,641 | $ 333,446 |

See accompanying notes to consolidated financial statements

**FUELCELL ENERGY, INC.**
**Consolidated Statements of Operations and Comprehensive Loss**
**(Unaudited)**
**(Amounts in thousands, except share and per share amounts)**

| | Three Months Ended April 30, | |
|---|---|---|
| | 2020 | 2019 |
| Revenues: | | |
| Product | $ — | $ — |
| Service and license | 6,972 | 2,598 |
| Generation | 4,631 | 1,633 |
| Advanced Technologies | 7,277 | 4,985 |
| Total revenues | 18,880 | 9,216 |
| Costs of revenues: | | |
| Product | 2,838 | 6,393 |
| Service and license | 5,967 | 1,745 |
| Generation | 5,692 | 1,685 |
| Advanced Technologies | 4,216 | 3,033 |
| Total costs of revenues | 18,713 | 12,856 |
| Gross profit (loss) | 167 | (3,640) |
| Operating expenses: | | |
| Administrative and selling expenses | 7,168 | 9,805 |
| Research and development expenses | 1,141 | 4,178 |
| Total costs and expenses | 8,309 | 13,983 |
| Loss from operations | (8,142) | (17,623) |
| Interest expense | (3,584) | (1,807) |
| Change in fair value of common stock warrant liability | (3,372) | — |
| Other income (expense), net | 340 | (31) |
| Loss before provision for income taxes | (14,758) | (19,461) |
| Provision for income taxes | (11) | (69) |
| Net loss | (14,769) | (19,530) |
| Series A warrant exchange | — | (3,169) |
| Series B preferred stock dividends | (800) | (800) |
| Series C preferred stock deemed contributions | — | 1,599 |
| Series D preferred stock deemed dividends | — | (976) |
| Net loss attributable to common stockholders | $ (15,569) | $ (22,876) |
| Loss per share basic and diluted: | | |
| Net loss per share attributable to common stockholders | $ (0.07) | $ (2.06) |
| Basic and diluted weighted average shares outstanding | 211,000,091 | 11,090,698 |

| | Three Months Ended April 30, | |
|---|---|---|
| | 2020 | 2019 |
| Net loss | $ (14,769) | $ (19,530) |
| Other comprehensive loss: | | |
| Foreign currency translation adjustments | (42) | (140) |
| Total comprehensive loss | $ (14,811) | $ (19,670) |

See accompanying notes to consolidated financial statements.

**FUELCELL ENERGY, INC.**
**Consolidated Statements of Operations and Comprehensive Loss**
**(Unaudited)**
**(Amounts in thousands, except share and per share amounts)**

| | Six Months Ended April 30, | |
|---|---|---|
| | **2020** | **2019** |
| Revenues: | | |
| Product | $ — | $ — |
| Service and license | 12,584 | 14,370 |
| Generation | 10,073 | 3,112 |
| Advanced Technologies | 12,487 | 9,517 |
| Total revenues | 35,144 | 26,999 |
| Costs of revenues: | | |
| Product | 4,854 | 9,815 |
| Service and license | 7,585 | 14,064 |
| Generation | 11,249 | 3,321 |
| Advanced Technologies | 8,008 | 5,644 |
| Total costs of revenues | 31,696 | 32,844 |
| Gross profit (loss) | 3,448 | (5,845) |
| Operating expenses: | | |
| Administrative and selling expenses | 12,434 | 16,564 |
| Research and development expenses | 2,296 | 10,458 |
| Total costs and expenses | 14,730 | 27,022 |
| Loss from operations | (11,282) | (32,867) |
| Interest expense | (6,861) | (4,271) |
| Change in fair value of common stock warrant liability | (37,617) | — |
| Other income, net | 871 | 129 |
| Loss before provision for income taxes | (54,889) | (37,009) |
| Provision benefit for income taxes | (31) | (69) |
| Net loss | (54,920) | (37,078) |
| Series A warrant exchange | — | (3,169) |
| Series B preferred stock dividends | (1,731) | (1,600) |
| Series C preferred stock deemed contributions and redemption value adjustment, net | — | (7,406) |
| Series D preferred stock deemed dividends and redemption accretion | — | (6,661) |
| Net loss attributable to common stockholders | $ (56,651) | $ (55,914) |
| Loss per share basic and diluted: | | |
| Net loss per share attributable to common stockholders | $ (0.27) | $ (5.77) |
| Basic and diluted weighted average shares outstanding | 206,560,031 | 9,683,253 |

| | Six Months Ended April 30, | |
|---|---|---|
| | **2020** | **2019** |
| Net loss | $ (54,920) | $ (37,078) |
| Other comprehensive loss: | | |
| Foreign currency translation adjustments | (91) | (133) |
| Total comprehensive loss | $ (55,011) | $ (37,211) |

**FUELCELL ENERGY, INC.**
**Consolidated Statements of Changes in Equity**
**(Unaudited)**
**(Amounts in thousands, except share amounts)**

| | Common Stock | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Shares | Amount | Additional Paid-in Capital | Accumulated Deficit | Accumulated Other Comprehensive Income (Loss) | Treasury Stock | Deferred Compensation | Total Equity |
| **Balance, October 31, 2019** | 193,608,684 | $ 19 | $ 1,151,454 | $ (1,075,089) | $ (647) | $ (466) | $ 466 | $ 75,737 |
| Share based compensation | — | — | 488 | — | — | — | — | 488 |
| Orion warrant exercises | 9,396,320 | 1 | 25,993 | — | — | — | — | 25,994 |
| Sale of common stock, net of fees | 7,938,228 | 1 | 3,501 | — | — | — | — | 3,502 |
| Taxes paid upon vesting of restricted stock awards, net of stock issued under benefit plans | 2,585 | — | (6) | — | — | — | — | (6) |
| Preferred dividends — Series B | — | — | (931) | — | — | — | — | (931) |
| Adjustment for deferred compensation | 20,012 | | | | | 29 | (29) | - |
| Effect of foreign currency translation | — | — | — | — | (49) | — | — | (49) |
| Net loss attributable to FuelCell Energy, Inc. | — | — | — | (40,151) | — | — | — | (40,151) |
| **Balance, January 31, 2020** | 210,965,829 | $ 21 | $ 1,180,499 | $ (1,115,240) | $ (696) | $ (437) | $ 437 | $ 64,584 |
| Share based compensation | — | — | 375 | — | — | — | — | 375 |
| Taxes paid upon vesting of restricted stock awards, net of stock issued under benefit plans | 86,572 | — | (32) | — | — | — | — | (32) |
| Preferred dividends — Series B | — | — | (800) | — | — | — | — | (800) |
| Effect of foreign currency translation | — | — | — | — | (42) | — | — | (42) |
| Net loss attributable to FuelCell Energy, Inc. | — | — | — | (14,769) | — | — | — | (14,769) |
| **Balance, April 30, 2020** | 211,052,401 | $ 21 | $ 1,180,042 | $ (1,130,009) | $ (738) | $ (437) | $ 437 | $ 49,316 |

**FUELCELL ENERGY, INC.**
**Consolidated Statements of Changes in Equity**
**(Unaudited)**
**(Amounts in thousands, except share amounts)**

| | Common Stock | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Shares | Amount | Additional Paid-in Capital | Accumulated Deficit | Accumulated Other Comprehensive Income (Loss) | Treasury Stock | Deferred Compensation | Total Equity |
| **Balance, October 31, 2018** | 7,972,686 | $ 1 | $ 1,073,463 | $ (990,867) | $ (403) | $ (363) | $ 363 | $ 82,194 |
| Share based compensation | — | — | 987 | — | — | — | — | 987 |
| Fee adjustment for common stock issuance | — | — | 90 | — | — | — | — | 90 |
| Taxes paid upon vesting of restricted stock awards, net of stock issued under benefit plans | 1,946 | — | 27 | — | — | — | — | 27 |
| Series C convertible preferred stock conversions | 127,829 | — | 1,974 | — | — | — | — | 1,974 |
| Series C convertible preferred stock adjustment for beneficial conversion feature | — | — | 6,586 | — | — | — | — | 6,586 |
| Series C convertible stock redemption value adjustments | — | — | (8,550) | — | — | — | — | (8,550) |
| Series D convertible preferred stock conversions | 932,144 | — | 4,334 | — | — | — | — | 4,334 |
| Series D convertible preferred stock redemption accretion | — | — | (3,793) | — | — | — | — | (3,793) |
| Preferred dividends — Series B | — | — | (800) | — | — | — | — | (800) |
| Impact of the adoption of Topic 606 | — | — | — | (6,654) | — | — | — | (6,654) |
| Effect of foreign currency translation | — | — | — | — | 7 | — | — | 7 |
| Net loss attributable to FuelCell Energy, Inc. | — | — | — | (17,548) | — | — | — | (17,548) |
| **Balance, January 31, 2019** | 9,034,605 | $ 1 | $ 1,074,318 | $ (1,015,069) | $ (396) | $ (363) | $ 363 | $ 58,854 |
| Common stock issued, non-employee compensation | 29,454 | — | 102 | — | — | — | — | 102 |
| Share based compensation | — | — | 955 | — | — | — | — | 955 |
| Taxes paid upon vesting of restricted stock awards, net of stock issued under benefit plans | 52,784 | — | (219) | — | — | — | — | (219) |
| Series A warrant exchange | 500,000 | — | — | — | — | — | — | — |
| Series C convertible preferred stock conversions | 2,127,528 | — | 10,355 | — | — | — | — | 10,355 |
| Series C convertible preferred stock modification | — | — | (6,047) | — | — | — | — | (6,047) |
| Series D convertible preferred stock conversions | 1,994,413 | — | 6,305 | — | — | — | — | 6,305 |
| Preferred dividends — Series B | — | — | (800) | — | — | — | — | (800) |
| Effect of foreign currency translation | — | — | — | — | (140) | — | — | (140) |
| Adjustment for deferred compensation | (29,454) | — | — | — | — | (103) | 103 | — |
| Net loss attributable to FuelCell Energy, Inc. | — | — | — | (19,530) | — | — | — | (19,530) |
| **Balance, April 30, 2019** | 13,709,330 | $ 1 | $ 1,084,969 | $ (1,034,599) | $ (536) | $ (466) | $ 466 | $ 49,835 |

See accompanying notes to consolidated financial statements.

**FUELCELL ENERGY, INC.**
**Consolidated Statements of Cash Flows**
**(Unaudited)**
**(Amounts in thousands)**

| | Six Months Ended April 30, | |
|---|---|---|
| | **2020** | **2019** |
| **Cash flows from operating activities:** | | |
| Net loss | $ (54,920) | $ (37,078) |
| Adjustments to reconcile net loss to net cash used in operating activities: | | |
| Share-based compensation | 863 | 1,940 |
| Loss from change in fair value of embedded derivatives | - | 26 |
| Depreciation and amortization | 9,102 | 4,398 |
| Change in fair value of common stock warrant liability | 37,617 | — |
| Gain on Series 1 preferred stock extinguishment | (475) | — |
| Non-cash interest expense on preferred stock and debt obligations | 3,497 | 2,575 |
| Unrealized loss on derivative contract | 526 | — |
| Operating lease expense | 315 | — |
| Operating lease payments | (460) | — |
| Unrealized foreign exchange gains | (948) | (329) |
| Impairment of property, plant and equipment | — | 2,840 |
| Other non-cash transactions, net | 766 | 126 |
| (Increase) decrease in operating assets: | | |
| Accounts receivable | (2,825) | (2,171) |
| Unbilled receivables | (641) | (3,490) |
| Inventories | (6,117) | (3,468) |
| Other assets | (288) | 560 |
| Increase (decrease) in operating liabilities: | | |
| Accounts payable | (3,868) | 8,982 |
| Accrued liabilities | 777 | 2,228 |
| Deferred revenue | 2,360 | 4,664 |
| **Net cash used in operating activities** | (14,719) | (18,197) |
| **Cash flows from investing activities:** | | |
| Capital expenditures | (55) | (2,091) |
| Project asset expenditures | (13,633) | (27,275) |
| Project asset acquisition | (611) | — |
| **Net cash used in investing activities** | (14,299) | (29,366) |
| **Cash flows from financing activities:** | | |
| Repayment of debt | (21,409) | (4,791) |
| Proceeds from debt, net of debt discount | 87,757 | 28,322 |
| Payment of deferred financing costs | (2,697) | (1,283) |
| Payment of preferred dividends and return of capital | (4,403) | (1,840) |
| Common stock issued for stock plans and related expenses | — | 31 |
| Proceeds from sale of common stock and warrant exercises, net | 3,502 | - |
| **Net cash provided by financing activities** | 62,750 | 20,439 |
| Effects on cash from changes in foreign currency rates | (91) | (133) |
| **Net increase (decrease) in cash, cash equivalents and restricted cash** | 33,641 | (27,257) |
| Cash, cash equivalents and restricted cash-beginning of period | 39,778 | 80,239 |
| **Cash, cash equivalents and restricted cash-end of period** | $ 73,419 | $ 52,982 |
| Supplemental cash flow disclosures: | | |
| Cash interest paid | $ 3,188 | $ 1,638 |
| Noncash financing and investing activity: | | |
| Series C preferred share conversions | — | 12,329 |
| Series C preferred share modification | — | 6,047 |
| Series D preferred share conversions | — | 10,639 |
| Addition of operating lease liabilities | 489 | — |
| Addition of operating lease right-of-use assets | 489 | — |
| Net noncash reclasses from project assets to inventory | 1,152 | — |
| Cashless warrant exercises | 25,994 | — |
| Accrued purchase of fixed assets, cash to be paid in subsequent period | 68 | 35 |
| Accrued purchase of project assets, cash to be paid in subsequent period | 1,273 | 893 |

See accompanying notes to consolidated financial statements.

**Note 1. Nature of Business and Basis of Presentation**

FuelCell Energy, Inc., together with its subsidiaries (the "Company", "FuelCell Energy", "we", "us", or "our"), is a leading integrated fuel cell company with a growing global presence in delivering environmentally-responsible distributed baseload power solutions through our proprietary, molten-carbonate fuel cell technology. We develop turn-key distributed power generation solutions and operate and provide comprehensive service for the life of the power plant. We are working to expand the proprietary technologies that we have developed over the past five decades into new products, applications, markets and geographies. Our mission and purpose remains to utilize our proprietary, state-of-the-art fuel cell platforms to enable a world empowered by clean energy and to reduce the global environmental footprint of baseload power generation by providing environmentally responsible solutions for reliable electrical power, hot water, steam, chilling, distributed hydrogen, micro-grid applications, electrolysis, long-duration hydrogen based energy storage and carbon capture.

***Basis of Presentation***

The accompanying unaudited consolidated financial statements have been prepared in accordance with the rules and regulations of the Securities and Exchange Commission ("SEC") regarding interim financial information. Accordingly, they do not contain all of the information and footnotes required by accounting principles generally accepted in the United States of America ("GAAP") for complete financial statements. In the opinion of management, all normal and recurring adjustments necessary to fairly present the Company's financial position and results of operations as of and for the three and six months ended April 30, 2020 and 2019 have been included. All intercompany accounts and transactions have been eliminated.

Certain information and footnote disclosures normally included in financial statements prepared in accordance with GAAP have been condensed or omitted. The balance sheet as of October 31, 2019 has been derived from the audited financial statements at that date, but it does not include all of the information and footnotes required by GAAP for complete financial statements. These financial statements should be read in conjunction with the Company's financial statements and notes thereto for the fiscal year ended October 31, 2019, which are contained in the Company's Annual Report on Form 10-K previously filed with the SEC. The results of operations for the interim periods presented are not necessarily indicative of results that may be expected for any other interim period or for the full fiscal year.

***Use of Estimates***

The preparation of financial statements and related disclosures requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities. Actual results could differ from those estimates. Estimates are used in accounting for, among other things, revenue recognition, contract loss accruals, excess, slow-moving and obsolete inventories, product warranty accruals, share-based compensation expense, fair value measurements, allowance for doubtful accounts, depreciation and amortization, impairment of goodwill and intangible assets, impairment of long-lived assets (including project assets), lease liabilities and right-of-use ("ROU") assets and contingencies. Estimates and assumptions are reviewed periodically, and the effects of revisions are reflected in the consolidated financial statements in the period they are determined to be necessary.

***Liquidity***

The Company's future liquidity will depend on its ability to (i) timely complete current projects in process within budget, including approved amounts that have been financed, as financing does not cover budget overages or the total cost of the projects, (ii) increase cash flows from its generation portfolio, including by meeting conditions required to timely commence operation of new projects, operating its generation portfolio in compliance with minimum performance guarantees and operating its generation portfolio in accordance with revenue expectations, (iii) obtain approval of and receive funding for project construction under its Credit Agreement with Orion Energy Partners Investment Agent, LLC and its affiliated lenders and meet conditions for release of funds, or obtain other financing, (iv) obtain permanent financing for its projects once constructed, (v) increase order and contract volumes, which would lead to additional product sales, services agreements and generation revenues, (vi) obtain funding for and receive payment for research and development under current and future Advanced Technology contracts, including achieving a $5 million technological performance milestone under its Joint Development Agreement with ExxonMobil Research and Engineering Company ("EMRE") during calendar year 2020, (vii) implement the cost reductions necessary to achieve profitable operations and (viii) access the capital markets to raise funds through the sale of equity securities, convertible notes, other equity-linked instruments and/or other debt instruments. Our business model requires substantial outside financing arrangements and satisfaction of the conditions of such financing arrangements to construct and deploy our projects and facilitate the growth of our business. We may seek to obtain such financing in both the debt and equity markets. If financing is not available to us on acceptable terms if and when needed, or on terms acceptable to us or our lenders, if we do not satisfy the conditions of our financing arrangements, if we spend more than the financing approved for projects, if project costs exceed an amount that the Company can finance, or if we do not generate sufficient revenues or obtain capital sufficient for our corporate needs, we may be required to reduce planned spending, reduce staffing, sell assets, seek alternative financing and take other measures, which could have a material adverse effect on our financial condition and operations.

There are indicators that substantial doubt about the Company's ability to continue as a going concern exists, including, but not limited to, historical losses and negative cash flows, increasing costs of debt financing, restrictive debt covenants and restrictions imposed by the Company's current lenders, limited availability of assets to support borrowing that have not already been pledged to existing lenders, potential delays in completing the manufacture of modules for project assets due to the closure of the Company's manufacturing facility as a result of the COVID-19 pandemic, and the need for additional financing to carry out the Company's business plans. When indicators of substantial doubt exist, GAAP requires management to make an assessment of whether substantial doubt is alleviated by management's plans. Even though equity and debt financings and other sources of funds may be available in the future, when assessing whether substantial doubt is alleviated, management is not able to place reliance on

uncommitted sources of financing. Management assessed substantial doubt about the Company's ability to continue as a going concern through analysis of existing cash on hand, expected receipts under existing agreements, and release of short-term restricted cash less expected disbursements over the next twelve months, and was not able to alleviate substantial doubt until it entered into the Fifth Orion Amendment (as defined and described below). As a result of this Fifth Orion Amendment, management has concluded that substantial doubt was alleviated, and the Company expects that it will meet its obligations for at least one year from the date of issuance of these financial statements (assuming that there are no extraordinary or unanticipated impacts to its business as result of COVID-19 or otherwise). Execution of the Company's business plan will require additional financing or other measures to generate cash inflows and reduce cash outflows as early as the expected filing of the Form 10-Q for the third quarter of 2020 in order to alleviate substantial doubt in future periods.

The key agreements which may impact the Company's future liquidity position include:

- Orion Facility and the Fifth Orion Amendment.

  On October 31, 2019, the Company and certain of its affiliates as guarantors entered into a Credit Agreement (as amended from time to time, the "Orion Credit Agreement") with Orion Energy Partners Investment Agent, LLC, as Administrative Agent and Collateral Agent (the "Agent"), and its affiliates, Orion Energy Credit Opportunities Fund II, L.P., Orion Energy Credit Opportunities Fund II GPFA, L.P., and Orion Energy Credit Opportunities Fund II PV, L.P., as lenders, for a $200.0 million senior secured credit facility (the "Orion Facility"). The Orion Facility is structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. In conjunction with the closing of the Orion Facility, on October 31, 2019, the Company drew down$14.5 million (the "Initial Funding"). The Company drew down an additional $65.5 million on November 22, 2019 (the "Second Funding"). The Company may draw the remainder of the Orion Facility, up to $120.0 million, over the first 18 months following the Initial Funding and subject to the Agent's approval, to fund project-related expenses consisting of: (i) construction costs, inventory and other capital expenditures of additional fuel cell projects with contracted cash flows (under power purchase agreements ("PPAs") with creditworthy counterparties) that meet or exceed a mutually agreed coverage ratio; and (ii) inventory, working capital, and other costs that may be required to be delivered by the Company on purchase orders, service agreements, or other binding customer agreements with creditworthy counterparties. Except as may be approved by the Agent and the lenders under the Orion Facility (and except as provided in the Fifth Orion Amendment), the Company cannot use the Orion Facility to fund its working capital or other expenses at the corporate level.

  On June 8, 2020, the Company and certain of its affiliates as guarantors entered into a fifth amendment to the Orion Credit Agreement with the Agent and the lenders (the "Fifth Orion Amendment"). Pursuant to the terms of the Fifth Orion Amendment and the amended Orion Credit Agreement, the lenders have committed to make available certain delayed-draw loans to the Company in an aggregate principal amount of up to $35 million (the "Secondary Facility Loans") between the execution date and September 14, 2020. Such Secondary Facility Loans may be used for general corporate purposes of the Company or the guarantors in accordance with either (i) the then effective operating budget of the Company or the guarantors or (ii) the cash use forecast delivered by the Company to the Agent on June 6, 2020. Any draws under the Secondary Facility Loans must be repaid by September 1, 2021. Refer to Note 18. "Subsequent Events" for additional details.

  The lenders and the Agent under the Orion Facility have broad approval rights over the Company's ability to raise additional capital, obtain other debt financing, and draw, allocate and use funds from the Orion Facility. If the Company is unable to obtain such approvals when the Company seeks to raise additional capital, obtain other debt financing, or use funds under the Orion Facility, it could have a material adverse effect on the Company's financial condition and operations.

- EMRE Joint Development Agreement.

  On November 5, 2019, the Company signed a two-year Joint Development Agreement with EMRE, pursuant to which the Company will continue exclusive research and development efforts with EMRE to evaluate and develop new and/or improved carbonate fuel cells to capture and reduce carbon dioxide emissions from industrial and power sources, in exchange for (a) payment of (i) an exclusivity and technology access fee of $5.0 million, (ii) up to $45.0 million for research and development efforts, and (iii) milestone-based payments of up to $10.0 million after certain technological milestones are met, and (b) certain licenses.

- Paycheck Protection Program Loan.

  On April 20, 2020, the Company entered into a Paycheck Protection Program Promissory Note, dated April 16, 2020 (the "PPP Note"), evidencing a loan to the Company from Liberty Bank under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). Pursuant to the PPP Note, the Company received total proceeds of approximately $6.5 million on April 24, 2020. In accordance with the original requirements of the CARES Act, at least 75% of the proceeds used by the Company to date have been used to pay eligible payroll costs. Under the original requirements of the CARES Act, the loan may be fully forgiven if (i) proceeds are used to pay eligible payroll costs, rent, mortgage interest and utilities and (ii) full-time employee headcount and salaries are either maintained during the applicable eight-week period or restored by June 30, 2020. Any forgiveness of the loan will be subject to approval by the U.S. Small Business Administration (the "SBA") and Liberty Bank and will require the Company to apply for such treatment in the future. In order to obtain the consent of the Agent and the lenders under the Orion Facility to enter into the PPP Note, the Agent and the lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020. On June 5, 2020, the Paycheck Protection Program Flexibility Act (the "PPP Flexibility Act") was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note. While the Company may apply for forgiveness of the PPP Note in accordance with the requirements and limitations under the CARES Act and the SBA regulations and requirements, no assurance can be given that any portion of the PPP Note will be forgiven.

The Company's cash, cash equivalents and restricted cash consist of (a) restricted cash and cash equivalents, which consist of amounts pledged as performance security, reserved for future debt service requirements, reserved for letters of credit for certain banking requirements and contracts and reserved to pay down the Orion Facility which can be accessed or redeployed into other project financing at the option of and only with the approval of the lenders and the Agent under the Orion Facility or other lenders or third parties; (b) project cash and cash equivalents, which consist of amounts borrowed under the Orion Facility which can be used only by our consolidated wholly-owned project subsidiaries in the normal course of operations for project construction, purchase of equipment (including inventory from FuelCell Energy, Inc.) and working capital for projects approved under the Orion Facility in accordance with each project's construction budget and schedule and which are classified as unrestricted cash on the Company's consolidated balance sheets; and (c) unrestricted cash and cash equivalents, which can be used by the Company for general corporate purposes, including working capital at the corporate level, and which include the proceeds of the PPP Note received during the quarter ended April 30, 2020. Unrestricted cash and cash equivalents, as presented on the Company's consolidated balance sheets, consist of the amounts described in (b) and (c) above. As of April 30, 2020, unrestricted cash and cash equivalents totaled $29.1 million compared to $9.4 million as of October 31, 2019. Of this amount, project cash and cash equivalents funded under the Orion Facility totaled $18.6 million as of April 30, 2020 compared to $0 as of October 31, 2019. Excluding project cash and cash equivalents and the remaining balance of approximately $6.0 million under the PPP Note, which may only be used for certain payroll and other eligible expenditures, unrestricted cash and cash equivalents totaled $4.5 million as of April 30, 2020 compared to $9.4 million as of October 31, 2019.

In future periods, the Company expects to seek lower-cost long-term debt and tax equity (e.g., sale-leaseback and partnership transactions) for its project asset portfolio as these projects commence commercial operations. The proceeds of any such financing, if obtained, may allow the Company to fund other fuel cell projects (subject to the approval of the lenders and the Agent under the Orion Facility) and/or pay down the outstanding principal balance of the Orion Facility. There can be no assurance that the Company can obtain such financing on terms acceptable to the Company, or that the lenders and the Agent under the Orion Facility will consent to such financing. The Company may also seek to raise funds through the sale of equity securities, convertible notes, other equity-linked instruments and/or other debt instruments. If the Company is unable to obtain such financing or raise additional capital, it could have a material adverse effect on the Company's financial condition and operations, and could require the Company to reduce its expenditures or slow its project spending.

**Note 2. Recent Accounting Pronouncements**

*Recently Adopted Accounting Guidance*

The Company adopted Accounting Standards Update Codification ("ASC"), "Leases" ("Topic 842" or "ASC 842") on November 1, 2019. ASC 842, including all the related amendments subsequent to its issuance, supersedes the prior guidance for lease accounting and requires lessees to recognize a ROU asset representing the right to use an underlying asset and a lease liability representing the obligation to make lease payments over the lease term for substantially all leases, as well as disclose key quantitative and qualitative information about leasing arrangements. Upon adoption, the Company recognized an operating lease liability of approximately $10.3 million and corresponding operating lease ROU assets of approximately $10.1 million. There was no cumulative effect of the adoption recorded to accumulated deficit. There was no significant net effect on the consolidated statements of operations and comprehensive loss. Refer to Note 11. "Leases" for additional information on the Company's adoption of ASC 842.

In May 2014, the Financial Accounting Standards Board (the "FASB") issued Accounting Standards Update 2014-09, "Revenue from Contracts with Customers (Topic 606)". The adoption of Topic 606 by the Company on November 1, 2018 using the modified retrospective transition method resulted in a cumulative effect adjustment that increased Accumulated deficit by $6.7 million.

*Recent Accounting Guidance Not Yet Effective*

There is no recent accounting guidance not yet effective that is expected to have a material impact on the Company's financial statements when adopted.

**Note 3. Revenue Recognition**

*Contract Balances*

Contract assets as of April 30, 2020 and October 31, 2019 were $11.9 million and $11.3 million, respectively. The contract assets relate to the Company's rights to consideration for work completed but not billed. These amounts are included on a separate line item as Unbilled receivables, and balances expected to be billed later than one year from the balance sheet date are included within Other assets on the accompanying consolidated balance sheets. The net change in contract assets represent amounts recognized as revenue offset by customer billings.

Contract liabilities as of April 30, 2020 and October 31, 2019 were $42.5 million and $40.2 million, respectively. The contract liabilities relate to the advance billings to customers for services that will be recognized over time and in some instances for deferred revenue relating to license performance obligations that will be recognized at a future point in time. These amounts are included within Deferred revenue and Long-term deferred revenue on the accompanying consolidated balance sheets. The net change in contract liabilities represents customer billings offset by revenue recognized.

*Remaining Performance Obligations*

Remaining performance obligations are the aggregate amount of total contract transaction price that is unsatisfied or partially unsatisfied. As of April 30, 2020, the Company's total remaining performance obligations for service agreements, license agreements and Advanced Technologies contracts were $192.4 million. License revenue recognized over time will be recognized over the remaining term of the applicable license agreement. License revenue recognized at a point in time will be recognized when the first specified upgrade that has been developed is delivered and when the second specified upgrade is developed and delivered. Service revenue in periods in which there are no module replacements is expected to be relatively consistent from period to period, whereas module replacements will result in an increase in revenue when replacements occur. Advanced technologies revenue will be recognized as costs are incurred.

The Company has elected practical expedients in the accounting guidance that allow for revenue to be recorded in the amount that the Company has a right to invoice, if that amount corresponds directly with the value to the customer of the Company's performance to date, and not to disclose related unsatisfied performance obligations. Generation sales, to the extent the related power purchase agreements are within the scope of Topic 606, fall into this category, as these sales are recognized as revenue in the period the Company provides the electricity and completes the performance obligation, which is the same as the monthly amount billed to customers. Revenue recognition for the Joint Development Agreement with EMRE also falls into this category where revenue is recorded consistent with the amounts invoiced for research performed.

(Tabular amounts in thousands, except share and per share amounts)

**Note 4. Accounts Receivable, Net and Unbilled Receivables**

Accounts receivable, net and Unbilled receivables as of April 30, 2020 and October 31, 2019 consisted of the following:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Commercial Customers: | | |
| Amount billed | $ 5,632 | $ 2,227 |
| Unbilled receivables (1) | 5,820 | 6,139 |
| | 11,452 | 8,366 |
| Advanced Technologies (including U.S. government(2)): | | |
| Amount billed | 485 | 1,065 |
| Unbilled receivables | 1,655 | 1,545 |
| | 2,140 | 2,610 |
| Accounts receivable, net and unbilled receivables | $ 13,592 | $ 10,976 |

(1) Additional long-term unbilled receivables of $4.4 million and $3.6 million are included within "Other Assets" as of April 30, 2020 and October 31, 2019, respectively.
(2) Total U.S. government accounts receivable, including unbilled receivables, outstanding as of April 30, 2020 and October 31, 2019 were $1.4 million and $1.2 million, respectively.

Accounts receivable are presented net of an allowance for doubtful accounts. There was no allowance for doubtful accounts as of April 30, 2020 and October 31, 2019. Uncollectible accounts receivable are charged against the allowance for doubtful accounts when all collection efforts have failed and it is deemed unlikely that the amount will be recovered.

**Note 5. Inventories**

Inventories (short and long-term) as of April 30, 2020 and October 31, 2019 consisted of the following:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Raw materials | $ 24,558 | $ 25,466 |
| Work-in-process (1) | 39,405 | 31,228 |
| Inventories | 63,963 | 56,694 |
| Inventories - short-term | (54,945) | (54,515) |
| Inventories - long-term (2) | $ 9,018 | $ 2,179 |

(1) Work-in-process includes the standard components of inventory used to build the typical modules or module components that are intended to be used in future project asset construction or power plant orders or for use under the Company's service agreements. Included in work-in-process as of April 30, 2020 and October 31, 2019 was $22.0 million and $23.5 million, respectively, of completed standard components and modules.
(2) Long-term inventory includes modules that are contractually required to be segregated for use as replacement modules for specific project assets. Given that these project assets are long-term, the Company classifies the inventory as long-term regardless of the expected timing of such module replacements.

Raw materials consist mainly of various nickel powders and steels, various other components used in producing cell stacks and purchased components for balance of plant. Work-in-process inventory is comprised of material, labor, and overhead costs incurred to build fuel cell stacks and modules, which are subcomponents of a power plant.

The Company incurred costs associated with excess plant capacity and manufacturing variances of $2.7 million and $3.4 million for the three months ended April 30, 2020 and 2019, respectively, and $4.4 million and $6.6 million for the six months ended April 30, 2020 and 2019, respectively, which were included within product cost of revenues on the consolidated statements of operations and comprehensive loss.

(Tabular amounts in thousands, except share and per share amounts)

**Note 6. Project Assets**

Project assets as of April 30, 2020 and October 31, 2019 were $153.9 million and $144.1 million, respectively. Project assets as of April 30, 2020 and October 31, 2019 included eight and seven, respectively, completed, commissioned installations generating power with respect to which the Company has PPAs with an aggregate carrying value of $77.9 million and $59.2 million as of April 30, 2020 and October 31, 2019, respectively. Certain of these assets are the subject of sale-leaseback arrangements with PNC Energy Capital, LLC ("PNC") and Crestmark Equipment Finance, a division of MetaBank ("Crestmark"), which are accounted for under the financing method. Project asset depreciation was approximately $2.8 million and $1.0 million for the three months ended April 30, 2020 and 2019, respectively, and $5.8 million and $2.1 million for the six months ended April 30, 2020 and 2019, respectively.

The Project assets balance as of April 30, 2020 and October 31, 2019 also includes installations with an aggregate value of $76.0 million and $84.9 million, respectively, which are being developed and constructed by the Company under existing PPAs that have not been placed in service.

Project construction costs incurred for long-term project assets are reported as investing activities in the consolidated statements of cash flows. The proceeds received from the sale and subsequent leaseback of project assets are classified as "Cash flows from financing activities" within the consolidated statements of cash flows and are classified as a financing obligation within "Current portion of long-term debt" and "Long-term debt and other liabilities" on the consolidated balance sheets (refer to Note 16. "Debt and Financing Obligations" for more information).

**Note 7. Goodwill and Intangible Assets**

As of April 30, 2020 and October 31, 2019, the Company had goodwill of $4.1 million that was recorded in connection with the 2012 acquisition of Versa Power Systems, Inc. ("Versa") and intangible assets of $20.6 million and $21.3 million, respectively, that were recorded in connection with the 2012 Versa acquisition and the 2019 Bridgeport Fuel Cell Project acquisition. The Versa intangible asset consists of indefinite-lived in-process research and development intangible assets ("IPR&D") for cumulative research and development efforts associated with the development of solid oxide fuel cell stationary power generation. The Company recorded $12.3 million as an intangible asset during fiscal year 2019 in connection with the Bridgeport Fuel Cell Project acquisition in May 2019 related to an acquired PPA that had favorable terms. The balance for the PPA intangible asset was $11.0 million and $11.7 million as of April 30, 2020 and October 31, 2019, respectively. Amortization expense for the Bridgeport Fuel Cell Project related intangible asset for the three and six months ended April 30, 2020 was $0.3 million and $0.7 million, respectively.

**Note 8. Other Current Assets**

Other current assets as of April 30, 2020 and October 31, 2019 consisted of the following:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Advance payments to vendors (1) | $ 1,338 | $ 1,899 |
| Prepaid expenses and other (2) | 4,334 | 4,022 |
| Other current assets | $ 5,672 | $ 5,921 |

(1) Advance payments to vendors relate to payments for inventory purchases ahead of receipt.
(2) Primarily relates to other prepaid expenses including insurance, rent and lease payments.

**Note 9. Other Assets**

Other assets as of April 30, 2020 and October 31, 2019 consisted of the following:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Long-term stack residual value (1) | $ 987 | $ 987 |
| Long-term unbilled receivables (2) | 4,438 | 3,588 |
| Other (3) | 5,425 | 4,914 |
| Other assets | $ 10,850 | $ 9,489 |

(1) Relates to estimated residual value for module exchanges performed under the Company's service agreements where the useful life extends beyond the contractual term of the service agreement and the Company obtains title for the module from the customer upon expiration or non-renewal of the service agreement. If the Company does not obtain rights to title from the customer, the full cost of the module is expensed at the time of the module exchange.

(Tabular amounts in thousands, except share and per share amounts)

(2) Represents unbilled receivables that relate to revenue recognized on customer contracts that will be billed in future periods in excess of 12 months from the balance sheet date.

(3) The Company entered into an agreement with one of its customers on June 29, 2016 that includes a fee for the purchase of the power plants at the end of the term of the agreement. The fee is payable in installments over the term of the agreement and the total paid as of April 30, 2020 and October 31, 2019 was $2.4 million and $2.3 million, respectively. Also included within "Other" are long-term security deposits and prepaid withholding taxes on deferred revenue as of April 30, 2020.

**Note 10. Accrued Liabilities**

Accrued liabilities as of April 30, 2020 and October 31, 2019 consisted of the following:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Accrued payroll and employee benefits | $ 1,934 | $ 2,282 |
| Accrued product warranty cost (1) | 110 | 144 |
| Accrued service agreement costs (2) | 4,011 | 4,047 |
| Accrued legal, taxes, professional and other | 4,850 | 4,979 |
| Accrued liabilities | $ 10,905 | $ 11,452 |

(1) Activity in the accrued product warranty costs represents reduction related to actual warranty activity as contracts progress through the warranty period or are beyond the warranty period and for the three months ended April 30, 2020 and 2019 was $0.01 million and $0.04 million, respectively, and for the six months ended April 30, 2020 and 2019 was $0.03 million and $0.08 million, respectively.

(2) The loss accruals on service contracts were $3.3 million as of October 31, 2019, which decreased to $3.0 million as of April 30, 2020. The accruals for performance guarantees increased from $0.8 million as of October 31, 2019 to $1.0 million as of April 30, 2020.

**Note 11. Leases**

The Company adopted ASC 842 and its related amendments (collectively, the "New Lease Accounting Standard") effective November 1, 2019 and elected the modified retrospective approach in which results and disclosures for periods before 2019 were not adjusted for the new standard and the cumulative effect of the change in accounting, if applicable, is recognized through accumulated deficit at the date of adoption.

The New Lease Accounting Standard establishes a right-of-use model that requires a lessee to record a ROU asset and a lease liability on the consolidated balance sheet for all leases. Leases are classified as either finance or operating, with classification affecting the pattern of expense recognition in the consolidated statement of operations. In addition, this standard requires a lessor to classify leases as either sales-type, finance or operating. A lease will be treated as a sale if it transfers all of the risks and rewards, as well as control of the underlying asset, to the lessee. If risks and rewards are conveyed without the transfer of control, the lease is treated as financing. If the lessor does not convey risks and rewards or control, the lease is treated as operating.

The New Lease Accounting Standard provides entities with several practical expedient elections. Among them, the Company elected the package of practical expedients that permits the Company to not reassess prior conclusions related to its leasing arrangements, lease classifications and initial direct costs. In addition, the Company has elected the practical expedients to not separate lease and non-lease components, to use hindsight in determining the lease terms and impairment of ROU assets, and to not apply the New Lease Accounting Standard's recognition requirements to short-term leases with a term of 12 months or less.

The adoption of the New Lease Accounting Standard did not have a material effect on the Company's consolidated statement of operations or consolidated statement of cash flows. Upon adoption, the Company recorded a $10.1 million operating lease ROU asset and a $10.3 million operating lease liability. The adoption of the New Lease Accounting Standard had no impact on accumulated deficit.

The Company enters into operating and finance lease agreements for the use of real estate space, vehicles, information technology equipment, and certain other equipment. We determine if an arrangement contains a lease at inception, which is the date on which the terms of the contract are agreed to and the agreement creates enforceable rights and obligations. Operating leases are included in Operating lease right-of-use assets, Operating lease liabilities, and Long-term operating lease liabilities in the Company's consolidated balance sheet. Finance leases are not considered significant to the Company's consolidated balance sheet or consolidated statement of operations. Finance lease ROU assets at April 30, 2020 of $0.1 million are included in Property, plant and equipment, net in the Company's consolidated balance sheet. Finance lease liabilities at April 30, 2020 of $0.1 million are included in Current portion of long-term debt and Long-term debt and other liabilities in the Company's consolidated balance sheet.

(Tabular amounts in thousands, except share and per share amounts)

ROU assets represent the Company's right to use an underlying asset for the lease term and lease liabilities represent the present value of the Company's obligation to make lease payments arising from the lease over the lease term at the commencement date of the lease (or November 1, 2019 for leases existing upon the adoption of ASC 842). As most of the Company's leases do not provide an implicit rate, the Company estimated the incremental borrowing rate based on the information available at the date of adoption in determining the present value of lease payments and used the implicit rate when readily determinable. The Company determined incremental borrowing rates through market sources for secured borrowings including relevant industry rates. The Company's operating lease ROU assets also include any lease pre-payments and exclude lease incentives. Certain of the Company's leases include variable payments, which may vary based upon changes in facts or circumstances after the start of the lease. The Company excludes variable payments from lease ROU assets and lease liabilities, to the extent not considered in-substance fixed, and instead, expenses variable payments as incurred. Variable lease expense and lease expense for short term contracts are not material components of lease expense. The Company's leases generally have remaining lease terms of 1 to 26 years, some of which include options to extend leases. The exercise of lease renewal options is at the Company's sole discretion and the Company's lease ROU assets and liabilities reflect only the options the Company is reasonably certain that it will exercise. We do not have leases with residual value guarantees or similar covenants.

Operating lease expense for the three and six months ended April 30, 2020 was $0.1 million and $0.3 million, respectively. As of April 30, 2020, the weighted average remaining lease term (in years) was approximately 19 years and the weighted average discount rate was 6.2%. Lease payments made for the three and six months ended April 30, 2020 were $0.2 million and $0.5 million, respectively.

Undiscounted maturities of operating lease and finance lease liabilities are as follows:

| | Operating Leases | Finance Leases |
|---|---|---|
| Due Year 1 | $ 1,198 | $ 69 |
| Due Year 2 | 1,339 | 18 |
| Due Year 3 | 1,292 | — |
| Due Year 4 | 768 | — |
| Due Year 5 | 693 | — |
| Thereafter | 14,413 | — |
| Total undiscounted lease payments | 19,703 | 87 |
| Less imputed interest | (9,217) | (4) |
| Total discounted lease payments | $ 10,486 | $ 83 |

Prior to the adoption of the New Lease Accounting Standard, rental commitments on an undiscounted basis were approximately $19.9 million under long-term non-cancelable operating leases and were payable as follows: $1.1 million in fiscal year 2020, $1.4 million in fiscal year 2021, $1.3 million in fiscal year 2022, $0.9 million in fiscal year 2023, $0.7 million in fiscal year 2024 and $14.6 million thereafter. Rent expense for the three and six months ended April 30, 2019 was $0.2 million and $0.5 million, respectively.

*Crestmark Sale-Leaseback Transaction*

On February 11, 2020, an indirect wholly-owned subsidiary of the Company, Central CA Fuel Cell 2, LLC ("CCFC2"), entered into a Purchase and Sale Agreement (the "Purchase Agreement") and an Equipment Lease Agreement (the "Lease") with Crestmark. Under these agreements, CCFC2 sold the 2.8 MW biogas fueled fuel cell power plant (the "Plant") located at the Tulare wastewater treatment plant in Tulare, California to Crestmark and then leased the Plant back from Crestmark through this sale-leaseback transaction. The Plant was designed, manufactured and installed by the Company, and commercial operations began on December 27, 2019. In operating the Plant, CCFC2 purchases biogas from the City of Tulare and sells the power produced by the Plant to Southern California Edison under a twenty-year PPA, which was separately entered into on April 20, 2018 (the "Tulare PPA"), under the California Bioenergy Market Adjusting Tariff.

Under the terms of the Purchase Agreement, Crestmark paid CCFC2 an aggregate purchase price of $14.4 million. A portion of these proceeds were used by CCFC2 to make a down payment and an initial rental payment under the Lease to Crestmark totaling $2.9 million, to pay taxes and transaction costs and to fund a debt service reserve totaling approximately $1.0 million, resulting in net proceeds to CCFC2 of approximately $10.5 million. These net proceeds were allocated as follows:

- Approximately $6.5 million of the net proceeds were deposited into the Project Proceeds Account (restricted cash on the Company's consolidated balance sheet) under the Orion Facility. These proceeds may be used to repay amounts outstanding under the Orion Facility or redeployed, subject to the approval of the lenders and the Agent under the Orion Facility, to other financing transactions for the Company's projects. These net proceeds are classified as long-term restricted cash on the consolidated balance sheet.
- Approximately $1.2 million of the net proceeds were deposited into a module reserve account and debt services reserve account under the Orion Facility. These net proceeds are classified as long-term restricted cash on the consolidated balance sheet.
- The balance of the net proceeds, totaling $2.8 million, were used to fund the quarterly cash interest payment due to the lenders under the Orion Facility and the dividend payments on the Company's Series B Preferred Stock (as defined below) and the dividend and return of capital payment on the Series 1 Preferred Shares (as defined below) of FCE Ltd. (as defined below) required to be paid in the second quarter of fiscal 2020.

The Lease has an initial term of ten years but may be extended at the option of CCFC2. As noted above, an initial rental down payment and one month's rent totaling $2.9 million was paid using the proceeds from the sale of the Plant. Lease payments are due on a monthly basis in the amount of $0.1 million. Lease payments are expected to be funded with proceeds from the sale of power under the Tulare PPA. Following the sale-leaseback transaction, the remaining lease payments due over the term of the Lease total approximately $9.3 million.

CCFC2 and Crestmark entered into an Assignment Agreement on February 11, 2020 (the "Assignment Agreement") and FuelCell Energy Finance, LLC ("FuelCell Finance", a wholly-owned subsidiary of the Company and the direct parent of CCFC2) and Crestmark entered into a Pledge Agreement on February 11, 2020 (the "Pledge Agreement") pursuant to which collateral was provided to Crestmark to secure CCFC2's obligations under the Lease. Specifically, CCFC2 and FuelCell Finance granted Crestmark a security interest in (i) certain agreements relating to the sale-leaseback transaction, (ii) the revenues CCFC2 receives with respect to the Plant, (iii) two fuel cell modules to be maintained by CCFC2 as replacement modules for the Plant, and (iv) FuelCell Finance's equity interest in CCFC2. CCFC2 and the Company also entered into a Technology License and Access Agreement with Crestmark on February 11, 2020, which provides Crestmark with certain intellectual property license rights to have access to the Company's proprietary fuel cell technology, but only for the purpose of maintaining and servicing the Plant in certain circumstances where the Company is not satisfying its obligations under its service agreement with regard to the maintenance and servicing of the Plant.

Pursuant to the Lease, CCFC2 has an obligation to indemnify Crestmark for the amount of any actual reduction in the U.S. Investment Tax Credit anticipated to be realized by Crestmark in connection with the foregoing sale-leaseback transaction. Such obligations would arise as a result of reductions to the value of the underlying fuel cell project as assessed by the U.S. Internal Revenue Service ("IRS"). The Company does not believe that any such obligation is likely based on the facts known as of April 30, 2020. The maximum potential future payments that CCFC2 could have to make under these obligations would depend on the difference between the fair values of the fuel cell project sold or financed and the values the IRS would determine as the fair value for the system for purposes of claiming the Investment Tax Credit. The value of the Investment Tax Credit in the sale-leaseback agreements is based on guidelines provided by regulations from the IRS. The Company and Crestmark used fair values determined with the assistance of an independent third-party appraisal.

The Purchase Agreement and the Lease contain representations and warranties, affirmative and negative covenants, and events of default that entitle Crestmark to cause CCFC2's indebtedness under the Lease to become immediately due and payable. The Lease includes an end of term option for CCFC2 to repurchase the transferred assets at the then fair market value of the assets. As a result, a repurchase of the assets would preclude sale accounting since there are no alternative assets, substantially the same as the transferred assets readily available in the marketplace. As such, the transaction is a failed sale-leaseback transaction that is accounted for as a financing transaction.

Pursuant to a Guaranty Agreement executed on February 11, 2020 by the Company for the benefit of Crestmark (the "Guaranty"), the Company has guaranteed the payment and performance of CCFC2's obligations under the Lease.

**Note 12. Stockholders' Equity and Warrant Liabilities**

***At Market Issuance Sales Agreement***

On October 4, 2019, the Company entered into an At Market Issuance Sales Agreement (the "Sales Agreement") with B. Riley FBR, Inc. (the "Sales Agent") to create an at-the-market equity program under which the Company was entitled, from time to time, to offer and sell up to 38.0 million shares of its common stock through the Sales Agent. However, to ensure that the Company had sufficient shares available for reservation and issuance upon exercise of all of the warrants to be issued to the lenders under the Orion Facility (as discussed in further detail below), the Company, effective as of October 31, 2019, reduced the number of shares reserved for future issuance and sale under the Sales Agreement from 27.9 million shares to 7.9 million shares (thus allowing for total aggregate issuances (past and future) of up to 18.0 million shares under the Sales Agreement) and reserved 20.0 million shares for issuance upon exercise of the warrants by the Orion lenders. Under the Sales Agreement, the Sales Agent was entitled to a commission in an amount equal to 3.0% of the gross proceeds from each sale of shares under the Sales Agreement.

There were no sales under the Sales Agreement during the three months ended April 30, 2020. During the six months ended April 30, 2020, the Company issued and sold a total of approximately 7.9 million shares of its common stock under the Sales Agreement at prevailing market prices, with an average sale price of $0.46 per share, and raised aggregate gross proceeds of approximately $3.6 million, before deducting expenses and commissions. Commissions of $0.1 million were paid to the Sales Agent in connection with these sales, resulting in net proceeds to the Company of approximately $3.5 million. As of April 30, 2020, there were 1,154 shares available for issuance under the Sales Agreement.

See Note 18. "Subsequent Events" for information regarding the termination of the Sales Agreement following the end of the quarter.

***Outstanding Warrants***

Orion Warrants

In connection with the closing of the Orion Facility and the Initial Funding, on October 31, 2019, the Company issued warrants to the lenders under the Orion Facility to purchase up to a total of 6,000,000 shares of the Company's common stock, at an exercise price of $0.310 per share (the "Initial Funding Warrants"). In addition, pursuant to the Orion Facility, on the date of the Second Funding (November 22, 2019), the Company issued warrants to the lenders under the Orion Facility to purchase up to a total of 14,000,000 shares of the Company's common stock, with an exercise price with respect to 8,000,000 of such shares of $0.242 per share and with an exercise price with respect to 6,000,000 of such shares of $0.620 per share (the "Second Funding Warrants", and together with the Initial Funding Warrants, the "Orion Warrants").

The Orion Warrants have an 8-year term from the date of issuance, are exercisable immediately beginning on the date of issuance, and include provisions permitting cashless exercises.

On January 9, 2020, the lenders exercised, on a cashless basis, Orion Warrants (with cash exercise prices of $0.310 per share and $0.62 per share) representing the right to purchase, in the aggregate, 12,000,000 shares of the Company's common stock. Because these warrants were exercised on a cashless basis pursuant to the formula set forth in the warrants, the lenders received, in the aggregate 9,396,320 shares of the Company's common stock upon the cashless exercise of Initial Funding Warrants representing the right to purchase 6,000,000 shares of the Company's common stock and Second Funding Warrants representing the right to purchase 6,000,000 shares of the Company's common stock. The cashless exercise resulted in 2,603,680 shares no longer being required to be reserved for issuance upon exercise of the Orion Warrants. Following this exercise, warrants to purchase 8,000,000 shares of the Company's common stock, with an exercise price of $0.242 per share, remain outstanding.

The estimated fair value of the Orion Warrants upon issuance was based on a Black-Scholes model using Level 2 inputs, including volatility of 96%, a risk free rate of 1.63%, the Company's common stock price as of October 31, 2019 of $0.24 per share and the term of 8 years, which resulted in a total value of $3.9 million. The Orion Warrants will be remeasured to fair value each reporting period.

The Orion Warrants that were converted were remeasured to fair value immediately preceding the conversion based upon volatility of 103.7%, a risk free rate of 1.81% and the Company's common stock price of $2.29 on January 8, 2020, which resulted in a $23.7 million charge for the three months ended January 31, 2020. The revised estimated fair value of the converted warrants as of the date of conversion of $26.0 million was reclassified to Additional paid in capital. The remaining warrants as of January 31, 2020 were remeasured to estimated fair value based upon a volatility of 104.9%, a risk free rate of 1.45% and the Company's common stock price at January 31, 2020 of $1.59 per share, which resulted in a charge for the three months ended January 31, 2020 of $10.5 million. The Company remeasured the remaining warrants again at April 30, 2020 based upon a volatility of 107.4%, a risk free rate of 0.57% and the Company's common stock price at April 30, 2020 of $2.02 per share, which resulted in a charge for the three months ended April 30, 2020 of $3.4 million. The remaining warrants outstanding are valued at $15.5 million as of April 30, 2020 and are classified as Long-term debt and other liabilities.

(Tabular amounts in thousands, except share and per share amounts)

Other Warrants

On May 3, 2017, the Company completed an underwritten public offering of (i) 1,000,000 shares of its common stock, (ii) Series C warrants to purchase 1,000,000 shares of its common stock and (iii) Series D warrants to purchase 1,000,000 shares of its common stock. The Series C warrants have an exercise price of $19.20 per share and a term of five years. The Series D warrants were exercised previously and are no longer outstanding. No Series C warrants were exercised during the three and six months ended April 30, 2020.

The following table summarizes outstanding warrant activity during the six months ended April 30, 2020:

| | Series C Warrants | Orion Warrants |
|---|---|---|
| Balance as of October 31, 2019 | 964,114 | 6,000,000 |
| Warrants issued | — | 14,000,000 |
| Warrants converted | — | (12,000,000) |
| Balance as of April 30, 2020 | 964,114 | 8,000,000 |

**Note 13. Redeemable Preferred Stock**

The Company is authorized to issue up to 250,000 shares of preferred stock, par value $0.01 per share, in one or more series, of which 105,875 shares were designated as 5% Series B Cumulative Convertible Perpetual Preferred Stock ("Series B Preferred Stock") in March 2005.

***Series B Preferred Stock***

As of April 30, 2020, the Company had 105,875 shares of Series B Preferred Stock, with a liquidation preference of $1,000.00 per share, authorized for issuance. As of April 30, 2020 and October 31, 2019, there were 64,020 shares of Series B Preferred Stock issued and outstanding, with a carrying value of $59.9 million. Dividends of $0.8 million were paid in cash during the three-month periods ended April 30, 2020 and 2019, and dividends of $3.2 million and $1.6 million were paid in cash during the six months ended April 30, 2020 and 2019, respectively. A payment of $2.4 million made in the fiscal quarter ended January 31, 2020 represented the dividends payable with respect to the May 15, 2019 and August 15, 2019 dividend dates and the dividends payable with respect to the November 15, 2019 dividend date that were declared on October 30, 2019.

***Class A Cumulative Redeemable Exchangeable Preferred Shares***

As of April 30, 2020, FCE FuelCell Energy, Ltd. ("FCE Ltd.") had 1,000,000 Class A Cumulative Redeemable Exchangeable Preferred Shares (the "Series 1 Preferred Shares") issued and outstanding, which are held by Enbridge, Inc. ("Enbridge"). Dividends and return of capital payments are due quarterly based on calendar quarters. The Company made payments of Cdn. $0.3 million during the three-month period ended April 30, 2020 and payments of Cdn. $1.5 million and Cdn. $0.3 million during the six-month periods ended April 30, 2020 and 2019, respectively. The Company's payments made during the fiscal quarter ended January 31, 2020 included the payments which were not made previously for the calendar quarters ended on March 31, 2019, June 30, 2019 and September 30, 2019. The Company recorded interest expense, which reflects the amortization of the fair value discount of approximately Cdn. $1.0 million and Cdn. $0.0 million for the three months ended April 30, 2020 and 2019, respectively and Cdn $1.8 million and Cdn. $0.7 million for the six months ended April 30, 2020 and 2019, respectively. As of April 30, 2020 and October 31, 2019, the carrying value of the Series 1 Preferred Shares was Cdn. $24.1 million (U.S. $17.3 million) and Cdn. $22.7 million (U.S. $17.2 million), respectively, and is classified as a preferred stock obligation of a subsidiary on the consolidated balance sheets. Under the terms of the January 2020 Letter Agreement (as defined and described below) relating to the amendment of the terms of the Series 1 Preferred Shares, the Company is still required to make (i) annual dividend payments of Cdn. $500,000 and (ii) annual return of capital payments of Cdn. $750,000. Dividend and return of capital payments are to be made on a quarterly basis and are scheduled to end on December 31, 2021 unless these obligations are satisfied in advance of such date.

(Tabular amounts in thousands, except share and per share amounts)

On January 20, 2020, the Company, FCE Ltd. and Enbridge entered into a letter agreement (the "January 2020 Letter Agreement"), pursuant to which they agreed to amend the articles of FCE Ltd. relating to and setting forth the terms of the Series 1 Preferred Shares to: (i) remove the provisions of the articles permitting or requiring the issuance of shares of the Company's common stock in exchange for the Series 1 Preferred Shares or as payment of amounts due to the holders of the Series 1 Preferred Shares, (ii) remove certain provisions of the articles relating to the redemption of the Series 1 Preferred Shares, (iii) increase the annual dividend rate, commencing on January 1, 2020, to 15%, (iv) extend the final payment date for all accrued and unpaid dividends and all return of capital payments (i.e., payments of the principal redemption price) from December 31, 2020 to December 31, 2021, (v) clarify when dividend and return of capital payments are to be made in the future and extend the quarterly dividend and return of capital payments through December 31, 2021 (which were previously to be paid each quarter through December 31, 2020), (vi) remove certain terms and provisions of the articles that are no longer applicable, and (vii) make other conforming changes to the articles. In addition, the parties agreed to amend the Company's guarantee in favor of Enbridge as necessary or as the parties may mutually agree, in either case, in order to be consistent with such amended articles and to maintain the Company's guarantee of FCE Ltd.'s obligations under the Series 1 Preferred Shares. The articles of FCE Ltd. were amended and filed in accordance with the provisions of the January 2020 Letter Agreement on March 26, 2020.

After taking into account the amendments to the terms of the Series 1 Preferred Shares described in the January 2020 Letter Agreement, the aggregate amount of all accrued and unpaid dividends to be paid on the Series 1 Preferred Shares on December 31, 2021 is expected to be Cdn. $26.5 million and the balance of the principal redemption price to be paid on December 31, 2021 with respect to all of the Series 1 Preferred Shares is expected to be Cdn. $3.5 million. The amendment to the Series 1 Preferred Shares resulted in an extinguishment of the prior Series 1 Preferred Shares for accounting purposes. A revised fair value was estimated using a discounted cash flow model resulting in a revised carrying value being recorded for the amended Series 1 Preferred Shares of Cdn. $24.1 million (U.S. $17.3 million) as of April 30, 2020, which resulted in a loss of Cdn. $0.2 million (U.S. $0.2 million) recorded in Other income, net on the consolidated statements of operations and comprehensive loss during the three and six months ended April 30, 2020. On an undiscounted basis, the Company's actual aggregate amount of all accrued and unpaid dividends to be paid on the Series 1 Preferred Shares as of April 30, 2020 totaled approximately Cdn. $21.9 million (U.S. $15.8 million) and the balance of the principal redemption price as of April 30, 2020 with respect to all of the Series 1 Preferred Shares totaled approximately Cdn. $4.8 million (U.S. $3.5 million).

Prior to the amendment, the Company bifurcated the conversion feature and a variable dividend feature. As a result of the January 2020 Letter Agreement, both features were removed from the Series 1 Preferred Shares which resulted in the Company recognizing a gain of $0.6 million.

**Note 14. Loss Per Share**

The calculation of basic and diluted loss per share was as follows:

| | Three Months Ended April 30, | | Six Months Ended April 30, | |
|---|---|---|---|---|
| | 2020 | 2019 | 2020 | 2019 |
| Numerator | | | | |
| Net loss | $ (14,769) | $ (19,530) | $ (54,920) | $ (37,078) |
| Series A warrant exchange | — | (3,169) | — | (3,169) |
| Series B preferred stock dividends | (800) | (800) | (1,731) | (1,600) |
| Series C preferred stock deemed contributions (dividends) and redemption value adjustment, net | — | 1,599 | — | (7,406) |
| Series D Preferred stock deemed dividends and redemption accretion | — | (976) | — | (6,661) |
| Net loss attributable to common stockholders | $ (15,569) | $ (22,876) | $ (56,651) | $ (55,914) |
| Denominator | | | | |
| Weighted average basic common shares | 211,000,091 | 11,090,698 | 206,560,031 | 9,683,253 |
| Effect of dilutive securities (1) | — | — | — | — |
| Weighted average diluted common shares | 211,000,091 | 11,090,698 | 206,560,031 | 9,683,253 |
| Basic loss per share | $ (0.07) | $ (2.06) | $ (0.27) | $ (5.77) |
| Diluted loss per share (1) | $ (0.07) | $ (2.06) | $ (0.27) | $ (5.77) |

(1) Due to the net loss to common stockholders in each of the periods presented above, diluted loss per share was computed without consideration to potentially dilutive instruments as their inclusion would have been anti-dilutive. As of April 30, 2020 and 2019, potentially dilutive securities excluded from the diluted loss per share calculation are as follows:

(Tabular amounts in thousands, except share and per share amounts)

| | April 30, 2020 | April 30, 2019 |
|---|---|---|
| Orion Warrants | 8,000,000 | — |
| May 2017 Offering - Series C Warrants | 964,114 | 964,114 |
| Outstanding options to purchase common stock | 23,891 | 24,945 |
| Unvested Restricted Stock Awards | 2,091 | 32,659 |
| Unvested Restricted Stock Units | 63,267 | 212,034 |
| Series C Preferred Shares to satisfy conversion requirements (1) | — | 313,589 |
| Series D Preferred Shares to satisfy conversion requirements (2) | — | 1,114,890 |
| 5% Series B Cumulative Convertible Preferred Stock | 37,837 | 37,837 |
| Series 1 Preferred Shares to satisfy conversion requirements | — | 1,264 |
| Total potentially dilutive securities | 9,091,200 | 2,701,332 |

(1) The number of shares of common stock issuable upon conversion of the Series C Convertible Preferred Stock was calculated using the liquidation preference value outstanding on April 30, 2019 of $1.6 million divided by the reduced conversion price of $5.16 per share.

(2) The number of shares of common stock issuable upon conversion of the Series D Convertible Preferred Stock was calculated using the liquidation preference value outstanding on April 30, 2019 of $18.5 million divided by the conversion price of $16.56 per share.

**Note 15. Restricted Cash**

As of April 30, 2020 and October 31, 2019, there was $44.3 million and $30.3 million, respectively, of restricted cash and cash equivalents pledged as performance security, reserved for future debt service requirements, reserved for letters of credit for certain banking requirements and contracts, and reserved to pay down the Orion Facility or be redeployed into other project financing at the option of the Agent and lenders under the Orion Facility. The allocation of restricted cash is as follows:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Cash Restricted for Outstanding Letters of Credit (1) | $ 6,225 | $ 5,733 |
| Cash Restricted for PNC Sale-Leaseback Transactions | 17,925 | 17,934 |
| Cash Restricted for Crestmark Sale-Leaseback Transaction | 430 | — |
| Bridgeport Fuel Cell Park Project Debt Service and Performance Reserves | 6,247 | 4,946 |
| Orion Facility - Performance Reserve (2) | 5,000 | — |
| Orion Facility - Module and Debt Service Reserves (3) | 1,175 | — |
| Orion Facility - Project Proceeds Account (4) | 6,543 | — |
| Other | 787 | 1,731 |
| Total Restricted Cash | 44,332 | 30,344 |
| Restricted Cash and Cash Equivalents - Short-Term (5) | (8,082) | (3,473) |
| Restricted Cash and Cash Equivalents - Long-Term | $ 36,250 | $ 26,871 |

(1) Letters of credit outstanding as of April 30, 2020 expire on various dates through August 2028.

(2) Short-term reserve related to certain project construction and financing milestones. Refer to Note. 16. “Debt and Financing Obligations” for conditions to be met to achieve the release of this reserve.

(3) Long-term reserve primarily to fund future module replacements for operating projects which fall under the collateral pool (CCSU and Triangle Street) under the Orion Facility.

(4) Reserve related to proceeds received from project refinancing to be used to pay-down the Orion Facility unless redeployed into other project financing (at the option of the Agent and the lenders under the Orion Facility).

(5) Short-term restricted cash and cash equivalents are amounts expected to be released and categorized as unrestricted cash within twelve months of the balance sheet date.

(Tabular amounts in thousands, except share and per share amounts)

**Note 16. Debt and Financing Obligations**

Debt as of April 30, 2020 and October 31, 2019 consisted of the following:

| | April 30, 2020 | October 31, 2019 |
|---|---|---|
| Orion Energy Partners Credit Facility | $ 80,000 | $ 14,500 |
| Connecticut Green Bank Loans | 10,217 | 7,555 |
| Liberty Bank Term Loan Agreement (BFC Loan) | 10,590 | 11,632 |
| Fifth Third Bank Term Loan Agreement (BFC Loan) | 10,590 | 11,632 |
| Finance obligation for sale-leaseback transactions | 55,681 | 45,219 |
| State of Connecticut Loan | 9,660 | 10,000 |
| New Britain Renewable Energy Term Loan | — | 497 |
| Enhanced Capital Term Loan and Security Agreement | — | 1,500 |
| Fifth Third Bank Construction Loan Agreement | — | 11,072 |
| Liberty Bank Promissory Note (PPP Note) | 6,515 | — |
| Capitalized lease obligations | 83 | 141 |
| Deferred finance costs | (4,572) | (3,180) |
| Unamortized debt discount | (5,520) | (4,251) |
| Total debt and financing obligations | $ 173,244 | $ 106,317 |
| Current portion of long-term debt and financing obligations | (13,834) | (21,916) |
| Long-term debt and financing obligations | $ 159,410 | $ 84,401 |

*Orion Energy Partners Investment Agent, LLC Credit Agreement*

On October 31, 2019, the Company and certain of its affiliates as guarantors entered into a Credit Agreement (as amended from time to time, the "Orion Credit Agreement") with Orion Energy Partners Investment Agent, LLC, as Administrative Agent and Collateral Agent (the "Agent"), and certain lenders affiliated with the Agent for a $200.0 million senior secured credit facility (the "Orion Facility"), structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. Under the Orion Credit Agreement, each lender will fund its commitments on each funding date in an amount equal to the principal amount of the loans to be funded by such lender on such date, less 2.50% of the aggregate principal amount of the loans funded by such lender on such date (the "Loan Discount).

On October 31, 2019, the Company drew down $14.5 million (the "Initial Funding") and received $14.1 million after taking into account a Loan Discount of $0.4 million.

On November 22, 2019, a second draw (the "Second Funding") of $65.5 million, funded by Orion Energy Credit Opportunities Fund II, L.P., Orion Energy Credit Opportunities Fund II GPFA, L.P., Orion Energy Credit Opportunities Fund II PV, L.P., and Orion Energy Credit Opportunities FuelCell Co-Invest, L.P. (the "Orion Lenders"), was made to fully repay certain outstanding third party debt of the Company, including the outstanding construction loan from Fifth Third Bank with respect to the Groton Project and the outstanding loan from Webster Bank with respect to the CCSU Project, as well as to fund remaining going forward construction costs and anticipated capital expenditures relating to the Groton Project (a 7.4 MW project), the LIPA Yaphank Solid Waste Management Project (a 7.4 MW project), and the Tulare BioMAT Project (a 2.8 MW project). The Company received $63.9 million in the Second Funding after taking into account a Loan Discount of $1.6 million as described above. Also in conjunction with the Second Funding, the Company issued to the Orion Lenders the Second Funding Warrants to purchase up to a total of 14.0 million shares of the Company's common stock, with an initial exercise price with respect to 8.0 million of such shares of $0.242 per share and with an initial exercise price with respect to 6.0 million of such shares of $0.620 per share.

The Company may draw the remainder of the Orion Facility, up to $120.0 million, over the first 18 months following the Initial Funding and subject to the Agent's approval to fund project-related expenses consisting of: (i) construction costs, inventory and other capital expenditures of additional fuel cell projects with contracted cash flows (under PPAs with creditworthy counterparties) that meet or exceed a mutually agreed coverage ratio; and (ii) inventory, working capital, and other costs that may be required to be delivered by the Company on purchase orders, service agreements, or other binding customer agreements with creditworthy counterparties. Except as may be approved by the Agent and the Orion Lenders (and except as provided in the Fifth Orion Amendment), the Company cannot use the Orion Facility to fund its working capital or other expenses at the corporate level. The Orion Lenders and the Agent have broad approval rights over the Company's ability to raise additional capital, obtain other debt financing, and draw, allocate and use funds from the Orion Facility.

Under the Orion Credit Agreement, cash interest of 9.9% per annum will be paid quarterly. In addition to the cash interest, payment-in-kind interest of 2.05% per annum will accrue which will be added to the outstanding principal balance of the Orion Facility but will be paid quarterly in cash to the extent of available cash after payment of the Company's operating expenses and the funding of certain reserves for the payment of outstanding indebtedness to the State of Connecticut and Connecticut Green Bank. The Orion Credit Agreement contains representations, warranties and other covenants.

Outstanding principal under the Orion Facility will be amortized on a straight-line basis over a seven year term in quarterly payments beginning one year after the Initial Funding, with the initial payment due 21 business days after the end of the first quarter of fiscal 2021; provided that, if the Company does not have sufficient cash on hand to make any required quarterly amortization payments, such amounts shall be deferred and payable at such time as sufficient cash is available to make such payments subject to all outstanding principal being due and payable on the maturity date, which is the date that is eight years after the date of the Initial Funding or October 31, 2027.

The issuance of the Initial Funding Warrants and recognition of the Second Funding Warrants resulted in $3.9 million being recorded as a liability as of October 31, 2019 with the offset recorded as a debt discount. Refer to Note 12. "Stockholders' Equity and Warrant Liabilities" for additional information regarding the Initial Funding Warrants and Second Funding Warrants, including the accounting, terms and conversions during the quarter ended January 31, 2020.

In conjunction with the Second Funding, the Company and the other loan parties entered into the First Amendment to the Orion Credit Agreement (the "First Orion Amendment"), which required the Company to establish a $5.0 million debt reserve, with such reserve to be released on the first date following the date of the Second Funding on which all of the following events shall have occurred: (a) each of (x) the commercial operation date for the Tulare BioMAT project shall have occurred and (y) a disposition, refinancing or tax equity investment in the Tulare BioMAT project of at least $5.0 million is consummated (both conditions (x) and (y) have been satisfied); (b) each of (x) the Groton Project shall have achieved its business plan in accordance with the Groton Construction Budget (as defined in the Orion Credit Agreement), (y) the commercial operation date for the Groton Project shall have occurred and (z) the Groton Project shall have met its annualized output and heat rate guarantees for three months; and (c) a disposition, refinancing or tax equity investment of at least $30 million shall have occurred with respect to the Groton Project. The First Orion Amendment further required the Company (i) to provide, no later than December 31, 2019, a biogas sale and purchase agreement through December 31, 2021 for the Tulare BioMAT project, which was obtained as of such date, (ii) to obtain by December 31, 2019, a fully executed contract for certain renewable energy credits for the Groton Project, which was obtained as of such date, and (iii) to provide by January 31, 2020, certain consents and estoppels from the Connecticut Municipal Electric Energy Cooperative ("CMEEC") related to the Groton Project and an executed, seventh modification to the lease between CMEEC and the United States Government, acting by and through the Department of the Navy, both of which were obtained as of such date.

In addition, in connection with the January 2020 Letter Agreement among the Company, FCE Ltd. and Enbridge described above, on January 20, 2020, in order to obtain the Orion Lenders' consent to the January 2020 Letter Agreement as required under the Orion Credit Agreement, the Company, the Agent, the Orion Lenders, and the other loan parties entered into the Second Amendment to the Orion Credit Agreement (the "Second Orion Amendment"), which added a new affirmative covenant to the Orion Credit Agreement that obligates the Company to, and to cause FCE Ltd. to, on or prior to November 1, 2021, either (i) pay and satisfy in full all of their respective obligations in respect of, and fully redeem and cancel, all of the Series 1 Preferred Shares of FCE Ltd., or (ii) deposit in a newly created account of FCE Ltd. or the Company cash in an amount sufficient to pay and satisfy in full all of their respective obligations in respect of, and to effect a redemption and cancellation in full of, all of the Series 1 Preferred Shares of FCE Ltd. The Second Orion Amendment also provides that the amended articles of FCE Ltd. setting forth the modified terms of the Series 1 Preferred Shares will be considered a "Material Agreement" under the Orion Credit Agreement. Under the Second Orion Amendment, a failure to satisfy this new affirmative covenant or to otherwise comply with the terms of the Series 1 Preferred Shares will constitute an event of default under the Orion Credit Agreement, which could result in the acceleration of any amounts outstanding under the Orion Credit Agreement.

Additionally, in order to obtain the Orion Lenders' consent to the Crestmark sale-leaseback transaction described in Note 11. "Leases" and to the use of certain proceeds from the Crestmark sale-leaseback transaction (the "Crestmark Proceeds") as described below, the Company, the Agent, the Orion Lenders and the other loan parties entered into the Third Amendment to the Orion Credit Agreement (the "Third Orion Amendment") dated February 11, 2020, and a Consent and Waiver dated February 11, 2020 (the "Consent and Waiver"). Pursuant to the Third Orion Amendment, TRS Fuel Cell, LLC was added as an Additional Covered Project Company (as defined in the Orion Credit Agreement), requiring the Company to pledge

all of the assets of TRS Fuel Cell, LLC under the Orion Credit Agreement. In addition, pursuant to the Orion Credit Agreement (as modified by the Third Orion Amendment), all of the proceeds received by the Company from the Crestmark sale-leaseback transaction described above, after a down payment and an initial rental payment under the Lease to Crestmark, the payment of taxes and transaction costs and funding a debt service reserve totaling approximately $1.0 million, were deposited in the Company's Project Proceeds Account, which account is restricted, with withdrawals permitted only with consent of the Agent for use to (i) prepay the loans under the Orion Credit Agreement or (ii) fund (x) construction costs, inventory or other capital expenditures for an Additional Covered Project (as defined in the Orion Credit Agreement) whose contracted cash flows (as determined in the Orion Lenders' sole discretion) meet or exceed a coverage ratio acceptable to the Orion Lenders, and (y) inventory, working capital and other costs required in connection with the performance of purchase orders, service agreements and other binding customer agreements (as determined in the Orion Lenders' sole discretion); provided, however, that, pursuant to the Third Orion Amendment, certain portions of the funds deposited in the Project Proceeds Account were used as follows: (a) $1.1 million of the Crestmark Proceeds were transferred to the Module Reserve Account (as defined in the Orion Credit Agreement) to fund module replacement costs for Covered Projects (as defined in the Orion Credit Agreement); (b) $0.1 million of the Crestmark Proceeds were transferred to the Debt Reserve Account; (c) $1.7 million of the Crestmark Proceeds were used to fund the quarterly cash interest due to the Orion Lenders under the Orion Credit Agreement; and (d) $1.1 million of the Crestmark Proceeds were used to fund the aggregate amount of the dividends on the Company's Series B Preferred Stock and the Series 1 Preferred Shares of FCE Ltd. required to be paid in the second quarter of fiscal 2020. As of April 30, 2020, the remaining approximately $6.5 million of the Crestmark Proceeds was long-term restricted cash in the Project Proceeds Account. As noted below, on April 30, 2020, the Company reached agreement with the Orion Lenders to allocate up to a total of $3.5 million of these funds to the San Bernardino project over time. Pursuant to the Consent and Wavier, subject to the terms and conditions described above in the Third Orion Amendment, the Orion Lenders consented to the release of liens on those assets that were the subject of the Crestmark sale-leaseback transaction and to the Company's entering into the Guaranty.

On April 30, 2020, the Company, the Agent, the Orion Lenders and the other loan parties entered into the Fourth Amendment to the Orion Credit Agreement (the "Fourth Orion Amendment"). Pursuant to the Fourth Orion Amendment, the Agent and the Orion Lenders agreed to permit the release of $3.5 million from the Project Proceeds Account (as defined in the Orion Credit Agreement) subject to the following terms and conditions. Pursuant to the Fourth Orion Amendment, the Company's 1.4 MW biogas fueled project at the wastewater treatment plant in San Bernardino, California has been added as an Additional Covered Project (as defined in the Orion Credit Agreement), and the Company subsidiary developing such project, San Bernardino Fuel Cell, LLC, has been added as an Additional Covered Project Company (as defined in the Orion Credit Agreement) such that those covenants, terms and conditions in the Orion Credit Agreement that apply to Covered Projects and Covered Project Companies will now be applicable to the foregoing project and project company, including that the "Project Payoff Amount" (i.e., the amount required pursuant to the Orion Credit Agreement to be realized upon a subsequent sale or refinancing of a project) for the San Bernardino project will be $5 million. Subsequent to quarter end, $2.3 million of the $3.5 million was released from the Project Proceeds Account, which account is restricted subject to the control of the Agent, and transferred to a General Business Unit Account (as defined in the Orion Credit Agreement), which account is unrestricted and available for general use by the Company. The remaining $1.2 million will be released from the Project Proceeds Account and transferred to a Covered Project Account (as defined in the Credit Agreement) being established for the San Bernardino project for use in connection with the construction of the San Bernardino project upon satisfaction of the following conditions: (a) approval of a self-generation incentive program grant for the San Bernardino project in an amount equal to no less than $1.0 million; (b) approval of an interconnection agreement; (c) provision of a fuel affidavit approval by Southern California Gas Company; (d) issuance of an air permit for the anaerobic digester gas cleanup system; (e) provision of an executed consent to collateral assignment by The City of San Bernardino Municipal Water District; (f) recordation in the land records of San Bernardino County of a memorandum of site license; (g) after giving effect to the release and transfer of $1.2 million to the Covered Project Account, evidence that there will be sufficient cash in the Covered Project Account for the San Bernardino project to cover remaining expenditures and complete the project and (h) written approval of the Agent. Refer to Note 18 "Subsequent Events" for additional information concerning the Orion Credit Agreement and the Fifth Orion Amendment.

*Connecticut Green Bank Loans*

As of October 31, 2019, the Company had a long-term loan agreement with the Connecticut Green Bank, providing the Company with a loan of $1.8 million (the "Green Bank Loan Agreement"). On and effective as of December 19, 2019, the Company and Connecticut Green Bank entered into an amendment to the Green Bank Loan Agreement (the "Green Bank Amendment"). Upon the execution of the Green Bank Amendment on December 19, 2019, Connecticut Green Bank made an additional loan to the Company in the aggregate principal amount of $3.0 million (the "December 2019 Loan"), which is to be used (i) first, to pay closing fees related to the May 9, 2019 acquisition of the Bridgeport Fuel Cell Project and the Subordinated Credit Agreement (as defined below), other fees, and accrued interest from May 9, 2019, totaling $0.4 million ("Accrued Fees"), and (ii) thereafter, for general corporate purposes as determined by the Company, including, but not limited to, expenditures in connection with the project being constructed by Groton Station Fuel Cell, LLC ("Groton Fuel Cell"). Pursuant to the terms of the Green Bank Amendment, Connecticut Green Bank will have no further obligation to make loans under the Green Bank Loan Agreement and the Company will have no right to make additional draws under the Green Bank Loan Agreement. The Green Bank Amendment provides that, until such time as the loan (which includes both the outstanding principal balance of the original loan under the Green Bank Loan Agreement and the outstanding principal amount of the December 2019 Loan) has been repaid in its entirety, interest on the outstanding balance of the loan shall accrue monthly in arrears from the date of the Green Bank Amendment at a rate of 5% per annum until May 8, 2019 and at a rate of 8% per annum thereafter, payable by the Company on a monthly basis in arrears. The Green Bank Amendment further provides that the payment by the Company of the Accrued Fees (as described above) includes any shortfall of interest due but unpaid by the Company through and including November 30, 2019. Interest payments made by the Company after the date of the Green Bank Amendment are to be applied first to interest that has accrued on the outstanding principal balance of the original loan under the Green Bank Loan Agreement and then to interest that has accrued on the December 2019 Loan. The Green Bank Amendment also modifies the repayment and mandatory prepayment terms and extends the maturity date set forth in the original Green Bank Loan Agreement. Under the Green Bank Amendment, to the extent that excess cash flow reserve funds under the BFC Credit Agreement (as defined below) are eligible for disbursement to Bridgeport Fuel Cell, LLC pursuant to Section 6.23(c) of the BFC Credit Agreement, such funds are to be paid to Connecticut Green Bank, to be applied first to repay the outstanding principal balance of the original loan under the Green Bank Loan Agreement and thereafter to repay the outstanding principal amount of the December 2019 Loan, until repaid in full. The Green Bank Amendment further provides that the entire unpaid balance of the loan and all other obligations due under the Green Bank Loan Agreement will be due and payable on May 9, 2026 if not paid sooner in accordance with the Green Bank Loan Agreement. Finally, with respect to mandatory prepayments, the Green Bank Amendment provides that, when the Company has closed on the subordinated project term loan pursuant to the Commitment Letter, dated February 6, 2019, issued by Connecticut Green Bank to Groton Fuel Cell to provide a subordinated project term loan to Groton Fuel Cell in the amount of $5.0 million, the Company will be required to prepay to Connecticut Green Bank the lesser of any then outstanding amount of the December 2019 Loan and the amount of the subordinated project term loan actually advanced by Connecticut Green Bank. The balance under the original Green Bank Loan Agreement and the December 2019 Loan as of April 30, 2020 was $4.8 million.

*Bridgeport Fuel Cell Project Loans*

On May 9, 2019, in connection with the closing of the purchase of the membership interests of Bridgeport Fuel Cell, LLC ("BFC") (and the 14.9 MW Bridgeport Fuel Cell Project), BFC entered into a subordinated credit agreement with the Connecticut Green Bank whereby Connecticut Green Bank provided financing in the amount of $6.0 million (the "Subordinated Credit Agreement"). This $6.0 million consisted of $1.8 million in incremental funding that was received by BFC and $4.2 million of funding previously received by FuelCell Energy, Inc. with respect to which BFC became the primary obligor. As security for the Subordinated Credit Agreement, Connecticut Green Bank received a perfected lien, subordinated and second in priority to the liens securing the $25.0 million loaned under the BFC Credit Agreement (as defined below), in all of the same collateral securing the BFC Credit Agreement. The interest rate under the Subordinated Credit Agreement is 8% per annum. Principal and interest are due monthly in amounts sufficient to fully amortize the loan over an 84-month period ending in May 2026. The Subordinated Credit Agreement contains representations, warranties and covenants. The balance under the Subordinated Credit Agreement as of April 30, 2020 was $5.4 million.

On May 9, 2019, in connection with the closing of the purchase of the Bridgeport Fuel Cell Project, BFC entered into a Credit Agreement with Liberty Bank, as administrative agent and co-lead arranger, and Fifth Third Bank as co-lead arranger and swap hedger (the "BFC Credit Agreement"), whereby (i) Fifth Third Bank provided financing in the amount of $12.5 million towards the purchase price for the BFC acquisition; and (ii) Liberty Bank provided financing in the amount of $12.5 million towards the purchase price for the BFC acquisition. As security for the BFC Credit Agreement, Liberty Bank and Fifth Third Bank were granted a first priority lien in (i) all assets of BFC, including BFC's cash accounts, fuel cells, and all other personal property, as well as third party contracts including the Energy Purchase Agreement between BFC and Connecticut Light and Power Company dated July 10, 2009, as amended; (ii) certain fuel cell modules that are intended to be used to replace the Bridgeport Fuel Cell Project's fuel cell modules as part of routine operation and maintenance; and (iii) FuelCell Finance's (a wholly-owned subsidiary of the Company and the direct parent of BFC) ownership interest in BFC. The maturity date under the BFC Credit Agreement is May 9, 2025. Monthly principal and interest are to be paid in arrears in an amount sufficient to fully amortize the term loan over a 72-month period. BFC has the right to make additional principal payments or pay the balance due under the BFC Credit Agreement in full, provided that it pays any associated breakage fees with regard to the interest rate swap agreements fixing the interest rate. The interest rate under the BFC Credit Agreement fluctuates monthly at the 30-day LIBOR rate plus 275 basis points on an initial total notional value of $25.0 million, reduced for principal payments.

An interest rate swap agreement was required to be entered into with Fifth Third Bank in connection with the BFC Credit Agreement to protect against movements in the floating LIBOR index. Accordingly, on May 16, 2019, an interest rate swap agreement (the "Swap Agreement") was entered into with Fifth Third Bank in connection with the BFC Credit Agreement for the term of the loan. The net interest rate across the BFC Credit Agreement and the swap transaction results in a fixed rate of 5.09%. The interest rate swap will be adjusted to fair value on a quarterly basis. The estimated fair value is based on Level 2 inputs including primarily the forward LIBOR curve available to swap dealers. The valuation methodology involves comparison of (i) the sum of the present value of all monthly variable rate payments based on a reset rate using the forward LIBOR curve and (ii) the sum of the present value of all monthly fixed rate payments on the notional amount, which is equivalent to the outstanding principal amount of the loan. The fair value adjustments for the three and six months ended April 30, 2020 resulted in a $0.5 million charge. The fair value of the interest rate swap at April 30, 2020 and October 31, 2019 was $1.2 million and $0.6 million, respectively.

*Finance obligations for sale leaseback agreements*

Several of the Company's special purpose project subsidiaries previously entered into sale-leaseback agreements with PNC for commissioned projects where the Company had entered into a PPA with the site host/end-user of produced power, and CCFC2 entered into a sale-leaseback with Crestmark on February 11, 2020 (refer to Note. 11. "Leases" for additional information). Under the financing method of accounting for a sale-leaseback, the Company did not recognize as income any of the sale proceeds received from the lessor that contractually constitute payments to acquire the assets subject to these arrangements. Instead, the sale proceeds received were accounted for as financing obligations. The outstanding financing obligation balance as of April 30, 2020 was $55.7 million, and the increase from $45.2 million on October 31, 2019 represents the finance obligation with Crestmark and the recognition of interest expense offset by lease payments. The outstanding financing obligation includes an embedded gain which will be recognized at the end of each 10-year lease term.

*State of Connecticut Loan*

In October 2015, the Company closed on a definitive Assistance Agreement with the State of Connecticut (the "Assistance Agreement") and received a disbursement of $10.0 million, which was used for the first phase of the expansion of the Company's Torrington, Connecticut manufacturing facility. In conjunction with this financing, the Company entered into a $10.0 million promissory note and related security agreements securing the loan with equipment liens and a mortgage on its Danbury, Connecticut location. Interest accrues at a fixed interest rate of 2.0%, and the loan is repayable over 15 years from the date of the first advance, which occurred in October of 2015. Principal payments were deferred for four years from disbursement and began on December 1, 2019. Under the Assistance Agreement, the Company was eligible for up to $5.0 million in loan forgiveness if the Company created 165 full-time positions and retained 538 full-time positions for two consecutive years (the "Employment Obligation") as measured on October 28, 2017 (the "Target Date"). The Assistance Agreement was subsequently amended in April 2017 to extend the Target Date by two years to October 28, 2019.

In January 2019, the Company and the State of Connecticut entered into a Second Amendment to the Assistance Agreement (the "Second Amendment"). The Second Amendment extends the Target Date to October 31, 2022 and amends the Employment Obligation to require the Company to continuously maintain a minimum of 538 full-time positions for 24 consecutive months. If the Company meets the Employment Obligation, as modified by the Second Amendment, and creates an additional 91 full-time positions, the Company may receive a credit in the amount of $2.0 million to be applied against the outstanding balance of the loan. However, based on the Company's current headcount and plans for fiscal year 2020, it will not meet this requirement or receive this credit. The Second Amendment deletes and cancels the provisions of the Assistance Agreement related to the second phase of the expansion project and the loans related thereto, but the Company had not drawn any funds or received any disbursements under those provisions. A job audit will be performed within 90 days of the Target Date. If the Company does not meet the Employment Obligation, then an accelerated payment penalty will be assessed at a rate of $18,587.36 times the number of employees below the number of employees required by the Employment Obligation. Such penalty is immediately payable and will be applied first to accelerate the payment of any outstanding fees or interest due and then to accelerate the payment of outstanding principal.

In April of 2020, as a result of the COVID-19 pandemic, the State of Connecticut agreed to defer three months of principal and interest payments under the Assistance Agreement beginning with the May 2020 payment. These deferred payments will be added at the end of the loan, thus extending out the maturity date by three months.

*Webster Bank Loan*

In November 2016, the Company assumed debt with Webster Bank, National Association ("Webster Bank") in the amount of $2.3 million as a part of a project asset acquisition transaction. The term loan interest rate was 5.0% per annum and payments, which commenced in January 2017, were due on a quarterly basis. The balance outstanding as of October 31, 2019 was $0.5 million. The loan was paid off and extinguished during the three months ended January 31, 2020.

*Enhanced Capital Loan*

On January 9, 2019, the Company, through its indirect wholly-owned subsidiary TRS Fuel Cell, LLC, entered into a Loan and Security Agreement with Enhanced Capital Connecticut Fund V, LLC ("Enhanced") in the amount of $1.5 million. On January 13, 2020, TRS Fuel Cell, LLC and Enhanced entered into a payoff letter pursuant to which the loan was paid off and extinguished on January 14, 2020.

*Fifth Third Bank Groton Loan*

On February 28, 2019, the Company, through its indirect wholly-owned subsidiary, Groton Station Fuel Cell, LLC ("Groton Fuel Cell"), entered into a Construction Loan Agreement (as amended from time to time, the "Groton Agreement") with Fifth Third Bank pursuant to which Fifth Third Bank agreed to make available to Groton Fuel Cell a construction loan facility in an aggregate principal amount of up to $23.0 million (the "Groton Facility") to fund the manufacture, construction, installation, commissioning and start-up of the 7.4 MW fuel cell power plant for the Connecticut Municipal Electric Energy Cooperative located on the U.S. Navy submarine base in Groton, Connecticut (the "Groton Project"). Groton Fuel Cell made an initial draw under the Groton Facility on the date of closing of $9.7 million and made an additional draw of $1.4 million in April 2019. The original maturity date of the Groton Facility was the earlier of (a) October 31, 2019, (b) the commercial operation date of the Groton Project, or (c) one business day after receipt of proceeds of debt financing (i.e., take out financing) in an amount sufficient to repay the outstanding indebtedness under the Groton Facility.

The total outstanding balance under the Groton Facility as of October 31, 2019 was $11.1 million. This balance was paid off, the loan was extinguished, and the Groton Facility was terminated during the three months ended January 31, 2020.

*Liberty Bank Promissory Note*

On April 20, 2020, the Company entered into the PPP Note, dated April 16, 2020, evidencing a loan to the Company from Liberty Bank, under the CARES Act, administered by the SBA. Pursuant to the PPP Note, the Company received total proceeds of approximately $6.5 million on April 24, 2020. In accordance with the requirements of the CARES Act, the Company is using the proceeds primarily for payroll costs.

The PPP Note is scheduled to mature on April 16, 2022, has a 1.00% per annum interest rate, and is subject to the terms and conditions applicable to loans administered by the SBA under the CARES Act. Monthly principal and interest payments, less the amount of any potential forgiveness (as discussed below), will commence on November 16, 2020. The Company did not provide any collateral or guarantees for the PPP Note, nor did the Company pay any facility charge to obtain the PPP Note. The PPP Note provides for events of default, including, among others, those relating to failure to make a payment when due under the PPP Note, failure to comply with any provision of the PPP Note, bankruptcy, and breaches of or materially misleading representations. Upon the occurrence of an event of default, Liberty Bank may require immediate payment of all amounts owing under the PPP Note, collect all amounts owing from the Company, and pursue other remedies. The PPP Note may be prepaid at any time with no prepayment penalties.

Under the original requirements of the CARES Act, proceeds may only be used for the Company's eligible payroll costs (with salary capped at $100,000 on an annualized basis for each employee), rent, mortgage interest, and utilities, in each case paid during the eight-week period following disbursement. Also, under the original requirements of the CARES Act, at least 75% of the proceeds must be used for eligible payroll costs. The loan may be fully forgiven if (i) proceeds are used to pay eligible payroll costs, rent, mortgage interest and utilities and (ii) full-time employee headcount and salaries are either maintained during the applicable eight-week period or restored by June 30, 2020. If not so maintained or restored, forgiveness of the loan will be reduced in accordance with the regulations to be issued by the SBA. Any forgiveness of the loan will be subject to approval by the SBA and Liberty Bank and will require the Company to apply for such treatment in the future. In order to obtain the consent of the Agent and the Orion Lenders under the Orion Facility to enter into the PPP Note, the Agent and the Orion Lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020.

On June 5, 2020, the PPP Flexibility Act was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note.

*Deferred Finance Costs*

Deferred finance costs relate primarily to (i) sale-leaseback transactions entered into with PNC and Crestmark, which are being amortized over the 10-year terms of the lease agreements, (ii) payments under the loans obtained to purchase the membership interests in BFC, which are being amortized over the 8-year term of the loans and (iii) payments to enter into the Orion Facility, which will be amortized over the 8 year term of the facility.

**Note 17. Commitments and Contingencies**

***Service Agreements***

Under the provisions of its service agreements, the Company provides services to maintain, monitor, and repair customer power plants to meet minimum operating levels. Under the terms of such service agreements, the particular power plant must meet a minimum operating output during defined periods of the term. If minimum output falls below the contract requirement, the Company may be subject to performance penalties and/or may be required to repair or replace the customer's fuel cell module(s).

***Power Purchase Agreements***

Under the terms of the Company's PPAs, customers agree to purchase power from the Company's fuel cell power plants at negotiated rates. Electricity rates are generally a function of the customers' current and estimated future electricity pricing available from the grid. As owner or lessee of the power plants, the Company is responsible for all operating costs necessary to maintain, monitor and repair the power plants. Under certain agreements, the Company is also responsible for procuring fuel, generally natural gas or biogas, to run the power plants. In addition, under the terms of some of the PPA agreements, the Company may be subject to a performance penalty if the Company does not meet certain performance requirements.

***Other***

As of April 30, 2020, the Company had unconditional purchase commitments aggregating $29.2 million, for materials, supplies and services in the normal course of business.

The Company is involved in legal proceedings, including, but not limited to, regulatory proceedings, claims, mediations, arbitrations and litigation, arising out of the ordinary conduct of its business ("Legal Proceedings"). Although the Company cannot assure the outcome, management presently believes that the result of such Legal Proceedings, either individually, or in the aggregate, will not have a material adverse effect on the Company's consolidated financial statements, and no material amounts have been accrued in the Company's consolidated financial statements with respect to these matters.

**Note 18. Subsequent Events**

***Impact of the COVID-19 Pandemic***

On March 18, 2020, in response to the COVID-19 pandemic, we temporarily suspended operations at our Torrington, Connecticut manufacturing facility and also ordered those employees that could work from home to do so. This suspension was subsequently extended following the guidance of Connecticut's stay at home orders, and we now are tentatively planning to resume operations in the manufacturing facility on June 22, 2020. We continue to evaluate our plans based on federal, state and local guidance, evolving data concerning the pandemic and the best interests of our employees, customers and stockholders. All employees that are not able to work from home due to their job function are still receiving full wages and benefits. To date, we have not implemented any furlough, layoff or shared work program supported by the State of Connecticut. If production resumes as currently planned on June 22, 2020, we do not expect a material adverse impact to current project schedules as a result of the shutdown. However, if we do not resume production as planned, our project schedules and associated financing could be adversely affected. Additionally, while we have attempted to continue business development activities during the pandemic, state and local shut downs, shelter in place orders and travel restrictions have impeded our ability to meet with customers and solicit new business and certain bids and solicitations in which we typically participate have been postponed. We expect these impacts to continue until such shut downs, shelter in place orders and travel restrictions are fully lifted and bids and solicitations are allowed to proceed.

On April 20, 2020, we entered into the PPP Note evidencing a loan to us from Liberty Bank under the CARES Act. Pursuant to the PPP Note, we received total proceeds of approximately $6.5 million on April 24, 2020. In order to obtain the consent of the Agent and the Orion Lenders under the Orion Facility to enter into the PPP Note, the Agent and the Orion Lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020. If we seek forgiveness of the loan, we must apply for such forgiveness by October 31, 2020.

On June 5, 2020, the PPP Flexibility Act was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note.

While we may apply for forgiveness of the PPP Note in accordance with the requirements and limitations under the CARES Act and the SBA regulations and requirements, no assurance can be given that any portion of the PPP Note will be forgiven. Based on guidance from the United States Department of the Treasury, since the total PPP Note proceeds exceeded $2.0 million, our forgiveness application will be subject to audit by the SBA.

***Increase in Authorized Shares***

The Company obtained stockholder approval on May 8, 2020 at the reconvened Annual Meeting of Stockholders to increase the number of shares of common stock we are authorized to issue under our Certificate of Incorporation, as amended. Our stockholders approved a 112,500,000 increase in the number of authorized shares of common stock. Accordingly, on May 11, 2020, the Company filed a Certificate of Amendment of the Certificate of Incorporation of the Company with the Delaware Secretary of State increasing the total number of authorized shares of common stock from 225,000,000 shares to 337,500,000 shares.

***Amendment and Restatement of the Company's 2018 Omnibus Incentive Plan***

At the reconvened Annual Meeting of Stockholders held on May 8, 2020, the Company's stockholders approved the amendment and restatement of the FuelCell Energy, Inc. 2018 Omnibus Incentive Plan (as so amended and restated, the "Plan"), which authorizes the Company to issue up to 4,000,000 additional shares of the Company's common stock pursuant to awards under the Plan and provides for an increase in the annual limit on the grant-date fair value of awards to any non-employee director of the Company from $200,000 to $250,000.

Following the approval of the Plan by the Company's stockholders at the Annual Meeting, the Plan provides the Company with the authority to issue a total of 4,333,333 shares of the Company's common stock, 1,000,000 shares of which have been reserved for settlement of restricted stock units granted pursuant to an employment agreement, effective as of August 26, 2019, between the Company and Jason Few, our President and Chief Executive Officer (the "Sign-On Award"). The Sign-On Award was contingent upon obtaining stockholder approval of a sufficient number of additional shares under the Plan. The Plan authorizes grants of stock options, stock appreciation rights, restricted stock, restricted stock units, shares, performance shares, performance units, incentive awards and dividend equivalent units to officers, other employees, directors, consultants and advisors.

***Fifth Amendment to Orion Credit Agreement***

On October 31, 2019, the Company and certain of its affiliates as guarantors entered into the Orion Credit Agreement with the Agent and certain lenders affiliated with the Agent for the $200.0 million Orion Facility, which is structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. The Orion Credit Agreement was amended on November 22, 2019, January 20, 2020, February 11, 2020 and April 30, 2020. Refer to Note 16 – "Debt and Financing Obligations" for detailed descriptions of the Orion Credit Agreement and each of these amendments thereto.

In order to alleviate substantial doubt about the Company's ability to continue as a going concern, on June 8, 2020, the Company, certain of its affiliates as guarantors, the Agent and the lenders entered into the Fifth Orion Amendment. Pursuant to the terms of the Fifth Orion Amendment, the lenders agreed to make a commitment to make certain loans to the Company in an aggregate principal amount of up to $35 million (which are referred to herein as the "Secondary Facility Loans"), and the Company, the guarantors, the Agent and the lenders agreed to amend the Orion Credit Agreement to facilitate the provision of such Secondary Facility Loans.

Pursuant to the Orion Credit Agreement, as amended by the Fifth Orion Amendment, the lenders have committed to make Secondary Facility Loans up to an aggregate amount of $35 million available to the Company for general corporate purposes of the Company or the guarantors in accordance with either (i) the then effective Operating Budget (as defined in the Orion Credit Agreement) of the Company or the guarantors or (ii) the cash use forecast delivered by the Company to the Agent on June 6, 2020. The Secondary Facility Loan commitment allows the Company to draw on the Secondary Facility Loans commencing on June 5, 2020 (the "Commencement Date") and terminating on September 14, 2020 (the "Termination

Date"). The Company may make draws on the Secondary Facility Loans in amounts of no less than $5 million, and no more than $15 million may be drawn in any 30 day period, provided that the Company may draw any remaining available funds under the Secondary Facility Loans between August 15, 2020 and the Termination Date. Any drawn amounts must be fully repaid on or before September 1, 2021 (the "Secondary Facility Repayment Date"). The amended Orion Credit Agreement contains representations and warranties, affirmative and negative covenants and events of default, including failure to make payments when due and termination of or default under certain material agreements as specified in the Orion Credit Agreement, that entitle the Agent and the lenders to cause the Company's indebtedness under the amended Orion Credit Agreement to become immediately due and payable.

In exchange for the Secondary Facility Loan commitment, the Company will pay to the lenders an option premium of $1 million on the earlier of September 14, 2020 and the date of full repayment of all amounts drawn on the Secondary Facility Loans. Such option premium is fully earned on the Commencement Date and non-refundable and non-creditable thereafter, and is due and payable whether or not any draw is ever made under the Secondary Facility Loan commitment. Additionally, for each draw made on the Secondary Facility Loans, the Company must pay to the lenders an initial draw discount of 5% of the amount drawn. In the event that full repayment of all amounts drawn under the Secondary Facility Loans has not occurred within 6 months of the date of initial draw, the Company must pay to the lenders an additional draw discount in the amount of 10% of any amount outstanding under the Secondary Facility Loans as of such date. In the event that full repayment has not occurred within 9 months of the date of initial draw under the Secondary Facility Loans, the Company must pay to the lenders an additional draw discount in the amount of 20% of any amount outstanding as of such date. All of such draw discounts will be fully earned on the respective dates and non-refundable and non-creditable thereafter, and will be due on the earlier of the Secondary Facility Repayment Date and the date of full repayment of all amounts drawn under the Secondary Facility Loans.

In connection with the lenders making the commitment to make Secondary Facility Loans, the Company is providing additional collateral to the lenders by a pledge of all of the Company's intellectual property assets. All liens on the Company's intellectual property will be released upon full repayment of all amounts drawn on the Secondary Facility Loans or upon termination of the Secondary Facility Loan commitment if no amounts are drawn.

Under the amended Orion Credit Agreement, cash interest of 9.9% per annum will be paid quarterly on all outstanding amounts under the Secondary Facility Loans. In addition to the cash interest, payment-in-kind interest of 2.05% per annum will accrue which will be added to the outstanding principal balance under the existing Orion Facility, but will be paid quarterly in cash to the extent of available cash after payment of the Company's operating expenses and the funding of certain reserves for payment of outstanding indebtedness to the State of Connecticut and Connecticut Green Bank. Any drawn amounts on the Secondary Facility Loans may be prepaid at any time without penalty.

The Company is required to prepay any draws on the Secondary Facility Loans in the event that the Company (i) issues or incurs any indebtedness (other than Permitted Indebtedness as defined in the Orion Credit Agreement) ("Debt") or (ii) issues or sells any capital stock or any option, warrant or other instrument, security or right that is convertible into or exercisable or exchangeable for capital stock ("Equity"), by applying 100% of the net proceeds of any such Debt issuance and 50% of the net proceeds of any such Equity issuance to pay down the outstanding amounts under the Secondary Facility Loans.

***Termination of At Market Issuance Sales Agreement***

On June 5, 2020, the Company provided written notice to B. Riley FBR, Inc. of the Company's determination to terminate the At Market Issuance Sales Agreement, dated October 4, 2019, effective as of 5 p.m. Eastern Time on June 12, 2020.

## ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

### FORWARD-LOOKING STATEMENTS

This Quarterly Report on Form 10-Q contains both historical and forward-looking statements that involve risks, uncertainties and assumptions. The statements contained in this report that are not purely historical are forward-looking statements that are subject to the safe harbors created under the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended, including statements regarding our expectations, beliefs, intentions and strategies for the future. When used in this report, the words "expects," "anticipates," "estimates," "projects," "intends," "plans," "believes," "predicts," "should," "will," "could," "would," "may," "forecast," and similar expressions and variations of such words are intended to identify forward-looking statements. Such statements relate to, among other things, the following: (i) the development and commercialization by FuelCell Energy, Inc. and its subsidiaries of fuel cell technology and products and the market for such products; (ii) expected operating results such as revenue growth and earnings; (iii) our belief that we have sufficient liquidity to fund our business operations for the next 12 months; (iv) future funding under Advanced Technologies contracts; (v) future financing for projects, including equity and debt investments by investors and commercial bank financing, as well as overall financial market conditions; (vi) actions by our current loan counterparties; (vii) our ability to comply with the terms and conditions of our loans, including the use proceeds of our loans as described herein; (viii) the expected cost competitiveness of our technology; and (ix) our ability to achieve our sales plans, market access and market expansion goals, and cost reduction targets.

The forward-looking statements contained in this report are subject to risks and uncertainties, known and unknown, that could cause actual results to differ materially from those forward-looking statements, including the risks contained in the section below entitled "Item 1A. Risk Factors," and the following risks and uncertainties: general risks associated with product development and manufacturing; general economic conditions; changes in the utility regulatory environment; changes in the utility industry and the markets for distributed generation, distributed hydrogen, and carbon capture configured fuel cell power plants; potential volatility of energy prices; availability of government subsidies and economic incentives for alternative energy technologies; our ability to remain in compliance with U.S. federal and state and foreign government laws and regulations and the listing rules of The Nasdaq Stock Market ("Nasdaq"); rapid technological change; competition; our dependence on strategic relationships; market acceptance of our products; changes in accounting policies or practices adopted voluntarily or as required by accounting principles generally accepted in the United States; factors affecting our liquidity position and financial condition; government appropriations; the ability of the government to terminate its development contracts at any time; the ability of the government to exercise "march-in" rights with respect to certain of our patents; the situation with POSCO Energy which has limited and continues to limit our efforts to access the South Korean and Asian markets and could expose us to costs of arbitration or litigation proceedings; our ability to implement our strategy; our ability to reduce our levelized cost of energy and our cost reduction strategy generally; our ability to protect our intellectual property; litigation and other proceedings; the risk that commercialization of our products will not occur when anticipated; our need for and the availability of additional financing; our ability to generate positive cash flow from operations; our ability to service our long-term debt; our ability to increase the output and longevity of our power plants; our ability to expand our customer base and maintain relationships with our largest customers and strategic business allies; changes by the U.S. Small Business Administration (the "SBA") or other governmental authorities regarding the CARES Act, the Payroll Protection Program or related administrative matters; and concerns with, threats of, or the consequences of, pandemics, contagious diseases or health epidemics, including the novel coronavirus ("COVID-19"), and resulting supply chain disruptions, shifts in clean energy demand, impacts to our customers' capital budgets and investment plans, impacts to our project schedules, impacts to our ability to service existing projects, and impacts on the demand for our products.

We cannot assure you that: we will be able to meet any of our development or commercialization schedules; we will be able to remain in compliance with the minimum bid price requirement of the Nasdaq listing rules; any of our new products or technologies, once developed, will be commercially successful; our existing SureSource power plants will remain commercially successful; we will be able to obtain financing or raise capital to achieve our business plans; the government will appropriate the funds anticipated by us under our government contracts; the government will not exercise its right to terminate any or all of our government contracts; or we will be able to achieve any other result anticipated in any other forward-looking statement contained herein.

Investors are cautioned that any such forward-looking statements are not guarantees of future performance and involve risks and uncertainties, many of which are beyond our ability to control, and that actual results may differ materially from those projected in the forward-looking statements as a result of various factors discussed herein.

Management's Discussion and Analysis of Financial Condition and Results of Operations is provided as a supplement to the accompanying financial statements and footnotes to help provide an understanding of our financial condition, changes in our financial condition and results of operations. The preparation of financial statements and related disclosures requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities, as well as management's assessment of the Company's ability to meet its obligations as they come due over the next twelve months. Actual results could differ from those estimates. Estimates are used in accounting for, among other things, revenue recognition, contract loss accruals, excess, slow-moving and obsolete inventories, product warranty accruals, share-based compensation expense, fair value measurements, allowance for doubtful accounts, depreciation and amortization, impairment of goodwill and intangible assets, impairment of long-lived assets (including project assets), lease liabilities and right-of-use ("ROU") assets and contingencies, and in management's assessment of the Company's ability to meet its obligations as they come due over the next twelve months. Estimates and assumptions are reviewed periodically, and the effects of revisions are reflected in the consolidated financial statements in the period they are determined to be necessary. Due to the inherent uncertainty involved in making estimates, actual results in future periods may differ from those estimates. The following discussion should be read in conjunction with information included in our Annual Report on Form 10-K for the fiscal year ended October 31, 2019 filed with the Securities and Exchange Commission ("SEC"). Unless otherwise indicated, the terms "Company", "FuelCell Energy", "we", "us", and "our" refer to FuelCell Energy, Inc. and its subsidiaries. All tabular dollar amounts are in thousands.

## OVERVIEW AND RECENT DEVELOPMENTS

***Overview***

FuelCell Energy was founded more than 50 years ago in 1969. We began selling stationary fuel cell power plants commercially in 2003. With more than 10.0 million megawatt hours of clean electricity produced, FuelCell Energy is now a global leader in delivering environmentally-responsible distributed baseload power solutions through our proprietary, molten-carbonate fuel cell technology. Today, we develop turn-key distributed power generation solutions and operate and provide comprehensive service for the life of the power plant. We are working to expand the proprietary technologies that we have developed over the past five decades into new products, applications, markets and geographies.

Our mission and purpose remains to utilize our proprietary, state-of-the-art fuel cell platforms to reduce the global environmental footprint of baseload power generation by providing environmentally responsible solutions for reliable electrical power, hot water, steam, chilling, distributed hydrogen, micro-grid applications, electrolysis, long-duration hydrogen-based energy storage and carbon capture and, in so doing, drive demand for our products and services, thus realizing positive stockholder returns.

***Recent Developments***

**Impact of the COVID-19 Pandemic**

On March 18, 2020, in response to the COVID-19 pandemic, we temporarily suspended operations at our Torrington, Connecticut manufacturing facility and also ordered those employees that could work from home to do so. This suspension was subsequently extended following the guidance of Connecticut's stay at home orders, and we now are tentatively planning to resume operations in the manufacturing facility on June 22, 2020. We continue to evaluate our plans based on federal, state and local guidance, evolving data concerning the pandemic and the best interests of our employees, customers and stockholders. All employees that are not able to work from home due to their job function are still receiving full wages and benefits. To date, we have not implemented any furlough, layoff or shared work program supported by the State of Connecticut. If production resumes as currently planned on June 22, 2020, we do not expect a material adverse impact to current project schedules as a result of the shutdown. However, if we do not resume production as planned, our project schedules and associated financing could be adversely affected. Additionally, while we have attempted to continue business development activities during the pandemic, state and local shut downs, shelter in place orders and travel restrictions have impeded our ability to meet with customers and solicit new business and certain bids and solicitations in which we typically participate have been postponed. We expect these impacts to continue until such shut downs, shelter in place orders and travel restrictions are fully lifted and bids and solicitations are allowed to proceed. Refer to the section below entitled "Item 1A. Risk Factors" for more information concerning risks to our business associated with COVID-19.

As described in further detail under "Liquidity and Capital Resources – Commitments and Significant Contractual Obligations" below, on April 20, 2020, we entered into a Paycheck Protection Program Promissory Note, dated April 16, 2020 (the "PPP Note"), evidencing a loan to us from Liberty Bank under the CARES Act. Pursuant to the PPP Note, we received total proceeds of approximately $6.5 million on April 24, 2020. In order to obtain the consent of the Agent (as defined below) and the Orion Lenders (as defined below) under the Orion Facility (as defined below) to enter into the PPP Note, the Agent and the Orion Lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020. If we seek forgiveness of the loan, we must apply for such forgiveness by October 31, 2020.

On June 5, 2020, the Paycheck Protection Program Flexibility Act (the "PPP Flexibility Act") was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note.

While we may apply for forgiveness of the PPP Note in accordance with the requirements and limitations under the CARES Act and the SBA regulations and requirements, no assurance can be given that any portion of the PPP Note will be forgiven. Based on guidance from the United States Department of the Treasury, since the total PPP Note proceeds exceeded $2.0 million, our forgiveness application will be subject to audit by the SBA.

**Increase in Authorized Shares**

We obtained stockholder approval on May 8, 2020 at the reconvened Annual Meeting of Stockholders to increase the number of shares of common stock we are authorized to issue under our Certificate of Incorporation, as amended. Our stockholders approved a 112,500,000 increase in the number of authorized shares of common stock. Accordingly, on May 11, 2020, we filed a Certificate of Amendment of the Certificate of Incorporation with the Delaware Secretary of State increasing the total number of authorized shares of common stock from 225,000,000 shares to 337,500,000 shares. Upon approval of the Board of Directors, the newly authorized shares of common stock may be issuable for any proper corporate purposes, including future acquisitions, investment opportunities, the establishment of collaboration or other strategic agreements, capital raising transactions of equity or convertible debt securities, future at the market offerings of common stock, stock splits, stock dividends, issuance under current or future employee equity plans or for other corporate purposes.

**Amendment and Restatement of the Company's 2018 Omnibus Incentive Plan**

At the reconvened Annual Meeting of Stockholders held on May 8, 2020, our stockholders approved the amendment and restatement of the FuelCell Energy, Inc. 2018 Omnibus Incentive Plan (as so amended and restated, the "Plan"), which authorizes us to issue up to 4,000,000 additional shares of

our common stock pursuant to awards under the Plan and provides for an increase in the annual limit on the grant-date fair value of awards to any non-employee director of the Company from $200,000 to $250,000.

Following the approval of the Plan by our stockholders at the Annual Meeting, the Plan provides us with the authority to issue a total of 4,333,333 shares of the Company's common stock, 1,000,000 shares of which have been reserved for settlement of restricted stock units granted pursuant to an employment agreement, effective as of August 26, 2019, between the Company and Jason Few, our President and Chief Executive Officer (the "Sign-On Award"). The Sign-On Award was contingent upon stockholder approval of a sufficient number of additional shares under the Plan. The Plan authorizes grants of stock options, stock appreciation rights, restricted stock, restricted stock units, shares, performance shares, performance units, incentive awards and dividend equivalent units to officers, other employees, directors, consultants and advisors.

**Fifth Amendment to Orion Credit Agreement**

On October 31, 2019, the Company and certain of its affiliates as guarantors entered into a Credit Agreement (as amended from time to time, the "Orion Credit Agreement") with Orion Energy Partners Investment Agent, LLC, as Administrative Agent and Collateral Agent (the "Agent"), and certain lenders affiliated with the Agent for a $200.0 million senior secured credit facility (the "Orion Facility"), structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. The Orion Credit Agreement was amended on November 22, 2019, January 20, 2020, February 11, 2020 and April 30, 2020. Refer to Note 16 – "Debt and Financing Obligations" and "Management's Discussion and Analysis of Financial Condition and Results of Operations – Liquidity and Capital Resources – Commitments and Significant Contractual Obligations" - for detailed descriptions of the Orion Credit Agreement and each of these amendments thereto.

In order to alleviate substantial doubt about the Company's ability to continue as a going concern, on June 8, 2020, the Company, certain of its affiliates as guarantors, the Agent and the lenders entered into the Fifth Amendment to the Orion Credit Agreement (the "Fifth Orion Amendment"). Pursuant to the terms of the Fifth Orion Amendment, the lenders agreed to make a commitment to make certain loans to the Company in an aggregate principal amount of up to $35 million (the "Secondary Facility Loans"), and the Company, the guarantors, the Agent and the lenders agreed to amend the Orion Credit Agreement to facilitate the provision of such Secondary Facility Loans.

Pursuant to the Orion Credit Agreement, as amended by the Fifth Orion Amendment, the lenders have committed to make Secondary Facility Loans up to an aggregate amount of $35 million available to the Company for general corporate purposes of the Company or the guarantors in accordance with either (i) the then effective Operating Budget (as defined in the Orion Credit Agreement) of the Company or the guarantors or (ii) the cash use forecast delivered by the Company to the Agent on June 6, 2020. The Secondary Facility Loan commitment allows the Company to draw on the Secondary Facility Loans commencing on June 5, 2020 (the "Commencement Date") and terminating on September 14, 2020 (the "Termination Date"). The Company may make draws on the Secondary Facility Loans in amounts of no less than $5 million, and no more than $15 million may be drawn in any 30 day period, provided that the Company may draw any remaining available funds under the Secondary Facility Loans between August 15, 2020 and the Termination Date. Any drawn amounts must be fully repaid on or before September 1, 2021 (the "Secondary Facility Repayment Date"). The amended Orion Credit Agreement contains representations and warranties, affirmative and negative covenants and events of default, including failure to make payments when due and termination of or default under certain material agreements as specified in the Orion Credit Agreement, that entitle the Agent and the lenders to cause the Company's indebtedness under the amended Orion Credit Agreement to become immediately due and payable.

In exchange for the Secondary Facility Loan commitment, the Company will pay to the lenders an option premium of $1 million on the earlier of September 14, 2020 and the date of full repayment of all amounts drawn on the Secondary Facility Loans. Such option premium is fully earned on the Commencement Date and non-refundable and non-creditable thereafter, and is due and payable whether or not any draw is ever made under the Secondary Facility Loan commitment. Additionally, for each draw made on the Secondary Facility Loans, the Company must pay to the lenders an initial draw discount of 5% of the amount drawn. In the event that full repayment of all amounts drawn under the Secondary Facility Loans has not occurred within 6 months of the date of initial draw, the Company must pay to the lenders an additional draw discount in the amount of 10% of any amount outstanding under the Secondary Facility Loans as of such date. In the event that full repayment has not occurred within 9 months of the date of initial draw under the Secondary Facility Loans, the Company must pay to the lenders an additional draw discount in the amount of 20% of any amount outstanding as of such date. All of such draw discounts will be fully earned on the respective dates and non-refundable and non-creditable thereafter, and will be due on the earlier of the Secondary Facility Repayment Date and the date of full repayment of all amounts drawn under the Secondary Facility Loans.

In connection with the lenders making the commitment to make Secondary Facility Loans, the Company is providing additional collateral to the lenders by a pledge of all of the Company's intellectual property assets. All liens on the Company's intellectual property will be released upon full repayment of all amounts drawn on the Secondary Facility Loans or upon termination of the Secondary Facility Loan commitment if no amounts are drawn.

Under the amended Orion Credit Agreement, cash interest of 9.9% per annum will be paid quarterly on all outstanding amounts under the Secondary Facility Loans. In addition to the cash interest, payment-in-kind interest of 2.05% per annum will accrue which will be added to the outstanding principal balance under the existing Orion Facility, but will be paid quarterly in cash to the extent of available cash after payment of the Company's operating expenses and the funding of certain reserves for payment of outstanding indebtedness to the State of Connecticut and Connecticut Green Bank. Any drawn amounts on the Secondary Facility Loans may be prepaid at any time without penalty.

The Company is required to prepay any draws on the Secondary Facility Loans in the event that the Company (i) issues or incurs any indebtedness (other than Permitted Indebtedness as defined in the Orion Credit Agreement) ("Debt") or (ii) issues or sells any capital stock or any option, warrant or other instrument, security or right that is convertible into or exercisable or exchangeable for capital stock ("Equity"), by applying 100% of the net proceeds of any such Debt issuance and 50% of the net proceeds of any such Equity issuance to pay down the outstanding amounts under the Secondary Facility Loans.

**Termination of At Market Issuance Sales Agreement**

On June 5, 2020, the Company provided written notice to B. Riley FBR, Inc. of the Company's determination to terminate the At Market Issuance Sales Agreement, dated October 4, 2019, effective as of 5 p.m. Eastern Time on June 12, 2020.

## RESULTS OF OPERATIONS

Management evaluates our results of operations and cash flows using a variety of key performance indicators, including revenues compared to prior periods and internal forecasts, costs of our products and results of our cost reduction initiatives, and operating cash use. These are discussed throughout the "Results of Operations" and "Liquidity and Capital Resources" sections. Results of Operations are presented in accordance with accounting principles generally accepted in the United States ("GAAP").

### Comparison of Three Months Ended April 30, 2020 and 2019

**Revenues and Costs of revenues**

Our revenues and cost of revenues for the three months ended April 30, 2020 and 2019 were as follows:

| | Three Months Ended April 30, | | Change | |
|---|---|---|---|---|
| (dollars in thousands) | 2020 | 2019 | $ | % |
| Total revenues | $ 18,880 | $ 9,216 | $ 9,664 | 105% |
| Total costs of revenues | $ 18,713 | $ 12,856 | $ 5,857 | 46% |
| Gross profit (loss) | $ 167 | $ (3,640) | $ 3,807 | 105% |
| Gross margin | 0.9% | (39.5)% | | |

Total revenues for the three months ended April 30, 2020 of $18.9 million reflects an increase of $9.7 million from $9.2 million during the same period in the prior year. Cost of revenues for the three months ended April 30, 2020 of $18.7 million reflect a $5.9 million increase from $12.9 million during the same period in the prior year. A discussion of the changes in product revenues, service and license revenues, generation revenues and Advanced Technologies contract revenues follows.

***Product revenues***

Our product revenues, cost of product revenues and gross loss from product revenues for the three months ended April 30, 2020 and 2019 were as follows:

| | Three Months Ended April 30, | | Change | |
|---|---|---|---|---|
| (dollars in thousands) | 2020 | 2019 | $ | % |
| Product revenues | $ — | $ — | $ — | N/A |
| Cost of product revenues | 2,838 | 6,393 | (3,555) | (56)% |
| Gross loss from product revenues | $ (2,838) | $ (6,393) | $ 3,555 | 56% |
| Product gross margin | N/A | N/A | | |

There was no product revenue during the three months ended April 30, 2020 and 2019.

Cost of product revenues decreased $3.6 million for the three months ended April 30, 2020 to $2.8 million, compared to $6.4 million in the same period in the prior year. Both periods were impacted by the under-absorption of fixed overhead costs due to low production volumes, but there were lower overall manufacturing costs for the three months ended April 30, 2020 due to the Company's reduction in workforce that was implemented during April of 2019 and the shutdown of our Torrington manufacturing facility due to the COVID-19 pandemic. The Company incurred approximately $1.0 million of manufacturing variances in the quarter ended April 30, 2020 due to the plant shutdown, which negatively impacted gross margin. Manufacturing variances, primarily related to low production volumes and other charges, totaled approximately $2.7 million for the three months ended April 30, 2020 compared to approximately $3.4 million for the three months ended April 30, 2019. Cost of product revenues for the three months ended April 30, 2019 also includes a charge for a specific non-commercial construction in process asset related to automation equipment for use in manufacturing with a carrying value of $2.8 million, which was impaired due to uncertainty as to whether the asset will be completed as a result of our liquidity position and continued low level of production rates. For the three months ended April 30, 2020, we operated at

an annualized production rate of approximately 12 megawatts ("MW"), which is a reduction from the annual production rate of 25 MW in fiscal 2019, which reduction is a result of the March 18, 2020 plant shutdown that was implemented in response to the COVID-19 pandemic.

As of April 30, 2020, there was no product sales backlog, compared to $1,000 of product sales backlog as of April 30, 2019.

***Service and license revenues***

Service and license revenues and related costs for the three months ended April 30, 2020 and 2019 were as follows:

| (dollars in thousands) | Three Months Ended April 30, 2020 | 2019 | Change $ | Change % |
|---|---|---|---|---|
| Service and license revenues | $ 6,972 | $ 2,598 | $ 4,374 | 168% |
| Cost of service and license revenues | 5,967 | 1,745 | 4,222 | 242% |
| Gross profit from service and license revenues | $ 1,005 | $ 853 | $ 152 | 18% |
| Service and license revenues gross margin | 14.4% | 32.8% | | |

Revenues for the three months ended April 30, 2020 from service agreements and license fee and royalty agreements increased $4.4 million to $7.0 million from $2.6 million for the three months ended April 30, 2019. Service and license revenues increased primarily as a result of revenue recorded in connection with module replacements, partially offset by higher performance guarantees, during the three months ended April 30, 2020.

Cost of service and license revenues increased $4.2 million to $6.0 million for the three months ended April 30, 2020 from $1.7 million for the three months ended April 30, 2019, due to the fact that there were module replacements in the three months ended April 30, 2020 compared to no module replacements in the three months ended April 30, 2019. Cost of service agreements includes maintenance and operating costs and module exchanges.

Overall gross profit from service and license revenues was $1.0 million for the three months ended April 30, 2020, which represents an increase of $0.1 million from a gross profit of $0.9 million for the three months ended April 30, 2019. The overall gross margin percentage was 14.4% for the three months ended April 30, 2020 compared to a gross margin of 32.8% in the prior year period. Gross margin decreased in the quarter ended April 30, 2020 primarily as a result of higher performance guarantees compared to the quarter ended April 30, 2019.

As of April 30, 2020, service and license backlog totaled approximately $183.3 million, compared to $224.3 million as of April 30, 2019. Service and license backlog does not include future variable royalties under license agreements. This backlog relates to service agreements of up to twenty years and is expected to generate positive margins and cash flows based on current estimates. The decrease in service backlog is primarily due to the acquisition of the Bridgeport Fuel Cell Project, as the service backlog of $30.4 million previously remaining for such project was eliminated. This acquisition resulted in additional revenue to be recorded under the power purchase agreement ("PPA") as compared to the service agreement. Service backlog also includes future license revenue.

***Generation revenues***

Generation revenues and related costs for the three months ended April 30, 2020 and 2019 were as follows:

| (dollars in thousands) | Three Months Ended April 30, 2020 | 2019 | Change $ | Change % |
|---|---|---|---|---|
| Generation revenues | $ 4,631 | $ 1,633 | $ 2,998 | 184% |
| Cost of generation revenues | 5,692 | 1,685 | 4,007 | 238% |
| Gross loss from generation revenues | $ (1,061) | $ (52) | $ (1,009) | 1940% |
| Generation revenues gross margin | (22.9)% | (3.2)% | | |

Revenues from generation for the three months ended April 30, 2020 totaled $4.6 million, which represents an increase of $3.0 million from revenue recognized of $1.6 million for the three months ended April 30, 2019. Generation revenues for the three months ended April 30, 2020 and 2019 reflect revenue from electricity generated under our PPAs. Generation revenues increased for the three months ended April 30, 2020 compared to the same period in the prior year due to additional revenue recorded for the PPA associated with the Bridgeport Fuel Cell Project, which was acquired on May 9, 2019, and the closing of a sale-leaseback financing transaction with respect to the Tulare BioMAT project during the three months ended April 30, 2020. Cost of generation revenues totaled $5.7 million in the three months ended April 30, 2020, which represents an increase from the comparable prior year period as a result of the addition of the Bridgeport Fuel Cell Project, costs in the quarter ended April 30, 2020 related to sales taxes incurred in connection with the financing of the Tulare BioMAT project and certain maintenance and repair costs (for maintenance and repairs at several plants) incurred in the quarter ended April 30, 2020. Cost of generation revenues included depreciation and amortization of approximately $3.1 million and $1.0 million for the three months ended April 30, 2020 and 2019, respectively. We had 32.6 MW of operating power plants in our portfolio as of April 30, 2020, compared to 11.2 MW as of April 30, 2019. This increase is primarily a result of the acquisition of the Bridgeport Fuel Cell Project.

As of April 30, 2020, generation backlog totaled approximately $1.1 billion, compared to $1.0 billion as of April 30, 2019.

***Advanced Technologies contract revenues***

Advanced Technologies contract revenues and related costs for the three months ended April 30, 2020 and 2019 were as follows:

| (dollars in thousands) | Three Months Ended April 30, 2020 | 2019 | Change $ | Change % |
|---|---|---|---|---|
| Advanced Technologies contract revenues | $ 7,277 | $ 4,985 | $ 2,292 | 46% |
| Cost of Advanced Technologies contract revenues | 4,216 | 3,033 | 1,183 | 39% |
| Gross profit from Advanced Technologies contracts | $ 3,061 | $ 1,952 | $ 1,109 | 57% |
| Advanced Technologies contract gross margin | 42.1% | 39.2% | | |

Advanced Technologies contract revenues for the three months ended April 30, 2020 were $7.3 million, which reflects an increase of $2.3 million when compared to $5.0 million of revenues for the three months ended April 30, 2019. Advanced Technologies contract revenues were higher for the three months ended April 30, 2020 as a result of the addition of the Company's Joint Development Agreement with EMRE (which was executed during the first quarter of fiscal 2020) and due to the timing of activity under other existing contracts. Cost of Advanced Technologies contract revenues increased $1.2 million to $4.2 million for the three months ended April 30, 2020, compared to $3.0 million for the same period in the prior year. Advanced Technologies contracts for the three months ended April 30, 2020 generated a gross margin of $3.1 million compared to a gross margin of $2.0 million for the three months ended April 30, 2019. The increase in Advanced Technologies contract gross margin is related to the timing and mix of contracts, which were more heavily weighted to the Company's Joint Development Agreement with EMRE (which was entered into on November 5, 2019), during the three months ended April 30, 2020, compared to the same period in the prior year.

As of April 30, 2020, Advanced Technologies backlog totaled approximately $56.8 million, compared to $32.9 million as of April 30, 2019. This increase was primarily a result of the Joint Development Agreement with EMRE.

**Administrative and selling expenses**

Administrative and selling expenses were $7.2 million and $9.8 million for the three months ended April 30, 2020 and 2019, respectively. The decrease from the same period in the prior year primarily relates to the additional legal and consulting costs incurred in connection with the restructuring and refinancing initiatives undertaken in 2019.

**Research and development expenses**

Research and development expenses decreased to $1.1 million for the three months ended April 30, 2020 compared to $4.2 million during the three months ended April 30, 2019. The decrease related to the reduction in spending resulting from the restructuring initiatives implemented in 2019 and the reduction in the resources being allocated to research and development (as resources were instead allocated to funded Advanced Technologies projects).

**Loss from operations**

Loss from operations for the three months ended April 30, 2020 was $8.1 million compared to $17.6 million for the three months ended April 30, 2019. The decrease in the loss from operations was primarily a result of a lower gross loss and lower operating expenses for the three months ended April 30, 2020 primarily due to lower spending (personnel and overhead costs) resulting from the restructuring initiatives implemented in 2019 and the reduction in the resources being allocated to research and development.

**Interest expense**

Interest expense for the three months ended April 30, 2020 and 2019 was $3.6 million and $1.8 million, respectively. Interest expense for both periods presented includes interest expense related to sale-leaseback transactions and interest for the amortization of the redeemable preferred stock of subsidiary fair value discount. The increase in interest expense during the three months ended April 30, 2020 primarily represents additional interest on the $80.0 million outstanding under our Credit Agreement with Orion Energy Partners Investment Agent, LLC and its affiliated lenders and interest on the loans made by Fifth Third Bank and Liberty Bank in connection with the acquisition of the Bridgeport Fuel Cell Project (the "Bridgeport Loans"). The interest expense during the three months ended April 30, 2019 primarily included interest on outstanding amounts under our loan and security agreement with Hercules Capital, Inc.

**Change in fair value of common stock warrant liability**

The $3.4 million expense for the three months ended April 30, 2020 represents an adjustment to the estimated fair value of the warrants still outstanding as of April 30, 2020 that were issued to the lenders under our Credit Agreement with Orion Energy Partners Investment Agent, LLC and its affiliated lenders based on a Black-Scholes model. The expense is primarily a result of an increase in the stock price during the quarter ended April 30, 2020.

**Other income (expense), net**

Other income (expense), net was other income of $0.3 million and other expense of $0.03 million for the three months ended April 30, 2020 and 2019, respectively. Other income, net for the three months ended April 30, 2020 primarily relates to a foreign exchange gain of $0.9 million related to the remeasurement of the Canadian Dollar denominated preferred stock obligation of our U.S. Dollar functional currency Canadian subsidiary offset by a loss of approximately $0.5 million related to the remeasurement of the interest rate swap on the Bridgeport Loans.

**Benefit for income taxes, net**

We have not paid federal or state income taxes in several years due to our history of net operating losses, although we have paid foreign income and withholding taxes in South Korea. Income tax recorded for the three months ended April 30, 2020 and 2019 was $0.01 million and $0.07 million, respectively.

**Series A warrant exchange**

On February 21, 2019, we entered into an Exchange Agreement (the "Exchange Agreement") with the holder (the "Warrant Holder") of the Series A Warrant to Purchase Common Stock, issued by us on July 12, 2016 (the "Series A Warrant"), which was exercisable for 640,000 shares of our common stock. Pursuant to the Exchange Agreement, we agreed to issue to the Warrant Holder 500,000 shares of our common stock (subject to adjustment for stock dividends, stock splits, stock combinations, and other reclassifications) in exchange for the transfer of the Series A Warrant back to us, in reliance on an exemption from registration provided by Section 3(a)(9) of the Securities Act of 1933, as amended. All common shares issuable pursuant to the Exchange Agreement were issued prior to April 30, 2019. Following the transfer of the Series A Warrant back to us, the Warrant was cancelled and no further shares are issuable pursuant to the Series A Warrant. During the three months ended April 30, 2019, we recorded a charge to common stockholders for the difference between the fair value of the Series A Warrant prior to the modification of $0.3 million and the fair value of the common shares issuable at the date of the Exchange Agreement of $3.5 million.

**Series B preferred stock dividends**

Dividends recorded on our 5% Series B Cumulative Convertible Perpetual Preferred Stock ("Series B Preferred Stock") were $0.8 million for the three month periods ended April 30, 2020 and 2019.

**Series C preferred stock deemed contributions**

During the three months ended April 30, 2019, conversions of our Series C Convertible Preferred Stock ("Series C Preferred Stock") resulted in a variable number of shares of our common stock being issued to settle the conversion amounts and were treated as a partial redemption of our Series C Preferred Stock. Conversions during the three months ended April 30, 2019 that were settled in a variable number of shares and treated as partial redemptions resulted in deemed contributions of $1.1 million. The deemed contributions represent the difference between the fair value of the common shares issued to settle the conversion amounts and the carrying value of the Series C Preferred Stock. The Company also accounted for an extinguishment of the Series C Preferred Stock as a result of the extinguishment by recording a deemed contribution of $0.5 million during the three months ended April 30, 2019.

The last outstanding shares of Series C Preferred Stock were converted into common stock on May 23, 2019, so there were no shares of Series C Preferred Stock outstanding during the three months ended April 30, 2020.

**Series D preferred stock deemed dividends**

During the three months ended April 30, 2019, conversions of our Series D Convertible Preferred Stock ("Series D Preferred Stock") in which the conversion price was below the initial conversion price (as adjusted for the reverse stock split) of $16.56 per share resulted in a variable number of shares of our common stock being issued to settle the conversion amounts and were treated as a partial redemption of the shares of our Series D Preferred Stock. Conversions during the three months ended April 30, 2019 that were settled in a variable number of shares and treated as redemptions resulted in deemed dividends of $1.0 million. The deemed dividends represent the difference between the fair value of the common shares issued to settle the conversion amounts and the carrying value of the Series D Preferred Stock.

The last outstanding shares of Series D Preferred Stock were converted into common stock on October 1, 2019, so there were no shares of Series D Preferred Stock outstanding during the three months ended April 30, 2020.

**Net loss attributable to common stockholders and loss per common share**

Net loss attributable to common stockholders for the quarter ended April 30, 2019 represents the net loss for the period less the Series A warrant exchange, the preferred stock dividends on the Series B Preferred Stock, the preferred stock deemed contributions on the Series C Preferred Stock and the Series D Preferred Stock deemed dividends. For the three month periods ended April 30, 2020 and 2019, net loss attributable to common stockholders was $15.6 million and $22.9 million, respectively, and loss per common share was $0.07 and $2.06, respectively. The decrease in the net loss for the three-months ended April 30, 2020 is primarily due a lower gross loss, lower operating expenses, the fact that there were no adjustments recorded for the Series A warrants and the Series D Preferred Stock deemed dividends, and the fact that there were no Series C Preferred Stock deemed contributions. The lower loss per common share primarily is due to the higher weighted average shares outstanding due to share issuances since April 30, 2019.

**Comparison of Six Months Ended April 30, 2020 and 2019**

**Revenues and Costs of revenues**

Our revenues and cost of revenues for the six months ended April 30, 2020 and 2019 were as follows:

| (dollars in thousands) | Six Months Ended April 30, 2020 | Six Months Ended April 30, 2019 | Change $ | Change % |
|---|---|---|---|---|
| Total revenues | $ 35,144 | $ 26,999 | $ 8,145 | 30% |
| Total costs of revenues | $ 31,696 | $ 32,844 | $ (1,148) | (3)% |
| Gross profit (loss) | $ 3,448 | $ (5,845) | $ 9,293 | (159)% |
| Gross margin | 9.8% | (21.6)% | | |

Total revenues for the six months ended April 30, 2020 of $35.1 million reflects an increase of $8.1 million from $27.0 million during the same period in the prior year. Cost of revenues for the six months ended April 30, 2020 of $31.7 million reflects a $1.1 million decrease from $32.8 million during the same period in the prior year. A discussion of the changes in product revenues, service and license revenues, generation revenues and Advanced Technologies contract revenues follows.

***Product revenues***

Our product revenues, cost of product revenues and gross loss from product revenues for the six months ended April 30, 2020 and 2019 were as follows:

| (dollars in thousands) | Six Months Ended April 30, 2020 | Six Months Ended April 30, 2019 | Change $ | Change % |
|---|---|---|---|---|
| Product revenues | $ — | $ — | $ — | N/A |
| Cost of product revenues | 4,854 | 9,815 | (4,961) | (51)% |
| Gross loss from product revenues | $ (4,854) | $ (9,815) | $ 4,961 | -51% |
| Product revenues gross loss | N/A | N/A | | |

There was no product revenue during the six months ended April 30, 2020 and 2019.

Cost of product revenues decreased $5.0 million for the six months ended April 30, 2020 to $4.9 million, compared to $9.8 million in the same period in the prior year. Both periods were impacted by the under-absorption of fixed overhead costs due to low production volumes, but there were lower overall manufacturing costs for the six months ended April 30, 2020 due to the Company's reduction in workforce that was implemented during April of 2019. Manufacturing variances, primarily related to low production volumes and other charges, totaled approximately $4.4 million for the six months ended April 30, 2020 compared to approximately $6.6 million for the six months ended April 30, 2019. Cost of product revenues for the six months ended April 30, 2019 also includes a charge for a specific non-commercial construction in process asset related to automation equipment for use in manufacturing with a carrying value of $2.8 million, which was impaired due to uncertainty as to whether the asset will be completed as a result of our liquidity position and continued low level of production rates. For the six months ended April 30, 2020, we operated at an annualized production rate of approximately 16.5 MW, which is a reduction from the annual production rate of 25 MW in fiscal 2019, which reduction is a result of the March 18, 2020 plant shutdown that was implemented in response to the COVID-19 pandemic.

***Service and license revenues***

Service and license revenues and related costs for the six months ended April 30, 2020 and 2019 were as follows:

| (dollars in thousands) | Six Months Ended April 30, 2020 | Six Months Ended April 30, 2019 | Change $ | Change % |
|---|---|---|---|---|
| Service and license revenues | $ 12,584 | $ 14,370 | $ (1,786) | (12)% |
| Cost of service and license revenues | 7,585 | 14,064 | (6,479) | (46)% |
| Gross profit from service and license revenues | $ 4,999 | $ 306 | $ 4,693 | 1534% |
| Service and license revenues gross margin | 39.7% | 2.1% | | |

Revenues for the six months ended April 30, 2020 from service agreements and license fee and royalty agreements decreased $1.8 million to $12.6 million from $14.4 million for the six months ended April 30, 2019. Service and license revenues decreased primarily as a result of the fact that there was less revenue recorded in connection with module replacements during the six months ended April 30, 2020. In addition, the six months ended April 30, 2019 included revenue recorded for the Bridgeport Fuel Cell Project service agreement. As a result of the purchase by the Company of the Bridgeport Fuel Cell Project on May 9, 2019, revenue under this service agreement is no longer being recognized. Service and license revenue for the six months ended April 30, 2020 includes license revenues of $4.0 million associated with the Joint Development Agreement entered into with EMRE on November 5, 2019.

Cost of service and license revenues decreased $6.5 million to $7.6 million for the six months ended April 30, 2020 from $14.1 million for the six months ended April 30, 2019, due to the fact that there were fewer module replacements in the six months ended April 30, 2020. Cost of service agreements includes maintenance and operating costs and module exchanges.

Overall gross profit from service and license revenues was $5.0 million for the six months ended April 30, 2020, which represents an increase of $4.7 million from a gross profit of $0.3 million for the six months ended April 30, 2019. This increase is primarily a result of the license revenues associated with the Joint Development Agreement entered into with EMRE. The overall gross margin percentage was 39.7% for the six months ended April 30, 2020 compared to a gross margin of 2.1% in the prior year period.

***Generation revenues***

Generation revenues and related costs for the six months ended April 30, 2020 and 2019 were as follows:

| | Six Months Ended April 30, | | Change | |
|---|---|---|---|---|
| (dollars in thousands) | 2020 | 2019 | $ | % |
| Generation revenues | $ 10,073 | $ 3,112 | $ 6,961 | 224% |
| Cost of generation revenues | 11,249 | 3,321 | 7,928 | 239% |
| Gross loss from generation revenues | $ (1,176) | $ (209) | $ (967) | 463% |
| Generation revenues gross margin | (11.7)% | (6.7)% | | |

Revenues from generation for the six months ended April 30, 2020 totaled $10.1 million, which represents an increase of $7.0 million from revenue recognized of $3.1 million for the six months ended April 30, 2019. Generation revenues for the six months ended April 30, 2020 and 2019 reflect revenue from electricity generated under our PPAs. Generation revenues increased for the six months ended April 30, 2020 compared to the same period in the prior year due to additional revenue recorded for the PPA associated with the Bridgeport Fuel Cell Project, which was acquired on May 9, 2019. Cost of generation revenues totaled $11.2 million in the six months ended April 30, 2020, which represents an increase from the comparable prior year period. Cost of generation revenues included depreciation and amortization of approximately $6.5 million and $2.1 million for the six months ended April 30, 2020 and 2019, respectively. We had 32.6 MW of operating power plants in our portfolio as of April 30, 2020, compared to 11.2 MW as of April 30, 2019. This increase is primarily a result of the acquisition of the Bridgeport Fuel Cell Project.

***Advanced Technologies contract revenues***

Advanced Technologies contract revenues and related costs for the six months ended April 30, 2020 and 2019 were as follows:

| | Six Months Ended April 30, | | Change | |
|---|---|---|---|---|
| (dollars in thousands) | 2020 | 2019 | $ | % |
| Advanced Technologies contract revenues | $ 12,487 | $ 9,517 | $ 2,970 | 31% |
| Cost of Advanced Technologies contract revenues | 8,008 | 5,644 | 2,364 | 42% |
| Gross profit from Advanced Technologies contracts | $ 4,479 | $ 3,873 | $ 606 | 16% |
| Advanced Technologies contract gross margin | 35.9% | 40.7% | | |

Advanced Technologies contract revenues for the six months ended April 30, 2020 were $12.5 million, which reflects an increase of $3.0 million when compared to $9.5 million of revenues for the six months ended April 30, 2019. Advanced Technologies contract revenues were higher for the six months ended April 30, 2020 due to the timing of activity under existing contracts as well as the addition of the Company's Joint Development Agreement with EMRE (which was executed during the first quarter of fiscal 2020). Cost of Advanced Technologies contract revenues increased $2.4 million to $8.0 million for the six months ended April 30, 2020, compared to $5.6 million for the same period in the prior year. Advanced Technologies contracts for the six months ended April 30, 2020 generated a gross margin of $4.5 million compared to a gross margin of $3.9 million for the six months ended April 30, 2019. The increase in Advanced Technologies contract gross margin is related to the timing and mix of contracts, which were more heavily weighted to revenue recognized on the Company's Joint Development Agreement with EMRE (which was entered into on November 5, 2019), during the six months ended April 30, 2020, compared to the same period in the prior year.

**Administrative and selling expenses**

Administrative and selling expenses were $12.4 million and $16.6 million for the six months ended April 30, 2020 and 2019, respectively. The decrease from the same period in the prior year primarily relates to a legal settlement of $2.2 million received during the six months ended April 30, 2020, which was recorded as an offset to administrative and selling expenses, and higher legal and consulting costs incurred during the six months ended April 30, 2019 in connection with the restructuring and refinancing initiatives undertaken by the Company in 2019.

**Research and development expenses**

Research and development expenses decreased to $2.3 million for the six months ended April 30, 2020, compared to $10.5 million during the six months ended April 30, 2019. The decrease related to the reduction in spending resulting from the restructuring initiatives implemented in 2019 and the reduction in the resources being allocated to internal research and development (as resources were instead allocated to funded Advanced Technologies projects).

**Loss from operations**

Loss from operations for the six months ended April 30, 2020 was $11.3 million compared to $32.9 million for the three months ended April 30, 2019. The decrease in the loss from operations was primarily a result of higher gross profit and lower operating expenses primarily due to lower spending (personnel and overhead costs) resulting from the restructuring initiatives implemented in 2019 and the reduction in the resources being allocated to research and development for the six months ended April 30, 2020.

**Interest expense**

Interest expense for the six months ended April 30, 2020 and 2019 was $6.9 million and $4.3 million, respectively. Interest expense for both periods presented includes interest expense related to sale-leaseback transactions and interest for the amortization of the redeemable preferred stock of subsidiary fair value discount. The increase in interest expense during the six months ended April 30, 2020 primarily represents additional interest on the $80.0 million outstanding under our Credit Agreement with Orion Energy Partners Investment Agent, LLC and its affiliated lenders and interest on the loans made by Fifth Third Bank and Liberty Bank in connection with the acquisition of the Bridgeport Fuel Cell Project. The interest expense during the six months ended April 30, 2019 primarily included interest on outstanding amounts under our loan and security agreement with Hercules Capital, Inc.

**Change in fair value of common stock warrant liability**

The $37.6 million expense for the six months ended April 30, 2020 represents an adjustment to the estimated fair value of the warrants issued to the lenders under our Credit Agreement with Orion Energy Partners Investment Agent, LLC and its affiliated lenders based on a Black-Scholes model. The adjustment included $23.7 million for warrants that were converted during the first fiscal quarter of 2020 and $13.9 million for warrants that were still outstanding as of April 30, 2020. The expense is primarily a result of an increase in the stock price during the six months ended April 30, 2020 compared to the stock price used in the Black-Scholes model upon the issuance of the warrants.

**Other income, net**

Other income, net was $0.9 million and $0.1 million for the six months ended April 30, 2020 and 2019, respectively. Other income, net for the six months ended April 30, 2020 primarily relates to a net non-cash gain on the extinguishment accounting related to the modification of the Series 1 Preferred Stock and the extinguishment related to the embedded derivatives (refer to Note 13. “Redeemable Preferred Stock” for additional information). Other income, net for the six months ended April 30, 2020 also included a foreign exchange gain of $0.9 million related to the remeasurement of the Canadian Dollar denominated preferred stock obligation of our U.S. Dollar functional currency Canadian subsidiary offset by a loss of approximately $0.5 million related to the remeasurement of the interest rate swap on the Bridgeport Loans.

**Benefit for income taxes, net**

We have not paid federal or state income taxes in several years due to our history of net operating losses, although we have paid foreign income and withholding taxes in South Korea. Income tax recorded for the six months ended April 30, 2020 and 2019 was $0.03 million and $0.07 million, respectively.

**Series A warrant exchange**

During the six months ended April 30, 2019, we recorded a charge to common shareholders for the difference between the fair value of the Series A Warrant prior to the modification of $0.3 million and the fair value of the common shares issuable at the date of the Exchange Agreement of $3.5 million.

**Series B preferred stock dividends**

Dividends recorded on our Series B Preferred Stock were $1.7 million and $1.6 million for the six-month periods ended April 30, 2020 and 2019, respectively.

**Series C preferred stock deemed contributions and redemption value adjustment, net**

During the six months ended April 30, 2019, conversions of our Series C Preferred Stock resulted in a variable number of shares of our common stock being issued to settle the conversion amounts and were treated as a partial redemption of our Series C Preferred Stock. Conversions during the six months ended April 30, 2019 that were settled in a variable number of shares and treated as partial redemptions resulted in deemed contributions

of $0.6 million. The deemed contributions represent the difference between the fair value of the common shares issued to settle the conversion amounts and the carrying value of the Series C Preferred Stock.

The Company also accounted for an extinguishment of the Series C Preferred Stock by recording a deemed contribution of $0.5 million during the six months ended April 30, 2019. A charge to common stockholders of $8.6 million was recorded during the six months ended January 31, 2019 because of equity conditions failures under the Certificate of Designations for the Series C Preferred Stock.

The last outstanding shares of Series C Preferred Stock were converted into common stock on May 23, 2019, so there were no shares of Series C Preferred Stock outstanding during the six months ended April 30, 2020.

**Series D preferred stock deemed dividends and redemption accretion**

During the six months ended April 30, 2019, conversions of our Series D Preferred Stock in which the conversion price was below the initial conversion price (as adjusted for the reverse stock split) of $16.56 per share resulted in a variable number of shares of our common stock being issued to settle the conversion amounts and were treated as a partial redemption of the shares of our Series D Preferred Stock. Conversions during the six months ended April 30, 2019 that were settled in a variable number of shares and treated as redemptions resulted in deemed dividends of $2.9 million. The deemed dividends represent the difference between the fair value of the common shares issued to settle the conversion amounts and the carrying value of the Series D Preferred Stock.

Redemption accretion was recorded during the six months ended April 30, 2019 of $3.8 million.

The last outstanding shares of Series D Preferred Stock were converted into common stock on October 1, 2019, so there were no shares of Series D Preferred Stock outstanding during the six months ended April 30, 2020.

**Net loss attributable to common stockholders and loss per common share**

Net loss attributable to common stockholders represents the net loss for the period less the Series A warrant exchange, the preferred stock dividends on the Series B Preferred Stock, the preferred stock deemed contributions and redemption value adjustment, net on the Series C Preferred Stock and the Series D Preferred Stock deemed dividends and redemption accretion. For the six month periods ended April 30, 2020 and 2019, net loss attributable to common stockholders was $56.7 million and $55.9 million, respectively, and loss per common share was $0.27 and $5.77, respectively. The increase in the net loss for the six months ended April 30, 2020 is primarily due to the change in fair value of the common stock warrant liability discussed above, partially offset by higher gross profit and lower operating expenses and the fact that there were no adjustments recorded for the Series A warrants, the Series D Preferred Stock deemed dividends and redemption accretion and the Series C Preferred Stock deemed contributions and redemption value adjustment, net. The lower loss per common share is due to the higher weighted average shares outstanding due to share issuances since April 30, 2019.

## LIQUIDITY AND CAPITAL RESOURCES

The Company's future liquidity will depend on its ability to (i) timely complete current projects in process within budget, including approved amounts that have been financed, as financing does not cover budget overages or the total cost of the projects, (ii) increase cash flows from its generation portfolio, including by meeting conditions required to timely commence operation of new projects, operating its generation portfolio in compliance with minimum performance guarantees and operating its generation portfolio in accordance with revenue expectations, (iii) obtain approval of and receive funding for project construction under its Credit Agreement with Orion Energy Partners Investment Agent, LLC and its affiliated lenders and meet conditions for release of funds, or obtain other financing, (iv) obtain permanent financing for its projects once constructed, (v) increase order and contract volumes, which would lead to additional product sales, services agreements and generation revenues, (vi) obtain funding for and receive payment for research and development under current and future Advanced Technology contracts, including achieving a $5 million technological performance milestone under its Joint Development Agreement with ExxonMobil Research and Engineering Company ("EMRE") during calendar year 2020, (vii) implement the cost reductions necessary to achieve profitable operations and (viii) access the capital markets to raise funds through the sale of equity securities, convertible notes, other equity-linked instruments and/or other debt instruments. Our business model requires substantial outside financing arrangements and satisfaction of the conditions of such financing arrangements to construct and deploy our projects and facilitate the growth of our business. We may seek to obtain such financing in both the debt and equity markets. If financing is not available to us on acceptable terms if and when needed, or on terms acceptable to us or our lenders, if we do not satisfy the conditions of our financing arrangements, if we spend more than the financing approved for projects, if project costs exceed an amount that the Company can finance, or if we do not generate sufficient revenues or obtain capital sufficient for our corporate needs, we may be required to reduce planned spending, reduce staffing, sell assets, seek alternative financing and take other measures, which could have a material adverse effect on our financial condition and operations.

There are indicators that substantial doubt about the Company's ability to continue as a going concern exists, including, but not limited to, historical losses and negative cash flows, increasing costs of debt financing, restrictive debt covenants and restrictions imposed by the Company's current lenders, limited availability of assets to support borrowing that have not already been pledged to existing lenders, potential delays in completing the manufacture of modules for project assets due to the closure of the Company's manufacturing facility as a result of the COVID-19 pandemic, and the need for additional financing to carry out the Company's business plans. When indicators of substantial doubt exist, GAAP requires management to make an assessment of whether substantial doubt is alleviated by management's plans. Even though equity and debt financings and other sources of funds may be available in the future, when assessing whether substantial doubt is alleviated, management is not able to place reliance on uncommitted sources of financing. Management assessed substantial doubt about the Company's ability to continue as a going concern through analysis of existing cash on hand, expected receipts under existing agreements, and release of short-term restricted cash less expected disbursements over the next twelve months, and was not able to alleviate substantial doubt until it entered into the Fifth Orion Amendment. As a result of this Fifth Orion Amendment, management has concluded that substantial doubt was alleviated, and the Company expects that it will meet its obligations for at

least one year from the date of issuance of these financial statements (assuming that there are no extraordinary or unanticipated impacts to its business as result of COVID-19 or otherwise). Execution of the Company's business plan will require additional financing or other measures to generate cash inflows and reduce cash outflows as early as the expected filing of the Form 10-Q for the third quarter of 2020 in order to alleviate substantial doubt in future periods.

The key agreements which may impact the Company's future liquidity position include:

- Orion Facility and the Fifth Orion Amendment.

  On October 31, 2019, the Company and certain of its affiliates as guarantors entered into the Orion Credit Agreement with Orion Energy Partners Investment Agent, LLC, as Administrative Agent and Collateral Agent (the "Agent"), and its affiliates, Orion Energy Credit Opportunities Fund II, L.P., Orion Energy Credit Opportunities Fund II GPFA, L.P., and Orion Energy Credit Opportunities Fund II PV, L.P., as lenders, for a $200.0 million senior secured credit facility (which is referred to herein as the "Orion Facility"). The Orion Facility is structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. In conjunction with the closing of the Orion Facility, on October 31, 2019, the Company drew down $14.5 million (the "Initial Funding"). The Company drew down an additional $65.5 million on November 22, 2019 (the "Second Funding"). The Company may draw the remainder of the Orion Facility, up to $120.0 million, over the first 18 months following the Initial Funding and subject to the Agent's approval, to fund project-related expenses consisting of: (i) construction costs, inventory and other capital expenditures of additional fuel cell projects with contracted cash flows (under power purchase agreements ("PPAs") with creditworthy counterparties) that meet or exceed a mutually agreed coverage ratio; and (ii) inventory, working capital, and other costs that may be required to be delivered by the Company on purchase orders, service agreements, or other binding customer agreements with creditworthy counterparties. Except as may be approved by the Agent and the lenders under the Orion Facility (and except as provided in the Fifth Orion Amendment), the Company cannot use the Orion Facility to fund its working capital or other expenses at the corporate level.

  On June 8, 2020, the Company and certain of its affiliates as guarantors entered into a fifth amendment to the Orion Credit Agreement with the Agent and the lenders (which is referred to herein as the "Fifth Orion Amendment"). Pursuant to the terms of the Fifth Orion Amendment and the amended Orion Credit Agreement, the lenders have committed to make available certain delayed-draw loans to the Company in an aggregate principal amount of up to $35 million (which are referred to herein as the "Secondary Facility Loans") between the execution date and September 14, 2020. Such Secondary Facility Loans may be used for general corporate purposes of the Company or the guarantors in accordance with either (i) the then effective operating budget of the Company or the guarantors or (ii) the cash use forecast delivered by the Company to the Agent on June 6, 2020. Any draws under the Secondary Facility Loans must be repaid by September 1, 2021. Refer to Note 18. "Subsequent Events" for additional details.

  The lenders and the Agent under the Orion Facility have broad approval rights over the Company's ability to raise additional capital, obtain other debt financing, and draw, allocate and use funds from the Orion Facility. If the Company is unable to obtain such approvals when the Company seeks to raise additional capital, obtain other debt financing, or use funds under the Orion Facility, it could have a material adverse effect on the Company's financial condition and operations.

- EMRE Joint Development Agreement.

  On November 5, 2019, the Company signed a two-year Joint Development Agreement with EMRE, which was effective as of October 31, 2019, pursuant to which the Company will continue exclusive research and development efforts with EMRE to evaluate and develop new and/or improved carbonate fuel cells to capture and reduce carbon dioxide emissions from industrial and power sources, in exchange for (a) payment of (i) an exclusivity and technology access fee of $5.0 million, (ii) up to $45.0 million for research and development efforts, and (iii) milestone-based payments of up to $10.0 million after certain technological milestones are met, and (b) certain licenses.

- Paycheck Protection Program Loan.

  On April 20, 2020, the Company entered into the PPP Note, evidencing a loan to the Company from Liberty Bank under the CARES Act. Pursuant to the PPP Note, the Company received total proceeds of approximately $6.5 million on April 24, 2020. In accordance with the original requirements of the CARES Act, at least 75% of the proceeds used by the Company to date have been used to pay eligible payroll costs. Under the original requirements of the CARES Act, the loan may be fully forgiven if (i) proceeds are used to pay eligible payroll costs, rent, mortgage interest and utilities and (ii) full-time employee headcount and salaries are either maintained during the applicable eight-week period or restored by June 30, 2020. Any forgiveness of the loan will be subject to approval by the SBA and Liberty Bank and will require the Company to apply for such treatment in the future. In order to obtain the consent of the Agent and the lenders under the Orion Facility to enter into the PPP Note, the Agent and the lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020. On June 5, 2020, the PPP Flexibility Act was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note. While the Company may apply for forgiveness of the PPP Note in accordance with the requirements and limitations under the CARES Act and the SBA regulations and requirements, no assurance can be given that any portion of the PPP Note will be forgiven.

The Company's cash, cash equivalents and restricted cash consist of (a) restricted cash and cash equivalents, which consist of amounts pledged as performance security, reserved for future debt service requirements, reserved for letters of credit for certain banking requirements and contracts and reserved to pay down the Orion Facility which can be accessed or redeployed into other project financing at the option of and only with the approval of the lenders and the Agent under the Orion Facility or other lenders or third parties; (b) project cash and cash equivalents, which consist of amounts borrowed under the Orion Facility which can be used only by our consolidated wholly-owned project subsidiaries in the normal course of operations for project construction, purchase of equipment (including inventory from FuelCell Energy, Inc.) and working capital for projects approved under the Orion Facility in accordance with each project's construction budget and schedule and which are classified as unrestricted cash on the Company's consolidated balance sheets; and (c) unrestricted cash and cash equivalents, which can be used by the Company for general corporate purposes, including working capital at the corporate level, and which include the proceeds of the PPP Note received during the quarter ended April 30, 2020. Unrestricted cash and cash equivalents, as presented on the Company's consolidated balance sheets, consist of the amounts described in (b) and (c) above. As of April 30, 2020, unrestricted cash and cash equivalents totaled $29.1 million compared to $9.4 million as of October 31, 2019. Of this amount, project cash and cash equivalents funded under the Orion Facility totaled $18.6 million as of April 30, 2020 compared to $0 as of October 31, 2019. Excluding project cash and cash equivalents and the remaining balance of approximately $6.0 million under the PPP Note, which may only be used for certain payroll and other eligible expenditures, unrestricted cash and cash equivalents totaled $4.5 million as of April 30, 2020 compared to $9.4 million as of October 31, 2019.

In future periods, the Company expects to seek lower-cost long-term debt and tax equity (e.g., sale-leaseback and partnership transactions) for its project asset portfolio as these projects commence commercial operations. The proceeds of any such financing, if obtained, may allow the Company to fund other fuel cell projects (subject to the approval of the lenders and the Agent under the Orion Facility) and/or pay down the outstanding principal balance of the Orion Facility. There can be no assurance that the Company can obtain such financing on terms acceptable to the Company, or that the lenders and the Agent under the Orion Facility will consent to such financing. The Company may also seek to raise funds through the sale of equity securities, convertible notes, other equity-linked instruments and/or other debt instruments. If the Company is unable to obtain such financing or raise additional capital, it could have a material adverse effect on the Company's financial condition and operations, and could require the Company to reduce its expenditures or slow its project spending.

**Generation/Operating Portfolio, Projects, Project Awards, and Backlog**

To grow our generation portfolio, the Company will invest in developing and building turn-key fuel cell projects which will be owned by the Company and classified as project assets on the balance sheet. This strategy requires liquidity, and the Company expects to continue to have increasing liquidity requirements as project sizes increase and more projects are added to backlog. We may commence building project assets upon the award of a project or execution of a multi-year PPA with an end-user that has a strong credit profile. Project development and construction cycles, which span the time between securing a PPA and commercial operation of the plant, vary substantially and can take years. As a result of these project cycles and strategic decisions to finance the construction of certain projects, we may need to make significant up-front investments of resources in advance of the receipt of any cash from the sale or long-term financing of such projects. To make these up-front investments, we may use our working capital, access funds available under our construction financing facilities, seek to raise funds through the sale of equity or debt securities, or seek other financing arrangements. Delays in construction progress and completing current projects in process within budget, or in completing financing or the sale of our projects may impact our liquidity in a material way.

Our operating portfolio (32.6 MW as of April 30, 2020) contributes higher long-term cash flows to the Company than if these projects had been sold. These projects currently generate approximately $22.0 million per year in annual revenue depending on plant output, operations performance and management, and site conditions. The Company plans to continue to grow this portfolio while also selling certain projects to investors. As of April 30, 2020, the Company had projects representing an additional 40.6 MW in various stages of development and construction, which projects are expected to generate operating cash flows in future periods, if completed. Retaining long-term cash flow positive projects, combined with our service fleet, is expected to result in reduced reliance on new project sales to achieve cash flow positive operations, however, operations and performance issues could impact results. The Company expects to finance the construction of the projects still under development and construction using proceeds from the Orion Facility, subject to lender approval, satisfaction of conditions for release of funding, including third party consents, keeping project costs within approved budgets, and having sufficient liquidity to fund our equity portion of such projects. We have worked with and expect to continue to work with other lenders and financial institutions to secure lower-cost long-term debt and tax equity (e.g., sale-leaseback and partnership transactions) for our project asset portfolio, but there can be no assurance that such financing can be attained, or that, if attained, it will be retained or sufficient. As of April 30, 2020, we have financed five projects through sale-leaseback transactions.

As of April 30, 2020, total financing obligations related to project assets under sale lease-back transactions was $55.7 million. Future required payments totaled $24.7 million as of April 30, 2020. The outstanding financing obligation under the sale-leaseback transactions includes an embedded gain, which will be recognized at the end of each respective lease term.

Our operating portfolio provides us with the full benefit of future cash flows, net of any debt service requirements.

The following table summarizes our operating portfolio as of April 30, 2020:

| Project Name | Location | Power Off-Taker | Rated Capacity (MW) | Actual Commercial Operation Date (FuelCell Energy Fiscal Quarter) | PPA Term (Years) |
|---|---|---|---|---|---|
| Central CT State University ("CCSU") | New Britain, CT | CCSU (CT University) | 1.4 | Q2 '12 | 10 |
| UCI Medical Center ("UCI") | Orange, CA | UCI (CA University Hospital) | 1.4 | Q1 '16 | 19 |
| Riverside Regional Water Quality Control Plant | Riverside, CA | City of Riverside (CA Municipality) | 1.4 | Q4 '16 | 20 |
| Pfizer, Inc. | Groton, CT | Pfizer, Inc. | 5.6 | Q4 '16 | 20 |
| Santa Rita Jail | Dublin, CA | Alameda County, California | 1.4 | Q1 '17 | 20 |
| Bridgeport Fuel Cell Project | Bridgeport, CT | Connecticut Light and Power Company (CT Utility) | 14.9 | Q1 '13 | 15 |
| Tulare BioMAT | Tulare, CA | Southern California Edison (CA Utility) | 2.8 | Q1 '20 | 20 |
| Triangle St | Danbury, CT | Tariff - Eversource (CT Utility) | 3.7 | Q2 '20 | Tariff |
| | | **Total MW Operating:** | **32.6** | | |

The following table summarizes projects in process, all of which are in backlog, as of April 30, 2020:

| Project Name | Location | Power Off-Taker | Rated Capacity (MW) | PPA Term (Years) |
|---|---|---|---|---|
| Groton Sub Base | Groton, CT | CMEEC (CT Electric Co-op) | 7.4 | 20 |
| Toyota | Los Angeles, CA | Southern California Edison; Toyota | 2.2 | 20 |
| San Bernardino | San Bernardino, CA | City of San Bernardino Municipal Water Department | 1.4 | 20 |
| LIPA 1 | Long Island, NY | PSEG / LIPA, LI NY (Utility) | 7.4 | 20 |
| CT RFP-1 | Hartford, CT | Eversource/United Illuminating (CT Utilities) | 7.4 | 20 |
| CT RFP-2 | Derby, CT | Eversource/United Illuminating (CT Utilities) | 14.8 | 20 |
| | | **Total MW in Process:** | **40.6** | |

The projects listed in the above table are in various stages of development or on-site construction and installation.

Backlog by revenue category is as follows:

- Services and license backlog totaled $183.3 million as of April 30, 2020, compared to $224.3 million as of April 30, 2019. Services backlog includes future contracted revenue from routine maintenance and scheduled module exchanges for power plants under service agreements.
- Generation backlog totaled $1.1 billion as of April 30, 2020, compared to $1.0 billion as of April 30, 2019. Generation backlog represents future contracted energy sales under contracted PPAs between us and the end-user of the power.
- There was no product sales backlog as of April 30, 2020, compared to $1,000 as of April 30, 2019.
- Advanced Technologies contract backlog totaled $56.8 million as of April 30, 2020, compared to $32.9 million as of April 30, 2019.

Backlog represents definitive agreements executed by the Company and our customers. Projects for which we have a PPA are included in generation backlog, which represents future revenue under long-term PPAs. Projects sold to customers (and not retained by the Company) are included in product sales and service backlog and the related generation backlog is removed upon sale.

Factors that may impact our liquidity in fiscal year 2020 and beyond include:

- The Company's cash on hand and access to additional liquidity. The Company's cash, cash equivalents and restricted cash consist of (a) restricted cash and cash equivalents, which consist of amounts pledged as performance security, reserved for future debt service requirements, reserved for letters of credit for certain banking requirements and contracts and reserved to pay down the Orion Facility which can be accessed or redeployed into other project financing at the option of and only with the approval of the lenders and the Agent under the Orion Facility or other lenders or third parties; (b) project cash and cash equivalents, which consist of amounts borrowed under the Orion Facility which can be used only by our consolidated wholly-owned project subsidiaries in the normal course of operations for project construction, purchase of equipment (including inventory from FuelCell Energy, Inc.) and working capital for projects approved under the Orion Facility in accordance with each project's construction budget and schedule and which are classified as unrestricted cash on the Company's consolidated balance sheets; and (c) unrestricted cash and cash equivalents, which can be used by the Company for general corporate purposes, including working capital at the corporate level, and which include the proceeds of the PPP Note received during the quarter ended April 30, 2020. Unrestricted cash and cash equivalents, as presented on the Company's consolidated balance sheets, consist of the amounts described in (b) and (c) above. As of April 30, 2020, unrestricted cash and cash equivalents totaled $29.1 million compared to $9.4 million as of October 31, 2019. Of this amount, project cash and cash equivalents funded under the Orion Facility totaled $18.6 million as of April 30, 2020 compared to $0 as of October 31, 2019. Excluding project cash and cash equivalents and the remaining balance of approximately $6.0 million under the PPP Note, which may only be used for certain payroll and other eligible expenditures, unrestricted cash and cash equivalents totaled $4.5 million as of April 30, 2020 compared to $9.4 million as of October 31, 2019.

- The Company's liquidity position is also supported by the Fifth Orion Amendment. Pursuant to the terms of the Fifth Orion Amendment and the amended Orion Credit Agreement, the lenders have committed to make available certain delayed-draw loans to the Company in an aggregate principal amount of up to $35 million (referred to herein as the "Secondary Facility Loans") between the execution date and September 14, 2020. Such Secondary Facility Loans may be used for general corporate purposes of the Company or the guarantors in accordance with either (i) the then effective operating budget of the Company or the guarantors or (ii) the cash use forecast delivered by the Company to the Agent on June 6, 2020. Any draws under the Secondary Facility Loans must be repaid by September 1, 2021. Refer to Note 18. "Subsequent Events" for additional details. The Company also intends to pursue other financing arrangements (equity or debt) to further enhance the Company's liquidity.
- Short-term restricted cash totaled $8.1 million as of April 30, 2020 compared to $3.5 million as of October 31, 2019. The restricted cash balance as of April 30, 2020 includes a $5.0 million debt reserve established in accordance with the First Orion Amendment (as defined below). The debt reserve will be released on the first date on which all of the following events have occurred (a) the Groton Project shall have achieved its business plan in accordance with the Groton Construction Budget (as defined in the Orion Credit Agreement), (b) the commercial operation date for the Groton Project shall have occurred, (c) the Groton Project shall have met its annualized output and heat rate guarantees for three months, and (d) a disposition, refinancing or tax equity investment of at least $30 million shall have occurred with respect to the Groton Project.
- While the Company has access to the $200.0 million Orion Facility to finance construction of its generation portfolio, the timing, availability and allocation of any new draws beyond the $80.0 million which has been funded under the Orion Facility are at the discretion of the lenders, which may negatively impact the Company's liquidity as well as its ability to complete various construction projects. In addition, in future periods, we expect to seek lower-cost long-term debt and tax equity (e.g., sale-leaseback and partnership transactions) for our project asset portfolio as these projects commence commercial operations. The proceeds of any such financing, if obtained, may allow the Company to fund other fuel cell projects (subject to the approval of the lenders and the Agent under the Orion Facility), and/or pay down the outstanding principal balance of the Orion Facility. There can be no assurance that the Company can obtain such financing on terms acceptable to the Company, or that the lenders and the Agent under the Orion Facility will consent to such financing. The Company may also seek to raise funds through the sale of equity securities, convertible notes, other equity-linked instruments and/or other debt instruments. If the Company is unable to obtain such financing or raise additional capital, it could have a material adverse effect on the Company's financial condition and operations, and could require the Company to reduce its expenditures or slow its project spending. The lenders and the Agent under the Orion Facility have broad approval rights over the Company's ability to raise additional capital, obtain other debt financing, and draw, allocate and use funds from the Orion Facility. If the Company is unable to obtain such approvals when the Company seeks to raise additional capital or use funds under the Orion Facility, it could have a material adverse effect on the Company's financial condition and operations.
- We bid on large projects in diverse markets that can have long decision cycles and uncertain outcomes. We manage production rate based on expected demand and projects schedules. Changes to production rate take time to implement. In conjunction with and following the reorganization and reduction in workforce in April 2019, we reduced our production rate to approximately 2 MW, which resulted in an annualized production rate through October 31, 2019 of 17 MW. The annualized production rate as of April 30, 2020 was 16.5 MW, which has been impacted by the continuing plant shutdown that was implemented in response to the COVID-19 pandemic. The Company will evaluate future increases in production rate if and when warranted by business conditions, and after restarting production.

- As project sizes and the number of projects evolves, project cycle times may increase. We may need to make significant up-front investments of resources in advance of the receipt of any cash from the financing or sale of our projects. These amounts include development costs, interconnection costs, posting of letters of credit, bonding or other forms of security, and incurring engineering, permitting, legal, and other expenses.
- The amount of accounts receivable and unbilled receivables as of April 30, 2020 and October 31, 2019 was $18.0 million ($4.4 million of which is classified as "Other assets") and $14.6 million ($3.6 million of which is classified as "Other assets"), respectively. Unbilled accounts receivable represents revenue that has been recognized in advance of billing the customer under the terms of the underlying contracts. Such costs have been funded with working capital and the unbilled amounts are expected to be billed and collected from customers once we meet the billing criteria under the contracts. Our accounts receivable balances may fluctuate as of any balance sheet date depending on the timing of individual contract milestones and progress on completion of our projects.
- The amount of total inventory as of April 30, 2020 and October 31, 2019 was $64.0 million ($9.0 million is classified as long-term inventory) and $56.7 million ($2.2 million is classified as long-term inventory), respectively, which includes work in process inventory totaling $39.4 million and $31.2 million, respectively. Work in process inventory can generally be deployed rapidly while the balance of our inventory requires further manufacturing prior to deployment. To execute on our business plan, we must produce fuel cell modules and procure balance of plant ("BOP") components in required volumes to support our planned construction schedules and potential customer contractual requirements. As a result, we may manufacture modules or acquire BOP components in advance of receiving payment for such activities. This may result in fluctuations in inventory and in use of cash as of any given balance sheet date.
- The amount of total project assets as of April 30, 2020 and October 31, 2019 was $153.9 million and $144.1 million, respectively. Project assets consist of capitalized costs for fuel cell projects that are operating and producing revenue or are under construction. Project assets as of April 30, 2020 consisted of $77.9 million of completed, operating installations and $76.0 million of projects in development. As of April 30, 2020, we had 32.6 MW of operating project assets that generated $10.1 million of revenue in the six months ended April 30, 2020. Also, as of April 30, 2020, the Company had an additional 40.6 MW of projects under development and construction, some of which are expected to generate operating cash flows in fiscal year 2020.
- Under the terms of certain contracts, the Company will provide performance security for future contractual obligations. As of April 30, 2020, we had pledged approximately $44.3 million of our cash and cash equivalents as collateral for performance security and for letters of credit for certain banking requirements and contracts. This balance may increase with a growing backlog and installed fleet.
- For fiscal year 2020, we forecast capital expenditures to be less than $1.0 million compared to capital expenditures of $2.2 million in fiscal year 2019.

As the Company builds project assets and makes capital expenditures, depreciation and amortization expenses are expected to increase. For the three months ended April 30, 2020 and 2019, depreciation and amortization totaled $4.5 million and $2.2 million, respectively (of these totals, approximately $3.1 million and $1.0 million, for the three months ended April 30, 2020 and 2019, respectively, relate to depreciation of project assets in our generation portfolio). For the six months ended April 30, 2020 and 2019, depreciation and amortization totaled $9.1 million and $4.4 million respectively (of these totals, approximately $6.5 million and $2.1 million for the six months ended April 30, 2020 and 2019, respectively, relate to depreciation of project assets in our generation portfolio).

**Cash Flows**

Cash and cash equivalents and restricted cash and cash equivalents totaled $73.4 million as of April 30, 2020 compared to $39.8 million as of October 31, 2019. As of April 30, 2020, restricted cash and cash equivalents was $44.3 million, of which $8.1 million was classified as current and $36.3 million was classified as non-current, compared to $30.3 million in restricted cash and cash equivalents as of October 31, 2019, of which $3.5 million was classified as current and $26.9 million was classified as non-current.

The following table summarizes our consolidated cash flows:

| | Six Months Ended April 30, | |
|---|---|---|
| (dollars in thousands) | 2020 | 2019 |
| Consolidated Cash Flow Data: | | |
| Net cash used in operating activities | $ (14,719) | $ (18,197) |
| Net cash used in investing activities | (14,299) | (29,366) |
| Net cash provided by financing activities | 62,750 | 20,439 |
| Effects on cash from changes in foreign currency rates | (91) | (133) |
| Net increase (decrease) in cash, cash equivalents and restricted cash | $ 33,641 | $ (27,257) |

The key components of our cash inflows and outflows were as follows:

***Operating Activities*** – Net cash used in operating activities was $14.7 million during the six months ended April 30, 2020, compared to $18.2 million of net cash used in operating activities during the six months ended April 30, 2019.

Net cash used in operating activities for the six months ended April 30, 2020 was primarily a result of the net loss of $54.9 million, increases in inventory of $6.1 million, accounts receivable of $2.8 million and unbilled receivables of $0.6 million, and decreases in accounts payable of $3.9

million, offset by an increase in deferred revenue of $2.4 million and net non-cash adjustments of $50.8 million, including a $37.6 million charge related to the change in fair value of common stock warrant liability.

Net cash used in operating activities for the six months ended April 30, 2019 was primarily the result of the net loss of $37.1 million and increases in inventory of $3.5 million, unbilled receivables of $3.5 million and accounts receivable of $2.2 million, offset by increases in accounts payable of $9.0 million, deferred revenue of $4.7 million and accrued liabilities of $2.2 million, and net non-cash adjustments of $11.6 million.

***Investing Activities*** – Net cash used in investing activities was $14.3 million for the six months ended April 30, 2020, compared to net cash used in investing activities of $29.4 million during the six months ended April 30, 2019.

Net cash used in investing activities for the six months ended April 30, 2020 included $13.6 million of project assets expenditures and a $0.6 million payment for a working capital adjustment for the acquisition of the Bridgeport Fuel Cell Project in May 2019.

Net cash used in investing activities for the six months ended April 30, 2019 included a $27.3 million investment in project assets to expand our operating portfolio and $2.1 million for capital expenditures.

***Financing Activities*** – Net cash provided by financing activities was $62.8 million during the six months ended April 30, 2020, compared to net cash provided by financing activities of $20.4 million during the six months ended April 30, 2019.

Net cash provided by financing activities during the six months ended April 30, 2020 resulted from the receipt of $65.5 million of debt proceeds from the Orion Facility, net of a loan discount of $1.6 million, $14.4 million of proceeds from the Crestmark sale-leaseback transaction, $6.5 million of debt proceeds from Liberty Bank under the PPP Note, $3.0 million of debt proceeds from Connecticut Green Bank and common stock sales of $3.5 million, offset by debt repayments of $21.4 million, the payment of deferred financing costs of $2.7 million and the payment of preferred dividends and return of capital of $4.4 million.

Net cash provided by financing activities during the six months ended April 30, 2019 resulted from the receipt of $28.3 million of debt proceeds, which included $11.1 million from Fifth Third Bank, $10.0 million received under our Construction Loan Agreement with Generate Lending, LLC, $5.8 million received under our Loan Agreement with NRG Energy, Inc., and $1.5 million received under our Loan and Security Agreement with Enhanced Capital Connecticut Fund V, LLC, offset by debt repayment of $4.8 million, the payment of preferred dividends and the return of capital of $1.8 million and the payment of deferred finance costs of $1.3 million.

**Sources and Uses of Cash and Investments**

In order to consistently produce positive cash flow from operations, we need to increase order flow to support higher production levels, leading to lower costs on a per unit basis. We also continue to invest in new product and market development and, as a result, we are not generating positive cash flow from our operations. Our operations are funded primarily through cash generated from product sales, service contracts, generation assets and Advanced Technologies contracts as well as sales of equity and equity linked securities, issuances of corporate and project level debt, and monetization of technology through licenses. During fiscal year 2019, we implemented a series of restructuring activities aimed at reducing operating costs and streamlining operations while targeting cash generation and long-term financial stability.

**Commitments and Significant Contractual Obligations**

A summary of our significant commitments and contractual obligations as of April 30, 2020 and the related payments by fiscal year are as follows:

| | | Payments Due by Period | | | |
|---|---|---|---|---|---|
| (dollars in thousands) | Total | Less than 1 Year | 1 – 3 Years | 3 – 5 Years | More than 5 Years |
| Purchase commitments (1) | $ 29,232 | $ 28,264 | $ 961 | $ 7 | $ — |
| Series 1 Preferred obligation (2) | 22,925 | 899 | 22,026 | — | — |
| Term and Construction loans (principal and interest) | 176,637 | 22,988 | 59,412 | 49,059 | 45,178 |
| Capital and operating lease commitments (3) | 19,790 | 1,267 | 2,649 | 1,461 | 14,413 |
| Sale-leaseback financing obligation (4) | 25,437 | 4,157 | 7,680 | 6,387 | 7,213 |
| Natural gas supply contract (5) | 13,782 | — | 2,953 | 3,938 | 6,891 |
| Option fee (6) | 150 | 150 | — | — | — |
| Series B Preferred dividends payable (7) | — | — | — | — | — |
| **Totals** | $ 287,953 | $ 57,725 | $ 95,681 | $ 60,852 | $ 73,695 |

(1) Purchase commitments with suppliers for materials, supplies and services incurred in the normal course of business.

(2) On January 20, 2020, the Company, FCE Ltd. and Enbridge Inc. ("Enbridge") entered into a letter agreement, which is referred to herein as the "January 2020 Letter Agreement," pursuant to which they agreed to amend the articles of FCE Ltd. relating to and setting forth the terms of the Series 1 Preferred Shares to modify certain terms of the Series 1 Preferred Shares. Under the terms of the January 2020 Letter Agreement (as described in additional detail below), the Company is still required to make (i) annual dividend payments of Cdn. $500,000 and (ii) annual return of capital payments of Cdn. $750,000. Dividend and return of capital payments are to be made on a quarterly basis and are scheduled to end on December 31, 2021, unless these obligations are satisfied in advance of such date. After taking into account the amendments to the terms of the Series 1 Preferred Shares described in the January 2020 Letter Agreement, the aggregate amount of all accrued and unpaid dividends to be paid on the Series 1 Preferred Shares on December 31, 2021 is expected to be Cdn. $26.5 million and the balance of the principal redemption price to be paid on December 31, 2021 with respect to all of the Series 1 Preferred Shares is expected to be Cdn. $3.5 million. Refer to Note 13. "Redeemable Preferred Stock" for additional information regarding such letter agreement and such modified terms.

(3) Future minimum lease payments on finance and operating leases.

(4) The amount represents payments due on sale-leaseback transactions of our wholly-owned subsidiaries, under their respective financing agreements with PNC and Crestmark. Lease payments for each lease under these facilities are generally payable in fixed quarterly installments over a ten-year period.

(5) During the three months ended April 30, 2020, the Company entered into a 7-year natural gas contract with an estimated annual cost per year of $2.0 million beginning on November 1, 2021. This gas contract is for the Company's Yaphank project and the costs will be offset by generation revenues on the project.

(6) The Company entered into an agreement with a customer on June 29, 2016 that includes a fee for the purchase of the plants at the end of the term of the agreement. The fee is payable in installments over the term of the agreement.

(7) We pay $3.2 million, if and when declared, in annual dividends on our Series B Preferred Stock. The $3.2 million annual dividend payment, if dividends are declared, has not been included in this table as we cannot reasonably determine when or if we will be able to convert the Series B Preferred Stock into shares of our common stock. We may, at our option, convert these shares into the number of shares of our common stock that are issuable at the then prevailing conversion rate if the closing price of our common stock exceeds 150% of the then prevailing conversion price ($1,692 per share at April 30, 2020) for 20 trading days during any consecutive 30 trading day period.

*Term and Construction Loans*

**Orion Energy Partners Investment Agent, LLC Credit Agreement:** On October 31, 2019, the Company and certain of its affiliates as guarantors entered into a Credit Agreement (as amended from time to time, the "Orion Credit Agreement") with Orion Energy Partners Investment Agent, LLC, as Administrative Agent and Collateral Agent (the "Agent"), and certain lenders affiliated with the Agent for a $200.0 million senior secured credit facility (the "Orion Facility"), structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. Under the Orion Credit Agreement, each lender will fund its commitments on each funding date in an amount equal to the principal amount of the loans to be funded by such lender on such date, less 2.50% of the aggregate principal amount of the loans funded by such lender on such date (the "Loan Discount).

On October 31, 2019, the Company drew down $14.5 million (the "Initial Funding") and received $14.1 million after taking into account a Loan Discount of $0.4 million.

On November 22, 2019, a second draw (the "Second Funding") of $65.5 million, funded by Orion Energy Credit Opportunities Fund II, L.P., Orion Energy Credit Opportunities Fund II GPFA, L.P., Orion Energy Credit Opportunities Fund II PV, L.P., and Orion Energy Credit Opportunities FuelCell Co-Invest, L.P. (the "Orion Lenders"), was made to fully repay certain outstanding third party debt of the Company, including the outstanding construction loan from Fifth Third Bank with respect to the Groton Project and the outstanding loan from Webster Bank, National Association ("Webster Bank") with respect to the CCSU Project, as well as to fund remaining going forward construction costs and anticipated capital expenditures relating to the Groton Project (a 7.4 MW project), the LIPA Yaphank Solid Waste Management Project (a 7.4 MW project), and the Tulare BioMAT Project (a 2.8 MW project). The Company received $63.9 million in the Second Funding after taking into account a Loan Discount of $1.6 million as described above. Also in conjunction with the Second Funding, the Company issued to the Orion Lenders warrants to purchase up to a total of 14.0 million shares of the Company's common stock, with an initial exercise price with respect to 8.0 million of such shares of $0.242 per share and with an initial exercise price with respect to 6.0 million of such shares of $0.620 per share (the "Second Funding Warrants").

The Company may draw the remainder of the Orion Facility, up to $120.0 million, over the first 18 months following the Initial Funding and subject to the Agent's approval to fund project-related expenses consisting of: (i) construction costs, inventory and other capital expenditures of additional fuel cell projects with contracted cash flows (under PPAs with creditworthy counterparties) that meet or exceed a mutually agreed coverage ratio; and (ii) inventory, working capital, and other costs that may be required to be delivered by the Company on purchase orders, service agreements, or other binding customer agreements with creditworthy counterparties. Except as may be approved by the Agent and the Orion Lenders (and except as provided in the Fifth Orion Amendment), the Company cannot use the Orion Facility to fund its working capital or other expenses at the corporate level. The Orion Lenders and the Agent have broad approval rights over the Company's ability to raise additional capital, obtain other debt financing, and draw, allocate and use funds from the Orion Facility.

Under the Orion Credit Agreement, cash interest of 9.9% per annum will be paid quarterly. In addition to the cash interest, payment-in-kind interest of 2.05% per annum will accrue which will be added to the outstanding principal balance of the Orion Facility but will be paid quarterly in cash to the extent of available cash after payment of the Company's operating expenses and the funding of certain reserves for the payment of outstanding indebtedness to the State of Connecticut and Connecticut Green Bank. The Orion Credit Agreement contains representations, warranties and other covenants.

Outstanding principal under the Orion Facility will be amortized on a straight-line basis over a seven year term in quarterly payments beginning one year after the Initial Funding, with the initial payment due 21 business days after the end of the first quarter of fiscal 2021; provided that, if the

Company does not have sufficient cash on hand to make any required quarterly amortization payments, such amounts shall be deferred and payable at such time as sufficient cash is available to make such payments subject to all outstanding principal being due and payable on the maturity date, which is the date that is eight years after the date of the Initial Funding or October 31, 2027.

The issuance of the warrants issued in connection with the Initial Funding to purchase up to a total of 6.0 million shares of the Company's common stock (which are referred to herein as the "Initial Funding Warrants") and recognition of the Second Funding Warrants resulted in $3.9 million being recorded as a liability as of October 31, 2019 with the offset recorded as a debt discount. Refer to Note 12. "Stockholders' Equity and Warrant Liabilities" for additional information regarding the Initial Funding Warrants and Second Funding Warrants, including the accounting, terms and conversions during the three and six months ended April 30, 2020.

In conjunction with the Second Funding, the Company and the other loan parties entered into the First Amendment to the Orion Credit Agreement (the "First Orion Amendment"), which required the Company to establish a $5.0 million debt reserve, with such reserve to be released on the first date following the date of the Second Funding on which all of the following events shall have occurred: (a) each of (x) the commercial operation date for the Tulare BioMAT project shall have occurred and (y) a disposition, refinancing or tax equity investment in the Tulare BioMAT project of at least $5.0 million is consummated (both conditions (x) and (y) have been satisfied); (b) each of (x) the Groton Project shall have achieved its business plan in accordance with the Groton Construction Budget (as defined in the Orion Credit Agreement), (y) the commercial operation date for the Groton Project shall have occurred and (z) the Groton Project shall have met its annualized output and heat rate guarantees for three months; and (c) a disposition, refinancing or tax equity investment of at least $30 million shall have occurred with respect to the Groton Project. The First Orion Amendment further required the Company (i) to provide, no later than December 31, 2019, a biogas sale and purchase agreement through December 31, 2021 for the Tulare BioMAT project, which was obtained as of such date, (ii) to obtain by December 31, 2019, a fully executed contract for certain renewable energy credits for the Groton Project, which was obtained as of such date, and (iii) to provide by January 31, 2020, certain consents and estoppels from CMEEC related to the Groton Project and an executed, seventh modification to the lease between CMEEC and the United States Government, acting by and through the Department of the Navy, both of which were obtained as of such date.

In addition, in connection with the Letter Agreement, dated January 20, 2020, among the Company, FCE Ltd. and Enbridge (the "January 2020 Letter Agreement"), pursuant to which such parties agreed to amend the articles of FCE Ltd. setting forth the terms of the Series 1 Preferred Shares, on January 20, 2020, in order to obtain the Orion Lenders' consent to the January 2020 Letter Agreement as required under the Orion Credit Agreement, the Company, the Agent, the Orion Lenders, and the other loan parties entered into the Second Amendment to the Orion Credit Agreement (the "Second Orion Amendment"), which added a new affirmative covenant to the Orion Credit Agreement that obligates the Company to, and to cause FCE Ltd. to, on or prior to November 1, 2021, either (i) pay and satisfy in full all of their respective obligations in respect of, and fully redeem and cancel, all of the Series 1 Preferred Shares of FCE Ltd., or (ii) deposit in a newly created account of FCE Ltd. or the Company cash in an amount sufficient to pay and satisfy in full all of their respective obligations in respect of, and to effect a redemption and cancellation in full of, all of the Series 1 Preferred Shares of FCE Ltd. The Second Orion Amendment also provides that the amended articles of FCE Ltd. setting forth the modified terms of the Series 1 Preferred Shares will be considered a "Material Agreement" under the Orion Credit Agreement. Under the Second Orion Amendment, a failure to satisfy this new affirmative covenant or to otherwise comply with the terms of the Series 1 Preferred Shares will constitute an event of default under the Orion Credit Agreement, which could result in the acceleration of any amounts outstanding under the Orion Credit Agreement.

Additionally, in order to obtain the Orion Lenders' consent to the Crestmark sale-leaseback transaction described in Note 11. "Leases" to our consolidated financial statements and to the use of certain proceeds from the Crestmark sale-leaseback transaction (the "Crestmark Proceeds") as described below, the Company, the Agent, the Orion Lenders and the other loan parties entered into the Third Amendment to the Orion Credit Agreement (the "Third Orion Amendment") dated February 11, 2020, and a Consent and Waiver dated February 11, 2020 (the "Consent and Waiver"). Pursuant to the Third Orion Amendment, TRS Fuel Cell, LLC was added as an Additional Covered Project Company (as defined in the Orion Credit Agreement), requiring the Company to pledge all of the assets of TRS Fuel Cell, LLC under the Orion Credit Agreement. In addition, pursuant to the Orion Credit Agreement (as modified by the Third Orion Amendment), all of the proceeds received by the Company from the Crestmark sale-leaseback transaction, after a down payment and an initial rental payment under the Lease to Crestmark, the payment of taxes and transaction costs and funding a debt service reserve totaling approximately $1.0 million, were deposited in the Company's Project Proceeds Account, which account is restricted, with withdrawals permitted only with consent of the Agent for use to (i) prepay the loans under the Orion Credit Agreement or (ii) fund (x) construction costs, inventory or other capital expenditures for an Additional Covered Project (as defined in the Orion Credit Agreement) whose contracted cash flows (as determined in the Orion Lenders' sole discretion) meet or exceed a coverage ratio acceptable to the Orion Lenders, and (y) inventory, working capital and other costs required in connection with the performance of purchase orders, service agreements and other binding customer agreements (as determined in the Orion Lenders' sole discretion); provided, however, that, pursuant to the Third Orion Amendment, certain portions of the funds deposited in the Project Proceeds Account were used as follows: (a) $1.1 million of the Crestmark Proceeds were transferred to the Module Reserve Account (as defined in the Orion Credit Agreement) to fund module replacement costs for Covered Projects (as defined in the Orion Credit Agreement); (b) $0.1 million of the Crestmark Proceeds were transferred to the Debt Reserve Account; (c) $1.7 million of the Crestmark Proceeds were used to fund the quarterly cash interest due to the Orion Lenders under the Orion Credit Agreement; and (d) $1.1 million of the Crestmark Proceeds were used to fund the aggregate amount of the dividends on the Company's Series B Preferred Stock and the Series 1 Preferred Shares of FCE Ltd. required to be paid in the second quarter of fiscal 2020. As of April 30, 2020, the remaining approximately $6.5 million of the Crestmark Proceeds was long-term restricted cash in the Project Proceeds Account. As noted below, on April 30, 2020, the Company reached agreement with the Orion Lenders to allocate up to a total of $3.5 million of these funds to the San Bernardino project over time. Pursuant to the Consent and Wavier, subject to the terms and conditions described above in the Third Orion Amendment, the Orion Lenders consented to the release of liens on those assets that were the subject of the Crestmark sale-leaseback transaction and to the Company's entering into the Guaranty (as defined elsewhere herein).

On April 30, 2020, the Company, the Agent, the Orion Lenders and the other loan parties entered into the Fourth Amendment to the Orion Credit Agreement (the "Fourth Orion Amendment"). Pursuant to the Fourth Orion Amendment, the Agent and the Orion Lenders agreed to permit the release of $3.5 million from the Project Proceeds Account (as defined in the Orion Credit Agreement) subject to the following terms and conditions.

Pursuant to the Fourth Orion Amendment, the Company's 1.4 MW biogas fueled project at the wastewater treatment plant in San Bernardino, California has been added as an Additional Covered Project (as defined in the Orion Credit Agreement), and the Company subsidiary developing such project, San Bernardino Fuel Cell, LLC, has been added as an Additional Covered Project Company (as defined in the Orion Credit Agreement) such that those covenants, terms and conditions in the Orion Credit Agreement that apply to Covered Projects and Covered Project Companies will now be applicable to the foregoing project and project company, including that the "Project Payoff Amount" (i.e., the amount required pursuant to the Orion Credit Agreement to be realized upon a subsequent sale or refinancing of a project) for the San Bernardino project will be $5 million. Subsequent to quarter end, $2.3 million of the $3.5 million was released from the Project Proceeds Account, which account is restricted subject to the control of the Agent, and transferred to a General Business Unit Account (as defined in the Orion Credit Agreement), which account is unrestricted and available for general use by the Company. The remaining $1.2 million will be released from the Project Proceeds Account and transferred to a Covered Project Account (as defined in the Credit Agreement) being established for the San Bernardino project for use in connection with the construction of the San Bernardino project upon satisfaction of the following conditions: (a) approval of a self-generation incentive program grant for the San Bernardino project in an amount equal to no less than $1.0 million; (b) approval of an interconnection agreement; (c) provision of a fuel affidavit approval by Southern California Gas Company; (d) issuance of an air permit for the anaerobic digester gas cleanup system; (e) provision of an executed consent to collateral assignment by The City of San Bernardino Municipal Water District; (f) recordation in the land records of San Bernardino County of a memorandum of site license; (g) after giving effect to the release and transfer of $1.2 million to the Covered Project Account, evidence that there will be sufficient cash in the Covered Project Account for the San Bernardino project to cover remaining expenditures and complete the project and (h) written approval of the Agent. Refer to Note 18. "Subsequent Events" for additional information concerning the Orion Credit Agreement and the Fifth Orion Amendment.

**Connecticut Green Bank Loans:** As of October 31, 2019, the Company had a long-term loan agreement with the Connecticut Green Bank, providing the Company with a loan of $1.8 million (the "Green Bank Loan Agreement"). On and effective as of December 19, 2019, the Company and Connecticut Green Bank entered into an amendment to the Green Bank Loan Agreement (the "Green Bank Amendment"). Upon the execution of the Green Bank Amendment on December 19, 2019, Connecticut Green Bank made an additional loan to the Company in the aggregate principal amount of $3.0 million (the "December 2019 Loan"), which is to be used (i) first, to pay closing fees related to the May 9, 2019 acquisition of the Bridgeport Fuel Cell Project and the Subordinated Credit Agreement (as defined below), other fees, and accrued interest from May 9, 2019, totaling $0.4 million ("Accrued Fees"), and (ii) thereafter, for general corporate purposes as determined by the Company, including, but not limited to, expenditures in connection with the project being constructed by Groton Station Fuel Cell, LLC ("Groton Fuel Cell"). Pursuant to the terms of the Green Bank Amendment, Connecticut Green Bank will have no further obligation to make loans under the Green Bank Loan Agreement and the Company will have no right to make additional draws under the Green Bank Loan Agreement.

The Green Bank Amendment provides that, until such time as the loan (which includes both the outstanding principal balance of the original loan under the Green Bank Loan Agreement and the outstanding principal amount of the December 2019 Loan) has been repaid in its entirety, interest on the outstanding balance of the loan shall accrue monthly in arrears from the date of the Green Bank Amendment at a rate of 5% per annum until May 8, 2019 and at a rate of 8% per annum thereafter, payable by the Company on a monthly basis in arrears. The Green Bank Amendment further provides that the payment by the Company of the Accrued Fees (as described above) includes any shortfall of interest due but unpaid by the Company through and including November 30, 2019. Interest payments made by the Company after the date of the Green Bank Amendment are to be applied first to interest that has accrued on the outstanding principal balance of the original loan under the Green Bank Loan Agreement and then to interest that has accrued on the December 2019 Loan. The Green Bank Amendment also modifies the repayment and mandatory prepayment terms and extends the maturity date set forth in the original Green Bank Loan Agreement. Under the Green Bank Amendment, to the extent that excess cash flow reserve funds under the BFC Credit Agreement (as defined below) are eligible for disbursement to Bridgeport Fuel Cell, LLC pursuant to Section 6.23(c) of the BFC Credit Agreement, such funds are to be paid to Connecticut Green Bank, to be applied first to repay the outstanding principal balance of the original loan under the Green Bank Loan Agreement and thereafter to repay the outstanding principal amount of the December 2019 Loan, until repaid in full. The Green Bank Amendment further provides that the entire unpaid balance of the loan and all other obligations due under the Green Bank Loan Agreement will be due and payable on May 9, 2026 if not paid sooner in accordance with the Green Bank Loan Agreement. Finally, with respect to mandatory prepayments, the Green Bank Amendment provides that, when the Company has closed on the subordinated project term loan pursuant to the Commitment Letter, dated February 6, 2019, issued by Connecticut Green Bank to Groton Fuel Cell to provide a subordinated project term loan to Groton Fuel Cell in the amount of $5.0 million, the Company will be required to prepay to Connecticut Green Bank the lesser of any then outstanding amount of the December 2019 Loan and the amount of the subordinated project term loan actually advanced by Connecticut Green Bank. The balance under the original Green Bank Loan Agreement and the December 2019 Loan as of April 30, 2020 was $4.8 million.

**Bridgeport Fuel Cell Project Loans:** On May 9, 2019, in connection with the closing of the purchase of the membership interests of Bridgeport Fuel Cell, LLC ("BFC") (and the 14.9 MW Bridgeport Fuel Cell Project), BFC entered into a subordinated credit agreement with the Connecticut Green Bank whereby Connecticut Green Bank provided financing in the amount of $6.0 million (the "Subordinated Credit Agreement"). This $6.0 million consisted of $1.8 million in incremental funding that was received by BFC and $4.2 million of funding previously received by FuelCell Energy, Inc. with respect to which BFC became the primary obligor. As security for the Subordinated Credit Agreement, Connecticut Green Bank received a perfected lien, subordinated and second in priority to the liens securing the $25.0 million loaned under the BFC Credit Agreement (as defined below), in all of the same collateral securing the BFC Credit Agreement. The interest rate under the Subordinated Credit Agreement is 8% per annum. Principal and interest are due monthly in amounts sufficient to fully amortize the loan over an 84 month period ending in May 2026. The Subordinated Credit Agreement contains representations, warranties and covenants. The balance under the Subordinated Credit Agreement as of April 30, 2020 was $5.4 million.

On May 9, 2019, in connection with the closing of the purchase of the Bridgeport Fuel Cell Project, BFC entered into a Credit Agreement with Liberty Bank, as administrative agent and co-lead arranger, and Fifth Third Bank as co-lead arranger and swap hedger (the "BFC Credit Agreement"), whereby (i) Fifth Third Bank provided financing in the amount of $12.5 million towards the purchase price for the BFC acquisition; and (ii) Liberty Bank provided financing in the amount of $12.5 million towards the purchase price for the BFC acquisition. As security for the BFC Credit Agreement, Liberty Bank and Fifth Third Bank were granted a first priority lien in (i) all assets of BFC, including BFC's cash accounts, fuel cells, and all other personal property, as well as third party contracts including the Energy Purchase Agreement between BFC and Connecticut Light and Power Company dated July 10, 2009, as amended; (ii) certain fuel cell modules that are intended to be used to replace the Bridgeport Fuel Cell Project's fuel cell modules as part of routine operation and maintenance; and (iii) FuelCell Finance's (a wholly-owned subsidiary of the Company and the direct parent of BFC) ownership interest in BFC. The maturity date under the BFC Credit Agreement is May 9, 2025. Monthly principal and interest are to be paid in arrears in an amount sufficient to fully amortize the term loan over a 72 month period. BFC has the right to make additional principal payments or pay the balance due under the BFC Credit Agreement in full, provided that it pays any associated breakage fees with regard to the interest rate swap agreements fixing the interest rate. The interest rate under the BFC Credit Agreement fluctuates monthly at the 30-day LIBOR rate plus 275 basis points on an initial total notional value of $25.0 million, reduced for principal payments.

An interest rate swap agreement was required to be entered into with Fifth Third Bank in connection with the BFC Credit Agreement to protect against movements in the floating LIBOR index. Accordingly, on May 16, 2019, an interest rate swap agreement (the "Swap Agreement") was entered into with Fifth Third Bank in connection with the BFC Credit Agreement for the term of the loan. The net interest rate across the BFC Credit Agreement and the swap transaction results in a fixed rate of 5.09%. The interest rate swap will be adjusted to fair value on a quarterly basis. The estimated fair value is based on Level 2 inputs including primarily the forward LIBOR curve available to swap dealers. The valuation methodology involves comparison of (i) the sum of the present value of all monthly variable rate payments based on a reset rate using the forward LIBOR curve and (ii) the sum of the present value of all monthly fixed rate payments on the notional amount, which is equivalent to the outstanding principal amount of the loan. The fair value adjustments for the three and six months ended April 30, 2020 resulted in a $0.5 million charge.

**State of Connecticut Loan:** In October 2015, the Company closed on a definitive Assistance Agreement with the State of Connecticut (the "Assistance Agreement") and received a disbursement of $10.0 million, which was used for the first phase of the expansion of the Company's Torrington, Connecticut manufacturing facility. In conjunction with this financing, the Company entered into a $10.0 million promissory note and related security agreements securing the loan with equipment liens and a mortgage on its Danbury, Connecticut location. Interest accrues at a fixed interest rate of 2.0%, and the loan is repayable over 15 years from the date of the first advance, which occurred in October of 2015. Principal payments were deferred for four years from disbursement and began on December 1, 2019. Under the Assistance Agreement, the Company was eligible for up to $5.0 million in loan forgiveness if the Company created 165 full-time positions and retained 538 full-time positions for two consecutive years (the "Employment Obligation") as measured on October 28, 2017 (the "Target Date"). The Assistance Agreement was subsequently amended in April 2017 to extend the Target Date by two years to October 28, 2019.

In January 2019, the Company and the State of Connecticut entered into a Second Amendment to the Assistance Agreement (the "Second Amendment"). The Second Amendment extends the Target Date to October 31, 2022 and amends the Employment Obligation to require the Company to continuously maintain a minimum of 538 full-time positions for 24 consecutive months. If the Company meets the Employment Obligation, as modified by the Second Amendment, and creates an additional 91 full-time positions, the Company may receive a credit in the amount of $2.0 million to be applied against the outstanding balance of the loan. However, based on the Company's current headcount and plans for fiscal year 2020, it will not meet this requirement or receive this credit. The Second Amendment deletes and cancels the provisions of the Assistance Agreement related to the second phase of the expansion project and the loans related thereto, but the Company had not drawn any funds or received any disbursements under those provisions. A job audit will be performed within 90 days of the Target Date. If the Company does not meet the Employment Obligation, then an accelerated payment penalty will be assessed at a rate of $18,587.36 times the number of employees below the number of employees required by the Employment Obligation. Such penalty is immediately payable and will be applied first to accelerate the payment of any outstanding fees or interest due and then to accelerate the payment of outstanding principal.

In April of 2020, as a result of the COVID-19 pandemic, the State of Connecticut agreed to defer three months of principal and interest payments under the Assistance Agreement, beginning with the May 2020 payment. These deferred payments will be added at the end of the loan, thus extending out the maturity date by three months.

**Liberty Bank Promissory Note:** On April 20, 2020, the Company entered into the PPP Note, evidencing a loan to the Company from Liberty Bank, under the CARES Act, administered by the SBA. Pursuant to the PPP Note, the Company received total proceeds of approximately $6.5 million on April 24, 2020. In accordance with the requirements of the CARES Act, the Company is using the proceeds primarily for payroll costs.

The PPP Note is scheduled to mature on April 16, 2022, has a 1.00% per annum interest rate, and is subject to the terms and conditions applicable to loans administered by the SBA under the CARES Act. Monthly principal and interest payments, less the amount of any potential forgiveness (as discussed below), will commence on November 16, 2020. The Company did not provide any collateral or guarantees for the PPP Note, nor did the Company pay any facility charge to obtain the PPP Note. The PPP Note provides for customary events of default, including, among others, those relating to failure to make a payment when due under the PPP Note, failure to comply with any provision of the PPP Note, bankruptcy, and breaches of or materially misleading representations. Upon the occurrence of an event of default, Liberty Bank may require immediate payment of all amounts owing under the PPP Note, collect all amounts owing from the Company, and pursue other remedies. The PPP Note may be prepaid at any time with no prepayment penalties.

Under the original requirements of the CARES Act, proceeds may only be used for the Company's eligible payroll costs (with salary capped at $100,000 on an annualized basis for each employee), rent, mortgage interest and utilities, in each case paid during the eight-week period following disbursement. Also under the original requirements of the CARES Act, at least 75% of the proceeds must be used for eligible payroll costs. The loan may be fully forgiven if (i) proceeds are used to pay eligible payroll costs, rent, mortgage interest and utilities and (ii) full-time employee headcount

and salaries are either maintained during the applicable eight-week period or restored by June 30, 2020. If not so maintained or restored, forgiveness of the loan will be reduced in accordance with the regulations to be issued by the SBA. Any forgiveness of the loan will be subject to approval by the SBA and Liberty Bank and will require the Company to apply for such treatment in the future. In order to obtain the consent of the Agent and the Orion Lenders under the Orion Facility to enter into the PPP Note, the Agent and the Orion Lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020.

On June 5, 2020, the PPP Flexibility Act was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note.

In addition to the commitments listed in the table under the heading "Commitments and Significant Contractual Obligations," we have the following outstanding obligations:

*Restricted Cash*

We have pledged approximately $44.3 million of our cash and cash equivalents as performance security and for letters of credit for certain banking requirements and contracts. As of April 30, 2020, outstanding letters of credit totaled $6.2 million. These expire on various dates through August 2028. Under the terms of certain contracts, we will provide performance security for future contractual obligations. The restricted cash balance as of April 30, 2020 also included $17.9 million primarily to support obligations under the power purchase and service agreements related to the PNC sale-leaseback transactions and $6.2 million relating to future obligations associated with the Bridgeport Fuel Cell Project. Refer to Note 15. "Restricted Cash" for a detailed discussion of the Company's restricted cash balance.

As of October 31, 2019, we had uncertain tax positions aggregating $15.7 million and have reduced our net operating loss ("NOL") carryforwards by this amount. Because of the level of NOLs and valuation allowances, unrecognized tax benefits, even if not resolved in our favor, would not result in any cash payment or obligation and therefore have not been included in the contractual obligation table under the heading "Commitments and Significant Contractual Obligations."

*Power purchase agreements*

Under the terms of our PPAs, customers agree to purchase power from our fuel cell power plants at negotiated rates. Electricity rates are generally a function of the customers' current and estimated future electricity pricing available from the grid. We are responsible for all operating costs necessary to maintain, monitor and repair our fuel cell power plants. Under certain agreements, we are also responsible for procuring fuel, generally natural gas or biogas, to run our fuel cell power plants. In addition, under certain agreements, we are required to produce minimum amounts of power under our PPAs and we have the right to terminate PPAs by giving written notice to the customer, subject to certain exit costs. As of April 30, 2020, our operating portfolio was 32.6 MW.

*Service and warranty agreements*

We warranty our products for a specific period of time against manufacturing or performance defects. Our standard U.S. warranty period is generally 15 months after shipment or 12 months after acceptance of the product. In addition to the standard product warranty, we have contracted with certain customers to provide services to ensure the power plants meet minimum operating levels for terms of up to 20 years. Pricing for service contracts is based upon estimates of future costs, which could be materially different from actual expenses. Refer to "Critical Accounting Policies and Estimates" for additional details.

*Advanced Technologies contracts*

We have contracted with various government agencies and certain companies from private industry to conduct research and development as either a prime contractor or sub-contractor under multi-year, cost-reimbursement and/or cost-share type contracts or cooperative agreements. Cost-share terms require that participating contractors share the total cost of the project based on an agreed upon ratio. In many cases, we are reimbursed only a portion of the costs incurred or to be incurred on the contract. While government research and development contracts may extend for many years, funding is often provided incrementally on a year-by-year basis if contract terms are met and Congress authorizes the funds. As of April 30, 2020, Advanced Technologies contracts backlog totaled $56.8 million, of which $46.6 million is funded and $10.2 million, which is related to government contracts, is unfunded. Should funding be terminated or delayed or if business initiatives change, we may choose to devote resources to other activities, including internally funded research and development. The funded backlog includes approximately $10 million of milestone payments that are contingent upon achieving technical milestones.

*Off-Balance Sheet Arrangements*

We have no off-balance sheet debt or similar obligations which are not classified as debt. We do not guarantee any third-party debt. See Note 17. "Commitments and Contingencies" to our consolidated financial statements for the six months ended April 30, 2020 included in this Quarterly Report on Form 10-Q for further information.

## CRITICAL ACCOUNTING POLICIES AND ESTIMATES

The preparation of financial statements and related disclosures requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities. Actual results could differ from those estimates. Estimates are used in accounting for, among other things, revenue recognition, contract loss accruals, excess, slow-moving and obsolete inventories, product warranty accruals, loss accruals on service agreements, share-based compensation expense, allowance for doubtful accounts, depreciation and amortization, impairment of goodwill and intangible assets, impairment of long-lived assets (including project assets), lease liabilities and right-of-use ("ROU") assets and contingencies. Estimates and assumptions are reviewed periodically, and the effects of revisions are reflected in the consolidated financial statements in the period they are determined to be necessary.

Our critical accounting policies are those that are both most important to our financial condition and results of operations and require the most difficult, subjective or complex judgments on the part of management in their application, often as a result of the need to make estimates about the effect of matters that are inherently uncertain. For a complete description of our critical accounting policies that affect our more significant judgments and estimates used in the preparation of our condensed consolidated financial statements, refer to our Annual Report on Form 10-K for the year ended October 31, 2019 filed with the Securities and Exchange Commission.

Effective November 1, 2019, we adopted Accounting Standards Update 2016-02, "Leases" ("Topic 842"). See "Note 11, "Leases" included in our notes to consolidated financial statements for changes to our critical accounting policies as a result of adopting Topic 842. Other than changes to our accounting for leases as a result of adopting Topic 842, there have been no significant changes to the critical accounting policies disclosed in "Management's Discussion and Analysis of Financial Condition and Results of Operations" in our Annual Report on Form 10-K for the year ended October 31, 2019.

## ACCOUNTING GUIDANCE UPDATE

See Note 2, "Recent Accounting Pronouncements," to our consolidated financial statements included in this Quarterly Report on Form 10-Q for a summary of recently adopted accounting guidance, as well as recent accounting guidance that is not yet effective.

## Item 3. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

### Interest Rate Exposure

Cash is invested overnight with high credit quality financial institutions and therefore we are not exposed to market risk on our cash holdings from changing interest rates. Based on our overall interest rate exposure as of April 30, 2020, including all interest rate sensitive instruments, a change in interest rates of 1% would not have a material impact on our results of operations.

### Foreign Currency Exchange Risk

As of April 30, 2020, approximately 1.0% of our total cash and cash equivalents were in currencies other than U.S. dollars (primarily the Euro, Canadian dollars and South Korean Won) and we have no plans of repatriation. We make purchases from certain vendors in currencies other than U.S. dollars. Although we have not experienced significant foreign exchange rate losses to date, we may in the future, especially to the extent that we do not engage in currency hedging activities. The economic impact of currency exchange rate movements on our operating results is complex because such changes are often linked to variability in real growth, inflation, interest rates, governmental actions and other factors. These changes, if material, may cause us to adjust our financing and operating strategies.

### Derivative Fair Value Exposure Risk

*Interest Rate Swap*

On May 16, 2019, an interest rate swap agreement (the "Swap Agreement") was entered into with Fifth Third Bank in connection with the BFC Credit Agreement for the term of the loan. The net interest rate across the BFC Credit Agreement and the swap transaction results in a fixed rate of 5.09%. The interest rate swap will be adjusted to fair value on a quarterly basis. The estimated fair value is based on Level 2 inputs including primarily the forward LIBOR curve available to swap dealers. The valuation methodology involves comparison of (i) the sum of the present value of all monthly variable rate payments based on a reset rate using the forward LIBOR curve and (ii) the sum of the present value of all monthly fixed rate payments on the notional amount which is equivalent to the outstanding principal amount of the loan. The fair value adjustments for the three and six months ended April 30, 2020 resulted in $0.5 million of charges.

## Item 4. CONTROLS AND PROCEDURES

***Evaluation of disclosure controls and procedures***

The Company maintains disclosure controls and procedures, which are designed to provide reasonable assurance that information required to be disclosed in the Company's periodic SEC reports is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms, and that such information is accumulated and communicated to its principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure.

We carried out an evaluation, under the supervision and with the participation of our principal executive officer and principal financial officer, of the effectiveness of the design and operation of our disclosure controls and procedures as of the end of the period covered by this report. Based on that evaluation, the Company's principal executive officer and principal financial officer have concluded that, due to the material weakness described below, the Company's disclosure controls and procedures were ineffective to provide reasonable assurance that information required to be disclosed in the Company's periodic SEC reports is recorded, processed, summarized, and reported within the time periods specified in the SEC's rules and forms, and that such information is accumulated and communicated to its principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure.

Notwithstanding the material weakness described below, management has concluded that our consolidated financial statements included in this Form 10-Q for the quarter ended April 30, 2020 are fairly stated in all material respects in accordance with generally accepted accounting principles in the United States of America for each of the periods presented and that they may be relied upon.

***Previously identified material weakness in internal control over financial reporting***

A material weakness is a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of our annual or interim financial statements will not be prevented or detected on a timely basis.

We previously disclosed in our Form 10-Qs for the quarters ended April 30, 2019 and July 31, 2019 that the Company did not have resources to sufficiently address asset impairments on a timely basis or the accounting considerations and disclosures related to the Company's amended credit facilities. As a result, we concluded that there was a material weakness in internal control over financial reporting, as we did not maintain effective controls over the accounting for and disclosures in the consolidated financial statements related to asset impairments and credit facilities. As disclosed in our Annual Report on Form 10-K for the fiscal year ended October 31, 2019, this control deficiency had not been remediated as of October 31, 2019 and the Company further identified that it did not have resources to sufficiently address certain other non-routine transactions and disclosures. This material weakness resulted in material misstatements that were corrected in the consolidated financial statements prior to issuance. This control deficiency has not been remediated as of April 30, 2020.

***Remediation plan for material weakness***

Subsequent to the evaluation made in connection with filing our Form 10-Q for the quarter ended April 30, 2019, our management, with the oversight of the Audit and Finance Committee of the Board of Directors, began the process of remediating the material weakness. Progress to date includes engagement of a third-party resource to help evaluate the accounting and disclosure for significant matters each quarter. Management also added additional experienced accounting staff. In addition, under the oversight of the Audit and Finance Committee, management will continue to review and make necessary changes to the overall design of our internal control environment to improve the overall effectiveness of internal control over financial reporting.

We have made progress in accordance with our remediation plan and our goal is to remediate this material weakness in fiscal year 2020. However, the material weakness will not be considered remediated until the applicable controls operate for a sufficient period of time and management has concluded, through testing, that these controls are operating effectively. We are committed to continuing to improve our internal control processes and will continue to review, optimize and enhance our financial reporting controls and procedures, however, there can be no assurance that this will occur within 2020.

***Changes in internal control over financial reporting***

Beginning on November 1, 2019, we adopted ASC 842, Leases. As a result of the adoption of this standard, we implemented changes to our processes related to leasing and the related internal controls. These changes included the development of new policies based on the leasing standard and the implementation of a leasing software tool to track and account for our leases. Other than the changes relating to the adoption of ASC 842, there were no changes in our internal control over financial reporting that occurred during our last fiscal quarter (ended April 30, 2020) that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

## PART II. OTHER INFORMATION

### Item 1. LEGAL PROCEEDINGS

We are involved in legal proceedings, including, but not limited to, regulatory proceedings, claims, mediations, arbitrations and litigation, arising out of the ordinary conduct of our business ("Legal Proceedings"). Although we cannot assure the outcome, management presently believes that the result of such Legal Proceedings, either individually, or in the aggregate, will not have a material adverse effect on our consolidated financial statements, and no material amounts have been accrued in our consolidated financial statements with respect to these matters.

### Item 1A. RISK FACTORS

You should carefully consider the following risk factors before making an investment decision. If any of the following risks actually occur, our business, financial condition, or results of operations could be materially and adversely affected. In such cases, the trading price of our common stock could decline, and you may lose all or part of your investment.

***Our business and operations may be adversely affected by the 2019 Novel Coronavirus (COVID-19) outbreak or other similar outbreaks.***

Any outbreaks of contagious diseases, including the recent outbreak of the coronavirus that was first detected in Wuhan, China in December 2019 and has since developed into a global pandemic, and other adverse public health developments in countries where we and our suppliers operate could have a material and adverse effect on our business, financial condition and results of operations. These effects could include disruptions or restrictions on our employees' ability to travel, as well as temporary closures of our facilities or the facilities of our customers, suppliers, or other vendors in our supply chain. In addition, the coronavirus has resulted in a widespread health crisis that has adversely affected, and may continue to adversely affect, the economies and financial markets of many countries, resulting in an economic downturn that could affect demand for our products or our ability to obtain financing for our business or projects. COVID-19 may impact the health of our team members, directors or customers, reduce the availability of our workforce or those of companies with which we do business, or otherwise cause human impacts that may negatively impact our business. Any of these events, which may result in disruptions to our supply chain or customer demand, could materially and adversely affect our business and our financial results. The extent to which the coronavirus will impact our business and our financial results will depend on future developments, which are highly uncertain and cannot be predicted. Such developments may include the geographic spread of the virus, the severity of the disease, the duration of the outbreak, the actions that may be taken by various governmental authorities in response to the outbreak, such as quarantine or "shelter-in-place" orders and business closures imposed by various states within the United States, and the impact on the U.S. or global economy. For example, on March 18, 2020, the Company, in response to the escalating global COVID-19 outbreak, temporarily suspended operations at its Torrington, Connecticut manufacturing facility, and also ordered those employees that could work from home to do so. This suspension was subsequently extended following the guidance of Connecticut's stay at home orders. While the Company now is tentatively planning to resume operations in the manufacturing facility on June 22, 2020, the Company will continue to evaluate its ability to resume operations and the advisability of resuming operations, based on federal, state and local guidance, evolving data concerning the pandemic and the best interests of its employees, customers and stockholders. Accordingly, there can be no assurance that the Torrington manufacturing facility will reopen on schedule (in full or in part), that our employees will return to the office or that our other operations will continue at full or limited capacity. If we do not resume production as planned, our project schedules and associated financing could be adversely affected. An extended period of remote working by the Company's employees could strain its technology resources and introduce operational risks, including heightened cybersecurity risk. Further, the Company may experience increased costs and expenses, including as a result of (i) conducting daily "fitness-for-duty" assessments for employees, including symptom checks and providing personal protective equipment, (ii) the expansion of benefits to the Company's employees, including the provision of additional time off for employees who have contracted COVID-19 or are required to be quarantined or who are unable to obtain childcare to return to work, (iii) implementing increased health and safety protocols at all of the Company's facilities, including increased cleaning/sanitization of workspaces, restricting visitor access, mandating social distancing guidelines and increasing the availability of sanitization products, and (iv) the increased cost of personal protective equipment. Although the Company believes it is currently considered an "essential" business in its operating markets, if any of the applicable exceptions or exemptions are curtailed or revoked in the future, that could adversely impact our business, operating results and financial condition. Furthermore, to the extent that these exemptions or exceptions do not extend to our key suppliers and customers, this would also adversely impact our business, operating results and financial condition. While we have attempted to continue business development activities during the pandemic, state and local shut downs, shelter in place orders and travel restrictions have impeded our ability to meet with customers and solicit new business and certain bids and solicitations in which we typically participate have been postponed. As a result, at this time, it is impossible to predict the overall impact of the coronavirus on our business, liquidity, capital resources, supply chain and financial results or its effect on clean energy demand, capital budgets of our customers, or demand for our products. Additionally, while we have continued to prioritize the health and safety of our team members and customers as we continue to operate during the pandemic, we face an increased risk of litigation related to our operating environments. Even after the COVID-19 pandemic has subsided, we may continue to experience adverse impacts to our business as a result of any economic recession that has occurred or may occur in the future because of the pandemic. Additional public health crises could also emerge in the future, including other pandemics or epidemics. Such public health crises could pose further risks to the Company and could also have a material adverse effect on our business, results of operations and financial position.

***Our Paycheck Protection Program loan may not be forgiven or may subject us to challenges and investigations regarding qualification for the loan.***

On April 20, 2020, the Company entered into a Paycheck Protection Program Promissory Note, dated April 16, 2020 (the "PPP Note"), evidencing a loan to the Company from Liberty Bank under the CARES Act. Pursuant to the PPP Note, the Company received total proceeds of approximately $6.5 million on April 24, 2020. In accordance with the original requirements of the CARES Act, at least 75% of the proceeds must be used for eligible payroll costs. The loan may be fully forgiven if (i) proceeds are used to pay eligible payroll costs, rent, mortgage interest and utilities and (ii)

full-time employee headcount and salaries are either maintained during the applicable eight-week period or restored by June 30, 2020. If not so maintained or restored, forgiveness of the loan will be reduced in accordance with the regulations to be issued by the SBA. In order to obtain the consent of the Agent and the Orion Lenders under the Orion Facility to enter into the PPP Note, the Agent and the Orion Lenders have required the Company to apply for forgiveness within 30 days after the last day of the loan forgiveness period as designated under the PPP regulations in effect as of June 6, 2020. On June 5, 2020, the Paycheck Protection Program Flexibility Act (the "PPP Flexibility Act") was signed into law, extending the loan forgiveness period from 8 weeks to 24 weeks after loan origination, reducing the required amount of payroll expenditures from 75% to 60%, removing the prior ban on borrowers taking advantage of payroll tax deferral after loan forgiveness and allowing for the amendment of the maturity date on existing loans from two years to five years. The Company is evaluating the impact of these changes on its PPP Note. Any forgiveness of the loan will be subject to approval by the SBA and Liberty Bank and will require the Company to apply for such treatment in the future. While we may apply for forgiveness of the PPP Note in accordance with the requirements and limitations under the CARES Act and the SBA regulations and requirements, no assurance can be given that any portion of the PPP Note will be forgiven. In addition, based on guidance from the United States Department of the Treasury, since the total PPP Note proceeds exceeded $2.0 million, our forgiveness application will be subject to audit by the SBA, including with respect to our certification that the current economic uncertainty made our loan request necessary to support our ongoing operations. Such certification does not contain any objective criteria and is subject to interpretation. If we are found to have been ineligible to receive the loan under the PPP Note, or in violation of any of the laws or regulations that may apply to us in connection with the PPP Note, including the False Claims Act, we may be subject to penalties, including significant civil, criminal and administrative penalties, and could be required to repay the PPP Note. In addition, our receipt of the loan may result in adverse publicity and damage to our reputation, governmental investigations, inquiries, reviews and audits, such as the SEC inquiry described below, which could consume significant financial and management resources. Any of these events could harm our business, results of operations and financial condition.

On or about May 11, 2020, the Division of Enforcement of the SEC sent the Company an inquiry requesting that the Company voluntarily provide information to the SEC pertaining to the Company's application and resulting loan under the Paycheck Protection Program and how the need for the loan compares with the Company's filings and financial condition. While this request for information is voluntary and the Company is not obligated to respond, the Company intends to cooperate by providing information to the SEC.

***We have incurred losses and anticipate continued losses and negative cash flow.***

We have transitioned from a research and development company to a commercial products manufacturer, services provider and developer. We have not been profitable since our year ended October 31, 1997. We expect to continue to incur net losses and generate negative cash flows until we can produce sufficient revenues and margins to cover our costs. We may never become profitable. Even if we do achieve profitability, we may be unable to sustain or increase our profitability in the future. For the reasons discussed in more detail below, there are uncertainties associated with our achieving and sustaining profitability. We have, from time to time, sought financing in the public markets in order to fund operations and will continue to do so. Our future ability to obtain such financing could be impaired by a variety of factors, including, but not limited to, the price of our common stock and general market conditions.

***Our cost reduction strategy may not succeed or may be significantly delayed, which may result in our inability to deliver improved margins.***

Our cost reduction strategy is based on the assumption that increases in production will result in economies of scale. In addition, our cost reduction strategy relies on advancements in our manufacturing process, global competitive sourcing, engineering design, reducing the cost of capital and technology improvements (including stack life and projected power output). Failure to achieve our cost reduction targets could have a material adverse effect on our results of operations and financial condition.

***Our workforce reduction and recent manufacturing facility closure may cause undesirable consequences and our results of operations may be harmed.***

On April 12, 2019, we undertook a reorganization, which included a workforce reduction of 30%, or 135 employees. On March 18, 2020, we temporarily suspended operations at our Torrington, Connecticut manufacturing facility as a result of the COVID-19 pandemic. This workforce reduction and subsequent manufacturing facility closure may yield unintended consequences, such as attrition beyond our reduction in workforce and reduced employee morale, which may cause our employees who were not affected by the reduction in workforce but have been affected by the manufacturing facility closure to seek alternate employment. Additional attrition could impede our ability to meet our operational goals, which could have a material adverse effect on our financial performance. Furthermore, employees whose positions were eliminated or those who determine to seek alternate employment may seek employment with our competitors. Although all our employees are required to sign a confidentiality agreement with us at the time of hire, we cannot assure you that the confidential nature of our proprietary information will be maintained in the course of such future employment. We cannot assure you that we will not undertake additional workforce reduction activities, that any of our efforts will be successful, or that we will be able to realize the cost savings and other anticipated benefits from our previous or any future workforce reduction plans. In addition, if we continue to reduce our workforce, it may adversely impact our ability to respond rapidly to any new product, growth or revenue opportunities and to execute on our backlog and business plans. Additionally, our recent reduction in workforce and manufacturing facility closure may make it more difficult to recruit and retain new hires as our business grows.

***We have debt outstanding and may incur additional debt in the future, which may adversely affect our financial condition and future financial results.***

As of April 30, 2020, our total consolidated debt and financing obligations outstanding ("indebtedness") was $183.3 million ($173.2 million, net of finance costs and debt discounts), of which an aggregate of $80.0 million ($72.2 million, net of finance costs and debt discounts) was senior secured indebtedness under the Orion Credit Agreement and an aggregate of $103.3 million ($101.2 million, net of finance costs and debt discounts) was other secured indebtedness. As of April 30, 2020, our subsidiaries had $136.7 million ($132.0 million, net of finance costs and debt discounts) of indebtedness and other liabilities (including trade payables, but excluding intercompany obligations and liabilities of a type not required to be

reflected on a balance sheet of such subsidiaries in accordance with GAAP). The majority of our debt is long-term with $13.8 million due within twelve months of April 30, 2020.

Our ability to make scheduled payments of principal and interest and other required repayments depends on our future performance, which is subject to economic, financial, competitive and other factors beyond our control. Our business may not generate cash flow from operations in the future sufficient to service our debt and make necessary capital expenditures. In addition, the Agent and the lenders under the Orion Credit Agreement have broad approval rights over our ability to draw and allocate funds from the Orion Facility and to take on additional debt. If we are unable to generate such cash flow, we may be required to adopt one or more alternatives, such as selling assets, restructuring operations, restructuring debt or obtaining additional equity capital on terms that may be onerous or dilutive.

It is also possible that we may incur additional indebtedness in the future in the ordinary course of business. If new debt is added to current debt levels, the risks described above could intensify. Our debt agreements contain representations and warranties, affirmative and negative covenants, and events of default that entitle the lenders to cause our indebtedness under such debt agreements to become immediately due and payable.

***We are required to maintain effective internal control over financial reporting. Our management previously identified a material weakness in our internal control over financial reporting. If we are unable to remediate the material weakness or other control deficiencies are identified in the future, we may not be able to report our financial results accurately, prevent fraud or file our periodic reports in a timely manner, which may adversely affect investor confidence in our company and, as a result, the value of our common stock.***

We are required, pursuant to Section 404 of the Sarbanes-Oxley Act, to furnish a report by management on, among other things, the effectiveness of our internal control over financial reporting. Complying with Section 404 requires a rigorous compliance program as well as adequate time and resources. We may not be able to complete our internal control evaluation, testing and any required remediation in a timely fashion. Additionally, if we identify one or more material weaknesses in our internal control over financial reporting, we will not be able to assert that our internal controls are effective. A material weakness is a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of our annual or interim financial statements will not be prevented or detected on a timely basis.

We previously disclosed in our Form 10-Qs for the quarters ended April 30, 2019, July 31, 2019 and January 31, 2020 and in our Form 10-K for the year ended October 31, 2019 that we did not have resources to sufficiently address asset impairments on a timely basis or the accounting considerations and disclosures related to our amended credit facilities. As a result, we concluded that there was a material weakness in internal control over financial reporting, as we did not maintain effective controls over the accounting for and disclosures in the consolidated financial statements related to asset impairments, credit facilities and other non-routine transactions and disclosures. This material weakness resulted in material misstatements that were corrected in the consolidated financial statements prior to issuance. This material weakness had not been remediated as of April 30, 2020.

Subsequent to the evaluation made in connection with filing our Form 10-Q for the quarter ended April 30, 2019, our management, with the oversight of the Audit and Finance Committee of our Board of Directors, began the process of remediating the material weakness. Progress to date includes engagement of a third party resource to help evaluate the accounting and disclosure for significant matters each quarter and the addition of additional experienced accounting staff. In addition, under the oversight of the Audit and Finance Committee, management will continue to review and make necessary changes to the overall design of our internal control environment to improve the overall effectiveness of internal control over financial reporting.

We have made progress in accordance with our remediation plan and our goal is to remediate this material weakness in fiscal year 2020. However, the material weakness will not be considered remediated until the applicable controls operate for a sufficient period of time and management has concluded, through testing, that these controls are operating effectively. We are committed to continuing to improve our internal control processes and will continue to review, optimize and enhance our financial reporting controls and procedures, however, there can be no assurance that this will occur within 2020.

We cannot be certain that these measures will successfully remediate the material weakness or that other material weaknesses and control deficiencies will not be discovered in the future. If our efforts are not successful or other material weaknesses are identified in the future, or if we are not able to comply with the requirements of Section 404 in a timely manner, our reported financial results could be materially misstated and we could be subject to investigations or sanctions by regulatory authorities, which would require additional financial and management resources, and the value of our common stock could decline.

To the extent we identify future weaknesses or deficiencies, there could be material misstatements in our consolidated financial statements and we could fail to meet our financial reporting obligations. As a result, our ability to obtain additional financing, or obtain additional financing on favorable terms, could be materially and adversely affected which, in turn, could materially and adversely affect our business, our financial condition and the value of our common stock. If we are unable to assert that our internal control over financial reporting is effective in the future, investor confidence in the accuracy and completeness of our financial reports could be further eroded, which would have a material adverse effect on the price of our common stock.

***Our products compete with products using other energy sources, and if the prices of the alternative sources are lower than energy sources used by our products or attributes of other energy sources are favored over our products, sales of our products will be adversely affected.***

Our power plants can operate on a variety of fuels, including but not limited to natural gas, renewable biogas, directed biogas and propane. If these fuels are not readily available or if their prices increase such that electricity produced by our products costs more than electricity provided by other generation sources, our products would be less economically attractive to potential customers. In addition, we have no control over the prices of several types of competitive energy sources such as solar, wind, oil, gas or coal or local utility electricity costs. Significant decreases (or short term increases) in the price of these technologies or fuels or prices for grid delivered electricity could also have a material adverse effect on our business because other generation sources could be more economically attractive to consumers than our products. Additionally, in certain markets, consumers and regulators have expressed a preference for zero-carbon generating resources despite their overall environmental footprint over fueled resources. Sales of our products could be adversely affected in these markets due to a misunderstanding of the total carbon footprint associated with zero-carbon intermittent power generating resources.

***Financial markets worldwide have experienced heightened volatility and instability which may have a material adverse impact on our Company, our customers and our suppliers.***

Financial market volatility can affect the debt, equity and project finance markets. This may impact the amount of financing available to all companies, including companies with substantially greater resources, better credit ratings and more successful operating histories than ours. It is impossible to predict future financial market volatility and instability and the impact on our Company, and it may have a materially adverse effect on us for a number of reasons, such as:

- The long term nature of our sales cycle can require long lead times between application design, order booking and product fulfillment. For such sales, we often require substantial cash down payments in advance of delivery. For our generation business, we must invest substantial amounts in application design, manufacture, installation, commissioning and operation, which amounts are returned through energy sales over long periods of time. Our growth strategy assumes that financing will be available for us to finance working capital or for our customers to provide down payments and to pay for our products. Financial market issues may delay, cancel or restrict the construction budgets and funds available to us or our customers for the deployment of our products and services.
- Projects using our products are, in part, financed by equity investors interested in tax benefits, as well as by the commercial and governmental debt markets. The significant volatility in the U.S. and international stock markets causes significant uncertainty and may result in an increase in the return required by investors in relation to the risk of such projects.
- If we, our customers or our suppliers cannot obtain financing under favorable terms, our business may be negatively impacted.

***Our contracted projects may not convert to revenue, and our project pipeline may not convert to contracts, which may have a material adverse effect on our revenue and cash flow.***

Some of the project awards we receive and orders we accept from customers require certain conditions or contingencies (such as permitting, interconnection or financing) to be satisfied, some of which are outside of our control. The time periods from receipt of an award to execution of a contract, or receipt of a contract to installation may vary widely and are determined by a number of factors, including the terms of the award, the terms of the customer contract and the customer's site requirements. These same or similar conditions and contingencies may be required by financiers in order to draw on financing to complete a project. If these conditions or contingencies are not satisfied, or changes in laws affecting project awards occur, project awards may not convert to contracts, and installations may be delayed or canceled. This could have an adverse impact on our revenue and cash flow and our ability to complete construction of a project.

***We have signed product sales contracts, engineering, procurement and construction contracts (EPC), power purchase agreements (PPAs) and long-term service agreements with customers subject to contractual, technology and operating risks as well as market conditions that may affect our operating results.***

We apply the transfer of control over time revenue recognition method under Accounting Standards Codification Topic 606: *Revenue from Contracts with Customer* to certain product sales contracts which are subject to estimates. On a quarterly basis, we perform a review process to help ensure that total estimated contract costs include estimates of costs to complete that are based on the most recent available information. The amount of costs incurred on a cumulative to date basis as a function of estimated costs at completion is applied to contract consideration to determine the cumulative revenue that should be recognized to date.

In certain instances, we have executed PPAs with the end-user of the power or site host of the fuel cell power plant. We may then sell the PPA to a project investor or retain the project and collect revenue from the sale of power over the term of the PPA, recognizing electricity revenue as power is generated and sold.

We have contracted under long-term service agreements with certain customers to provide service on our products over terms up to 20 years. Under the provisions of these contracts, we provide services to maintain, monitor, and repair customer power plants to meet minimum operating levels. Pricing for service contracts is based upon estimates of future costs including future module replacements. While we have conducted tests to determine the overall life of our products, we have not run certain of our products over their projected useful life prior to large scale commercialization. As a result, we cannot be sure that these products will last to their expected useful life, which could result in warranty claims, performance penalties, maintenance and module replacement costs in excess of our estimates and losses on service contracts.

Our ability to proceed with projects under development and complete construction of projects on schedule and within budget may be adversely affected by escalating costs for materials, tariffs, labor and regulatory compliance, inability to obtain necessary permits, interconnections or other

approvals on acceptable terms or on schedule and by other factors. If any development project or construction is not completed, is delayed or is subject to cost overruns, we could become obligated to make delay or termination payments or become obligated for other damages under contracts, experience diminished returns or write off all or a portion of our capitalized costs in the project. Each of these events could have an adverse effect on our business, financial condition, results of operations and prospects.

***Our growing portfolio of project assets exposes us to operational risks and commodity market volatility.***

We have a growing portfolio of project assets used to generate and sell power under PPAs and utility tariff programs that exposes us to operational risks and uncertainties, including, among other things, lost revenues due to prolonged outages, replacement equipment costs, risks associated with facility start-up operations, failures in the availability or acquisition of fuel, the impact of severe adverse weather conditions, natural disasters, terrorist attacks, risks of property damage or injury from energized equipment, availability of adequate water resources and ability to intake and discharge water, use of new or unproven technology, fuel commodity price risk and fluctuating market prices, and lack of alternative available fuel sources.

***We extend product warranties, which could affect our operating results.***

We provide for a warranty of our products for a specific period of time against manufacturing or performance defects. We accrue for warranty costs based on historical warranty claim experience; however, actual future warranty expenses may be greater than we have assumed in our estimates. As a result, operating results could be negatively impacted should there be product manufacturing or performance defects in excess of our estimates.

***Our products are complex and could contain defects and may not operate at expected performance levels which could impact sales and market adoption of our products or result in claims against us.***

We develop complex and evolving products and we continue to advance the capabilities of our fuel cell stacks and are now producing stacks in the United States with a net rated power output of 350 kilowatts and an expected seven-year life.

We are still gaining field operating experience with respect to our products, and despite experience gained from our growing installed base and testing performed by us, our customers and our suppliers, issues may be found in existing or new products. This could result in a delay in recognition or loss of revenues, loss of market share or failure to achieve broad market acceptance. The occurrence of defects could also cause us to incur significant warranty, support and repair costs, could divert the attention of our engineering personnel from our product development efforts, and could harm our relationships with our customers. The occurrence of these problems could result in the delay or loss of market acceptance of our products and would likely harm our business. Defects or performance problems with our products could result in financial or other damages to our customers. From time to time, we have been involved in disputes regarding product warranty issues. Although we seek to limit our liability, a product liability claim brought against us, even if unsuccessful, would likely be time consuming, could be costly to defend, and may hurt our reputation in the marketplace. Our customers could also seek and obtain damages from us for their losses. We have accrued liabilities for potential damages related to performance problems; however, actual results may be different than the assumptions used in our accrual calculations.

***We currently face and will continue to face significant competition.***

We compete on the basis of our products' reliability, efficiency, environmental considerations and cost. Technological advances in alternative energy products or improvements in the electric grid or other sources of power generation, or other fuel cell technologies may negatively affect the development or sale of some or all of our products or make our products non-competitive or obsolete prior to or after commercialization. Other companies, some of which have substantially greater resources than ours, are currently engaged in the development of products and technologies that are similar to, or may be competitive with, our products and technologies.

Several companies in the U.S. are engaged in fuel cell development, although we are the only domestic company engaged in manufacturing and deployment of stationary carbonate fuel cells. Other emerging fuel cell technologies (and the companies developing them) include small or portable proton-exchange membrane ("PEM") fuel cells (Ballard Power Systems, Plug Power, and increasing activity by numerous automotive companies including Toyota, Hyundai, Honda and GM), stationary phosphoric acid fuel cells (Doosan), stationary solid oxide fuel cells (Bloom Energy), and small residential solid oxide fuel cells (Ceres Power Holdings and Ceramic Fuel Cells Ltd.). Each of these competitors has the potential to capture market share in our target markets. There are also other potential fuel cell competitors internationally that could capture market share.

Other than fuel cell developers, we must also compete with companies that manufacture combustion-based distributed power equipment, including various engines and turbines, and have well-established manufacturing, distribution, operating and cost features. Electrical efficiency of these products can be competitive with our SureSource power plants in certain applications. Significant competition may also come from gas turbine companies and large scale solar and wind technologies.

***We derive significant revenue from contracts awarded through competitive bidding processes involving substantial costs and risks. Due to this competitive pressure, we may be unable to grow revenue and achieve profitability.***

We expect a significant portion of the business that we will seek in the foreseeable future will be awarded through competitive bidding against other fuel cell technologies and other forms of power generation. The competitive bidding process involves substantial costs and a number of risks, including the significant cost and managerial time to prepare bids and proposals for contracts that may not be awarded to us and our failure to

accurately estimate the resources and costs that will be required to fulfill any contract we win. In addition, following a contract award, we may encounter significant expense, delay or contract modifications as a result of our competitors protesting or challenging contracts awarded to us in competitive bidding. In addition, multi-award contracts require that we make sustained post-award efforts to obtain task orders under the contract. We may not be able to obtain task orders or recognize revenue under these multi-award contracts. Our failure to compete effectively in this procurement environment could adversely affect our revenue and/or profitability.

***Unanticipated increases or decreases in business growth may result in adverse financial consequences for us.***

If our business grows more quickly than we anticipate, our existing and planned manufacturing facilities may become inadequate and we may need to seek out new or additional space, at considerable cost to us. If our business does not grow as quickly as we expect, our existing and planned manufacturing facilities would, in part, represent excess capacity for which we may not recover the cost. In that circumstance, our revenues may be inadequate to support our committed costs and our planned growth, and our gross margins and business strategy would be adversely affected.

***Our plans are dependent on market acceptance of our products.***

Our plans are dependent upon market acceptance of, as well as enhancements to, our products. Fuel cell systems represent an emerging market, and we cannot be sure that potential customers will accept fuel cells as a replacement for traditional power sources or non-fuel based power sources. As is typical in a rapidly evolving industry, demand and market acceptance for recently introduced products and services are subject to a high level of uncertainty and risk. Since the distributed generation market is still evolving, it is difficult to predict with certainty the size of the market and its growth rate. The development of a market for our products may be affected by many factors that are out of our control, including:

- the cost competitiveness of our fuel cell products including availability and output expectations and total cost of ownership;
- the future costs of natural gas and other fuels used by our fuel cell products;
- customer reluctance to try a new product;
- the market for distributed generation and government policies that affect that market;
- local permitting and environmental requirements;
- customer preference for non-fuel based technologies; and
- the emergence of newer, more competitive technologies and products.

If a sufficient market fails to develop or develops more slowly than we anticipate, we may be unable to recover the losses we will have incurred in the development of our products and may never achieve profitability.

As we continue to expand markets for our products, we intend to continue offering power production guarantees and other terms and conditions relating to our products that will be acceptable to the marketplace, and continue to develop a service organization that will aid in servicing our products and obtain self-regulatory certifications, if available, with respect to our products. Failure to achieve any of these objectives may also slow the development of a sufficient market for our products and, therefore, have a material adverse effect on our results of operations and financial condition.

***We are substantially dependent on a concentrated number of customers and the loss of any one of these customers could adversely affect our business, financial condition and results of operations.***

We contract with a concentrated number of customers for the sale of products and for research and development contracts. There can be no assurance that we will continue to achieve the current level of sales of our products to our largest customers. Even though our customer base is expected to increase and our revenue streams to diversify, a substantial portion of net revenues could continue to depend on sales to a limited number of customers. Our agreements with these customers may be canceled if we fail to meet certain product specifications or research and development milestones or materially breach the agreements, or if our customers materially breach the agreements, and our customers may seek to renegotiate the terms of current agreements or renewals. The loss of, or a reduction in sales to, one or more of our larger customers could have a material adverse effect on our business, financial condition and results of operations.

***If our goodwill and other intangible assets, long-lived assets, inventory or project assets become impaired, we may be required to record a significant charge to earnings.***

We may be required to record a significant charge to operations in our financial statements should we determine that our goodwill, other intangible assets (i.e., in process research and development ("IPR&D")), other long-lived assets (i.e., property, plant and equipment and definite-lived intangible assets), inventory, or project assets are impaired. Such a charge might have a significant impact on our reported financial condition and results of operations. We recorded the following impairment charges during the year ended October 31, 2019: (i) a $2.8 million charge for a specific construction in process asset related to automation equipment for use in manufacturing due to uncertainty as to whether the asset will be completed as a result of our liquidity position and continued low level of production rates, (ii) a $14.4 million charge related to a project asset that we will not be able to secure a power purchase agreement ("PPA") with acceptable terms and therefore we have decided to operate the plant under a merchant model for the next 5 years and sell power through the Connecticut grid under wholesale tariff rates and Renewable Energy Credits (RECs) to market

participants, and (iii) a $3.1 million charge related to a project asset where we decided to pursue termination of the PPA given regulatory changes impacting the future cost profile of the project.

As required by accounting rules, we review our goodwill for impairment at least annually as of July 31 or more frequently if facts and circumstances indicate that it is more likely than not that the fair value of a reporting unit that has goodwill is less than its carrying value. Factors that may be considered a change in circumstances indicating that the carrying value of our goodwill might not be recoverable include a significant decline in projections of future cash flows and lower future growth rates in our industry. We review IPR&D for impairment on an annual basis as of July 31 or more frequently if facts and circumstances indicate the fair value is less than the carrying value. If the technology has been determined to be abandoned or not recoverable, we would be required to impair the asset. We review inventory, long-lived assets and project assets for impairment whenever events or changes in circumstances indicate the carrying amount may not be recoverable. We consider a project commercially viable and recoverable if it is anticipated to be sellable for a profit, or generates positive cash flows, once it is either fully developed or fully constructed. If our projects are not considered commercially viable, we would be required to impair the respective project assets.

***We have risks associated with high levels of inventory.***

The amount of total inventory as of April 30, 2020 and October 31, 2019 was $64.0 million ($9.0 million of which was classified as long-term inventory) and $56.7 million ($2.2 million of which was classified as long-term inventory), respectively, which includes work in process inventory totaling $39.4 million and $31.2 million, respectively. We reduced our production rate and have been operating at a lower level for a period of time in order to deploy inventory to new projects and mitigate future increases in inventory. In addition, there are risks that our inventory could lose some or all of its value due to technological obsolescence, shifts in market demand or other unexpected changes in industry conditions and circumstances. If we are unable to deploy our current inventory or new inventory consistent with our business plan, we may be required to sell it at a loss, abandon it or recycle it into different products. These actions would result in a significant charge to earnings. Such a charge might have a significant impact on our financial condition and results of operations.

***Our advanced technologies contracts are subject to the risk of termination by the contracting party and we may not realize the full amounts allocated under some contracts due to the lack of Congressional appropriations.***

A portion of our fuel cell revenues has been derived from long-term cooperative agreements and other contracts with the U.S. Department of Energy and other U.S. government agencies. These agreements are important to the continued development of our technology and our products. We also contract with private sector companies under certain advanced technologies contracts to develop strategically important and complementary offerings.

Generally, our government research and development contracts are subject to the risk of termination at the convenience of the contracting agency. Furthermore, these contracts, irrespective of the amounts allocated by the contracting agency, are subject to annual Congressional appropriations and the results of government or agency sponsored reviews and audits of our cost reduction projections and efforts. We can only receive funds under these contracts ultimately made available to us annually by Congress as a result of the appropriations process. Accordingly, we cannot be sure whether we will receive the full amounts awarded under our government research and development or other contracts. Failure to receive the full amounts under any of our government research and development contracts could materially and adversely affect our business prospects, results of operations and financial condition.

Our privately funded advanced technologies contracts are subject to termination at the convenience of the contracting party and contain certain milestones and deliverables. Accordingly, we cannot be sure whether we will receive the full amounts contracted for under privately funded advanced technologies contracts. Termination of these contracts or failure to receive the full amounts under any of these contracts could materially and adversely affect our business prospects, results of operations and financial condition.

***A negative government audit could result in an adverse adjustment of our revenue and costs and could result in civil and criminal penalties.***

Government agencies, such as the Defense Contract Audit Agency, routinely audit and investigate government contractors. These agencies review a contractor’s performance under its contracts, cost structure, and compliance with applicable laws, regulations, and standards. If the agencies determine through these audits or reviews that we improperly allocated costs to specific contracts, they will not reimburse us for these costs. Therefore, an audit could result in adjustments to our revenue and costs.

Further, although we have internal controls in place to oversee our government contracts, no assurance can be given that these controls are sufficient to prevent isolated violations of applicable laws, regulations and standards. If the agencies determine that we or one of our subcontractors engaged in improper conduct, we may be subject to civil or criminal penalties and administrative sanctions, payments, fines, and suspension or prohibition from doing business with the government, any of which could materially affect our results of operations and financial condition.

***The U.S. government has certain rights relating to our intellectual property, including the right to restrict or take title to certain patents.***

Multiple U.S. patents that we own have resulted from government-funded research and are subject to the risk of exercise of "march-in" rights by the government. March-in rights refer to the right of the U.S. government or a government agency to exercise its non-exclusive, royalty-free, irrevocable worldwide license to any technology developed under contracts funded by the government if the contractor fails to continue to develop the technology. These "march-in" rights permit the U.S. government to take title to these patents and license the patented technology to third parties if the contractor fails to utilize the patents.

***Our future success and growth is dependent on our market strategy.***

We cannot assure you that we will enter into business relationships that are consistent with, or sufficient to support, our commercialization plans and our growth strategy or that these relationships will be on terms favorable to us. Even if we enter into these types of relationships, we cannot assure you that the business associates with whom we form relationships will focus adequate resources on selling our products or will be successful in selling them. Some of these arrangements have required or will require that we grant exclusive rights to certain companies in defined territories. These exclusive arrangements could result in our being unable to enter into other arrangements at a time when the business associate with whom we form a relationship is not successful in selling our products or has reduced its commitment to marketing our products. In addition, future arrangements may also include the issuance of equity and/or warrants to purchase our equity, which may have an adverse effect on our stock price and would dilute our existing stockholders. To the extent we enter into partnerships or other business relationships, the failure of these partners or other business associates to assist us with the deployment of our products may adversely affect our results of operations and financial condition.

***We depend on third party suppliers for the development and supply of key raw materials and components for our products.***

We use various raw materials and components to construct a fuel cell module, including nickel and stainless steel which are critical to our manufacturing process. We also rely on third-party suppliers for the balance-of-plant components in our products. Suppliers must undergo a qualification process, which takes four to twelve months. We continually evaluate new suppliers, and we are currently qualifying several new suppliers. There are a limited number of suppliers for some of the key components of our products. A supplier's failure to develop and supply components in a timely manner or to supply components that meet our quality, quantity or cost requirements or our technical specifications, or our inability to obtain alternative sources of these components on a timely basis or on terms acceptable to us, could each harm our ability to manufacture our SureSource products. In addition, to the extent the processes that our suppliers use to manufacture components are proprietary, we may be unable to obtain comparable components from alternative suppliers.

During periods of constrained liquidity, we may delay certain payments to third parties, including our suppliers, to conserve cash. Management may enter into forbearance agreements and payment arrangements with certain suppliers. However, suppliers whose payments are delayed may take action against us, including, but not limited to, filing litigation, arbitration or other proceedings against us.

We do not know whether we will be able to maintain long-term supply relationships with our critical suppliers, or secure new long-term supply relationships, or whether such relationships will be on terms that will allow us to achieve our objectives. Our business prospects, results of operations and financial condition could be harmed if we fail to secure long-term relationships with entities that will supply the required components for our SureSource products.

***We depend on our intellectual property, and our failure to protect that intellectual property could adversely affect our future growth and success.***

Failure to protect our existing intellectual property rights may result in the loss of our exclusivity or the right to use our technologies. If we do not adequately ensure our freedom to use certain technology, we may have to pay others for rights to use their intellectual property, pay damages for infringement or misappropriation, or be enjoined from using such intellectual property. We rely on patent, trade secret, trademark and copyright law to protect our intellectual property.

We have licensed our carbonate fuel cell manufacturing intellectual property to POSCO Energy Co., Ltd. ("POSCO Energy") through a series of manufacturing and technology transfer agreements entered into in 2007, 2009 and 2012, which agreements expire on October 31, 2027, and have provided POSCO Energy with the exclusive right to manufacture, sell, distribute and service our SureSource 300, SureSource 1500 and SureSource 3000 fuel cell technology in Asia. In addition, effective as of June 11, 2019, we entered into a License Agreement with ExxonMobil Research and Engineering Company (the "EMRE License Agreement"), pursuant to which we agreed, subject to the terms of the EMRE License Agreement, to grant ExxonMobil Research and Engineering Company ("EMRE") and its affiliates a non-exclusive, worldwide, fully paid, perpetual, irrevocable, non-transferrable license and right to use our patents, data, know-how, improvements, equipment designs, methods, processes and the like to the extent it is useful to research, develop, and commercially exploit carbonate fuel cells in applications in which the fuel cells concentrate carbon dioxide from industrial and power sources and for any other purpose attendant thereto or associated therewith. Such right and license is sublicensable to third parties performing work for or with EMRE or its affiliates, but shall not otherwise be sublicensable. We depend on POSCO Energy and EMRE to also protect our intellectual property rights as licensed.

As of April 30, 2020, we, excluding our subsidiaries, had 96 U.S. patents and 163 patents in other jurisdictions covering our fuel cell technology (in certain cases covering the same technology in multiple jurisdictions), with patents directed to various aspects of our SureSource technology, solid oxide fuel cell ("SOFC") technology, PEM fuel cell technology and applications thereof. As of April 30, 2020, we also had 60 patent applications pending in the U.S. and 108 patent applications pending in other jurisdictions. Our U.S. patents will expire between 2020 and 2038, and the current average remaining life of our U.S. patents is approximately 9.0 years. Our subsidiary, Versa Power Systems, Ltd., as of April 30, 2020, had 34 U.S. patents and 100 international patents covering the SOFC technology (in certain cases covering the same technology in multiple jurisdictions), with an average remaining U.S. patent life of approximately 5.0 years. As of April 30, 2020, Versa Power Systems, Ltd. also had 2 pending U.S. patent applications and 14 patent applications pending in other jurisdictions. In addition, as of April 30, 2020, our subsidiary, FuelCell Energy Solutions, GmbH, had license rights to 2 U.S. patents and 7 patents outside the U.S. for carbonate fuel cell technology licensed from Fraunhofer IKTS.

Some of our intellectual property is not covered by any patent or patent application and includes trade secrets and other know-how that is not able to be patented, particularly as it relates to our manufacturing processes and engineering design. In addition, some of our intellectual property includes technologies and processes that may be similar to the patented technologies and processes of third parties. If we are found to be infringing third-party patents, we do not know whether we will be able to obtain licenses to use such patents on acceptable terms, if at all. Our patent position is subject to complex factual and legal issues that may give rise to uncertainty as to the validity, scope, and enforceability of a particular patent.

We cannot assure you that any of the U.S. or international patents owned by us or other patents that third parties license to us will not be invalidated, circumvented, challenged, rendered unenforceable or licensed to others, or that any of our pending or future patent applications will be issued with the breadth of claim coverage sought by us, if issued at all. In addition, effective patent, trademark, copyright and trade secret protection may be unavailable, limited or not applied for in certain foreign countries.

We also seek to protect our proprietary intellectual property, including intellectual property that may not be patented or able to be patented, in part by confidentiality agreements and, if applicable, inventors' rights agreements with our subcontractors, vendors, suppliers, consultants, strategic business associates and employees. We cannot assure you that these agreements will not be breached, that we will have adequate remedies for any breach or that such persons or institutions will not assert rights to intellectual property arising out of these relationships. Certain of our intellectual property has been licensed to us on a non-exclusive basis from third parties that may also license such intellectual property to others, including our competitors. If our licensors are found to be infringing third-party patents, we do not know whether we will be able to obtain licenses to use the intellectual property licensed to us on acceptable terms, if at all.

If necessary or desirable, we may seek extensions of existing licenses or further licenses under the patents or other intellectual property rights of others. However, we can give no assurances that we will obtain such extensions or further licenses or that the terms of any offered licenses will be acceptable to us. The failure to obtain a license from a third party for intellectual property that we use at present could cause us to incur substantial liabilities, and to suspend the manufacture or shipment of products or our use of processes requiring the use of that intellectual property.

While we are not currently engaged in any intellectual property litigation, we could become subject to lawsuits in which it is alleged that we have infringed the intellectual property rights of others or commence lawsuits against others who we believe are infringing our rights or violating their agreements to protect our intellectual property. Our involvement in intellectual property litigation could result in significant expense to us, adversely affecting the development of sales of the challenged product or intellectual property and diverting the efforts of our technical and management personnel, whether or not that litigation is resolved in our favor.

***Our future success will depend on our ability to attract and retain qualified management, technical, and other personnel.***

Our future success is substantially dependent on the services and performance of our executive officers and other key management, engineering, scientific, manufacturing and operating personnel. The loss of the services of key management, engineering, scientific, manufacturing and operating personnel could materially adversely affect our business. Our ability to achieve our commercialization plans and to increase production at our manufacturing facility in the future will also depend on our ability to attract and retain additional qualified management, technical, manufacturing and operating personnel. Recruiting personnel for the fuel cell industry is competitive. We do not know whether we will be able to attract or retain additional qualified management, technical, manufacturing and operating personnel. Our inability to attract and retain additional qualified management, technical, manufacturing and operating personnel, or the departure of key employees, could materially and adversely affect our development, commercialization and manufacturing plans and, therefore, our business prospects, results of operations and financial condition. In addition, our inability to attract and retain sufficient management, technical, manufacturing and operating personnel to quickly increase production at our manufacturing facility when and if needed to meet increased demand may adversely impact our ability to respond rapidly to any new product, growth or revenue opportunities. Our inability to attract and retain sufficient qualified management, technical, engineering, research, and manufacturing personnel to staff our third party research contracts may result in our inability to complete such contracts or terminations of such contracts, which may adversely impact financial conditions and results of operations.

***We may be affected by environmental and other governmental regulation.***

We are subject to various federal, state and local laws and regulations relating to, among other things, land use, safe working conditions, handling and disposal of hazardous and potentially hazardous substances and emissions of carbon dioxide and pollutants into the atmosphere. In addition, it is possible that industry-specific laws and regulations will be adopted covering matters such as transmission scheduling, distribution, emissions, and the characteristics and quality of our products, including installation and servicing. These regulations could limit the growth in the use of carbonate fuel cell products, decrease the acceptance of fuel cells as a commercial product and increase our costs and, therefore, the price of our products. Accordingly, compliance with existing or future laws and regulations could have a material adverse effect on our business prospects, results of operations and financial condition.

***Utility companies may resist the adoption of distributed generation and could impose customer fees or interconnection requirements on our customers that could make our products less desirable.***

Investor-owned utilities may resist adoption of distributed generation fuel cell plants as such plants are disruptive to the utility business model that primarily utilizes large central generation power plants and associated transmission and distribution. On-site distributed generation that is on the customer-side of the electric meter competes with the utility. Distributed generation on the utility-side of the meter generally has power output that is significantly less than central generation power plants and may be perceived by the utility as too small to materially impact its business, limiting its interest. Additionally, perceived technology risk may limit utility interest in stationary fuel cell power plants.

Utility companies commonly charge fees to larger, industrial customers for disconnecting from the electric grid or for having the capacity to use power from the electric grid for back up purposes. These fees could increase the cost to our customers of using our SureSource products and could make our products less desirable, thereby harming our business prospects, results of operations and financial condition.

***We could be liable for environmental damages resulting from our research, development or manufacturing operations.***

Our business exposes us to the risk of harmful substances escaping into the environment, resulting in personal injury or loss of life, damage to or destruction of property, and natural resource damage. Depending on the nature of the claim, our current insurance policies may not adequately reimburse us for costs incurred in settling environmental damage claims, and in some instances, we may not be reimbursed at all. Our business is subject to numerous federal, state, and local laws and regulations that govern environmental protection and human health and safety. We believe that our businesses are operating in compliance in all material respects with applicable environmental laws; however, these laws and regulations have changed frequently in the past and it is reasonable to expect additional and more stringent changes in the future.

Our operations may not comply with future laws and regulations and we may be required to make significant unanticipated capital and operating expenditures. If we fail to comply with applicable environmental laws and regulations, governmental authorities may seek to impose fines and penalties on us or to revoke or deny the issuance or renewal of operating permits and private parties may seek damages from us. Under those circumstances, we might be required to curtail or cease operations, conduct site remediation or other corrective action, or pay substantial damage claims.

***Our products use inherently dangerous, flammable fuels, operate at high temperatures and use corrosive carbonate material, each of which could subject our business to product liability claims.***

Our business exposes us to potential product liability claims that are inherent in products that use hydrogen. Our products utilize fuels such as natural gas and convert these fuels internally to hydrogen that is used by our products to generate electricity. The fuels we use are combustible and may be toxic. In addition, our SureSource products operate at high temperatures and use corrosive carbonate material, which could expose us to potential liability claims. Although we have incorporated a robust design and redundant safety features in our power plants, have established comprehensive safety, maintenance, and training programs, follow third-party certification protocols, codes and standards, and do not store natural gas or hydrogen at our power plants, we cannot guarantee that there will not be accidents. Any accidents involving our products or other hydrogen-using products could materially impede widespread market acceptance and demand for our products. In addition, we might be held responsible for damages beyond the scope of our insurance coverage. We also cannot predict whether we will be able to maintain adequate insurance coverage on acceptable terms.

***We are subject to risks inherent in international operations.***

Since we market our products both inside and outside the U.S., our success depends in part on our ability to secure international customers and our ability to manufacture products that meet foreign regulatory and commercial requirements in target markets. Sales to customers in South Korea represent the majority of our international sales. We have limited experience developing and manufacturing our products to comply with the commercial and legal requirements of international markets. In addition, we are subject to tariff regulations and requirements for export licenses, particularly with respect to the export of some of our technologies. We face numerous challenges in our international expansion, including unexpected changes in regulatory requirements and other geopolitical risks, fluctuations in currency exchange rates, longer accounts receivable requirements and collections, greater bonding and security requirements, difficulties in managing international operations, potentially adverse tax consequences, restrictions on repatriation of earnings and the burdens of complying with a wide variety of international laws. Any of these factors could adversely affect our results of operations and financial condition.

We source raw materials and parts for our products on a global basis, which subjects us to a number of potential risks, including the impact of export duties and quotas, trade protection measures imposed by the U.S. and other countries including tariffs, potential for labor unrest, changing global and regional economic conditions and current and changing regulatory environments. Changes to these factors may have an adverse effect on our ability to source raw materials and parts in line with our current cost structure.

Although our reporting currency is the U.S. dollar, we conduct our business and incur costs in the local currency of most countries in which we operate. As a result, we are subject to currency translation and transaction risk. Changes in exchange rates between foreign currencies and the U.S. dollar could affect our net sales and cost of sales and could result in exchange gains or losses. We cannot accurately predict the impact of future exchange rate fluctuations on our results of operations.

We could also expand our business into new and emerging markets, many of which have an uncertain regulatory environment relating to currency policy. Conducting business in such markets could cause our exposure to changes in exchange rates to increase, due to the relatively high volatility associated with emerging market currencies and potentially longer payment terms for our proceeds. Our ability to hedge foreign currency exposure is dependent on our credit profile with financial institutions that are willing and able to do business with us. Deterioration in our credit position or a significant tightening of the credit market conditions could limit our ability to hedge our foreign currency exposure and, therefore, result in exchange gains or losses.

***Exports of certain of our products are subject to various export control regulations and may require a license or permission from the U.S. Department of State, the U.S. Department of Energy or other agencies.***

As an exporter, we must comply with various laws and regulations relating to the export of products, services and technology from the U.S. and other countries having jurisdiction over our operations. We are subject to export control laws and regulations, including the International Traffic in Arms Regulation, the Export Administration Regulation, and the Specially Designated Nationals and Blocked Persons List, which generally prohibit U.S. companies and their intermediaries from exporting certain products, importing materials or supplies, or otherwise doing business with restricted countries, businesses or individuals, and require companies to maintain certain policies and procedures to ensure compliance. We are also subject to the Foreign Corrupt Practices Act which prohibits improper payments to foreign governments and their officials by U.S. and other business entities. Under these laws and regulations, U.S. companies may be held liable for their actions and actions taken by their strategic or local partners or representatives. If we, or our intermediaries, fail to comply with the requirements of these laws and regulations, or similar laws of other countries, governmental authorities in the United States or elsewhere, as applicable, could seek to impose civil and/or criminal penalties, which could damage our reputation and have a material adverse effect on our business, financial condition and results of operations.

We are also subject to registration under the U.S. State Department's Directorate of Defense Trade Controls ("DDTC"). Due to the nature of certain of our products and technology, we must obtain licenses or authorizations from various U.S. government agencies such as DDTC or the U.S. Department of Energy, before we are permitted to sell such products or license such technology outside of the U.S. We can give no assurance that we will continue to be successful in obtaining the necessary licenses or authorizations or that certain sales will not be prevented or delayed. Any significant impairment of our ability to sell products or license technology outside of the U.S. could negatively impact our results of operations, financial condition or liquidity.

***We depend on strategic relationships with third parties, and the terms and enforceability of many of these relationships are not certain.***

We have entered into strategic relationships with third parties for the design, product development, sale and service of our existing products and products under development, some of which may not have been documented by a definitive agreement and others of which may require renewal. The terms and conditions of many of these relationships allow for termination by the third parties. Termination or expiration of any of these relationships could adversely affect our ability to design, develop and distribute these products to the marketplace. We cannot assure you that we will be able to successfully negotiate and execute definitive agreements or renewals with any of these third parties, and failure to do so may effectively terminate the relevant relationship.

***We are increasingly dependent on information technology, and disruptions, failures or security breaches of our information technology infrastructure could have a material adverse effect on our operations. In addition, increased information technology security threats and more sophisticated computer crime pose a risk to our systems, networks, products and services.***

We rely on information technology networks and systems, including the Internet, to process, transmit and store electronic and financial information and to manage a variety of business processes and activities, including communication with power plants owned by us or our customers and production, manufacturing, financial, logistics, sales, marketing and administrative functions. Additionally, we collect and store data that is sensitive to us and to third parties. Operating these information technology networks and systems and processing and maintaining this data, in a secure manner, are critical to our business operations and strategy. We depend on our information technology infrastructure to communicate internally and externally with employees, customers, suppliers and others. We also use information technology networks and systems to comply with regulatory, legal and tax requirements and to operate our fuel cell power plants. These information technology systems, many of which are managed by third parties or used in connection with shared service centers, may be susceptible to damage, disruptions or shutdowns due to failures during the process of upgrading or replacing software, databases or components thereof, power outages, hardware failures, computer viruses, attacks by computer hackers or other cybersecurity risks, telecommunication failures, user errors, natural disasters, terrorist attacks or other catastrophic events. If any of our significant information technology systems suffer severe damage, disruption or shutdown, and our disaster recovery and business continuity plans do not effectively resolve the issues in a timely manner, our product sales, financial condition and results of operations may be materially and adversely affected, and we could experience delays in reporting our financial results, or our fuel cell power plant operations may be disrupted, exposing us to performance penalties under our contracts with customers.

In addition, information technology security threats — from user error to cybersecurity attacks designed to gain unauthorized access to our systems, networks and data — are increasing in frequency and sophistication. Cybersecurity attacks may range from random attempts to coordinated and targeted attacks, including sophisticated computer crime and advanced persistent threats. These threats pose a risk to the security of our systems and

networks and the confidentiality, availability and integrity of our data. Cybersecurity attacks could also include attacks targeting customer data or the security, integrity and/or reliability of the hardware and software installed in our products. We have experienced, and may continue to experience in the future, cybersecurity attacks that have resulted in unauthorized parties gaining access to our information technology systems and networks and, in one instance, gaining control of the information technology system at one of our power plants. However, to date, no cybersecurity attack has resulted in any material loss of data, interrupted our day-to-day operations or had a material impact on our financial condition, results of operations or liquidity. While we actively manage information technology security risks within our control, there can be no assurance that such actions will be sufficient to mitigate all potential risks to our systems, networks and data. In addition to the direct potential financial risk as we continue to build, own and operate generation assets, other potential consequences of a material cybersecurity attack include reputational damage, litigation with third parties, disruption to systems, unauthorized release of confidential or otherwise protected information, corruption of data, diminution in the value of our investment in research, development and engineering, and increased cybersecurity protection and remediation costs, which in turn could adversely affect our competitiveness, results of operations and financial condition. The amount of insurance coverage we maintain may be inadequate to cover claims or liabilities relating to a cybersecurity attack.

***Litigation could expose us to significant costs and adversely affect our business, financial condition, and results of operations.***

We are, or may become, party to various lawsuits and claims arising in the ordinary course of business, which may include lawsuits or claims relating to commercial liability, product recalls, product liability, product claims, employment matters, environmental matters, breach of contract, intellectual property or other aspects of our business. Litigation is inherently unpredictable, and although we may believe we have meaningful defenses in these matters, we may incur judgments or enter into settlements of claims that could have a material adverse effect on our business, financial condition, and results of operations. The costs of responding to or defending litigation may be significant and may divert the attention of management away from our strategic objectives. There may also be adverse publicity associated with litigation that may decrease customer confidence in our business, regardless of whether the allegations are valid or whether we are ultimately found liable. As a result, litigation may have a material adverse effect on our business, financial condition, and results of operations.

***Our results of operations could vary as a result of changes to our accounting policies or the methods, estimates and judgments we use in applying our accounting policies.***

The methods, estimates and judgments we use in applying our accounting policies have a significant impact on our results of operations. Such methods, estimates and judgments are, by their nature, subject to substantial risks, uncertainties and assumptions, and factors may arise over time that could lead us to reevaluate our methods, estimates and judgments.

In future periods, management will continue to reevaluate its estimates for contract margins, service agreements, loss accruals, warranty, performance guarantees, liquidated damages and inventory valuation allowances. Changes in those estimates and judgments could significantly affect our results of operations and financial condition. We will also adopt changes required by the Financial Accounting Standards Board and the SEC.

***Our stock price has been and could remain volatile.***

The market price for our common stock has been and may continue to be volatile and subject to extreme price and volume fluctuations in response to market and other factors, including the following, some of which are beyond our control:

- failure to meet commercialization milestones;
- failure to win contracts through competitive bidding processes;
- the loss of a major customer or a contract;
- variations in our quarterly operating results from the expectations of securities analysts or investors;
- downward revisions in securities analysts' estimates or changes in general market conditions;
- changes in the securities analysts that cover us or failure to regularly publish reports;
- announcements of technological innovations or new products or services by us or our competitors;
- announcements by us or our competitors of significant acquisitions, strategic partnerships, joint ventures or capital commitments;
- additions or departures of key personnel;
- investor perception of our industry or our prospects;

- insider selling or buying;
- demand for our common stock;
- dilution from issuances of common stock;
- general market trends or preferences for non-fueled resources;
- general technological or economic trends; and
- changes in United States or foreign political environment and the passage of laws, including, tax, environmental or other laws, affecting the product development business.

In the past, following periods of volatility in the market price of their stock, many companies have been the subject of securities class action litigation. If we became involved in securities class action litigation in the future, it could result in substantial costs and diversion of management's attention and resources and could harm our stock price, business prospects, results of operations and financial condition.

***Provisions of Delaware and Connecticut law and of our certificate of incorporation and by-laws and our outstanding securities may make a takeover more difficult.***

Provisions in our Certificate of Incorporation, as amended ("Certificate of Incorporation"), and Amended and Restated By-Laws ("By-Laws") and in Delaware and Connecticut corporate law may make it difficult and expensive for a third-party to pursue a tender offer, change in control or takeover attempt that is opposed by our management and board of directors. In addition, certain provisions and rights of the Series 1 Preferred Shares of FCE Ltd. and our Series B Preferred Stock could make it more difficult or more expensive for a third party to acquire us. Public stockholders who might desire to participate in such a transaction may not have an opportunity to do so. These anti-takeover provisions could substantially impede the ability of public stockholders to benefit from a change in control or change in our management and board of directors.

***Our By-Laws provide that the Court of Chancery of the State of Delaware is the exclusive forum for substantially all disputes between us and our stockholders, which could limit our stockholders' ability to obtain a judicial forum deemed favorable by the stockholder for disputes with us or our directors, officers or employees.***

Our By-Laws provide that the Court of Chancery of the State of Delaware is the exclusive forum for any derivative action or proceeding brought on our behalf, any action asserting a breach of fiduciary duty, any action asserting a claim against us arising pursuant to the Delaware General Corporation Law, our Certificate of Incorporation or our By-Laws, any action to interpret, apply, enforce, or determine the validity of our Certificate of Incorporation or By-Laws, or any action asserting a claim against us that is governed by the internal affairs doctrine. The choice of forum provision may limit a stockholder's ability to bring a claim in a judicial forum that the stockholder finds favorable for disputes against us or our directors, officers or other employees, which may discourage such lawsuits against us and our directors, officers and other employees. Alternatively, if a court were to find the choice of forum provision contained in our By-Laws to be inapplicable or unenforceable in an action, we may incur additional costs associated with resolving such action in other jurisdictions, which could adversely affect our business and financial condition.

***The implementation of our business plan and strategy will require additional capital. If we are unable to raise capital, it may create substantial doubt about our ability to continue as a going concern.***

The implementation of our business plan and strategy requires additional capital to fund operations as well as investment by us in project assets. If we are unable to raise additional capital in the amounts required, or at all, we will not be able to successfully implement our business plan and strategy. There can be no guarantee that we will be able to raise such additional capital at the times required or in the amounts required for the implementation of our business plan and strategy. In addition, the recent change to a more capital-intensive business model increases the risks of our being able to successfully implement our plans, if we do not raise additional capital in the amounts required. If we are unable to raise additional capital, our business, operations and prospects could be materially and adversely affected.

The lenders and the Agent under the Orion Facility have broad approval rights over our ability to raise additional capital, obtain other debt financing, and draw, allocate and use funds from the Orion Facility. If we are unable to obtain such approvals when we seek to raise additional capital, obtain other debt financing, or use funds under the Orion Facility, it could have a material adverse effect on our financial condition and operations.

There are indicators that substantial doubt about our ability to continue as a going concern exists, including, but not limited to, historical losses and negative cash flows, increasing costs of debt financing, restrictive debt covenants and restrictions imposed by our current lenders, limited availability of assets to support borrowing that have not already been pledged to existing lenders, potential delays in completing the manufacture of modules for project assets due to the closure of our manufacturing facility as a result of the COVID-19 pandemic, and the need for additional financing to carry out our business plans. When indicators of substantial doubt exist, GAAP requires management to make an assessment of whether substantial doubt is alleviated by management's plans. Even though equity and debt financings and other sources of funds may be available in the future, when assessing whether substantial doubt is alleviated, management is not able to place reliance on uncommitted sources of financing. Management assessed substantial doubt about our ability to continue as a going concern through analysis of existing cash on hand, expected receipts under existing agreements, and release of short-term restricted cash less expected disbursements over the next twelve months, and was not able to alleviate substantial doubt until it entered into the Fifth Orion Amendment described elsewhere herein. As a result of this Fifth Orion Amendment, management has concluded that substantial doubt was alleviated, and we expect that we will meet our obligations for at least one year from the date of issuance of these financial statements (assuming that there are no extraordinary or unanticipated impacts to our business as result of COVID-19 or

otherwise). Execution of our business plan will require additional financing or other measures to generate cash inflows and reduce cash outflows as early as the expected filing of the Form 10-Q for the third quarter of 2020 in order to alleviate substantial doubt in future periods.

***We will need to raise additional capital, and such capital may not be available on acceptable terms, or on terms acceptable to our lenders, if at all. If we do raise additional capital utilizing equity, existing stockholders will suffer dilution. If we do not raise additional capital, our business could fail or be materially and adversely affected.***

We will need to raise additional funds in debt and equity financings, and these funds may not be available to us when we need them or on acceptable terms, or on terms acceptable to our lenders, if at all. Such additional financings could be significant. If we raise additional funds through further issuances of our common stock, or securities convertible or exchangeable into shares of our common stock, into the public market, including shares of our common stock issued upon exercise of options or warrants, holders of our common stock could suffer significant dilution, and any new equity securities we issue could have rights, preferences and privileges superior to those of our then-existing capital stock. Any debt financing secured by us in the future could involve restrictive covenants relating to our capital raising activities and other financial and operational matters, which may make it more difficult for us to obtain additional capital and to pursue business opportunities. If we cannot raise additional funds when we need them, our business and prospects could fail or be materially and adversely affected. In addition, if additional funds are not secured in the future, we will have to modify, reduce, defer or eliminate parts of our present and anticipated future projects, or sell some or all of our assets.

***Future sales of substantial amounts of our common stock could affect the market price of our common stock.***

Future sales of substantial amounts of our common stock, or securities convertible or exchangeable into shares of our common stock, into the public market, including shares of our common stock issued upon exercise of options or warrants, or perceptions that those sales could occur, could adversely affect the prevailing market price of our common stock and our ability to raise capital in the future.

***We have agreed in principle with the SEC Staff to settle a proposed proceeding related to certain sales of shares of our common stock in the open market, and may be subject to actions for rescission or damages in connection with such sales.***

Between August 2005 and April 2017, we sold shares of our common stock pursuant to a series of "at-the-market" sales plans. The shares sold pursuant to these sales plans represented a portion of the shares registered by us pursuant to shelf registration statements we filed with the SEC during this time period. While we reported the number of shares we had sold, along with the net proceeds earned by us from those sales made during each fiscal quarter pursuant to the sales plans in our annual and quarterly reports on Forms 10-K and 10-Q, we omitted from the shelf registration statements certain information about the offerings, including the specific plan of distribution and the nature and terms of compensation or other agreements with any underwriters, dealers, or agents, and for some offerings, also omitted the specific type and quantity of securities offered; and we did not file or deliver prospectus supplements at the time of or prior to making these sales or otherwise timely disclose the information that had been omitted from the shelf registration statements, as is required by SEC regulations.

In 2018, we reported to the SEC Staff these sales and our failure to file or deliver prospectus supplements, and in response to our report, the SEC Staff opened an informal investigation of these sales. The SEC Staff has informed us that they have determined to recommend that the SEC authorize the institution of enforcement proceedings to charge us with violating Section 5(b)(2) of the Securities Act in connection with these sales, seeking the entry of an order requiring us to cease and desist from committing or causing any future violation of Section 5(b)(2), but not seeking any penalty or disgorgement. We have reached an agreement in principle with the SEC Staff to settle this proposed proceeding on the basis of the entry of such an order, without our admitting or denying the proposed findings of the SEC. Any such settlement, however, is subject to the approval of the SEC, and the final terms of the settlement are subject to change. Such a settlement, without a waiver by the SEC, would disqualify us from using the private placement safe harbor from registration under the Securities Act set forth in Regulation A and Regulation D following the effective date of the settlement. Accordingly, we intend to submit an application to the SEC for a waiver of any relevant disqualifications, and our agreement in principle to the proposed settlement is conditioned upon our receipt of such waiver. No assurance can be given that our application for such waiver will be granted. The purchasers of the shares we sold without filing or delivering prospectus supplements may have rescission rights or claims for damages. If purchasers successfully seek rescission and/or recover damages that are not covered by insurance, we may not have sufficient capital or access to capital to make the necessary payments, and any such claims or damages could have a material adverse effect on our stock price, business prospects, results of operations, and financial condition. Although we believe we would have defenses to many of such claims or actions if brought, we are unable to predict the amount of any such claims or damages which could be sought against us, or the extent to which any such financial exposure would be covered by insurance.

***The situation with POSCO Energy has limited and continues to limit our efforts to access the South Korean and Asian markets and could expose us to costs of arbitration or litigation proceedings.***

From approximately 2007 through 2015, we relied on POSCO Energy to develop and grow the South Korean and Asian markets for our products and services. We entered into manufacturing and technology transfer agreements with POSCO Energy in 2007, 2009 and 2012, each of which expires on October 31, 2027. The Cell Technology Transfer Agreement ("CTTA") provides POSCO Energy with the technology rights to manufacture, sell, distribute and service our SureSource 300, SureSource 1500 and SureSource 3000 fuel cell technology in Asia. The CTTA requires POSCO Energy to pay to us a 3.0% royalty on POSCO Energy net product sales, as well as a royalty on scheduled fuel cell module replacements under service agreements for modules that were built by POSCO Energy and installed at plants in Asia under the terms of long-term service agreements between POSCO Energy and its customers. While the aforementioned manufacturing and technology transfer agreements entered into in 2007, 2009 and 2012 remain in effect, due to certain actions and inactions of POSCO Energy, we have not realized any material revenues, royalties or new projects developed by POSCO Energy since 2016.

In March 2017, we entered into a memorandum of understanding ("MOU") with POSCO Energy to permit us to directly develop the Asian fuel cell business, including the right for us to sell SureSource solutions in South Korea and the broader Asian market. In June 2018, POSCO Energy advised us in writing that it was terminating the MOU effective July 15, 2018. Pursuant to the terms of the MOU, notwithstanding its termination, we will continue to execute on sales commitments in Asia secured in writing prior to July 15, 2018, including the 20 MW power plant installed for Korea Southern Power Co., Ltd. ("KOSPO").

On or about November 2, 2018, POSCO Energy served FuelCell Energy with an arbitration demand, initiating a proceeding to resolve various outstanding amounts between the companies. The parties amicably resolved the arbitration proceeding in July 2019. Since that date, we have made numerous attempts to engage with POSCO Energy to address the need for deployment of carbonate fuel cell technology in the Asian market in accordance with the requirements of the manufacturing and technology transfer agreements, our understanding of the desire of the South Korean government to advance fuel cell and hydrogen technology, and the needs of the Asian market, but have made little progress to date.

In November 2019, POSCO Energy spun-off its fuel cell business into a new entity, Korea Fuel Cell, Ltd. ("KFC"). As part of the spin-off, POSCO Energy transferred manufacturing and service rights under the aforementioned manufacturing and technology transfer agreements to KFC, but retained distribution rights, including trademarks, and severed its own liability under the aforementioned manufacturing and technology transfer agreements. We believe that these actions are all in material breach of the terms of the CTTA and other manufacturing and technology transfer agreements and are effectively a misappropriation of the company's intellectual property. We have formally objected to POSCO Energy's spin-off, and POSCO Energy has posted a bond to secure any liabilities to FuelCell Energy arising out of the spin-off. On February 19, 2020, the Company, through its Korean counsel, notified POSCO Energy in writing that it is in material breach of the CTTA and other manufacturing and technology transfer agreements by (i) its actions in connection with the spin-off of the fuel cell business to KFC, (ii) its suspension of performance through its cessation of all sales activities since late 2015 and its abandonment of its fuel cell business in Asia, and (iii) its disclosure of material nonpublic information to third parties and its public pronouncements about the fuel cell business on television and in print media that have caused reputational damage to the fuel cell business, the Company and its products. The Company also notified POSCO Energy that, under the terms of the CTTA and other manufacturing and technology transfer agreements, it has 60 days to fully cure its breaches to the Company's satisfaction and that failure will lead to termination of the CTTA and other manufacturing and technology transfer agreements. On March 27, 2020, we further notified POSCO Energy of additional instances of its material breach of the CTTA and other manufacturing and technology transfer agreements based on POSCO Energy's failure to pay royalties required to be paid in connection with certain module replacements. On April 27, 2020, POSCO Energy initiated a series of arbitrations against the Company alleging certain warranty defects in a sub-megawatt conditioning facility at its facility in Pohang, Korea. POSCO Energy has obtained attachments of certain revenues owed to the Company by KOSPO as part of such warranty claims which has delayed receipt of certain payments owed to the Company. In light of the situation with POSCO Energy, we are evaluating all of our options with respect to our relationship and agreements with POSCO Energy, including trade related matters, POSCO Energy's material breach of its obligations under the CTTA and the manufacturing and technology transfer agreements, and the misappropriation of our intellectual property.

We cannot predict the outcome of any future discussions with, or actions or legal proceedings against or involving, POSCO Energy or KFC, if they occur, the future status or scope of our relationship with POSCO Energy or KFC, whether our relationship with POSCO Energy or KFC will continue in the future, whether we will become involved in additional mediations, arbitrations, litigation or other proceedings with POSCO Energy or KFC, what the costs of any such proceedings will be or the effect of such proceedings on the market. Any such proceedings could result in significant expense to us and adversely affect our business and financial condition and reputation in the market, whether or not such proceedings are resolved in our favor. If our relationship with POSCO Energy or KFC ends, or continues on terms that are less favorable to us, or remains unresolved, our efforts to access the South Korean and Asian markets, which are complex markets, may not be successful or may be limited, hindered or delayed.

***The rights of the Series 1 Preferred Shares and our Series B Preferred Stock could negatively impact our cash flows and the rights of our Series B Preferred Stock could dilute the ownership interest of our stockholders.***

The terms of the Series 1 Preferred Shares issued by FCE Ltd. provide rights to the holder, Enbridge Inc. ("Enbridge"), which could negatively impact us.

The provisions of the Series 1 Preferred Shares, as such were amended pursuant to a letter agreement entered into by the Company, FCE Ltd. and Enbridge on January 20, 2020, require that FCE Ltd. make annual payments totaling Cdn. $1,250,000, including (i) annual dividend payments of Cdn. $500,000 and (ii) annual return of capital payments of Cdn. $750,000, with such payments to be made on a quarterly basis through December 31, 2021. Commencing on January 1, 2020, dividends accrue at an annual rate of 15% on the principal redemption price with respect to the Series 1 Preferred Shares and any accrued and unpaid dividends on the Series 1 Preferred Shares. The aggregate amount of all accrued and unpaid dividends to be paid on the Series 1 Preferred Shares on or before December 31, 2021 is expected to be Cdn. $26.5 million and the balance of the principal redemption price to be paid on or before December 31, 2021 with respect to all of the Series 1 Preferred Shares is expected to be Cdn. $3.5 million. In connection with the letter agreement, the Company entered into the Second Amendment to the Orion Credit Agreement (the "Second Orion Amendment"), which adds a new affirmative covenant to the Orion Credit Agreement that obligates the Company to, and to cause FCE Ltd. to, on or prior to November 1, 2021, either (i) pay and satisfy in full all of their respective obligations in respect of, and fully redeem and cancel, all of the Series 1 Preferred Shares of FCE Ltd., or (ii) deposit in a newly created account of FCE Ltd. or the Company cash in an amount sufficient to pay and satisfy in full all of their respective obligations in respect of, and to effect a redemption and cancellation in full of, all of the Series 1 Preferred Shares of FCE Ltd. The Second Orion Amendment also provides that the amended articles of FCE Ltd. setting forth the modified terms of the Series 1 Preferred Shares will be considered a "Material Agreement" under the Orion Credit Agreement. Under the Second Orion Amendment, a failure to satisfy this new affirmative covenant or to otherwise comply with the terms of the Series 1 Preferred Shares will constitute an event of default under the Orion Credit Agreement, which could result in the acceleration of any amounts outstanding under the Orion Credit Agreement.

The terms of our Series B Preferred Stock also provide rights to their holders that could negatively impact us. Holders of the Series B Preferred Stock are entitled to receive cumulative dividends at the rate of $50 per share per year, payable either in cash or in shares of our common stock. To the extent the dividend is paid in shares, additional issuances could be dilutive to our existing stockholders and the sale of those shares could have a negative impact on the price of our common stock. A share of our Series B Preferred Stock may be converted at any time, at the option of the holder, into 0.5910 shares of our common stock (which is equivalent to an initial conversion price of $1,692 per share), plus cash in lieu of fractional shares. Furthermore, the conversion rate applicable to the Series B Preferred Stock is subject to additional adjustment upon the occurrence of certain events.

***The Series B Preferred Stock ranks senior to our common stock with respect to payments upon liquidation, dividends, and distributions.***

The rights of the holders of our Series B Preferred Stock rank senior to our obligations to our common stockholders. Upon our liquidation, the holders of Series B Preferred Stock are entitled to receive $1,000.00 per share plus all accumulated and unpaid dividends (the "Liquidation Preference"). Until the holders of Series B Preferred Stock receive their Liquidation Preference in full, no payment will be made on any junior shares, including shares of our common stock. The existence of senior securities such as the Series B Preferred Stock could have an adverse effect on the value of our common stock.

**Item 2. UNREGISTERED SALES OF EQUITY SECURITIES AND USE OF PROCEEDS**

(a) None.

(b) Not applicable.

(c) Stock Repurchases

The following table sets forth information with respect to purchases made by us or on our behalf of our common stock during the periods indicated:

| Period | Total Number of Shares Purchased (1) | Average Price Paid per Share | Total Number of Shares Purchased as Part of Publicly Announced Programs | Maximum Number of Shares that May Yet be Purchased Under the Plans or Programs |
|---|---|---|---|---|
| February 1, 2020 – February 29, 2020 | 1,794 | $ 1.73 | — | — |
| March 1, 2020 – March 31, 2020 | 27 | $ 1.93 | — | — |
| April 1, 2020 – April 30, 2020 | 21,463 | $ 1.44 | — | — |
| **Total** | 23,284 | $ 1.46 | — | — |

(1) Includes only shares that were surrendered by employees to satisfy statutory tax withholding obligations in connection with the vesting of stock-based compensation awards.

**Item 3. DEFAULT UPON SENIOR SECURITIES**

None.

**Item 4. MINE SAFETY DISCLOSURES**

None.

**Item 5. OTHER INFORMATION**

*Fifth Amendment to Orion Credit Agreement*

On October 31, 2019, the Company and certain of its affiliates as guarantors entered into a Credit Agreement (as amended from time to time, the "Orion Credit Agreement") with Orion Energy Partners Investment Agent, LLC, as Administrative Agent and Collateral Agent (the "Agent"), and certain lenders affiliated with the Agent for a $200.0 million senior secured credit facility (the "Orion Facility"), structured as a delayed draw term loan to be provided by the lenders primarily to fund certain of the Company's construction and related costs for fuel cell projects which meet the requirements of the Orion Facility. The Orion Credit Agreement was amended on November 22, 2019, January 20, 2020, February 11, 2020 and April 30, 2020. Refer to Note 16 – "Debt and Financing Obligations" and "Management's Discussion and Analysis of Financial Condition and Results of Operations – Liquidity and Capital Resources – Commitments and Significant Contractual Obligations" - for detailed descriptions of the Orion Credit Agreement and each of these amendments thereto.

In order to alleviate substantial doubt about the Company's ability to continue as a going concern, on June 8, 2020, the Company, certain of its affiliates as guarantors, the Agent and the lenders entered into the Fifth Amendment to the Orion Credit Agreement (the "Fifth Orion Amendment"). Pursuant to the terms of the Fifth Orion Amendment, the lenders agreed to make a commitment to make certain loans to the Company in an aggregate principal amount of up to $35 million (the "Secondary Facility Loans"), and the Company, the guarantors, the Agent and the lenders agreed to amend the Orion Credit Agreement to facilitate the provision of such Secondary Facility Loans.

Pursuant to the Orion Credit Agreement, as amended by the Fifth Orion Amendment, the lenders have committed to make Secondary Facility Loans up to an aggregate amount of $35 million available to the Company for general corporate purposes of the Company or the guarantors in accordance with either (i) the then effective Operating Budget (as defined in the Orion Credit Agreement) of the Company or the guarantors or (ii) the cash use forecast delivered by the Company to the Agent on June 6, 2020. The Secondary Facility Loan commitment allows the Company to draw on the Secondary Facility Loans commencing on June 5, 2020 (the "Commencement Date") and terminating on September 14, 2020 (the "Termination Date"). The Company may make draws on the Secondary Facility Loans in amounts of no less than $5 million, and no more than $15 million may be drawn in any 30 day period, provided that the Company may draw any remaining available funds under the Secondary Facility Loans between August 15, 2020 and the Termination Date. Any drawn amounts must be fully repaid on or before September 1, 2021 (the "Secondary Facility Repayment Date"). The amended Orion Credit Agreement contains representations and warranties, affirmative and negative covenants and events of default, including failure to make payments when due and termination of or default under certain material agreements as specified in the Orion Credit Agreement, that entitle the Agent and the lenders to cause the Company's indebtedness under the amended Orion Credit Agreement to become immediately due and payable.

In exchange for the Secondary Facility Loan commitment, the Company will pay to the lenders an option premium of $1 million on the earlier of September 14, 2020 and the date of full repayment of all amounts drawn on the Secondary Facility Loans. Such option premium is fully earned on the Commencement Date and non-refundable and non-creditable thereafter, and is due and payable whether or not any draw is ever made under the Secondary Facility Loan commitment. Additionally, for each draw made on the Secondary Facility Loans, the Company must pay to the lenders an initial draw discount of 5% of the amount drawn. In the event that full repayment of all amounts drawn under the Secondary Facility Loans has not occurred within 6 months of the date of initial draw, the Company must pay to the lenders an additional draw discount in the amount of 10% of any amount outstanding under the Secondary Facility Loans as of such date. In the event that full repayment has not occurred within 9 months of the date of initial draw under the Secondary Facility Loans, the Company must pay to the lenders an additional draw discount in the amount of 20% of any amount outstanding as of such date. All of such draw discounts will be fully earned on the respective dates and non-refundable and non-creditable thereafter, and will be due on the earlier of the Secondary Facility Repayment Date and the date of full repayment of all amounts drawn under the Secondary Facility Loans.

In connection with the lenders making the commitment to make Secondary Facility Loans, the Company is providing additional collateral to the lenders by a pledge of all of the Company's intellectual property assets. All liens on the Company's intellectual property will be released upon full repayment of all amounts drawn on the Secondary Facility Loans or upon termination of the Secondary Facility Loan commitment if no amounts are drawn.

Under the amended Orion Credit Agreement, cash interest of 9.9% per annum will be paid quarterly on all outstanding amounts under the Secondary Facility Loans. In addition to the cash interest, payment-in-kind interest of 2.05% per annum will accrue which will be added to the outstanding principal balance under the existing Orion Facility, but will be paid quarterly in cash to the extent of available cash after payment of the Company's operating expenses and the funding of certain reserves for payment of outstanding indebtedness to the State of Connecticut and Connecticut Green Bank. Any drawn amounts on the Secondary Facility Loans may be prepaid at any time without penalty.

The Company is required to prepay any draws on the Secondary Facility Loans in the event that the Company (i) issues or incurs any indebtedness (other than Permitted Indebtedness as defined in the Orion Credit Agreement) ("Debt") or (ii) issues or sells any capital stock or any option, warrant

or other instrument, security or right that is convertible into or exercisable or exchangeable for capital stock ("Equity"), by applying 100% of the net proceeds of any such Debt issuance and 50% of the net proceeds of any such Equity issuance to pay down the outstanding amounts under the Secondary Facility Loans.

The foregoing summary of the terms of the Fifth Orion Amendment and the amended Orion Credit Agreement does not purport to be complete and is qualified in its entirety by reference to the full text of the Fifth Orion Amendment (and the amended Orion Credit Agreement, which is attached as Annex B to the Fifth Orion Amendment), a copy of which is attached as Exhibit 10.13 to this Form 10-Q and incorporated herein by reference.

**Item 6. EXHIBITS**

| Exhibit No. | Description |
|---|---|
| 3.1 | Certificate of Incorporation of the Company, as amended, July 12, 1999 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated September 21, 1999). |
| 3.2 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated November 21, 2000 (incorporated by reference to Exhibit 3.3 to the Company's Annual Report on Form 10-K dated January 12, 2017). |
| 3.3 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated October 31, 2003 (incorporated by reference to Exhibit 3.11 to the Company's Current Report on Form 8-K dated November 3, 2003). |
| 3.4 | Amended Certificate of Designation of Series B Cumulative Convertible Perpetual Preferred Stock, dated March 14, 2005 (incorporated by reference to Exhibit 3.4 to the Company's Annual Report on Form 10-K dated January 12, 2017). |
| 3.5 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 8, 2011 (incorporated by reference to Exhibit 3.5 to the Company's Annual Report on Form 10-K dated January 12, 2017). |
| 3.6 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 5, 2012 (incorporated by reference to Exhibit 3.6 to the Company's Annual Report on Form 10-K dated January 12, 2017). |
| 3.7 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated December 3, 2015 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated December 3, 2015). |
| 3.8 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 18, 2016 (incorporated by reference to Exhibit 3.9 to the Company's Quarterly Report on Form 10-Q for the period ending April 30, 2016). |
| 3.9 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 7, 2017 (incorporated by reference to Exhibit 3.10 to the Company's Quarterly Report on Form 10-Q for the period ending April 30, 2017). |
| 3.10 | Certificate of Amendment of the Certificate of Incorporation of the Company, dated December 14, 2017 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated December 14, 2017). |
| 3.11 | Certificate of Amendment of the Certificate of Incorporation of FuelCell Energy, Inc., dated May 8, 2019 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on May 8, 2019). |
| 3.12 | Certificate of Amendment of the Certificate of Incorporation of FuelCell Energy, Inc., dated May 11, 2020 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on May 12, 2020). |
| 3.13 | Amended and Restated By-Laws of the Company, dated December 15, 2016 (incorporated by reference to Exhibit 3.2 to the Company's Current Report on Form 8-K dated December 15, 2016). |
| 4.1 | Specimen of Common Share Certificate (incorporated by reference to Exhibit 4 to the Company's Annual Report on Form 10-K for fiscal year ended October 31, 1999). |
| 4.2 | Schedule A to Articles of Amendment of FuelCell Energy, Ltd., setting forth the rights, privileges, restrictions and conditions of Class A Cumulative Redeemable Exchangeable Preferred Stock (incorporated by reference to exhibit of the same number contained in the Company's Quarterly Report on Form 10-Q for the period ended January 31, 2009). |
| 4.3 | Letter Agreement, dated March 31, 2011, and Guarantee, dated April 1, 2011, by and between the Company and Enbridge, Inc., and Revised Special Rights and Restrictions attributable to the Class A Preferred Stock of FuelCell Energy, Ltd. (incorporated by reference to Exhibits 4.1, 4.2 and 4.3 to the Company's Current Report on Form 8-K dated March 31, 2011). |
| 4.4 | Certificate of Designation for the Company's 5% Series B Cumulative Convertible Perpetual Preferred Stock (incorporated by reference to Exhibit 3.1 to the Company's Current Report Form 8-K, dated November 22, 2004). |
| 4.5 | Certificate of Designations for the Company's Series C Convertible Preferred Stock (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K, dated September 5, 2017). |
| 4.6 | Certificate of Designations, Preferences and Rights for the Company's Series D Convertible Preferred Stock (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated August 27, 2018). |
| 4.7 | Specimen Series D Convertible Preferred Stock Certificate. (incorporated by reference to Exhibit 4.1 to the Company's Current Report on Form 8-K dated August 27, 2018). |
| 4.8 | Form of Series A Warrants to purchase common stock (incorporated by reference to Exhibit 10.3 to the Company's Current Report on Form 8-K dated July 6, 2016). |
| 4.9 | Form of Series B Warrants to purchase common stock (incorporated by reference to Exhibit 10.4 to the Company's Current Report on Form 8-K dated July 6, 2016). |
| 4.10 | Form of Series C Warrants to purchase common stock (incorporated by reference to Exhibit 4.1 to the Company's Current Report on Form 8-K dated April 27, 2017). |
| 4.11 | Form of Series D Warrants to purchase common stock (incorporated by reference to Exhibit 4.2 to the Company's Current Report on Form 8-K dated April 27, 2017). |
| 4.12 | Form of Warrant to purchase common stock (incorporated by reference to Exhibit 10.6 to the Company's Current Report on Form 8-K filed on November 6, 2019). |
| 4.13 | Letter Agreement, dated January 20, 2020, among FuelCell Energy, Inc., FCE FuelCell Energy Ltd., and Enbridge Inc. relating to the amendment of the terms of the Class A Cumulative Preferred Stock of FCE FuelCell Energy Ltd. (incorporated by reference to Exhibit 4.13 to the Company's Annual Report on Form 10-K for the year ended October 31, 2019, filed on January 22, 2020). |
| 4.14 | Schedule A setting forth the amended rights, privileges, restrictions and conditions of the Class A Cumulative Preferred Stock of FCE FuelCell Energy Ltd. (incorporated by reference to Exhibit 4.14 to the Company's Annual Report on Form 10-K for the year ended October 31, 2019, filed on January 22, 2020). |
| 4.15 | Articles of FCE FuelCell Energy Ltd., effective as of January 20, 2020, including in Article 27.2 the Special Rights and Restrictions of the Class A Preferred Shares of FCE FuelCell Energy Ltd. |
| 10.1 | Purchase and Sale Agreement, dated February 11, 2020, by and between Central CA Fuel Cell 2, LLC and Crestmark Equipment Finance (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed on February 13, 2020). |

| Exhibit No. | Description |
|---|---|
| 10.2 | Equipment Lease Agreement, dated February 11, 2020, by and between Central CA Fuel Cell 2, LLC and Crestmark Equipment Finance (incorporated by reference to Exhibit 10.2 to the Company's Current Report on Form 8-K filed on February 13, 2020). |
| 10.3 | Assignment Agreement, dated February 11, 2020, by a Central CA Fuel Cell 2, LLC in favor of Crestmark Equipment Finance (incorporated by reference to Exhibit 10.3 to the Company's Current Report on Form 8-K filed on February 13, 2020). |
| 10.4 | Pledge Agreement, dated February 11, 2020, by and between FuelCell Energy Finance, LLC and Crestmark Equipment Finance (incorporated by reference to Exhibit 10.4 to the Company's Current Report on Form 8-K filed on February 13, 2020). |
| 10.5 | Guaranty Agreement, dated February 11, 2020, by FuelCell Energy, Inc. in favor of Crestmark Equipment Finance (incorporated by reference to Exhibit 10.5 to the Company's Current Report on Form 8-K filed on February 13, 2020). |
| 10.6 | Technology License and Access Agreement for Tulare BioMAT Fuel Cell Power Plant, dated February 11, 2020, by and among Crestmark Equipment Finance, Central CA Fuel Cell 2, LLC and FuelCell Energy, Inc. (incorporated by reference to Exhibit 10.6 to the Company's Current Report on Form 8-K filed on February 13, 2020). |
| 10.7 | Third Amendment to Credit Agreement, dated as of February 11, 2020, by and among FuelCell Energy, Inc., each of the Guarantors party to the Credit Agreement, each of the lenders party to the Credit Agreement and Orion Energy Partners Investment Agent, LLC. (incorporated by reference to Exhibit 10.7 to the Company's Current report on Form 8-K filed on February 13, 2020). |
| 10.8 | Consent and Waiver, dated as of February 11, 2020, by and among FuelCell Energy, Inc., each of the Guarantors party to the Credit Agreement, each of the lenders party to the Credit Agreement and Orion Energy Partners Investment Agent, LLC. (incorporated by reference to Exhibit 10.8 to the Company's Current Report on Form 8-K filed on February 13, 2020). |
| 10.9 | Paycheck Protection Program Promissory Note, entered into on April 20, 2020 and dated April 16, 2020, between Liberty Bank and FuelCell Energy, Inc. (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed on April 24, 2020). |
| 10.10 | First Amendment, dated as of April 23, 2020, to the Employment Agreement, effective as of August 26, 2019, between FuelCell Energy, Inc. and Jason B. Few (incorporated by reference to Exhibit 10.2 to the Company's Current Report on Form 8-K filed on April 24, 2020). |
| 10.11 | Fourth Amendment to Credit Agreement, dated as of April 30, 2020, by and among FuelCell Energy, Inc., each of the Guarantors party to the Credit Agreement, each of the lenders party to the Credit Agreement and Orion Energy Partners Investment Agent, LLC (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed on May 4, 2020). |
| 10.12 | FuelCell Energy, Inc. 2018 Omnibus Incentive Plan, as amended and restated, effective as of May 8, 2020 (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed on May 12, 2020). |
| 10.13 | Fifth Amendment to Credit Agreement, dated as of June 8, 2020, by and among FuelCell Energy, Inc., each of the Guarantors party to the Credit Agreement, each of the lenders party to the Credit Agreement and Orion Energy Partners Investment Agent, LLC. |
| 31.1 | Certification of Chief Executive Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002 |
| 31.2 | Certification of Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002 |
| 32.1 | Certification of Chief Executive Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 |
| 32.2 | Certification of Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 |
| 101.INS | Inline XBRL Instance Document – the instance document does not appear in the Interactive Data File because its XBRL tags are embedded within the Inline XBRL document. |
| 101.SCH | Inline XBRL Schema Document |
| 101.CAL | Inline XBRL Calculation Linkbase Document |
| 101.LAB | Inline XBRL Labels Linkbase Document |
| 101.PRE | Inline XBRL Presentation Linkbase Document |
| 104 | Cover Page Interactive Data File (formatted as Inline XBRL and contained in Exhibit 101). |

**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

**FUELCELL ENERGY, INC.**
**(Registrant)**

June 12, 2020
**Date**

/s/ Michael S. Bishop
**Michael S. Bishop**
Executive Vice President, Chief Financial Officer and Treasurer
(Principal Financial Officer and Principal Accounting Officer)

**Exhibit 4.15**

**Incorporation Number** C0866047

**Effective as of** January 20, 2020

**ARTICLES**

**OF**

**FCE FUELCELL ENERGY LTD.**

**PROVINCE OF BRITISH COLUMBIA**

***BUSINESS CORPORATIONS ACT***

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**Incorporation Number** C0866047

**ARTICLES**

**FCE FUELCELL ENERGY LTD.**

**(the "Company")**

**ARTICLE 1**
**INTERPRETATION**

**Section 1.1 Definitions**

In these Articles, unless the context otherwise requires:

(1) "**appropriate person**" has the meaning assigned in the *Securities Transfer Act*;

(2) "**board of directors**" and "**board**" mean the board of directors or sole director of the Company for the time being;

(3) "**BCA**" means the *Business Corporations Act* (British Columbia) from time to time in force and all amendments thereto and includes all regulations and amendments thereto made pursuant to that Act;

(4) "**director**" means a person who is a director of the Company for the time being;

(5) "**directors' resolution**" means a resolution of the board of directors passed at a meeting of the board or consented to by the directors in accordance with Section 140 of the BCA and Section 18.12;

(6) "**Distribution**" has the meaning ascribed thereto in Section 27.1(3);

(7) "**Interpretation Act**" means the *Interpretation Act* (British Columbia) from time to time in force and all amendments thereto and includes all regulations and amendments thereto made pursuant to that Act;

(8) "**legal personal representative**" means the personal or other legal representative of a shareholder or other person, as the context requires;

(9) "**protected purchaser**" has the meaning assigned in the *Securities Transfer Ac*t;

(10) "**registered address**" of a shareholder means the shareholder's address as recorded in the central securities register;

(11) "**seal**" means the seal of the Company, if any;

(12) "***Securities Act***" means the *Securities Act* (British Columbia) from time to time in force and all amendments thereto and includes all regulations and amendments thereto made pursuant to that Act;

(13) "**securities legislation**" means statutes concerning the regulation of securities markets and trading in securities and the regulations, rules, forms and schedules under those statutes, all as amended from time to time, and the blanket rulings and orders, as amended from time to time, issued by the securities commissions or similar regulatory authorities appointed under or pursuant to those statutes; "**Canadian securities legislation**" means the securities legislation

in any province or territory of Canada and includes the *Securities Act*; and "**U.S. securities legislation**" means the securities legislation in the federal jurisdiction of the United States and in any state of the United States and includes the *Securities Act* of 1933 and the *Securities Exchange Act* of 1934;

(14) "***Securities Transfer Act***" means the *Securities Transfer Act* (British Columbia) from time to time in force and all amendments thereto and includes all regulations and amendments thereto made pursuant to that Act; and

(15) "**special business**" has the meaning set out in Section 11.1.

**Section 1.2 BCA and *Interpretation Act* Definitions Applicable**

The definitions in the BCA and the definitions and rules of construction in the *Interpretation Act*, with the necessary changes, so far as applicable, and unless the context requires otherwise, apply to these Articles as if they were an enactment.

**Section 1.3 Conflicts or Inconsistencies**

If there is a conflict between a definition in the BCA and a definition or rule in the *Interpretation Act* relating to a term used in these Articles, the definition in the BCA will prevail in relation to the use of the term in these Articles. If there is a conflict or inconsistency between these Articles and the BCA, the BCA will prevail.

## ARTICLE 2
## SHARES AND SHARE CERTIFICATES

**Section 2.1 Authorized Share Structure**

The authorized share structure of the Company consists of shares of the class or classes and series, if any, described in the Notice of Articles of the Company.

**Section 2.2 Form of Share Certificate**

Each share certificate issued by the Company must comply with, and be signed as required by, the BCA.

**Section 2.3 Shareholder Entitled to Certificate or Acknowledgement**

Unless the shares of which the shareholder is the registered owner are uncertificated shares within the meaning of the BCA, each shareholder is entitled, without charge, to (a) one share certificate representing the shares of each class or series of shares registered in the shareholder's name or (b) a non-transferable written acknowledgement of the shareholder's right to obtain such a share certificate, provided that in respect of a share held jointly by several persons, the Company is not bound to issue more than one share certificate or acknowledgement and delivery of a share certificate or an acknowledgement to one of several joint shareholders or to a duly authorized agent of one of the joint shareholders will be sufficient delivery to all.

**Section 2.4 Delivery by Mail**

Any share certificate or non-transferable written acknowledgement of a shareholder's right to obtain a share certificate may be sent to the shareholder by mail at the shareholder's registered address and neither the Company nor any director, officer or agent of the Company is liable for any loss to the shareholder because the share certificate or acknowledgement is lost in the mail or stolen.

**Section 2.5 Replacement of Worn Out or Defaced Certificate or Acknowledgement**

If the Company is satisfied that a share certificate or a non-transferable written acknowledgement of the shareholder's right to obtain a share certificate is worn out or defaced, it must, on production to it of the share certificate or acknowledgement, as the case may be, and on such other terms, if any, as it thinks fit:

(1) order the share certificate or acknowledgement, as the case may be, to be cancelled; and

(2) issue a replacement share certificate or acknowledgement, as the case may be.

**Section 2.6 Replacement of Lost, Destroyed or Wrongfully Taken Certificate**

If a person entitled to a share certificate claims that the share certificate has been lost, destroyed or wrongfully taken, the Company must issue a new share certificate, if that person:

(1) so requests before the Company has notice that the share certificate has been acquired by a protected purchaser;

(2) provides the Company with an indemnity bond sufficient in the Company's judgement to protect the Company from any loss that the Company may suffer by issuing a new certificate; and

(3) satisfies any other reasonable requirements imposed by the Company.

A person entitled to a share certificate may not assert against the Company a claim for a new share certificate where a share certificate has been lost, apparently destroyed or wrongfully taken if that person fails to notify the Company of that fact within a reasonable time after that person has notice of it and the Company registers a transfer of the shares represented by the certificate before receiving a notice of the loss, apparent destruction or wrongful taking of the share certificate.

**Section 2.7 Recovery of New Share Certificate**

If, after the issue of a new share certificate, a protected purchaser of the original share certificate presents the original share certificate for the registration of transfer, then in addition to any rights under any indemnity bond, the Company may recover the new share certificate from a person to whom it was issued or any person taking under that person other than a protected purchaser.

**Section 2.8 Splitting Share Certificates**

If a shareholder surrenders a share certificate to the Company with a written request that the Company issue in the shareholder's name two or more share certificates, each representing a specified number of shares and in the aggregate representing the same number of shares as represented by the share certificate so surrendered, the Company must cancel the surrendered share certificate and issue replacement share certificates in accordance with that request.

**Section 2.9 Certificate Fee**

There must be paid to the Company, in relation to the issue of any share certificate under Section 2.5, Section 2.6, or Section 2.8, the amount, if any and which must not exceed the amount prescribed under the BCA, determined by the board.

**Section 2.10 Recognition of Trusts**

Except as required by law or statute or these Articles, no person will be recognized by the Company as holding any share upon any trust, and the Company is not bound by or compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or fraction of a share or (except as required by law or statute or these Articles or as ordered by a court of competent jurisdiction) any other rights in respect of any share except an absolute right to the entirety thereof in the shareholder.

## ARTICLE 3
## ISSUE OF SHARES

**Section 3.1 Board Authorized**

Subject to the BCA and the rights, if any, of the holders of issued shares of the Company, the Company may issue, allot, sell or otherwise dispose of the unissued shares, and issued shares held by the Company, at the times, to the persons, including directors, in the manner, on the terms and conditions and for the issue prices (including any premium at which shares with par value may be issued) that the board may determine. The issue price for a share with par value must be equal to or greater than the par value of the share.

**Section 3.2 Commissions and Discounts**

The Company may at any time pay a reasonable commission or allow a reasonable discount to any person in consideration of that person purchasing or agreeing to purchase shares of the Company from the Company or any other person or procuring or agreeing to procure purchasers for shares of the Company.

**Section 3.3 Brokerage**

The Company may pay such brokerage fee or other consideration as may be lawful for or in connection with the sale or placement of its securities.

**Section 3.4 Conditions of Issue**

Except as provided for by the BCA, no share may be issued until it is fully paid. A share is fully paid when:

(1) consideration is provided to the Company for the issue of the share by one or more of the following:

(a) past services performed for the Company;

(b) property;

(c) money; and

(2) the value of the consideration received by the Company equals or exceeds the issue price set for the share under Section 3.1.

**Section 3.5 Share Purchase Warrants and Rights**

Subject to the BCA, the Company may issue share purchase warrants, options and rights upon such terms and conditions as the board determines, which share purchase warrants, options and rights may be issued alone or in conjunction with debentures, debenture stock, bonds, shares or any other securities issued or created by the Company from time to time.

## ARTICLE 4
## SHARE REGISTERS

**Section 4.1 Central Securities Register**

As required by and subject to the BCA, the Company must maintain a central securities register, which may be kept in electronic form. The board may, subject to the BCA, appoint an agent to maintain the central securities register. The board may also appoint one or more agents, including the agent which keeps the central securities register, as transfer agent for its shares or any class or series of its shares, as the case may be, and the same or another agent as registrar for its shares or such class or series of its shares, as the case may be. The board may terminate such appointment of any agent at any time and may appoint another agent in its place.

**Section 4.2 Closing Register**

The Company must not at any time close its central securities register.

## ARTICLE 5
## SHARE TRANSFERS

**Section 5.1 Registering Transfers**

Subject to Article 26, the BCA and the *Securities Transfer Act*, the Company must register a transfer of a share of the Company if either:

(1) the Company or the transfer agent or registrar for the class or series of shares to be transferred has received:

(a) in the case where the Company has issued a share certificate in respect of the share to be transferred, that share certificate and a written instrument of transfer (which may be on a separate document or endorsed on the share certificate) made by the shareholder or other appropriate person or by an agent who has actual authority to act on behalf of that person;

(b) in the case of a share that is not represented by a share certificate (including an uncertificated share within the meaning of the BCA and including the case where the Company has issued a non-transferable written acknowledgement of the shareholder's right to obtain a share certificate in respect of the share to be transferred), a written instrument of transfer, made by the shareholder or other appropriate person or by an agent who has actual authority to act on behalf of that person; and

(c) such other evidence, if any, as the Company or the transfer agent or registrar for the class or series of shares to be transferred may require to prove the title of the transferor or the transferor's right to transfer the share, that the written instrument of transfer is genuine and authorized and that the transfer is rightful or to a protected purchaser; or

(2) all the preconditions for a transfer of a share under the *Securities Transfer Act* have been met and the Company is required under the *Securities Transfer Act* to register the transfer.

**Section 5.2 Waivers of Requirements for Transfer**

The Company may waive any of the requirements set out in Section 5.1(1) and any of the preconditions referred to in Section 5.1(2).

**Section 5.3 Form of Instrument of Transfer**

The instrument of transfer in respect of any share of the Company must be either in the form, if any, on the back of the Company's share certificates or in any other form satisfactory to the Company or the transfer agent for the class or series of shares to be transferred.

**Section 5.4 Transferor Remains Shareholder**

Except to the extent that the BCA otherwise provides, the transferor of shares is deemed to remain the holder of the shares until the name of the transferee is entered in a securities register of the Company in respect of the transfer.

**Section 5.5 Signing of Instrument of Transfer**

If a shareholder or other appropriate person or an agent who has actual authority to act on behalf of that person, signs an instrument of transfer in respect of shares registered in the name of the shareholder, the signed instrument of transfer constitutes a complete and sufficient authority to the Company and its directors, officers and agents to register the number of shares specified in the instrument of transfer or specified in any other manner, or, if no number is specified but share certificates are deposited with the instrument of transfer, all the shares represented by such share certificates:

(1) in the name of the person named as transferee in that instrument of transfer; or

(2) if no person is named as transferee in that instrument of transfer, in the name of the person on whose behalf the instrument is deposited for the purpose of having the transfer registered.

**Section 5.6 Enquiry as to Title Not Required**

Neither the Company nor any director, officer or agent of the Company is bound to inquire into the title of the person named in the instrument of transfer as transferee or, if no person is named as transferee in the instrument of transfer, of the person on whose behalf the instrument is deposited for the purpose of having the transfer registered or is liable for any claim related to registering the transfer by the shareholder or by any intermediate owner or holder of the shares, of any interest in the shares, of any share certificate representing such shares or of any written acknowledgement of a right to obtain a share certificate for such shares.

**Section 5.7 Transfer Fee**

Subject to the applicable rules of any stock exchange on which the shares of the Company may be listed, there must be paid to the Company, in relation to the registration of any transfer, the amount, if any, determined by the board.

## ARTICLE 6
## TRANSMISSION OF SHARES

**Section 6.1 Legal Personal Representative Recognized on Death**

In the case of the death of a shareholder, the legal personal representative of the shareholder, or in the case of shares registered in the shareholder's name and the name of another person in joint tenancy, the surviving joint holder, will be the only person recognized by the Company as having any title to the shareholder's interest in the shares. Before recognizing a person as a legal personal representative of a shareholder, the board may require the original grant of probate or letters of administration or a court certified copy of them or the original or a court certified or authenticated copy of the grant of representation, will, order or other instrument or other evidence of the death under which title to the shares or securities is claimed to vest.

**Section 6.2 Rights of Legal Personal Representative**

The legal personal representative of a shareholder has the rights, privileges and obligations that attach to the shares held by the shareholder, including the right to transfer the shares in accordance with these Articles and applicable securities legislation, if appropriate evidence of appointment or incumbency within the meaning of the *Securities Transfer Act* has been deposited with the Company. This Section 6.2 does not apply in the case of the death of a shareholder with respect to shares registered in the shareholder's name and the name of another person in joint tenancy.

## ARTICLE 7
## ACQUISITION OF COMPANY'S SHARES

**Section 7.1 Company Authorized to Purchase or Otherwise Acquire Shares**

Subject to Section 7.2, the special rights or restrictions attached to the shares of any class or series of shares, the BCA and applicable securities legislation, the Company may, if authorized by the board, purchase or otherwise acquire any of its shares at the price and upon the terms determined by the board.

**Section 7.2 No Purchase, Redemption or Other Acquisition When Insolvent**

The Company must not make a payment or provide any other consideration to purchase, redeem or otherwise acquire any of its shares if there are reasonable grounds for believing that:

(1) the Company is insolvent; or

(2) making the payment or providing the consideration would render the Company insolvent.

**Section 7.3 Sale and Voting of Purchased, Redeemed or Otherwise Acquired Shares**

If the Company retains a share redeemed, purchased or otherwise acquired by it, the Company may sell, gift or otherwise dispose of the share, but, while such share is held by the Company, it:

(1) is not entitled to vote the share at a meeting of its shareholders;

(2) must not pay a dividend in respect of the share; and

(3) must not make any other distribution in respect of the share.

## ARTICLE 8
## BORROWING POWERS

**Section 8.1 Borrowing Powers**

The Company, if authorized by the board, may:

(1) borrow money in the manner and amount, on the security, from the sources and on the terms and conditions that the board considers appropriate;

(2) issue bonds, debentures and other debt obligations either outright or as security for any liability or obligation of the Company or any other person and at such discounts or premiums and on such other terms as the board considers appropriate;

(3) guarantee the repayment of money by any other person or the performance of any obligation of any other person; and

(4) mortgage, charge, whether by way of specific or floating charge, grant a security interest in, or give other security on, the whole or any part of the present and future assets and undertaking of the Company.

## ARTICLE 9
## ALTERATIONS

**Section 9.1 Alteration of Authorized Share Structure**

Subject to Section 9.2, the special rights or restrictions attached to the shares of any class or series of shares and the BCA, the Company may:

(1) by ordinary resolution;

(a) create one or more classes or series of shares or, if none of the shares of a class or series of shares are allotted or issued, eliminate that class or series of shares;

(b) increase, reduce or eliminate the maximum number of shares that the Company is authorized to issue out of any class or series of shares or establish a maximum number of shares that the Company is authorized to issue out of any class or series of shares for which no maximum is established;

(c) subdivide or consolidate all or any of its unissued, or fully paid issued, shares;

(d) if the Company is authorized to issue shares of a class of shares with par value:

(i) decrease the par value of those shares; or

(ii) if none of the shares of that class of shares are allotted or issued, increase the par value of those shares;

(e) change all or any of its unissued, or fully paid issued, shares with par value into shares without par value or any of its unissued shares without par value into shares with par value;

(f) alter the identifying name of any of its shares; or

(g) otherwise alter its shares or authorized share structure when required or permitted to do so by the BCA;

and, if applicable, alter its Notice of Articles and, if applicable, its Articles, accordingly; or

(2) by directors' resolution, subdivide or consolidate all or any of its unissued, or fully paid issued, shares and if applicable, alter its Notice of Articles and, if applicable, its Articles accordingly.

**Section 9.2 Special Rights or Restrictions**

Subject to the special rights or restrictions attached to the shares of any class or series of shares and the BCA, the Company may by ordinary resolution:

(1) create special rights or restrictions for, and attach those special rights or restrictions to, the shares of any class or series of shares, whether or not any or all of those shares have been issued; or

(2) vary or delete any special rights or restrictions attached to the shares of any class or series of shares, whether or not any or all of those shares have been issued;

and alter its Articles and Notice of Articles accordingly.

**Section 9.3 No Interference with Class or Series Rights without Consent**

A right or special right attached to issued shares must not be prejudiced or interfered with under the BCA, the Notice of Articles or these Articles unless the holders of shares of the class or series of shares to which the right or special right is attached consent by a special separate resolution of the holders of such class or series of shares.

**Section 9.4 Change of Name**

The Company may by directors' resolution or ordinary resolution authorize an alteration to its Notice of Articles in order to change its name.

**Section 9.5 Other Alterations**

If the BCA does not specify the type of resolution and these Articles do not specify another type of resolution, the Company may by ordinary resolution alter these Articles.

## ARTICLE 10
## MEETINGS OF SHAREHOLDERS

**Section 10.1 Annual General Meetings**

Unless an annual general meeting is deferred or waived in accordance with the BCA, the Company must hold its first annual general meeting within 18 months after the date on which it was incorporated or otherwise recognized, and after that must hold an annual general meeting at least once in each calendar year and not more than 15 months after the last annual reference date at such time and place, either in or outside British Columbia, as may be determined by the board.

**Section 10.2 Resolution Instead of Annual General Meeting**

If all the shareholders who are entitled to vote at an annual general meeting consent by a unanimous resolution to all of the business that is required to be transacted at that annual general meeting, the annual general meeting is deemed to have been held on the date of the unanimous resolution. The shareholders must, in any unanimous resolution passed under this Section 10.2, select as the Company's annual reference date a date that would be appropriate for the holding of the applicable annual general meeting.

**Section 10.3 Calling of Meetings of Shareholders**

The board may, at any time, call a meeting of shareholders, to be held at such time and at such place, either in or outside British Columbia, as may be determined by the board.

**Section 10.4 Electronic Meetings**

The board may determine that a meeting of shareholders shall be held entirely by means of telephone, electronic or other communications facilities that permit all participants to communicate with each other during the meeting. A meeting of shareholders may also be held at which some, but not necessarily all, persons entitled to attend may participate by means of such communications facilities, if the board determines to make them available. A person participating in a meeting by such means is deemed to be present at the meeting.

**Section 10.5Notice for Meetings of Shareholders**

The Company must send notice of the date, time and location of any meeting of shareholders (including, without limitation, any notice specifying the intention to propose a resolution as an exceptional resolution, a special resolution or a special separate resolution, and any notice to consider approving an amalgamation into a foreign jurisdiction, an arrangement or the adoption of an amalgamation agreement, and any notice of a general meeting, class meeting or series meeting), in the manner provided in these Articles, or in such other manner, if any, as may be prescribed by ordinary resolution (whether previous notice of the resolution has been given or not), to each shareholder entitled to attend the meeting, to each director and to the auditor of the Company, unless these Articles otherwise provide, at least the following number of days before the meeting:

(1) if and for so long as the Company is a public company, 21 days;

(2) otherwise, 10 days.

**Section 10.6Record Date for Notice**

The board may set a date as the record date for the purpose of determining shareholders entitled to notice of any meeting of shareholders. The record date must not precede the date on which the meeting is to be held by more than two months or, in the case of a general meeting requisitioned by shareholders under the BCA, by more than four months. The record date must not precede the date on which the meeting is held by fewer than:

(1) if and for so long as the Company is a public company, 21 days;

(2) otherwise, 10 days.

If no record date is set, the record date is 5 p.m. on the day immediately preceding the first date on which the notice is sent or, if no notice is sent, the beginning of the meeting.

**Section 10.7Record Date for Voting**

The board may set a date as the record date for the purpose of determining shareholders entitled to vote at any meeting of shareholders. The record date must not precede the date on which the meeting is to be held by more than two months or, in the case of a general meeting requisitioned by shareholders under the BCA, by more than four months. If no record date is set, the record date is 5 p.m. on the day immediately preceding the first date on which the notice is sent or, if no notice is sent, the beginning of the meeting.

**Section 10.8Failure to Give Notice and Waiver of Notice**

The accidental omission to send notice of any meeting of shareholders to, or the non-receipt of any notice by, any of the persons entitled to notice does not invalidate any proceedings at that meeting. Any person entitled to notice of a meeting of shareholders may, in writing or otherwise, waive that entitlement or agree to reduce the period of that notice. Attendance of a person at a meeting of shareholders is a waiver of entitlement to notice of the meeting unless that person attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

**Section 10.9Notice of Special Business at Meetings of Shareholders**

If a meeting of shareholders is to consider special business within the meaning of Section 11.1, the notice of meeting must:

(1) state the general nature of the special business; and

(2) if the special business includes considering, approving, ratifying, adopting or authorizing any document or the signing of or giving of effect to any document, have attached to it a copy of the document or state that a copy of the document will be available for inspection by shareholders:

(a) at the Company's records office, or at such other reasonably accessible location in British Columbia as is specified in the notice; and

(b) during statutory business hours on any one or more specified days before the day set for the holding of the meeting.

**Section 10.10 Class Meetings and Series Meetings of Shareholders**

Unless otherwise specified in these Articles, the provisions of these Articles relating to a meeting of shareholders will apply with the necessary changes and so far as they are applicable, to a class meeting or series meeting of shareholders holding a particular class or series of shares.

**Section 10.11 Notice of Dissent Rights**

The Company must send to each of its shareholders, whether or not their shares carry the right to vote, a notice of any meeting of shareholders at which a resolution entitling shareholders to dissent is to be considered specifying the date of the meeting and containing a statement advising of the right to send a notice of dissent together with a copy of the proposed resolution at least the following number of days before the meeting:

(1) if and for so long as the Company is a public company, 21 days;

(2) otherwise, 10 days.

## ARTICLE 11
## PROCEEDINGS AT MEETINGS OF SHAREHOLDERS

**Section 11.1 Special Business**

At a meeting of shareholders, the following business is special business:

(1) at a meeting of shareholders that is not an annual general meeting, all business is special business except business relating to the conduct of or voting at the meeting;

(2) at an annual general meeting, all business is special business except for the following:

(a) business relating to the conduct of or voting at the meeting;

(b) consideration of any financial statements of the Company presented to the meeting;

(c) consideration of any reports of the board or auditor;

(d) the setting or changing of the number of directors;

(e) the election or appointment of directors;

(f) the appointment of an auditor;

(g) the setting of the remuneration of an auditor;

(h) business arising out of a report of the board not requiring the passing of a special resolution or an exceptional resolution;

(i) any non-binding advisory vote; and

(j) any other business which, under these Articles or the BCA, may be transacted at a meeting of shareholders without prior notice of the business being given to the shareholders.

**Section 11.2Special Majority**

The majority of votes required for the Company to pass a special resolution at a general meeting of shareholders is two-thirds of the votes cast on the resolution.

**Section 11.3Quorum**

Subject to the special rights or restrictions attached to the shares of any class or series of shares, a quorum for the transaction of business at a meeting of shareholders is present if shareholders who, in the aggregate, hold at least 5% of the issued shares entitled to be voted at the meeting are present in person or represented by proxy, irrespective of the number of persons actually present at the meeting.

**Section 11.4Persons Entitled to Attend Meeting**

In addition to those persons who are entitled to vote at a meeting of shareholders, the only other persons entitled to be present at the meeting are the directors, the officers, any lawyer for the Company, the auditor of the Company, any persons invited to be present at the meeting by the board or by the chair of the meeting and any other persons who, although not entitled to vote, are entitled or required under the BCA or these Articles to be present at the meeting; but if any of those persons does attend the meeting, that person is not to be counted in the quorum and is not entitled to vote at the meeting unless that person is a shareholder or proxy holder entitled to vote at the meeting.

**Section 11.5Requirement of Quorum**

No business, other than the election of a chair of the meeting and the adjournment of the meeting, may be transacted at any meeting of shareholders unless a quorum of shareholders entitled to vote is present at the commencement of the meeting, but such quorum need not be present throughout the meeting.

**Section 11.6Lack of Quorum**

If, within one-half hour from the time set for holding a meeting of shareholders, a quorum is not present:

(1) in the case of a general meeting requisitioned by shareholders, the meeting is dissolved, and

(2) in the case of any other meeting of shareholders, the meeting stands adjourned to the same day in the next week at the same time and place.

**Section 11.7Lack of Quorum at Succeeding Meeting**

If, at the meeting to which the meeting referred to in Section 11.6(2) was adjourned, a quorum is not present within one-half hour from the time set for holding the meeting, the person or persons present and being, or representing by proxy, one or more shareholders entitled to attend and vote at the meeting constitute a quorum.

**Section 11.8 Chair**

The following individual is entitled to preside as chair at a meeting of shareholders:

(1) the chair of the board, if any; or

(2) if the chair of the board is absent or unwilling to act as chair of the meeting, the president, if any.

**Section 11.9 Selection of Alternate Chair**

If, at any meeting of shareholders, there is no chair of the board or president present within 15 minutes after the time set for holding the meeting, or if the chair of the board and the president are unwilling to act as chair of the meeting, or if the chair of the board and the president have advised the secretary, if any, or any director present at the meeting, that they will not be present at the meeting, the directors present must choose one of their number to be chair of the meeting. If all of the directors present decline to take the chair or fail to so choose or if no director is present, the shareholders entitled to vote at the meeting who are present in person or by proxy may choose any person present at the meeting to chair the meeting.

**Section 11.10 Adjournments**

The chair of a meeting of shareholders may, and if so directed by the meeting must, adjourn the meeting from time to time and from place to place, but no business may be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

**Section 11.11 Notice of Adjourned Meeting**

It is not necessary to give any notice of an adjourned meeting of shareholders or of the business to be transacted at an adjourned meeting of shareholders except that, when a meeting is adjourned for 30 days or more, notice of the adjourned meeting must be given as in the case of the original meeting.

**Section 11.12 Electronic Voting**

Any vote at a meeting of shareholders may be held entirely or partially by means of telephonic, electronic or other communications facilities if the directors determine to make them available whether or not persons entitled to attend participate in the meeting by means of telephonic, electronic or other communications facilities.

**Section 11.13 Decisions by Show of Hands or Poll**

Subject to the BCA, every motion put to a vote at a meeting of shareholders will be decided on a show of hands or the functional equivalent of a show of hands by means of telephonic, electronic or other communications facilities, unless a poll, before or on the declaration of the result of the vote by show of hands (or its functional equivalent), is directed by the chair or demanded by any shareholder entitled to vote who is present in person or by proxy.

**Section 11.14 Declaration of Result**

The chair of a meeting of shareholders must declare to the meeting the decision on every question in accordance with the result of the show of hands (or its functional equivalent) or the poll, as the case may be, and that decision must be entered in the minutes of the meeting. A declaration of the chair that a resolution is carried by the necessary majority or is defeated is, unless a poll is directed by the chair or demanded under Section 11.13, conclusive evidence without proof of the number or proportion of the votes recorded in favour of or against the resolution.

**Section 11.15 Motion Need Not be Seconded**

No motion proposed at a meeting of shareholders need be seconded unless the chair of the meeting rules otherwise, and the chair of any meeting of shareholders is entitled to propose or second a motion.

**Section 11.16 Casting Vote**

In the case of an equality of votes, the chair of a meeting of shareholders does not, either on a show of hands or on a poll, have a second or casting vote in addition to the vote or votes to which the chair may be entitled as a shareholder.

**Section 11.17 Manner of Taking Poll**

Subject to Section 11.18, if a poll is duly demanded at a meeting of shareholders:

(1) the poll must be taken:

(a) at the meeting, or within seven days after the date of the meeting, as the chair of the meeting directs; and

(b) in the manner, at the time and at the place that the chair of the meeting directs;

(2) the result of the poll is deemed to be the decision of the meeting at which the poll is demanded; and

(3) the demand for the poll may be withdrawn by the person who demanded it.

**Section 11.18 Demand for Poll on Adjournment**

A poll demanded at a meeting of shareholders on a question of adjournment must be taken immediately at the meeting.

**Section 11.19 Chair Must Resolve Dispute**

In the case of any dispute as to the admission or rejection of a vote given on a poll, the chair of the meeting must determine the dispute, and his or her determination made in good faith is final and conclusive.

**Section 11.20 Casting of Votes**

On a poll, a shareholder entitled to more than one vote need not cast all the votes in the same way.

**Section 11.21 No Demand for Poll on Election of Chair**

No poll may be demanded in respect of the vote by which a chair of a meeting of shareholders is elected.

**Section 11.22 Demand for Poll Not to Prevent Continuance of Meeting**

The demand for a poll at a meeting of shareholders does not, unless the chair of the meeting so rules, prevent the continuation of the meeting for the transaction of any business other than the question on which a poll has been demanded.

**Section 11.23 Retention of Ballots and Proxies**

The Company must, for at least three months after a meeting of shareholders, keep each ballot cast on a poll and each proxy voted at the meeting, and, during that period, make them available for inspection during normal business hours by any shareholder or proxyholder entitled to vote at the meeting. At the end of such three month period, the Company may destroy such ballots and proxies.

## ARTICLE 12
## VOTES OF SHAREHOLDERS

**Section 12.1Number of Votes by Shareholder or by Shares**

Subject to any special rights or restrictions attached to any shares and to the restrictions imposed on joint shareholders under Section 12.3:

(1) on a vote by show of hands (or its functional equivalent), every person present who is a shareholder or proxy holder and entitled to vote on the matter has one vote; and

(2) on a poll, every shareholder entitled to vote on the matter has one vote in respect of each share entitled to be voted on the matter and held by that shareholder and may exercise that vote either in person or by proxy.

**Section 12.2Votes of Persons in Representative Capacity**

A person who is not a shareholder may vote at a meeting of shareholders, whether on a show of hands or on a poll, and may appoint a proxy holder to act at the meeting, if, before doing so, the person satisfies the chair of the meeting, or the board, that the person is a legal personal representative or a trustee in bankruptcy for a shareholder who is entitled to vote at the meeting.

**Section 12.3Votes by Joint Holders**

If there are joint shareholders registered in respect of any share:

(1) any one of the joint shareholders may vote at any meeting of shareholders, personally or by proxy, in respect of the share as if that joint shareholder were solely entitled to it; or

(2) if more than one of the joint shareholders is present at any meeting of shareholders, personally or by proxy, and more than one of them votes in respect of that share, then only the vote of the joint shareholder present whose name stands first on the central securities register in respect of the share will be counted.

**Section 12.4Legal Personal Representatives as Joint Shareholders**

Two or more legal personal representatives of a shareholder in whose sole name any share is registered are, for the purposes of Section 12.3, deemed to be joint shareholders registered in respect of that share.

**Section 12.5Representative of a Corporate Shareholder**

If a corporation that is not a subsidiary of the Company is a shareholder, that corporation may appoint a person to act as its representative at any meeting of shareholders of the Company, and:

(1) for that purpose, the instrument appointing a representative must be received:

(a) at the registered office of the Company or at any other place specified, in the notice calling the meeting, for the receipt of proxies, at least the number of business days specified in the notice for the receipt of proxies, or if no number of days is specified, two business days before the day set for the holding of the meeting or any adjourned meeting; or

(b) at the meeting or any adjourned meeting, by the chair of the meeting or adjourned meeting or by a person designated by the chair of the meeting or adjourned meeting;

(2) if a representative is appointed under this Section 12.5:

(a) the representative is entitled to exercise in respect of and at that meeting the same rights on behalf of the corporation that the representative represents as that corporation could exercise if it were a shareholder who is an individual, including, without limitation, the right to appoint a proxy holder; and

(b) the representative, if present at the meeting, is to be counted for the purpose of forming a quorum and is deemed to be a shareholder present in person at the meeting.

Evidence of the appointment of any such representative may be sent to the Company by written instrument, fax or any other method of transmitting legibly recorded messages.

**Section 12.6When Proxy Holder Need Not Be Shareholder**

A person must not be appointed as a proxy holder unless the person is a shareholder, although a person who is not a shareholder may be appointed as a proxy holder if:

(1) the person appointing the proxy holder is a corporation or a representative of a corporation appointed under Section 12.5;

(2) the Company has at the time of the meeting for which the proxy holder is to be appointed only one shareholder entitled to vote at the meeting;

(3) the shareholders present in person or by proxy at and entitled to vote at the meeting for which the proxy holder is to be appointed, by a resolution on which the proxy holder is not entitled to vote but in respect of which the proxy holder is to be counted in the quorum, permit the proxy holder to attend and vote at the meeting; or

(4) the Company is a public company.

**Section 12.7When Proxy Provisions Do Not Apply to the Company**

If and for so long as the Company is a public company, Section 12.8 to Section 12.16 apply only insofar as they are not inconsistent with any Canadian securities legislation applicable to the Company, any U.S. securities legislation applicable to the Company or any rules of an exchange on which securities of the Company are listed.

**Section 12.8Appointment of Proxy Holders**

Every shareholder of the Company, including a corporation that is a shareholder but not a subsidiary of the Company, entitled to vote at a meeting of shareholders may, by proxy, appoint one or more proxy holders to attend and act at the meeting in the manner, to the extent and with the powers conferred by the proxy. The instructing of proxy holders may be carried out by means of telephonic, electronic or other communications facility in addition to or in substitution for instructing proxy holders by mail.

**Section 12.9Alternate Proxy Holders**

A shareholder may appoint one or more alternate proxy holders to act in the place of an absent proxy holder.

**Section 12.10 Deposit of Proxy**

Subject to Section 12.13 and Section 12.15, a proxy for a meeting of shareholders must:

(1) be received at the registered office of the Company or at any other place specified, in the notice calling the meeting, for the receipt of proxies, at least the number of business days specified in the notice, or if no number of days is specified, two business days before the day set for the holding of the meeting or any adjourned meeting; or

(2) unless the notice provides otherwise, be received, at the meeting or any adjourned meeting, by the chair of the meeting or adjourned meeting or by a person designated by the chair of the meeting or adjourned meeting.

A proxy may be sent to the Company by written instrument, fax or any other method of transmitting legibly recorded messages or by using such available telephone or internet voting services as may be approved by the board.

**Section 12.11 Validity of Proxy Vote**

A vote given in accordance with the terms of a proxy is valid notwithstanding the death or incapacity of the shareholder giving the proxy and despite the revocation of the proxy or the revocation of the authority under which the proxy is given, unless notice in writing of that death, incapacity or revocation is received:

(1) at the registered office of the Company, at any time up to and including the last business day before the day set for the holding of the meeting or any adjourned meeting at which the proxy is to be used; or

(2) at the meeting or any adjourned meeting, by the chair of the meeting or adjourned meeting, before any vote in respect of which the proxy has been given has been taken.

**Section 12.12 Form of Proxy**

A proxy, whether for a specified meeting or otherwise, must be either in the following form or in any other form approved by the board or the chair of the meeting:

[name of company]

(the "Company")

The undersigned, being a shareholder of the Company, hereby appoints [name] or, failing that person, [name], as proxy holder for the undersigned to attend, act and vote for and on behalf of the undersigned at the meeting of shareholders of the Company to be held on [month, day, year] and at any adjournment of that meeting.

Number of shares in respect of which this proxy is given (if no number is specified, then this proxy is given in respect of all shares registered in the name of the undersigned): _____

_____
Signed [month, day, year]

_____
[Signature of shareholder]

_____
[Name of shareholder - printed]

**Section 12.13 Revocation of Proxy**

Subject to Section 12.14 and Section 12.15, every proxy may be revoked by an instrument in writing that is received:

(1) at the registered office of the Company at any time up to and including the last business day before the day set for the holding of the meeting or any adjourned meeting at which the proxy is to be used; or

(2) at the meeting or any adjourned meeting, by the chair of the meeting or adjourned meeting, before any vote in respect of which the proxy has been given has been taken.

**Section 12.14 Revocation of Proxy Must Be Signed**

An instrument referred to in Section 12.13 must be signed as follows:

(1) if the shareholder for whom the proxy holder is appointed is an individual, the instrument must be signed by the shareholder or his or her legal personal representative or trustee in bankruptcy; or

(2) if the shareholder for whom the proxy holder is appointed is a corporation, the instrument must be signed by the corporation or by a representative appointed for the corporation under Section 12.5.

**Section 12.15 Chair May Determine Validity of Proxy.**

The chair of any meeting of shareholders may, at his or her sole discretion, determine whether or not a proxy deposited for use at the meeting, which may not strictly comply with the requirements of this Article 12 as to form, execution, accompanying documentation, time of filing or otherwise, shall be valid for use at the meeting, and any such determination made in good faith shall be final, conclusive and binding upon the meeting.

**Section 12.16 Production of Evidence of Authority to Vote**

The board or the chair of any meeting of shareholders may, but need not, at any time (including before, at or subsequent to the meeting), inquire into the authority of any person to vote at the meeting and may, but need not, demand from that person production of evidence for the purposes of determining a person's share ownership as at the relevant record date and the authority to vote.

## ARTICLE 13
## DIRECTORS

**Section 13.1 Number of Directors**

(1) The number of directors is the number determined from time to time by directors' resolution.

(2) If the number of directors has not been determined as provided in paragraph (1), the number of directors is equal to the number of directors designated as directors in the Notice of Articles that applied when the Company was recognized under the BCA or the number of directors holding office immediately following the most recent election or appointment of directors, whether at an annual or special general meeting of the shareholders, by a consent resolution of shareholders, or by the directors pursuant to Section 14.4, Section 14.5 or Section 14.8.

(3) Notwithstanding paragraph (2), the minimum number of directors is one or, if the company is a public company, three.

**Section 13.2Change in Number of Directors**

If the number of directors is set under Section 13.1(1):

(1) the shareholders may elect or appoint the directors needed to fill any vacancies in the board of directors up to that number; and

(2) if the shareholders do not elect or appoint the directors needed to fill any vacancies in the board of directors up to that number at the first meeting of shareholders following the setting of that number, then the board, subject to Section 14.8, may appoint, or the shareholders may elect or appoint, directors to fill those vacancies.

No decrease in the number of directors will shorten the term of an incumbent director.

**Section 13.3Board's Acts Valid Despite Vacancy**

An act or proceeding of the board is not invalid merely because fewer than the number of directors set or otherwise required under these Articles is in office.

**Section 13.4Qualifications of Directors**

A director is not required to hold a share of the Company as qualification for his or her office but must be qualified as required by the BCA to become, act or continue to act as a director.

**Section 13.5Remuneration of Directors**

The directors are entitled to the remuneration for acting as directors, if any, as the board may from time to time determine. If the board so decides, the remuneration of the directors, if any, will be determined by the shareholders. That remuneration may be in addition to any salary or other remuneration paid to any officer or employee of the Company as such, who is also a director.

**Section 13.6Reimbursement of Expenses of Directors**

The Company must reimburse each director for the reasonable expenses that he or she may incur in and about the business of the Company.

**Section 13.7Special Remuneration for Directors**

If any director performs any professional or other services for the Company that in the opinion of the board are outside the ordinary duties of a director, or if any director is otherwise specially occupied in or about the Company's business, he or she may be paid remuneration fixed by the board, or, at the option of that director, fixed by ordinary resolution, and such remuneration may be either in addition to, or in substitution for, any other remuneration that he or she may be entitled to receive.

**Section 13.8Gratuity, Pension or Allowance on Retirement of Director**

Unless otherwise determined by ordinary resolution, the board on behalf of the Company may pay a gratuity or pension or allowance on retirement to any director who has held any salaried office or place of profit with the Company or to his or her spouse or dependants and may make contributions to any fund and pay premiums for the purchase or provision of any such gratuity, pension or allowance.

## ARTICLE 14
## ELECTION AND REMOVAL OF DIRECTORS

**Section 14.1 Election at Annual General Meeting**

At every annual general meeting and in every unanimous resolution contemplated by Section 10.2:

(1) the shareholders entitled to vote at the annual general meeting for the election of directors must elect, or in the unanimous resolution appoint, a board of directors consisting of the number of directors for the time being set under these Articles; and

(2) all the directors cease to hold office immediately before the election or appointment of directors under paragraph (1) but are eligible for re-election or re-appointment.

**Section 14.2 Consent to be a Director**

No election, appointment or designation of an individual as a director is valid unless:

(1) that individual consents to be a director in the manner provided for in the BCA;

(2) that individual is elected or appointed at a meeting at which the individual is present and the individual does not refuse, at the meeting, to be a director; or

(3) with respect to first directors, the designation is otherwise valid under the BCA.

**Section 14.3 Failure to Elect or Appoint Directors**

If:

(1) the Company fails to hold an annual general meeting, and all the shareholders who are entitled to vote at an annual general meeting fail to pass the unanimous resolution contemplated by Section 10.2, on or before the date by which the annual general meeting is required to be held under the BCA; or

(2) the shareholders fail, at the annual general meeting or in the unanimous resolution contemplated by Section 10.2, to elect or appoint any directors;

then each director then in office continues to hold office until the earlier of:

(3) when his or her successor is elected or appointed; and

(4) when he or she otherwise ceases to hold office under the BCA or these Articles.

**Section 14.4 Places of Retiring Directors Not Filled**

If, at any meeting of shareholders at which there should be an election of directors, the places of any of the retiring directors are not filled by that election, those retiring directors who are not re-elected and who are asked by the newly elected directors to continue in office will, if willing to do so, continue in office to complete the number of directors for the time being set pursuant to these Articles until further new directors are elected at a meeting of shareholders convened for that purpose.

**Section 14.5 Board May Fill Casual Vacancies**

Any casual vacancy occurring in the board of directors may be filled by the remaining directors. For greater certainty, the appointment of a director to fill a casual vacancy as contemplated by this section is not the appointment of an additional director for the purposes of Section 14.8.

**Section 14.6 Remaining Directors' Power to Act**

The board may act notwithstanding any vacancy in the board of directors, but if the Company has fewer directors in office than the number set pursuant to these Articles as the quorum of directors, the board may only act for the purpose of:

(1) appointing directors up to that number; or

(2) calling a meeting of shareholders for the purpose of filling any vacancies on the board of directors or, subject to the BCA, for any other purpose.

**Section 14.7 Shareholders May Fill Vacancies**

If the Company has no directors or fewer directors in office than the number set pursuant to these Articles as the quorum of directors, the shareholders may elect or appoint directors to fill any vacancies on the board of directors.

**Section 14.8 Additional Directors**

Notwithstanding Section 13.1 and Section 13.2, between annual general meetings or unanimous resolutions contemplated by Section 10.2, the board may appoint one or more additional directors, but the number of additional directors appointed under this Section 14.8 must not at any time exceed:

(1) one-third of the number of first directors, if, at the time of the appointments, one or more of the first directors have not yet completed their first term of office; or

(2) in any other case, one-third of the number of the current directors who were elected or appointed as directors other than under this Section 14.8.

Any director so appointed ceases to hold office immediately before the next election or appointment of directors under Section 14.1(1), but is eligible for re-election or re-appointment.

**Section 14.9 Ceasing to be a Director**

A director ceases to be a director when:

(1) the term of office of the director expires;

(2) the director dies;

(3) the director resigns as a director by notice in writing provided to the Company or a lawyer for the Company; or

(4) the director is removed from office pursuant to Section 14.10 or Section 14.11.

**Section 14.10 Removal of Director by Shareholders**

The Company may remove any director before the expiration of his or her term of office by special resolution. In that event, the shareholders may elect, or appoint by ordinary resolution, a director to fill the resulting vacancy. If the shareholders do not elect or appoint a director to fill the resulting vacancy contemporaneously with the removal, then the board may appoint or the shareholders may elect, or appoint by ordinary resolution, a director to fill that vacancy.

**Section 14.11 Removal of Director by Directors**

The board may remove any director before the expiration of his or her term of office if the director is convicted of an indictable offence, or if the director ceases to be qualified to act as a director of a company in accordance with the BCA and does not promptly resign, and the board may appoint a director to fill the resulting vacancy.

## ARTICLE 15
## ALTERNATE DIRECTORS

**Section 15.1 Application**

The provisions of this Article 15 do not apply to the Company and its directors if and for so long as it is a public company.

**Section 15.2 Appointment of Alternate Director**

Any director (an "**appointor**") may by notice in writing received by the Company appoint any person (an "**appointee**") who is qualified to act as a director to be his or her alternate to act in his or her place at meetings of the board or committees of the board at which the appointor is not present unless (in the case of an appointee who is not a director) the board has reasonably disapproved the appointment of such person as an alternate director and has given notice to that effect to his or her appointor within a reasonable time after the notice of appointment is received by the Company.

**Section 15.3 Notice of Meetings**

Every alternate director so appointed is entitled to notice of meetings of the board and of committees of the board of which his or her appointor is a member and to attend and vote as a director at any such meetings at which his or her appointor is not present.

**Section 15.4 Alternate for More Than One Director Attending Meetings**

A person may be appointed as an alternate director by more than one director, and an alternate director:

(1) will be counted in determining the quorum for a meeting of the board once for each of his or her appointors and, in the case of an appointee who is also a director, once more in that capacity;

(2) has a separate vote at a meeting of the board for each of his or her appointors and, in the case of an appointee who is also a director, an additional vote in that capacity;

(3) will be counted in determining the quorum for a meeting of a committee of the board once for each of his or her appointors who is a member of that committee and, in the case of an appointee who is also a member of that committee as a director, once more in that capacity; and

(4) has a separate vote at a meeting of a committee of the board for each of his or her appointors who is a member of that committee and, in the case of an appointee who is also a member of that committee as a director, an additional vote in that capacity.

**Section 15.5 Consent Resolutions**

Every alternate director, if authorized by the notice appointing him or her, may sign in place of his or her appointor any resolutions to be consented to in writing.

**Section 15.6 Alternate Director Not an Agent**

Every alternate director is deemed not to be the agent of his or her appointor.

**Section 15.7Revocation of Appointment of Alternate Director**

An appointor may at any time, by notice in writing received by the Company, revoke the appointment of an alternate director appointed by him or her.

**Section 15.8Ceasing to be an Alternate Director**

The appointment of an alternate director ceases when:

(1) his or her appointor ceases to be a director and is not promptly re-elected or re-appointed;

(2) the alternate director dies;

(3) the alternate director resigns as an alternate director by notice in writing provided to the Company or a lawyer for the Company;

(4) the alternate director ceases to be qualified to act as a director; or

(5) his or her appointor revokes the appointment of the alternate director.

**Section 15.9Remuneration and Expenses of Alternate Director**

The Company may reimburse an alternate director for the reasonable expenses that would be properly reimbursed if he or she were a director, and the alternate director is entitled to receive from the Company such proportion, if any, of the remuneration otherwise payable to the appointor as the appointor may from time to time direct.

## ARTICLE 16
## POWERS AND DUTIES OF THE BOARD

**Section 16.1Powers of Management**

The board must, subject to the BCA and these Articles, manage or supervise the management of the business and affairs of the Company and has the authority to exercise all such powers of the Company as are not, by the BCA or by these Articles, required to be exercised by the shareholders of the Company.

**Section 16.2Appointment of Attorney of Company**

The board may from time to time, by power of attorney or other instrument, under seal if so required by law, appoint any person to be the attorney of the Company for such purposes, and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these Articles and excepting the power to fill vacancies in the board of directors, to remove a director, to change the membership of, or fill vacancies in, any committee of the board, to appoint or remove officers appointed by the board and to declare dividends) and for such period, and with such remuneration and subject to such conditions as the board may think fit. Any such power of attorney may contain such provisions for the protection or convenience of persons dealing with such attorney as the board thinks fit. Any such attorney may be authorized by the board to sub-delegate all or any of the powers, authorities and discretions for the time being vested in him or her.

## ARTICLE 17
## INTERESTS OF DIRECTORS AND OFFICERS

**Section 17.1Obligation to Account for Profits**

A director or senior officer who holds a disclosable interest (as that term is used in the BCA) in a contract or transaction into which the Company has entered or proposes to enter is liable to account to the Company for any profit that accrues to the director or senior officer under or as a result of the contract or transaction only if and to the extent provided in the BCA.

**Section 17.2Restrictions on Voting by Reason of Interest**

A director who holds a disclosable interest in a contract or transaction into which the Company has entered or proposes to enter is not entitled to vote on any directors' resolution to approve that contract or transaction, unless all the directors have a disclosable interest in that contract or transaction, in which case any or all of those directors may vote on such resolution.

**Section 17.3Interested Director Counted in Quorum**

A director who holds a disclosable interest in a contract or transaction into which the Company has entered or proposes to enter and who is present at the meeting of the board at which the contract or transaction is considered for approval may be counted in the quorum at the meeting whether or not the director votes on any or all of the resolutions considered at the meeting.

**Section 17.4Disclosure of Conflict of Interest or Property**

A director or senior officer who holds any office or possesses any property, right or interest that could result, directly or indirectly, in the creation of a duty or interest that materially conflicts with that individual's duty or interest as a director or senior officer, must disclose the nature and extent of the conflict as required by the BCA.

**Section 17.5Director Holding Other Office in the Company**

A director may hold any office or place of profit with the Company, other than the office of auditor of the Company, in addition to his or her office of director for the period and on the terms (as to remuneration or otherwise) that the board may determine.

**Section 17.6No Disqualification**

No director or intended director is disqualified by his or her office from contracting with the Company either with regard to the holding of any office or place of profit the director holds with the Company or as vendor, purchaser or otherwise, and no contract or transaction entered into by or on behalf of the Company in which a director is in any way interested is liable to be voided for that reason.

**Section 17.7Professional Services by Director or Officer**

Subject to the BCA, a director or officer, or any person in which a director or officer has an interest, may act in a professional capacity for the Company, except as auditor of the Company, and the director or officer or such person is entitled to remuneration for professional services as if that director or officer were not a director or officer.

**Section 17.8Director or Officer in Other Corporations**

A director or officer may be or become a director, officer or employee of, or otherwise interested in, any person in which the Company may be interested as a shareholder or otherwise, and, subject to the BCA, the director or officer is not accountable to the Company for any remuneration or other benefits received by him or her as director, officer or employee of, or from his or her interest in, such other person.

## ARTICLE 18
## PROCEEDINGS OF THE BOARD

**Section 18.1Meetings of the Board**

The board may meet for the conduct of business, adjourn and otherwise regulate its meetings as the board thinks fit, and meetings of the board held at regular intervals may be held at the place, at the time and on the notice, if any, as the board may from time to time determine.

**Section 18.2Voting at Meetings**

Questions arising at any meeting of the board are to be decided by a majority of votes and, in the case of an equality of votes, the chair of the meeting does not have a second or casting vote.

**Section 18.3Chair of Meetings**

The following individual is entitled to preside as chair at a meeting of the board:

(1) the chair of the board, if any;

(2) in the absence of the chair of the board, the president, if any, if the president is a director; or

(3) any other director chosen by the directors present if:

(a) neither the chair of the board nor the president, if a director, is present at the meeting within 15 minutes after the time set for holding the meeting;

(b) neither the chair of the board nor the president, if a director, is willing to chair the meeting; or

(c) the chair of the board and the president, if a director, have advised the secretary, if any, or any other director, that they will not be present at the meeting.

**Section 18.4Meetings by Telephone or Other Communications Medium**

A director may participate in a meeting of the board or of any committee of the board:

(1) in person;

(2) by telephone; or

(3) with the consent of all directors who wish to participate in the meeting, by other communications medium;

if all directors participating in the meeting, whether in person, or by telephone or other communications medium, are able to communicate with each other. A director who participates in a meeting in a manner contemplated by this Section 18.4 is deemed for all purposes of the BCA and these Articles to be present at the meeting and to have agreed to participate in that manner.

**Section 18.5Calling of Meetings**

A director may, and the secretary or an assistant secretary of the Company, if any, on the request of a director must, call a meeting of the board at any time.

**Section 18.6Notice of Meetings**

Other than for meetings held at regular intervals as determined by the board pursuant to Section 18.1 or as provided in Section 18.7, reasonable notice of each meeting of the board, specifying the place, day and time of that meeting must be given to each of the directors and the alternate directors by any method set out in Section 24.1 or orally or by telephone conversation with that director.

**Section 18.7When Notice Not Required**

It is not necessary to give notice of a meeting of the board to a director or an alternate director if:

(1) the meeting is to be held immediately following a meeting of shareholders at which that director was elected or appointed, or is the meeting of the board at which that director is appointed; or

(2) the director or alternate director, as the case may be, has waived notice of the meeting.

**Section 18.8 Meeting Valid Despite Failure to Give Notice**

The accidental omission to give notice of any meeting of the board to, or the non-receipt of any notice by, any director or alternate director, does not invalidate any proceedings at that meeting.

**Section 18.9 Waiver of Notice of Meetings**

Any director or alternate director may send to the Company a document signed by him or her waiving notice of any past, present or future meeting or meetings of the board and may at any time withdraw that waiver with respect to meetings held after that withdrawal. After sending a waiver with respect to all future meetings and until that waiver is withdrawn, no notice of any meeting of the board need be given to that director or, unless the director otherwise requires by notice in writing to the Company, to his or her alternate director, and all meetings of the board so held are deemed not to be improperly called or constituted by reason of notice not having been given to such director or alternate director.

Attendance of a director or alternate director at a meeting of the board is a waiver of notice of the meeting, unless that director or alternate director attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

**Section 18.10 Quorum**

The quorum necessary for the transaction of the business at a meeting of the board may be set by the board and, if not so set, is deemed to be set at a majority of the number of directors then in office. If the number of directors is set at one, the quorum is deemed to be set at one director, and that director may constitute a meeting.

**Section 18.11 Validity of Acts Where Appointment Defective**

Subject to the BCA, an act of a director or officer is not invalid merely because of an irregularity in the election or appointment or a defect in the qualification of that director or officer.

**Section 18.12 Consent Resolutions in Writing**

A resolution of the board or of any committee of the board may be passed without a meeting:

(1) in all cases, if each of the directors entitled to vote on the resolution consents to it in writing; or

(2) in the case of a resolution to approve a contract or transaction in respect of which a director has disclosed that he or she has or may have a disclosable interest, if each of the other directors who have not made such a disclosure consents in writing to the resolution.

A consent in writing under this Section 18.12 may be by any written instrument, fax, e-mail or any other method of transmitting legibly recorded messages in which the consent of the director is evidenced, whether or not the signature of the director is included in the record. A consent in writing may be in two or more counterparts which together are deemed to constitute one consent in writing. A resolution of the board or of any committee of the board passed in accordance with this Section 18.12 is effective on the date stated in the consent in writing or on the latest date stated on any counterpart and is deemed to be a proceeding at a meeting of the board or of the committee of the board and to be as valid and effective as if it had been passed at a meeting of the board or of the committee of the board that satisfies all the requirements of the BCA and all the requirements of these Articles relating to meetings of the board or of a committee of the board.

## ARTICLE 19
## EXECUTIVE AND OTHER COMMITTEES

**Section 19.1Appointment and Powers of Executive Committee**

The board may, by resolution, appoint an executive committee consisting of the director or directors that they consider appropriate, and during the intervals between meetings of the board all of the board's powers are delegated to the executive committee, except:

(1) the power to fill vacancies in the board of directors;

(2) the power to remove a director;

(3) the power to change the membership of, or fill vacancies in, any committee of the board; and

(4) such other powers, if any, as may be set out in the resolution or any subsequent directors' resolution.

**Section 19.2Appointment and Powers of Other Committees**

The board may, by resolution:

(1) appoint one or more committees (other than the executive committee) consisting of the director or directors that they consider appropriate;

(2) delegate to a committee appointed under paragraph (1) any of the board's powers, except:

(a) the power to fill vacancies in the board of directors;

(b) the power to remove a director;

(c) the power to change the membership of, or fill vacancies in, any committee of the board; and

(d) the power to appoint or remove officers appointed by the board; and

(3) make any delegation referred to in paragraph (2) subject to the conditions set out in the resolution or any subsequent directors' resolution.

**Section 19.3Obligations of Committees**

Any committee appointed under Section 19.1 or Section 19.2, in the exercise of the powers delegated to it, must:

(1) conform to any rules that may from time to time be imposed on it by the board; and

(2) report every act or thing done in exercise of those powers at such times as the board may require.

**Section 19.4Powers of Board**

The board may, at any time, with respect to a committee appointed under Section 19.1 or Section 19.2:

(1) revoke or alter the authority given to the committee, or override a decision made by the committee, except as to acts done before such revocation, alteration or overriding;

(2) terminate the appointment of, or change the membership of, the committee; and

(3) fill vacancies in the committee.

**Section 19.5Committee Meetings**

Subject to Section 19.3(1) and unless the board otherwise provides in the resolution appointing the committee or in any subsequent resolution, with respect to a committee appointed under Section 19.1 or Section 19.2:

(1) the committee may meet and adjourn as it thinks proper;

(2) the committee may elect a chair of its meetings but, if no chair of a meeting is elected, or if at a meeting the chair of the meeting is not present within 15 minutes after the time set for holding the meeting, the directors present who are members of the committee may choose one of their number to chair the meeting;

(3) a majority of the members of the committee constitutes a quorum of the committee; and

(4) questions arising at any meeting of the committee are determined by a majority of votes of the members present, and in the case of an equality of votes, the chair of the meeting does not have a second or casting vote.

## ARTICLE 20
## OFFICERS

**Section 20.1Board May Appoint Officers**

The board may, from time to time, appoint such officers, if any, as the board determines and the board may, at any time, terminate any such appointment.

**Section 20.2Functions, Duties and Powers of Officers**

The board may, for each officer:

(1) determine the functions and duties of the officer;

(2) delegate to the officer any of the powers exercisable by the board on such terms and conditions and with such restrictions as the board thinks fit; and

(3) revoke, withdraw, alter or vary all or any of the functions, duties and powers of the officer.

**Section 20.3Qualifications**

No officer may be appointed unless that officer is qualified in accordance with the BCA. One person may hold more than one position as an officer of the Company. Any person appointed as the chair of the board must be a director. Any other officer need not be a director.

**Section 20.4Remuneration and Terms of Appointment**

All appointments of officers are to be made on the terms and conditions and at the remuneration (whether by way of salary, fee, commission, participation in profits or otherwise) that the board thinks fit and are subject to termination at the pleasure of the board, and an officer may in addition to such remuneration be entitled to receive, after he or she ceases to hold such office or leaves the employment of the Company, a pension or gratuity.

## ARTICLE 21
## INDEMNIFICATION

**Section 21.1Definitions**

In this Article 21:

(1) "**eligible penalty**" means a judgment, penalty or fine awarded or imposed in, or an amount paid in settlement of, an eligible proceeding;

(2) "**eligible proceeding**" means a legal proceeding or investigative action, whether current, threatened, pending or completed, in which a director, former director, alternate director, officer or former officer of the Company (each, an "**eligible party**") or any of the heirs and legal personal representatives of the eligible party, by reason of the eligible party being or having been a director or alternate director or officer of the Company:

(a) is or may be joined as a party; or

(b) is or may be liable for or in respect of a judgment, penalty or fine in, or expenses related to, the proceeding;

(3) "**expenses**" has the meaning set out in the BCA; and

(4) "**officer**" means a person appointed by the board as an officer of the Company.

**Section 21.2Mandatory Indemnification of Eligible Parties**

Subject to the BCA, the Company must indemnify an eligible party and his or her heirs and legal personal representatives against all eligible penalties to which such person is or may be liable, and the Company must, after the final disposition of an eligible proceeding, pay the expenses actually and reasonably incurred by such person in respect of that proceeding. Each director, alternate director and officer is deemed to have contracted with the Company on the terms of the indemnity contained in this Section 21.2.

**Section 21.3Permitted Indemnification**

Notwithstanding Section 21.2 and subject to any restrictions in the BCA, the Company may indemnify any person including directors, officers, employees, agents and representatives of the Company.

**Section 21.4Non-Compliance with BCA**

The failure of a director, alternate director or officer of the Company to comply with the BCA or these Articles or, if applicable, any former Articles, does not invalidate any indemnity to which he or she is entitled under this Article 21.

**Section 21.5Company May Purchase Insurance**

The Company may purchase and maintain insurance for the benefit of any person (or his or her heirs or legal personal representatives) who:

(1) is or was a director, alternate director, officer, employee or agent of the Company;

(2) is or was a director, alternate director, officer, employee or agent of a corporation at a time when the corporation is or was an affiliate of the Company;

(3) at the request of the Company, is or was a director, alternate director, officer, employee or agent of a corporation or of a partnership, trust, joint venture or other unincorporated entity;

(4) at the request of the Company, holds or held a position equivalent to that of a director, alternate director or officer of a partnership, trust, joint venture or other unincorporated entity;

against any liability incurred by him or her as such director, alternate director, officer, employee or agent or person who holds or held such equivalent position.

## ARTICLE 22
## DIVIDENDS

**Section 22.1Payment of Dividends Subject to Special Rights**

The provisions of this Article 22 are subject to the rights, if any, of shareholders holding shares with special rights as to dividends.

**Section 22.2Declaration of Dividends**

Subject to the BCA, the board may from time to time declare and authorize payment of such dividends as it may consider appropriate.

**Section 22.3No Notice Required**

The board need not give notice to any shareholder of any declaration under Section 22.2.

**Section 22.4Record Date**

The board may set a date as the record date for the purpose of determining shareholders entitled to receive payment of a dividend. The record date must not precede the date on which the dividend is to be paid by more than two months. If no record date is set, the record date is 5 p.m. on the date on which the board passes the resolution declaring the dividend.

**Section 22.5Manner of Paying Dividend**

A resolution declaring a dividend may direct payment of the dividend wholly or partly in money or by the distribution of specific assets or of fully paid shares or of bonds, debentures or other securities of the Company or any other corporation, or in any one or more of those ways.

**Section 22.6Settlement of Difficulties**

If any difficulty arises in regard to a distribution under Section 22.5, the board may settle the difficulty as it deems advisable, and, in particular, may:

(1) set the value for distribution of specific assets;

(2) determine that money in substitution for all or any part of the specific assets to which any shareholders are entitled may be paid to any shareholders on the basis of the value so fixed in order to adjust the rights of all parties; and

(3) vest any such specific assets in trustees for the persons entitled to the dividend.

**Section 22.7When Dividend Payable**

Any dividend may be made payable on such date as is fixed by the board.

**Section 22.8 Dividends to be Paid in Accordance with Number of Shares**

All dividends on shares of any class or series of shares must be declared and paid according to the number of such shares held.

**Section 22.9 Receipt by Joint Shareholders**

If several persons are joint shareholders of any share, any one of them may give an effective receipt for any dividend, bonus or other money payable in respect of the share.

**Section 22.10 Dividend Bears No Interest**

No dividend bears interest against the Company.

**Section 22.11 Fractional Dividends**

If a dividend to which a shareholder is entitled includes a fraction of the smallest monetary unit of the currency of the dividend, that fraction may be disregarded in making payment of the dividend and that payment represents full payment of the dividend.

**Section 22.12 Payment of Dividends**

Any dividend or other distribution payable in respect of shares will be paid by cheque or by electronic means or by such other method as the directors may determine. The payment will be made to or to the order of each registered holder of shares in respect of which the payment is to be made. Cheques will be sent to the registered address of the shareholder, unless the shareholder otherwise directs. In the case of joint holders, the payment will be made to the order of all such joint holders and, if applicable, sent to them at the registered address of the joint shareholder who is first named on the central securities register, unless such joint holders otherwise direct. The sending of the cheque or the sending of the payment by electronic means or the sending of the payment by a method determined by the directors in an amount equal to the dividend or other distribution to be paid less any tax that the Company is required to withhold will satisfy and discharge the liability for the payment, unless payment is not made upon presentation, if applicable, or the amount of tax so deducted is not paid to the appropriate taxing authority.

**Section 22.13 Capitalization of Retained Earnings or Surplus**

Notwithstanding anything contained in these Articles, the board may from time to time capitalize any retained earnings or surplus of the Company and may from time to time issue, as fully paid, shares or any bonds, debentures or other securities of the Company as a dividend representing the retained earnings or surplus so capitalized or any part thereof.

## ARTICLE 23
## ACCOUNTING RECORDS AND AUDITOR

**Section 23.1 Recording of Financial Affairs**

The board must cause adequate accounting records to be kept to record properly the financial affairs and condition of the Company and to comply with the BCA.

**Section 23.2 Inspection of Accounting Records**

Unless the board determines otherwise, or unless otherwise determined by ordinary resolution, no shareholder of the Company is entitled to inspect or obtain a copy of any accounting records of the Company.

**Section 23.3 Remuneration of Auditor**

The board may set the remuneration of the auditor of the Company.

## ARTICLE 24
## NOTICES

**Section 24.1 Method of Giving Notice**

Unless the BCA or these Articles provide otherwise, a notice, statement, report or other record required or permitted by the BCA or these Articles to be sent by or to a person may be sent by any one of the following methods:

(1) mail addressed to the person at the applicable address for that person as follows:

(a) for a record mailed to a shareholder, the shareholder's registered address;

(b) for a record mailed to a director or officer, the prescribed address for mailing shown for the director or officer in the records kept by the Company or the mailing address provided by the recipient for the sending of that record or records of that class;

(c) in any other case, the mailing address of the intended recipient;

(2) delivery at the applicable address for that person as follows, addressed to the person:

(a) for a record delivered to a shareholder, the shareholder's registered address;

(b) for a record delivered to a director or officer, the prescribed address for delivery shown for the director or officer in the records kept by the Company or the delivery address provided by the recipient for the sending of that record or records of that class;

(c) in any other case, the delivery address of the intended recipient;

(3) unless the intended recipient is the auditor of the Company, sending the record by fax to the fax number provided by the intended recipient for the sending of that record or records of that class;

(4) unless the intended recipient is the auditor of the Company, sending the record by e-mail to the e-mail address provided by the intended recipient for the sending of that record or records of that class;

(5) physical delivery to the intended recipient; or

(6) as otherwise permitted by applicable securities legislation.

**Section 24.2 Deemed Receipt**

A notice, statement, report or other record that is:

(1) mailed to a person by ordinary mail to the applicable address for that person referred to in Section 24.1 is deemed to be received by the person to whom it was mailed on the day, Saturdays, Sundays and holidays excepted, following the date of mailing;

(2) faxed to a person to the fax number provided by that person referred to in Section 24.1 is deemed to be received by the person to whom it was faxed on the day it was faxed; and

(3) e-mailed to a person to the e-mail address provided by that person referred to in Section 24.1 is deemed to be received by the person to whom it was e-mailed on the day it was e-mailed.

**Section 24.3Certificate of Sending**

A certificate signed by the secretary, if any, or other officer of the Company or of any other corporation acting in that capacity on behalf of the Company stating that a notice, statement, report or other record was sent in accordance with Section 24.1 is conclusive evidence of that fact.

**Section 24.4Notice to Joint Shareholders**

A notice, statement, report or other record may be provided by the Company to the joint shareholders of a share by providing such record to the joint shareholder first named in the central securities register in respect of the share.

**Section 24.5Notice to Legal Personal Representatives and Trustees**

A notice, statement, report or other record may be provided by the Company to the persons entitled to a share in consequence of the death, bankruptcy or incapacity of a shareholder by:

(1) mailing the record, addressed to them:

(a) by name, by the title of the legal personal representative of the deceased or incapacitated shareholder, by the title of trustee of the bankrupt shareholder or by any similar description; and

(b) at the address, if any, supplied to the Company for that purpose by the persons claiming to be so entitled; or

(2) if an address referred to in paragraph (1)(b) has not been supplied to the Company, by giving the notice in a manner in which it might have been given if the death, bankruptcy or incapacity had not occurred.

**Section 24.6Undelivered Notices**

If, on two consecutive occasions, a notice, statement, report or other record is sent to a shareholder pursuant to Section 24.1 and on each of those occasions any such record is returned because the shareholder cannot be located, the Company shall not be required to send any further records to the shareholder until the shareholder informs the Company in writing of his or her new address.

## ARTICLE 25
## SEAL

**Section 25.1Who May Attest Seal**

Except as provided in Section 25.2 and Section 25.3, the Company's seal, if any, must not be impressed on any record except when that impression is attested by the signatures of:

(1) any two directors;

(2) any officer, together with any director;

(3) if the Company only has one director, that director; or

(4) any one or more directors or officers or persons as may be determined by the board.

**Section 25.2Sealing Copies**

For the purpose of certifying under seal a certificate of incumbency of the directors or officers of the Company or a true copy of any resolution or other document, despite Section 25.1, the impression of the seal may be attested by the signature of any director or officer or the signature of any other person as may be determined by the board.

**Section 25.3Mechanical Reproduction of Seal**

The board may authorize the seal to be impressed by third parties on share certificates or bonds, debentures or other securities of the Company as the board may determine appropriate from time to time. To enable the seal to be impressed on any share certificates or bonds, debentures or other securities of the Company, whether in definitive or interim form, on which facsimiles of any of the signatures of the directors or officers of the Company are, in accordance with the BCA or these Articles, printed or otherwise mechanically reproduced, there may be delivered to the person employed to engrave, lithograph or print such definitive or interim share certificates or bonds, debentures or other securities one or more unmounted dies reproducing the seal and such persons as are authorized under Section 25.1 to attest the Company's seal may in writing authorize such person to cause the seal to be impressed on such definitive or interim share certificates or bonds, debentures or other securities by the use of such dies. Share certificates or bonds, debentures or other securities to which the seal has been so impressed are for all purposes deemed to be under and to bear the seal impressed on them.

## ARTICLE 26
## PROHIBITIONS

**Section 26.1Definitions**

In this Article 26:

(1) "**security**" has the meaning assigned in the *Securities Act*;

(2) "**transfer restricted security**" means

(a) a share of the Company;

(b) a security of the Company convertible into shares of the Company; or

(c) any other security of the Company which must be subject to restrictions on transfer in order for the Company to satisfy the requirement for restrictions on transfer under the "private issuer" exemption of Canadian securities legislation or under any other exemption from prospectus or registration requirements of Canadian securities legislation similar in scope and purpose to the "private issuer" exemption.

**Section 26.2Application**

Section 26.3 does not apply to the Company if and for so long as it is a public company.

**Section 26.3Consent Required for Transfer of Shares or Transfer Restricted Securities**

No share or other transfer restricted security may be sold, transferred or otherwise disposed of without the consent of the board and the board is not required to give any reason for refusing to consent to any such sale, transfer or other disposition.

**ARTICLE 27**
**SPECIAL RIGHTS OR RESTRICTIONS**

**Section 27.1 Common Shares**

The special rights and restrictions attaching to the Common Shares shall be as follows:

**(1) Voting**

Holders of Common Shares shall be entitled to receive notice of and to attend and vote at all meetings of shareholders of the Company. Each Common Share shall entitle the holder thereof to one vote.

**(2) Dividends**

Subject to the preferences accorded to holders of any shares of the Company ranking senior to the Common Shares from time to time with respect to the payment of dividends, holders of Common Shares shall be entitled to receive, if, as and when declared by the board of directors, such dividends as may be declared thereon by the board of directors from time to time. Holders of Common Shares shall be entitled to receive dividends on the Common Shares exclusive of any other shares of the Company.

**(3) Liquidation, Dissolution or Winding-Up**

In the event of the voluntary or involuntary liquidation, dissolution or winding-up of the Company, or any other distribution of its assets among its shareholders for the purpose of winding-up its affairs (such event referred to herein as a "Distribution"), holders of Common Shares shall be entitled, subject to the preferences accorded to holders of any shares of the Company ranking senior to the Common Shares from time to time with respect to payment on a Distribution, to share equally, share for share, in the remaining property of the Company.

**Section 27.2Class A Preferred Share Rights**

The special rights and restrictions attaching to the Class A Preferred Shares shall be as follows:

(1) **DEFINITIONS**:

For the purposes of these share conditions the following definitions shall apply:

(a) “accrued and unpaid dividends” means an amount computed at the rate of dividend from time to time attaching to the Class A Preferred Shares as though dividends on such shares had been declared every Calendar Quarter and were accruing on a day to day basis from the date of issue to the date to which the computation of accrued dividends is to be made, after deducting all dividend payments made on such shares, as adjusted by Section 27.2(2)(e);

(b) “Board of Directors” means the board of directors of the Company;

(c) “Calendar Quarter” means each of the three month periods ended March 31, June 30, September 30 and December 31 in each year;

(d) "Common Shares" means only common shares of FuelCell as constituted on May 27, 2004 or as subsequently consolidated or subdivided and any other shares resulting from reclassification or change of such common shares or consolidation, amalgamation, arrangement or merger of FuelCell with or into any other entity, or any sale of its properites and assets as, or substantially as, an entirety to any other person or entity;

(e) Intentionally Omitted;

(f) Intentionally Omitted;

(g) Intentionally Omitted;

(h) "Dividend Commencement Date" means May 27, 2004;

(i) "Dividend Payment Date" means the 10th day of January, April, July and October in each year with the first such date to be July 10, 2004;

(j) "FuelCell" means FuelCell Energy, Inc., a corporation existing under the laws of the State of Delaware and includes any successor corporation;

(k) "Market Price" means the volume weighted average price in U.S. dollars at which board lots of the Common Shares have been traded on NASDAQ during the Calendar Quarter and converted into Canadian dollars using the Bank of Canada's noon rate of exchange on the last day of the Calendar Quarter. In the event the Common Shares are not listed on NASDAQ but are listed on another stock exchange or stock exchange in Canada or the United States, any reference to NASDAQ shall be deemed to be references to such other stock exchange, or, if more than one, to such one on which the greatest volume of trading of Common Shares occurred during such Calendar Quarter. In the event Common Shares are not so traded on any stock exchange in Canada or the United States, the Market Price thereof shall be determined by the Board of Directors, which determination shall be conclusive;

(l) "NASDAQ" means NASDAQ Stock Market Inc.;

(m) "Principal Redemption Price" means, at any time and for each Class A Preferred Share, $25.00 less all amounts paid on or before such time by the Company to a holder of a Class A Preferred Share as a return of capital;

(n) Intentionally Omitted;

(o) "Tax Act" means the *Income Tax Act* (Canada), and the regulations thereunder as such act and regulations may be amended, superseded or replaced from time to time.

(2) **DIVIDENDS AND RETURN OF CAPITAL**

(a) The holders of Class A Preferred Shares shall be entitled to receive, and the Company shall pay, preferential cumulative dividends, as and when declared by the Board of Directors, out of the assets of the Company properly applicable to the payment of dividends, at a rate per annum on the Principal Redemption Price of the Class A Preferred Shares plus, after January 1, 2011, on accrued and unpaid dividends as of the first day of the relevant Calendar Quarter determined for such Calendar Quarter as follows:

| **Market Price, in Canadian currency, in the Calendar Quarter** | **Annual Dividend Rate Applicable to that Calendar Quarter** |
|---|---|
| Less than or equal to $128.89 | 5% |
| $128.90 to $146.81 | 4% |
| $146.82 to $164.73 | 3% |
| $164.74 to $182.65 | 2% |
| greater than $182.65 | 1% |

Such dividends shall accrue and be cumulative from the Dividend Commencement Date. Such dividends shall be payable on the Dividend Payment Dates to shareholders of record on the immediately preceding Calendar Quarter end date. The rate of any dividend declared and paid for a portion of a Calendar Quarter shall be prorated accordingly.

Notwithstanding the foregoing and in lieu of the annual dividend rates set forth above, commencing on January 1, 2020, for each Class A Preferred Share held by a holder of Class A Preferred Shares, such holder shall be entitled to receive, and the Company shall pay, preferential cumulative dividends, as and when declared by the Board of Directors, out of the assets of the Company properly applicable to the payment of dividends, at an annual rate of 15% on the sum of the Principal Redemption Price plus any accrued and unpaid dividends. Further, notwithstanding anything to the contrary set forth in this Section 27.2(2)(a), commencing on January 1, 2020, the Company shall only be required to make dividend payments as and when required by Section 27.2(2)(k), if so declared by the Board of Directors, out of assets of the Company properly applicable to the payment of dividends. Any accrued and unpaid dividends in excess of the amount of the dividend payments made pursuant to Section 27.2(2)(k) will remain outstanding and will be payable as set forth in Section 27.2(2)(j) (or Section 27.2(2)(h) at the Company's discretion).

(b) If on any Dividend Payment Date the dividend payable on such date is not declared and paid in full on all of the Class A Preferred Shares then issued and outstanding, such dividend or the unpaid part thereof shall be paid on a subsequent date or dates determined by the Board of Directors on which the Company shall have sufficient monies properly applicable to the payment of the same. When any such dividend is not paid in full, the Class A Preferred Shares shall participate rateably with all other preferred shares, if any, which rank on a parity with the Class A Preferred Shares with respect to the payment of dividends, in respect of such dividends including accumulations, if any, in accordance with the sums which would be payable on the Class A Preferred Shares and such other shares if all such dividends were declared and paid in full in accordance with their terms. The holders of Class A Preferred Shares shall not be entitled to any dividends other than or in excess of the dividends hereinbefore provided for.

(c) Intentionally Omitted.

(d) Dividends (less any tax required to be withheld by the Company) on the Class A Preferred Shares shall be paid by electronic funds transfer or by cheque payable in lawful money of Canada, at any branch in Canada of the Company's bankers. The mailing of such cheque from the Company's head office on or before the date on which such dividend is to be paid to a holder of Class A Preferred Shares shall be deemed to be payment of the dividends represented thereby and payable on such date unless the cheque is not paid upon presentation.

(e) Notwithstanding the provisions of Section 27.2(2)(a) but subject to Section 27.2(2)(h), at all times prior to January 1, 2011 the Company shall declare and pay a dividend on the Class A Preferred Shares in respect of a Calendar Quarter ending in a particular fiscal year of the Company only to the extent that the Company would not be liable to pay tax under Part VI.I of the Tax Act in respect of such dividend other than tax that would be fully recovered by means of the deduction under paragraph 110(1)(k) of the Tax Act for that fiscal year. On each Dividend Payment Date, the Company shall estimate the amount of its taxable income for the fiscal year which includes such Dividend Payment Date and shall compute the amount of the dividend which it is obliged to declare and pay accordingly. Once the actual amount of taxable income for such fiscal year is established by means of the filing of the relevant tax return, or if a previous estimate thereof has been revised by a subsequent estimate thereof made by the Company, such adjustment as is appropriate to achieve the result expressed herein shall be made to the amount of the dividend required to be declared and paid on the next Dividend Payment Date, whether that date falls within the same or a subsequent fiscal year. The Company shall deliver to the holders of the Class A Preferred Shares, on such Dividend Payment Date, a calculation in writing showing the amount of the Company's taxable income for its fiscal year that includes that Dividend Payment Date as so estimated or as finally determined by the Company, as well as the dividend that such holders are entitled to receive on that Dividend Payment Date having regard to such estimated or actual taxable income, as the case may be.

If the Company does not declare and pay dividends on the Class A Preferred Shares as a consequence of the provisions of this Section 27.2(2)(e), dividends shall continue to accrue at the rate or rates provided in these share conditions and the amount of all such dividends accrued prior to January 1, 2011 which remain unpaid, shall be adjusted upward by a multiplicative factor equal to 1.0245 raised to an exponent equal to the number of Calendar Quarters, including decimal fractions thereof based on 91 days per Calendar Quarter, between the 10th day following the Calendar Quarter in which the unpaid dividend originally accrued and January 1, 2011, assuming for these calculations that the Class A Preferred Shares were issued on July 31, 2000 and that the Company paid $125,000 in dividends per Calendar Quarter from the notional issue date until the Calendar Quarter ended December 31, 2003. By way of illustration, for greater certainty, if the Board of Directors determines to declare and pay on November 25, 2005, a dividend which originally accrued in respect of the Calendar Quarter ending September 30, 2000, then the dividend which originally accrued would be multiplied by 1.643 (i.e. 1.0245 to the exponent 20.51) to determine the adjusted amount of the dividend to be declared. Any dividends declared and paid on the Class A Preferred Shares, shall always be in respect of the earliest Calendar Quarter for which the original accrued dividend, or any part thereof, remains unpaid. The Company shall maintain in its books of account at the end of each Calendar Quarter a record of the adjusted amount of each accrued and unpaid dividend, calculated on the basis of the amount that would be payable as of the 10th business day following the Calendar Quarter, and the aggregate adjusted amount of all such accrued and unpaid dividends.

(f) The Company shall take into account the amount of any dividend allowance available to it under subsection 191.1(2) of the Tax Act in determining the amount of the dividend which it is required to declare and pay under Section 27.2(2)(e) and, in the event the Company is or becomes "associated" for purposes of the Tax Act with any other corporation prior to January 1, 2011, no portion of the said dividend allowance shall be allocated to such associated corporation under Subsection 191.1(3) of the Tax Act.

(g) The Company shall have full flexibility in planning its tax affairs so as to reduce its taxable income for a particular fiscal year as it sees fit, including the claiming of all discretionary deductions, notwithstanding that this will have the effect of reducing the amount of the dividends to actually be declared and paid to the holders of the Class A Preferred Shares in that fiscal year, by virtue of the operation of Section 27.2(2)(e).

(h) Notwithstanding Section 27.2(2)(e), the Company may, in its sole discretion, on any Dividend Payment Date, declare and pay dividends, up to the amount of the then accrued and unpaid dividends, without regard to the limitation imposed under Section 27.2(2)(e).

(i) Intentionally omitted.

(j) On December 31, 2021, the amount of all accrued and unpaid dividends on the Class A Preferred Shares plus the Principal Redemption Price for each Class A Preferred Share (collectively, the "December 2021 Payment"), shall be paid to the holder of the Class A Preferred Shares by the Company in accordance with Section 27.2(2)(d). Upon the payment of the December 2021 Payment (whether made on or before December 31, 2021), the Company will have no further obligations to holders of the Class A Preferred Shares.

(k) On the last day of each Calendar Quarter starting on March 31, 2011 and ending on the date that the December 2021 Payment is made, the Company shall make (i) to the extent the Principal Redemption Price for each Class A Preferred Share has not been paid in full, a return of capital payment to the holders of the Class A Preferred Shares in an aggregate amount equal to $187,500, and (ii) to the extent there are accrued and unpaid dividends on the Class A Preferred Shares, a dividend payment to the holders of the Class A Preferred Shares in an aggregate amount equal to $125,000.

(l) Intentionally omitted.

(m) Notwithstanding Section 27.2(2)(k), the Company may, in its sole discretion, make any return of capital payment referred to in such sections to the holders of the Class A Preferred Shares before the date such return of capital payment is due.

(3) **LIQUIDATION**

In the event of the liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, or any other Distribution, the holders of Class A Preferred Shares, shall be entitled to receive the Principal Redemption Price of such shares together with an amount equal to all accrued and unpaid dividends thereon, which amounts shall be calculated as if such dividends were accruing for the period from the expiration of the last Calendar Quarter for which the dividends thereon have been paid in full up to the date of such event, the whole before any amount shall be paid or any property or assets of the Company shall be distributed to the holders of the common shares of the Company or to the holders of any other shares of the Company ranking junior to the Class A Preferred Shares in any respect. If such amounts are not paid in full, the Class A Preferred Shares shall participate rateably with all preferred shares and all other shares, if any, which rank on a parity with the preferred shares with respect to the

return of capital or any other distribution of the assets of the Company, in respect of any return of capital in accordance with the sums which would be payable on such preferred shares and such other shares on such return of capital, if all sums so payable were paid in full in accordance with their terms. After payment to the holders of the Class A Preferred Shares of the amounts so payable to them they shall not be entitled to share in any other distribution of the property or assets of the Company.

(4) **INTENTIONALLY OMITTED**

(5) **INTENTIONALLY OMITTED**

(6) **PRE-EMPTIVE RIGHTS**

Holders of Class A Preferred Shares shall not be entitled as of right to subscribe for or purchase or receive any shares, bonds, debentures, or other securities of the Company now or hereafter authorized, other than shares receivable upon the exercise of the right of exchange as provided herein.

(7) **RESTRICTIONS**

(a) So long as any Class A Preferred Shares are outstanding, the Company shall not, without the approval of the holders of the Class A Preferred Shares given in the same manner as provided under Section 27.2(10):

(i) issue any shares ranking in priority to or pari passu with the Class A Preferred Shares as to the payment of dividends or the distribution of assets in the event of liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, or other distribution of the assets of the Company among its shareholders for the purpose of winding up its affairs;

(ii) pay any dividends on any shares of the Company which by their terms rank junior to the Class A Preferred Shares;

(iii) redeem or purchase or make any capital distribution in respect of any shares of the Company ranking junior to the Class A Preferred Shares (except out of net cash proceeds of a substantially concurrent issue of shares of the Company which by their terms rank junior to the Class A Preferred Shares);

(iv) redeem or purchase any other shares of the Company ranking pari passu with the Class A Preferred Shares; or

(v) set aside any money or make any payments for any sinking fund or other retirement fund applicable to any shares of the Company ranking junior to the Class A Preferred Shares;

unless all dividends up to, and including, the Dividend Payment Date for the last completed Calendar Quarter for which dividends shall be payable shall have been declared and paid or set apart for payment in respect of the Class A Preferred Shares and all other shares ranking on a parity with or in priority to the Class A Preferred Shares.

(b) Nothing in Section 27.2(7)(a) shall apply to, hinder or prevent, and authorization is hereby given for, any of the actions referred to in such Section if consented to, or approved, by the holders of the Class A Preferred Shares in the manner hereinafter specified.

(8) **VOTING RIGHTS**

Subject to the provisions of the BCA, the holders of the Class A Preferred Shares shall not be entitled as such to any voting rights or to receive notice of or to attend any meeting of the shareholders of the Company or to vote at any such meeting (but shall be entitled to receive notice of meetings of shareholders of the Company called for the purpose of authorizing the dissolution of the Company or the sale of its undertakings or a substantial part thereof).

(9) **AMENDMENTS**

The rights, privileges, restrictions and conditions attached to the Class A Preferred Shares may not be amended, modified, suspended, altered or repealed unless consented to, or approved by, the holders of the Class A Preferred Shares in the manner set out in Section 27.2(10) and in accordance with Aany requirements of the of the BCA, or any Act enacted in substitution therefor or in addition thereto applicable to the Company, and any amendments thereto from time to time.

(10) **APPROVAL BY HOLDERS OF CLASS A PREFERRED SHARES**

Any consent or approval required or permitted to be given by the holders of Class A Preferred Shares shall be deemed to have been sufficiently given if it shall have been given in writing by the holders of all of the outstanding Class A Preferred Shares.

(11) **NOTICES**

Any notice required to be given under the provisions attaching to the Class A Preferred Shares to the holders thereof shall be given by posting same in postage paid envelope addressed to each holder at the last address of such holder as it appears on the books of the Company or, in the event of the address of any such holder not so appearing, then to the address of such holder last known to the Company; provided that accidental failure or omission to give any notice as aforesaid to one or more of such holders shall not invalidate any action or proceeding founded thereon.

(12) **TAX ELECTION**

The Company shall elect, in the manner and within the time provided under Section 191.2 of the Tax Act, to pay tax at a rate, and to take all other necessary action under the Tax Act, such that no holder of Class A Preferred Shares will be required to pay tax on dividends received or deemed to be received on Class A Preferred Shares under Section 107.2 of Part IV.1 of the Tax Act.

**Section 27.3Class B Preferred Share Rights**

The special rights and restrictions attaching to the Class B Preferred Shares shall be as follows:

(1) **Non-Voting**

The holders of the Class B Preferred Shares shall not, as such, be entitled to receive notice of or to attend at any meetings of the shareholders of the Company and shall not be entitled to vote at any such meetings (except where the holders of a specified class of shares are entitled to vote separately as a class as provided in the BCA. Notwithstanding the aforesaid restrictions, conditions or prohibitions on the right to vote, the holders of the Class B Preferred Shares are entitled to notice of meetings of shareholders called for the purpose of authorizing the dissolution of the Company or the sale, lease or exchange of all or substantially all the property of the Company other than in the ordinary course of business of the Company.

(2) **Dividends**

The holders of the Class B Preferred Shares shall be entitled to receive and the Company shall pay thereon, as and when declared by the board of directors of the Company out of the moneys of the Company properly applicable to the payment of dividends, such dividends as the board of directors of the Company may from time to time declare, in their absolute discretion, but always subordinate to the payment of dividends on the Class A Preferred Shares and in preference and priority to any payment of dividends on the Common Shares.

(3) **Redemption**

The Company may, at its option, redeem all or from time to time any part of the outstanding Class B Preferred Shares on payment to the holders thereof, for each share to be redeemed, of the sum equal to the fair market value of the consideration received by the Company upon the issuance of each such Class B Preferred Share as determined by the directors of the Company as of the time of such issuance, subject to Section 27.3(4) below (the "Redemption Amount", and, together with all dividends declared thereon and unpaid, the "Redemption Price"). Before redeeming any Class B Preferred Shares, the Company shall notify each registered holder of shares to be redeemed. In case a part only of the outstanding Class B Preferred Shares is at any time to be redeemed, the shares to be redeemed shall be selected, at the option of the directors, either by lot in such manner as the directors in their sole discretion shall determine or as nearly as may be pro-rata (disregarding fractions) according to the number of Class B Preferred Shares held by each holder. In case a part only of the Class B Preferred Shares represented by any certificate shall be redeemed, a new certificate for the balance shall be issued at the expense of the Company. From and after the date specified for redemption, the holders of the shares called for redemption shall cease to be entitled to dividends and shall not be entitled to any rights in respect thereof, except to receive the Redemption Price, unless payment of the Redemption Price shall not be made by the Company in accordance with the foregoing provisions, in which case the rights of the holders of such shares shall remain unimpaired. On or before the date specified for redemption the Company shall have the right to deposit the Redemption Price of the shares called for redemption in a special account with any chartered bank or trust company in Canada named in the notice of redemption, such Redemption Price to be paid to or to the order of the respective holders of such shares called for redemption upon presentation and surrender of the certificates representing the same and, upon such deposit being made, the shares in respect whereof such deposit shall have been made shall be redeemed and the rights of the several holders thereof, after such deposit, shall be limited to receiving, out of the moneys so deposited, without interest, the Redemption Price applicable to their respective shares against presentation and surrender of the certificates representing such shares.

(4) **Retraction**

(a) Subject to paragraph Section 27.3(4)(b) below, a holder of Class B Preferred Shares shall be entitled to require the Company to redeem at any time and from time to time after the date of issue of any Class B Preferred Shares, upon giving notice as hereinafter provided, all or any number of the Class B Preferred Shares registered in the name of such holder on the books of the Company at the Redemption Price. A holder of Class B Preferred Shares exercising his option to have the Company redeem shall give notice to the Company, which notice shall set out the date on which the Company is to redeem, which date shall not be less than 3 days nor more than 10 days from the date of mailing of the notice, and if the holder desires to have less than all of the Class B Preferred Shares registered in his name redeemed by the Company, the number of the holder's shares to be redeemed. The date on which the redemption at the option of the holder is to occur is hereafter referred to as the "option redemption date". The holder of any Class B Preferred Shares may, with the consent of the Company, revoke such notice prior to the option redemption date. Upon delivery to the Company of a share certificate or certificates representing the Class B Preferred Shares which the holder desires to have the Company redeem, the Company shall, on the option redemption date, redeem such Class B Preferred Shares by paying to the holder the Redemption Price therefor. Upon payment of the Redemption Price of the Class B Preferred Shares to be redeemed by the Company, the holders thereof shall cease to be entitled to dividends or to exercise any rights of holders in respect thereof; and

(b) If the redemption by the Company on any option redemption date of all of the Class B Preferred Shares to be redeemed on such date would be contrary to any provisions of the BCA or any other applicable law, the Company shall be obligated to redeem only the maximum number of Class B Preferred Shares which the Company determines it is then permitted to redeem, such redemptions to be made pro-rata (disregarding fractions of shares) according to the number of Class B Preferred Shares required by each such holder to be redeemed by the Company and the Company shall issue new certificates representing the Class B Preferred Shares not redeemed by the Company; the Company shall, before redeeming any other Class B Preferred Shares, redeem in the manner contemplated by Section 27.3(3) on the 1st day of each month thereafter the maximum number of such Class B Preferred Shares as would not then be contrary to any provisions of the BCA or any other applicable law, until all of such shares have been redeemed, provided that the Company shall be under no obligation to give any notice to the holders of the Class B Preferred Shares in respect of such redemption or redemptions as provided for in Section 27.3(3).

(5) **Price Adjustment**

In the case of Class B Preferred Shares issued by the Company for consideration other than cash, the Redemption Amount will be subject to a proportionate increase or decrease so that the aggregate Redemption Amount of the Class B Preferred Shares issued in consideration for the purchase of property (referred to in this section as the **"**Acquired Property**"**) equals the fair market value of the Acquired Property received by the Company, less the fair market value of any non-share consideration paid by the Company in consideration for such Acquired Property. In the event that the Canada Revenue Agency, any successor agency, or any other competent taxing authority, should make or propose to make an assessment or re-assessment of income tax or any other tax on the basis that the fair market value of the Acquired Property (less the fair market value of any non-share consideration paid by the Company in consideration for such Acquired Property) differs from the said aggregate Redemption Amount, the Redemption Amount of each such Class B Preferred Share shall be increased or decreased to an amount such that the aggregate Redemption Amount thereof equals the fair market value of the Acquired Property (less the fair market value of any non-share consideration paid by the

Company in consideration for such Acquired Property), which serves as the basis for such assessment or re-assessment by such taxing authority against which no appeal is taken, or which is agreed upon by the Company, the holder of the Class B Preferred Shares and the said taxing authority in settlement of a dispute regarding such assessment or re-assessment or proposed assessment or re-assessment or which is finally established by a court or tribunal of competent jurisdiction on appeal from such assessment or re-assessment. If the Company has redeemed some or all of the Class B Preferred Shares pursuant to Section 27.3(3) or Section 27.3(4) and subsequent thereto the Redemption Amount is increased by operation of this paragraph Section 27.3(5), the Company will immediately pay to the holder of the Class B Preferred Shares, as additional Redemption Amount, the amount of such increase, together with interest on such amount calculated daily at the Prime Rate, as hereinafter defined, (net of any applicable withholding tax). If the Company has redeemed some or all of the Class B Preferred Shares pursuant to Section 27.3(3) or Section 27.3(4), and subsequent thereto the Redemption Amount is decreased by operation of this Section 27.3(5), the holder of the Class B Preferred Shares will immediately repay to the Company the amount of the Redemption Amount received by him in excess of the adjusted Redemption Amount, together with interest on such amount calculated daily at the Prime Rate (net of any applicable withholding tax). For the purposes of this paragraph, the term "Prime Rate" shall mean the rate of interest per annum established from time to time by the bankers of the Company as the reference rate of interest for the determination of interest rates that such bankers will charge to customers of varying degrees of credit worthiness in Canada for Canadian dollar loans in Calgary, Alberta.

(6) **Liquidation, Dissolution and Winding-up**

In the event of the liquidation, dissolution or winding-up of the Company , whether voluntary or involuntary, the holders of the Class B Preferred Shares shall be entitled to receive subject to the prior rights of the Class A Preferred Shares, but before any Distribution among the holders of any shares ranking junior and subject to the Class A Preferred Shares, for each Class B Preferred Share, an amount equal to the Redemption Price and no more.

(7) **Restriction on Dividends or Redemptions**

The Company shall not pay dividends on, or redeem, any shares of any class ranking subordinate to the Class B Preferred Shares if, after the payment of such dividend or the redemption, the realizable value of the assets of the Company would be less than the aggregate of the liabilities of the Company and the aggregate amount that would be payable to the holders of the Class B Preferred Shares on a redemption of the Class B Preferred Shares.

(8) **Ranking of Shares**

(a) The Common Shares shall rank junior to the Class A Preferred Shares and Class B Preferred Shares of the Company with regards to the payment of dividends, return of capital and Distributions.

(b) The Class B Preferred Shares shall rank junior to the Class A Preferred Shares of the Company with regards to the payment of dividends, return of capital and Distributions.

**EXHIBIT 10.13**

**EXECUTION VERSION**

FIFTH AMENDMENT TO CREDIT AGREEMENT

This FIFTH AMENDMENT TO CREDIT AGREEMENT (this "Amendment"), dated as of June 8, 2020, is entered into by and among FuelCell Energy, Inc., a Delaware corporation (the "Borrower"), each of the Guarantors party to the Credit Agreement, the lenders party to the Credit Agreement referred to below (collectively, the "Lenders" and each individually a "Lender") that are signatories hereto, and Orion Energy Partners Investment Agent, LLC, as administrative and collateral agent for the Lenders (in such capacity, the "Administrative Agent"). Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed thereto in the Credit Agreement (as defined below).

W I T N E S S E T H:

WHEREAS, the Borrower and the Guarantors have entered into financing arrangements pursuant to which the Lenders have made and provided loans and other financial accommodations, and may in the future make additional loans and financial accommodations, to the Borrower as set forth in the Credit Agreement, dated as of October 31, 2019, by and among the Borrower, the Guarantors, the Lenders and the Administrative Agent (as the same has heretofore been, and may hereafter be, amended, modified, supplemented, extended, renewed, restated, amended and restated or replaced, the "Credit Agreement");

WHEREAS, the Borrower and the Guarantors desire to amend certain provisions of the Credit Agreement as set forth herein;

WHEREAS, in connection with this Amendment, the Borrower has requested that the Lenders set forth on Annex A hereto (such Lenders, the "Secondary Facility Lenders") make a commitment to make Secondary Facility Loans (as defined in the Credit Agreement (as amended by this Amendment)) subject to the terms and conditions set forth in the Credit Agreement (as amended by this Amendment);

WHEREAS, subject to the terms and conditions of this Amendment and the Credit Agreement (as amended by this Amendment), the Secondary Facility Lenders have agreed to make Secondary Facility Commitments in an aggregate principal amount of $35,000,000;

WHEREAS, pursuant to Section 10.02(b) of the Credit Agreement, in order to effect the amendments to the Credit Agreement contemplated by this Amendment, this Amendment must be executed by the Borrower and the Required Lenders and acknowledged by the Administrative Agent; and

WHEREAS, the undersigned Lenders constitute the Required Lenders.

NOW THEREFORE, in consideration of the foregoing and the mutual agreements and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

SECTION 1. Amendments to the Credit Agreement. Subject to the terms and conditions hereof, effective as of the Fifth Amendment Effective Date (as defined below) and subject to the satisfaction of the conditions precedent set forth in Section 3:

(a) the Credit Agreement is hereby amended to delete the stricken text (indicated textually in the same manner as the following example: ~~stricken text~~) and to add the double-underlined text (indicated textually in the same manner as the following example: double-underlined text) as set forth in the pages of the Credit Agreement attached as Annex B hereto;

(b) Annex I to the Credit Agreement is hereby amended and restated to read in its entirety as set forth on Annex C hereto; and

(c) Exhibit C to the Credit Agreement is hereby amended and restated to read in its entirety as set forth on Annex D hereto.

SECTION 2. Secondary Facility Commitments. Subject to the terms and conditions hereof and of the Credit Agreement (as amended by this Amendment), effective as of the Fifth Amendment Effective Date and subject to the satisfaction of the conditions precedent set forth in Section 3, each Secondary Facility Lender party hereto hereby agrees, severally and not jointly, to make a Secondary Facility Commitment to the Borrower on the Fifth Amendment Effective Date in the aggregate principal amount equal to the amount set forth under the heading "Secondary Facility Commitment" opposite such Secondary Facility Lender's name on Annex A hereto, on the terms set forth in this Amendment and in the Credit Agreement (as amended by this Amendment).

SECTION 3. Conditions Precedent. This Amendment shall only become effective upon the date (the "Fifth Amendment Effective Date") on which the Administrative Agent shall have received counterparts of this Amendment, duly authorized, executed and delivered by the Borrower, the Guarantors, the Secondary Facility Lenders and the Required Lenders.

SECTION 4. Representations and Warranties. The Borrower and each Guarantor hereby represents and warrants to the Administrative Agent and Lenders as follows, which representations and warranties shall survive the execution and delivery hereof:

(a) Each of the Loan Parties has full corporate, limited liability company or other organizational powers, authority and legal right to enter into, deliver and perform its respective obligations under this Amendment and has taken all necessary corporate, limited liability company or other organizational action to authorize the execution, delivery and performance by it of this Amendment.

(a) This Amendment has been duly executed and delivered by each Loan Party and is in full force and effect and constitutes a legal, valid and binding obligation of such Loan Party, enforceable against such Loan Party in accordance with its terms, except as enforcement may be limited (i) by Bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or other similar laws affecting creditors' rights generally, (ii) by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) and (iii) by implied covenants of good faith and fair dealing.

(b) The execution, delivery and performance by each Loan Party of this Amendment does not and will not, as applicable, (i) conflict with the Organizational Documents of such Loan Party, (ii) conflict with or result in a breach of, or constitute a default under, any indenture, loan agreement, mortgage, deed of trust or other material instrument or agreement to which any Loan Party is a party or by which it is bound or to which any Loan Party's property or assets are subject, or (iii) conflict with or result in a breach of, or constitute a default under, in any material respect, any Applicable Law.

(c) After giving effect to this Amendment, the representations and warranties of the Borrower and each of the other Loan Parties contained in the Credit Agreement, the Security Agreement and the other Financing Documents are true, correct and complete in all material respects (without duplication of any materiality provision contained therein) on and as of the Fifth Amendment Effective Date (or any earlier date with respect to which any such representation or warranty relates).

(d) After giving effect to this Amendment, no Default or Event of Default has occurred and is continuing.

SECTION 5. Effect of this Amendment; Ratification.

(a) Except as expressly set forth herein, no other amendments, consents, changes or modifications to the Credit Agreement, the Security Agreement or any other Financing Document are intended or implied, and in all other respects the Credit Agreement, the Security Agreement and each other Financing Document is hereby specifically ratified and confirmed by all parties hereto as of the Fifth Amendment Effective Date and neither the Borrower nor any other Loan Party shall be entitled to any other or further amendment solely by virtue of the provisions of this Amendment or the subject matter of this Amendment. This Amendment is not a novation, satisfaction, release or discharge of any of the obligations of the Borrower or any other Loan Party under the Credit Agreement, the Security Agreement or any other Financing Document. This Amendment shall be deemed to be a Financing Document.

(b) The execution, delivery and effectiveness of this Amendment shall not operate as a waiver of any obligation of the Borrower or any other Loan Party under, or any right, power, or remedy of the Administrative Agent or the Lenders under, the Credit Agreement, the Security Agreement or any other Financing Document (which rights, powers and remedies are expressly reserved), nor constitute a consent to or waiver of any past, present or future violations of any provision of the Credit Agreement, the Security Agreement or any other Financing Document.

(c) For the benefit of the Administrative Agent and the Lenders, the Borrower and each other Loan Party hereby (i) affirms and confirms its guarantees, pledges, grants of collateral and security interests and other undertakings under the Credit Agreement, the Security Agreement and the other Financing Documents, (ii) ratifies and reaffirms all of its payment and performance obligations, contingent or otherwise, under the Credit Agreement, the Security Agreement and each of the other Financing Documents, (iii) agrees that (x) the Credit Agreement, the Security Agreement and each other Financing Document shall continue to be in full force and effect and (y) all guarantees, pledges, grants of collateral and security interests and other undertakings under the Credit Agreement, the Security Agreement and each other Financing Document shall continue

to be in full force and effect and shall accrue to the benefit of the Administrative Agent and the Lenders, (iv) confirms and agrees that it is truly and justly indebted to the Lenders and the Administrative Agent in the aggregate amount of the Obligations without defense, counterclaim or offset of any kind whatsoever, and (v) reaffirms and admits the validity and enforceability of the Financing Documents.

SECTION 6. Expenses. The Borrower and the other Loan Parties agree to pay, or reimburse, the Administrative Agent for all expenses reasonably incurred for the preparation and negotiation of this Amendment and related agreements and instruments and the transactions contemplated hereby, including, but not limited to, the reasonable and documented fees and expenses of counsel to the Administrative Agent.

SECTION 7. Governing Law; Jurisdiction; Etc.

(a) Governing Law. This Amendment shall be construed in accordance with and governed by the law of the State of New York.

(b) Submission to Jurisdiction. Any legal action or proceeding with respect to this Amendment shall, except as provided in clause (d) below, be brought in the courts of the State of New York, or of the United States District Court for the Southern District of New York, in each case, seated in the County of New York and, by execution and delivery of this Amendment, each party hereto hereby irrevocably accepts for itself and in respect of its property, generally and unconditionally, the exclusive jurisdiction of the aforesaid courts. Each party hereto agrees that a judgment, after exhaustion of all available appeals, in any such action or proceeding shall be conclusive and binding upon it, and may be enforced in any other jurisdiction, including by a suit upon such judgment, a certified copy of which shall be conclusive evidence of the judgment.

(c) Waiver of Venue. Each party hereto hereby irrevocably waives any objection that it may now have or hereafter have to the laying of the venue of any suit, action or proceeding arising out of or relating to this Amendment brought in the Supreme Court of the State of New York or in the United States District Court for the Southern District of New York, in each case, seated in the County of New York and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

(d) Rights of the Secured Parties. Nothing in this Section 7 shall limit the right of the Secured Parties to refer any claim against a Loan Party to any court of competent jurisdiction anywhere else outside of the State of New York, nor shall the taking of proceedings by any Secured Party before the courts in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction whether concurrently or not.

(e) WAIVER OF JURY TRIAL. EACH PARTY TO THIS AMENDMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION ARISING UNDER THIS AMENDMENT IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THIS AMENDMENT, OR THE TRANSACTIONS RELATED THERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER FOUNDED IN CONTRACT OR TORT OR

OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS AMENDMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE SIGNATORIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.

(f) Waiver of Immunity. To the extent that any Loan Party has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution, sovereign immunity or otherwise) with respect to itself or its property, it hereby irrevocably waives such immunity, to the fullest extent permitted by law, in respect of its obligations under this Amendment.

SECTION 8. Binding Effect. This Amendment shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and permitted assigns.

SECTION 9. Captions. The captions in this Amendment are intended for convenience only and do not constitute and shall not be interpreted as part of this Amendment.

SECTION 10. No Course of Dealing. The Borrower and each other Loan Party acknowledges that (a) except as expressly set forth herein, neither the Administrative Agent nor any Lender has agreed (and has no obligation whatsoever to discuss, negotiate or agree) to any restructuring, modification, amendment, extension, waiver, or forbearance with respect to the Credit Agreement, the Security Agreement or any other Financing Document or any of the terms thereof, and (b) the execution and delivery of this Amendment has not established any course of dealing between the parties hereto or created any obligation or agreement of the Administrative Agent or any Lender with respect to any future restructuring, modification, amendment, extension, waiver, or forbearance with respect to the Credit Agreement, the Security Agreement or any other Financing Document or any of the terms thereof.

SECTION 11. Counterparts. This Amendment may be executed in any number of and by different parties hereto on separate counterparts, all of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same agreement. Any signature delivered by a party by facsimile or electronic transmission (including email transmission of a PDF image) shall be deemed to be an original signature hereto.

[***Signature Pages Follow***]

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered by their authorized officers as of the day and year first above written.

**BORROWER:**

FUELCELL ENERGY, INC.

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**GUARANTORS:**

FUELCELL ENERGY FINANCE II, LLC

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

BAKERSFIELD FUEL CELL 1, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**GUARANTORS:**

YAPHANK FUEL CELL PARK, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

LONG BEACH TRIGEN, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**GUARANTORS:**

SAN BERNARDINO FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

MONTVILLE FUEL CELL PARK, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

EASTERN CONNECTICUT FUEL CELL PROPERTIES, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**GUARANTORS:**

CR FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

BRT FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

DERBY FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**GUARANTORS:**

HOMESTEAD FUEL CELL 1, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

CENTRAL CT FUEL CELL 1, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

FARMINGDALE FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**GUARANTORS:**

NEW BRITAIN RENEWABLE ENERGY, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

GROTON STATION FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

TRS FUEL CELL, LLC

By: FuelCell Energy Finance II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: EVP, Chief Financial Officer & Treasurer

**ADMINISTRATIVE AGENT:**

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC

By: /s/ Gerrit J. Nicholas
Name: Gerrit J. Nicholas
Title: Managing Partner

**COLLATERAL AGENT:**

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC

By: /s/ Gerrit J. Nicholas
Name: Gerrit J. Nicholas
Title: Managing Partner

**LENDERS:**

ORION ENERGY CREDIT OPPORTUNITIES FUND II, L.P.

By: Orion Energy Credit Opportunities Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holdings, LLC
Its: General Partner

By: /s/ Gerrit J. Nicholas
Name: Gerrit J. Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES FUND II PV, L.P.

By: Orion Energy Credit Opportunities Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holdings, LLC
Its: General Partner

By: /s/ Gerrit J. Nicholas
Name: Gerrit J. Nicholas
Title: Managing Partner

**LENDERS:**

ORION ENERGY CREDIT OPPORTUNITIES FUND II GPFA, L.P.

By: Orion Energy Credit Opportunities Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holdings, LLC
Its: General Partner

By: /s/ Gerrit J. Nicholas
Name: Gerrit J. Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES FUELCELL CO-INVEST, L.P.

By: Orion Energy Credit Opportunities
Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holdings, LLC
Its: General Partner

By: /s/ Gerrit J. Nicholas
Name: Gerrit J. Nicholas
Title: Managing Partner

**ANNEX A**

**Secondary Facility Lenders**

| Secondary Facility Lender | Secondary Facility Commitment |
|---|---|
| Orion Energy Credit Opportunities Fund II, L.P. | $12,936,788.77 |
| Orion Energy Credit Opportunities Fund II PV, L.P. | $20,788,720.83 |
| Orion Energy Credit Opportunities Fund II GPFA, L.P. | $1,274,490.40 |

**ANNEX B**

**As Amended Credit Agreement**

See Attached

CREDIT AGREEMENT

dated as of

October 31, 2019
and as amended by
First Amendment to Credit Agreement, dated as of November 22, 2019, and
Second Amendment to Credit Agreement, dated as of January 20, 2020, and
Third Amendment to Credit Agreement, dated as of February 6, 2020, and
Fourth Amendment to Credit Agreement, dated as of April 30, 2020, and
Fifth Amendment to Credit Agreement, dated as of June 8, 2020

among

FUELCELL ENERGY, INC.,
as Borrower,

THE GUARANTORS FROM TIME TO TIME PARTY HERETO,

THE LENDERS PARTY HERETO,

and

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC,
as Administrative Agent and Collateral Agent

$200,000,000 Senior Secured Term Loan Facility

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| | |
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This CREDIT AGREEMENT is dated as of October 31, 2019, among FUELCELL ENERGY, INC., a Delaware corporation (the "Borrower"), the other Loan Parties from time to time party hereto as Guarantors, each LENDER designated as a "Lender" on Annex I from time to time party hereto (collectively, the "Lenders" and individually, a "Lender") and ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, as the Administrative Agent and the Collateral Agent.

WHEREAS, the Borrower has requested that the Lenders (i) extend term loans on the Initial Funding Date in an aggregate amount of $14,500,000, which will be used, among other things, (a) to pay transaction costs and expenses incurred herewith, (b) to refinance in full certain outstanding Indebtedness of the Borrower and its Subsidiaries as specified herein, (c) to fund the payment of certain dividends in respect of the Borrower's Series B Preferred Stock, and (d) for working capital and other general corporate purposes, (ii) provide Commitments to extend term loans on the Second Funding Date, subject to the satisfaction of the conditions set forth herein, in an aggregate amount of $65,500,000 (a) to pay transaction costs and expenses incurred herewith, (b) to refinance in full certain outstanding Indebtedness of the Borrower and its Subsidiaries as specified herein, (c) to fund the construction, development and completion of certain Projects as specified herein and (d) for working capital and other general corporate purposes, and (iii) provide certain other Commitments of up to $120,000,000 (a) to fund the refinance of certain other outstanding Indebtedness of the Borrower and its Subsidiaries as specified herein, (b) to fund the construction, development and completion of certain Projects as specified herein, and (c) for working capital and other general corporate purposes related thereto, in each case, on the terms and conditions set forth herein;

WHEREAS, in consideration for the extensions of credit provided hereunder, the Guarantors have jointly and severally agreed to provide a guarantee pursuant to Article IX hereof for the performance of the Borrower's obligations under this Agreement; and

WHEREAS, the Lenders are willing to provide such financing to the Borrower on the terms and subject to the conditions set forth herein.

NOW, THEREFORE, the parties hereto agree as follows:

## ARTICLE I

## DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"Account Establishment Date" means the earlier of (i) the date that is the 30th day following the Closing Date and (ii) the Second Funding Date.

"Accrued Interest" means the payment-in-kind of interest in respect of the Loans by increasing the outstanding principal amount of the Loans.

"Additional Agreements" means any contracts or agreements related to the construction, installation, completion, development, servicing (including ancillary services), maintenance, repair, operation or use of any portion of the Business entered into by any Borrower Group Company and any other Person, or assigned to any Borrower Group Company, subsequent to the Closing Date.

"Additional Covered Project" means each new fuel cell project developed, owned, constructed or operated by any Additional Covered Project Company after the Closing Date.

"Additional Covered Project Company" means (x) TRS Fuel Cell, LLC and San Bernardino Fuel Cell, LLC and (y) any Restricted Project Company that owns, constructs or operates such Additional Covered Project to the extent such Restricted Project Company is designated as an Additional Covered Project Company in a written instrument executed by the Borrower and the Administrative Agent.

"Additional Covered Project Construction Budget" means, with respect to any Additional Covered Project, the Construction Budget for such Additional Covered Project as approved by the Administrative Agent pursuant to Section 5.16(b).

"Additional Covered Project Construction Schedule" means, with respect to any Additional Covered Project, the Construction Schedule for such Additional Covered Project as approved by the Administrative Agent pursuant to Section 5.16(b).

"Additional Excluded Project" means (i) each Covered Project that, at any time after the Closing Date, consummates a Permitted Project Disposition/Refinancing, and (ii) each new fuel cell project developed, owned, constructed or operated by any Borrower Group Company after the Closing Date for which a Proposed Financing has been consummated in accordance with Section 6.19 with an alternative financing source that is not the Administrative Agent or its Affiliates.

"Additional Excluded Project Company" with respect to any Additional Excluded Project, any Borrower Group Company that owns, constructs or operates such Additional Excluded Project.

"Additional Loan Ratio" means, as of any date, the ratio of (i) the sum of the aggregate principal amount of the Loans funded on the Initial Funding Date plus the aggregate principal amount of the Loans funded on any and all subsequent Funding Dates to (ii) the aggregate principal amount of the Loans funded on the Initial Funding Date, in each case, not taking into account original issue discount.

"Additional Material Agreements" an Additional Agreement that (A) with respect to any Project Company, (i) provides for the payment by such Project Company, or the provision to such Project Company, of goods, inventory or services with a value in excess of $500,000 per year or (ii) provides revenue or income to such Project Company in excess of $1,000,000 per year and (B) with respect to any Borrower Group Company other than a Project Company, (i) provides for the payment by such Borrower Group Company, or the provision to such Borrower Group Company, of goods, inventory or services with a value in excess of $5,000,000 per year or (ii) provides revenue or income to such Borrower Group Company in excess of $5,000,000 per year.

"Administrative Agent" means Orion Energy Partners Investment Agent, LLC, in its capacity as administrative agent for the Lenders hereunder, and any successor thereto pursuant to Article VIII.

"Administrative Questionnaire" means a questionnaire, in a form supplied by the Administrative Agent, completed by a Lender.

"Affected Property" means any property of any Loan Party or any Existing Foreign Subsidiary that suffers an Event of Loss.

"Affiliate" means, with respect to a specified Person, another Person that at such time directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified. Each Borrower Group Company shall be considered an "Affiliate" of the Borrower.

"Agent Reimbursement Letter" means the reimbursement letter, dated as of the Closing Date, among Borrower, the Administrative Agent and the Collateral Agent.

"Agents" means, collectively, the Administrative Agent and the Collateral Agent.

"Aggregate Exposure" means with respect to any Lender at any time, an amount equal to (a) until the funding of the Loans on the Initial Funding Date, the sum of such Lender's Commitment at such time and (b) thereafter, the sum of such Lender's unused Commitment at such time and the aggregate then unpaid principal amount of such Lender's Loans at such time.

"Aggregate Exposure Percentage" means with respect to any Lender at any time, the ratio (expressed as a percentage) of such Lender's Aggregate Exposure at such time to the sum of the Aggregate Exposures of all Lenders at such time.

"Aggregate Reserve Release Usage Amount" means, as of any date of determination, an amount (which shall not be less than zero) equal to (a) the aggregate amount of all cash that shall have been released from the Applicable Reserves and transferred to a Business Unit Account pursuant to one or more Reserve Releases effected pursuant to Section 5.18(l) at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination, *minus* (b) the aggregate amount of Reserve Replenishments pursuant to Section 5.27 that shall have been funded with the proceeds of a Reserve Replenishment Secondary Facility Loan at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination.

"Aggregate Secondary Facility Commitment Amount" means, as of any date of determination, the aggregate Secondary Facility Commitments of all Lenders as of such date of determination. For the avoidance of doubt, as of the Fifth Amendment Effective Date, the Aggregate Secondary Facility Commitment Amount is $35,000,000.

"Aggregate Secondary Facility Loan Usage Amount" means, as of any date of determination, an amount equal to the aggregate principal amount of all Secondary Facility Loans that shall have been made hereunder at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination.

"Aggregate Secondary Facility Usage Amount" means, as of any date of determination, the sum of (a) the Aggregate Secondary Facility Loan Usage Amount as of such date of determination, *plus* (b) the Aggregate Reserve Release Usage Amount as of such date of determination.

"Agreement" means this Credit Agreement, as amended, restated, replaced, supplemented or otherwise modified from time to time.

"Anti-Corruption Laws" means any law of any jurisdiction relating to corruption in which any Loan Party performs business, including without limitation, the FCPA and where applicable, legislation relating to corruption enacted by member states and signatories implementing the OECD Convention Combating Bribery of Foreign Officials.

"Anti-Corruption Prohibited Activity" means the offering, payment, promise to pay, authorization of the payment of any money or the offer, promise to give, giving, or authorizing the giving of anything of value, to any Government Official or to any person under the circumstances where the Person, such Person's Affiliate's or such Person's representative knew or had reason to know that all or a portion of such money or thing of value would be offered, given or promised, directly or indirectly, to any Government Official, for the purpose of (a) influencing any act or decision of such Government Official in his or her official capacity, (b) inducing such Government Official to do or omit to do any act in relation to his or her lawful duty, (c) securing any improper advantage, or (d) inducing such Government Official to influence or affect any act or decision of any Governmental Authority, in each case, in order to assist such Person in obtaining or retaining business for or with, or in directing business to, any person.

"Anti-Money Laundering Laws" means the U.S. Currency and Foreign Transaction Reporting Act of 1970, as amended, and all money laundering-related laws of the United States and other jurisdictions where such Person conducts business or owns assets, and any related or similar law issued, administered or enforced by any Governmental Authority.

"Applicable Law" means with respect to any Person, property or matter, any of the following applicable thereto: any constitution, writ, injunction, statute, law, regulation, ordinance, rule, judgment, principle of common law, order, decree, court decision, Authorization, approval, concession, grant, franchise, license, agreement, directive, requirement, or other governmental restriction or any similar form of decision of, or determination by, or any binding interpretation or administration of any of the foregoing, by any Governmental Authority, whether in effect as of the date hereof or thereafter and in each case as amended, including Environmental Laws.

"Approved Fund" means any Person (other than a natural person) that is engaged in making, purchasing, holding or investing in bank loans and similar extensions of credit in the ordinary course.

"Approved REC Contract" means a fully executed contract, in form and substance reasonably satisfactory to the Administrative Agent, for Renewable Energy Certificates to be produced and sold by Groton Station Fuel Cell, LLC that provides for:

(a) Cal2021 and Cal2022 strips; and

(b) a volume of 85% of the "Output Guarantee" (as defined in the PPA in respect of the Groton Project) for each respective "Contract Year" (as defined in the PPA in respect of the Groton Project) in accordance with the PPA in respect of the Groton Project, provided that such volume may require proration of each Contract Year (as defined in the PPA) to match Cal2021 and Cal2022.

"Applicable Reserve Release Amount" means, with respect to any Applicable Reserve as of any date of determination, an amount (which shall not be less than zero) equal to (a) the aggregate amount of all cash that shall have been released from such Applicable Reserve and transferred to a Business Unit Account pursuant to one or more Reserve Releases effected pursuant to Section 5.18(l) at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination, *minus* (b) the aggregate amount of Reserve Replenishments that shall have been consummated with respect to such Applicable Reserve pursuant to Section 5.27 at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination.

"Applicable Reserves" means each of (a) the cash from time to time held in the Covered Project Account in respect of the Yaphank Project, (b) the Cash Reserve from time to time held in the Borrower Funding Account, (c) the cash from time to time held in the Project Proceeds Account, (d) the cash from time to time held in the Module Replacement Reserve Account, and (e) the cash from time to time held in the Debt Reserve Account.

"Assignment and Assumption" means an assignment and assumption entered into by a Lender and an assignee (with the consent of any party whose consent is required by Section 10.04), in the form of Exhibit A or any other form approved by the Administrative Agent.

"Authorization" means any consent, waiver, variance, registration, filing, declaration, notarization, certificate, license, tariff, approval, permit (including water and environmental permits), authorization, exception or exemption from, by or with any Governmental Authority or Trading Market, whether given by express action or deemed given by failure to act within any specified period, and all corporate, creditors', shareholders' and partners' approvals or consents.

"Authorized Representative" means, with respect to any Person, the chief executive officer, the chief financial officer, president, secretary, or any other executive officer or authorized representative of such Person as may be designated from time to time by such Person in writing by a notice delivered to the Administrative Agent. Any document or certificate delivered under the Financing Documents that is signed by an Authorized Representative may be conclusively presumed by the Administrative Agent and Lenders to have been authorized by all necessary corporate, limited liability company or other action on the part of the relevant Person.

"Bail-In Action" means the exercise of any Write-Down and Conversion Powers by the applicable EEA Resolution Authority in respect of any liability of an EEA Financial Institution.

"Bail-In Legislation" means, with respect to any EEA Member Country implementing Article 55 of Directive 2014/59/EU of the European Parliament and of the Council of the European Union, the implementing law for such EEA Member Country from time to time which is described in the EU Bail-In Legislation Schedule.

"Bankruptcy" means with respect to any Person (i) commencement by such Person of any case or other proceeding (x) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (y) seeking appointment of a receiver, trustee, custodian or other similar official for it or for all or any substantial part of its assets; or (ii) commencement against such Person of any case or other proceeding of a nature referred to in clause (x) or (y) above which (a) results in the entry of an order for relief or any such adjudication or appointment or (b) remains undismissed, undischarged or unbonded for a period of ninety (90) days; or (iii) commencement against such Person of any case or other proceeding seeking issuance of a warrant of attachment, execution or similar process against all or any substantial part of its assets which results in the entry of an order for any such relief which shall not have been vacated, discharged, or stayed or bonded pending appeal within ninety (90) days from the entry thereof; or (iv) such Person shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (i), (ii) or (iii) above; or (v) such Person shall admit in writing its inability to pay its debts as they become due or shall make a general assignment for the benefit of its creditors.

"Biogas Sale and Purchase Agreement" means an agreement for the purchase of directed biogas at the Tulare Project through December 31, 2021 substantially in the form disclosed by the Borrower to, and acknowledged as the "Biogas Sale and Purchase Agreement" in writing by, the Administrative Agent prior to the Second Funding Date.

"Blocked Control Agreement" means a blocked account control agreement, in form and substance reasonably satisfactory to the Collateral Agent and the Administrative Agent, executed by the financial institution at which an account is maintained, pursuant to which such financial institution agrees that such financial institution will comply with instructions or entitlement orders originated by the Collateral Agent as to disposition of funds in such account, without further consent by any other Person.

"Board" means the Board of Governors of the Federal Reserve System of the United States of America.

"Bolthouse Construction Budget" means the Construction Budget as provided by the Borrower to, and acknowledged as the "Bolthouse Construction Budget" in writing by, the Administrative Agent on November 21, 2019, as may be modified from time to time in accordance with Section 5.21.

"Bolthouse Construction Schedule" means the Construction Schedule as provided by the Borrower to, and acknowledged as the "Bolthouse Construction Schedule" in writing by, the Administrative Agent prior to the Closing, as may be modified from time to time in accordance with Section 5.21.

"Bolthouse Project" means the 5.0 MW Bolthouse Farms project located in Bakersfield, California.

"Borrower" has the meaning assigned to such term in the introductory paragraph.

"Borrower Funding Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Borrower Group Company" means the Borrower and each direct and indirect Subsidiary of the Borrower.

"Borrower Waterfall Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Borrowing Request" means a request by the Borrower for Loans in accordance with Section 2.01.

"Bridgeport Project" means the 14.9 MW Bridgeport Fuel Cell project located in Bridgeport, Connecticut.

"Business" means, collectively, the design, manufacture, installation, ownership, operation and service of stationary fuel cell power plants that generate electricity and usable heat for commercial, industrial, government and utility customers, and the research and development of advanced technology projects and businesses reasonably related or incidental thereto or representing a reasonable expansion thereof and the licensing of intellectual property in connection with such businesses.

"Business Day" means a day other than a Saturday, Sunday or other day on which commercial banks in New York City, New York are authorized or required by law to close.

"Business Revenues" means, with respect to any one or more Borrower Group Companies or Business Units, as applicable, for any period (without duplication), all revenue received by or on behalf of the applicable Borrower Group Companies or Business Units during such period, interest paid in respect of any Collateral Accounts, proceeds from any business interruption insurance and any other receipts otherwise arising or derived from or paid or payable to the applicable Borrower Group Companies or Business Units under the Material Agreements or otherwise in respect of the Business of the applicable Borrower Group Companies or Business Units (including any extraordinary receipts).

"Business Unit" means each of (i) the Specified Business Unit and (ii) collectively each of the Borrower's other business units and business operations not included in the foregoing clause (i).

"Business Unit Account" means each of the General Business Unit Accounts and the Specified Business Unit Account.

"Capital Expenditures" means with respect to any Person, the aggregate of all expenditures and costs (whether paid in cash or accrued as liabilities and including that portion of payments under Capital Lease Obligations that are capitalized on the balance sheet of such Person) by such Person and its Subsidiaries which are required to be capitalized under GAAP on a balance sheet of such Person.

"Capital Lease Obligations" means, with respect to any Person, the obligations of such Person to pay rent or any other amounts under any lease of (or other arrangements conveying the right to use) real or personal property, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person in accordance with GAAP.

"Capital Stock" means, with respect to any Person, any and all shares, interests, participations and/or rights in or other equivalents (however designated, whether voting or nonvoting, ordinary or preferred) in the equity or capital of such Person, now or hereafter outstanding, and any and all rights, warrants or options exchangeable for or convertible into any of the foregoing.

"Cash Equivalent Investments" means:

(a) direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States of America (or by any agency thereof to the extent such obligations are backed by the full faith and credit of the United States of America), in each case maturing within one year from the date of acquisition thereof;

(b) investments in commercial paper maturing within one year from the date of acquisition thereof and having, at such date of acquisition, the highest credit rating obtainable from S&P or from Moody's;

(c) investments in certificates of deposit, banker's acceptances and time deposits maturing within one year from the date of acquisition thereof issued or guaranteed by or placed with, and money market deposit accounts issued or offered by, any domestic office of any commercial bank organized under the laws of the United States of America or any State thereof that has a combined capital and surplus and undivided profits of not less than $100,000,000;

(d) fully collateralized repurchase agreements with a term of not more than thirty (30) days for securities described in clause (a) above and entered into with a financial institution satisfying the criteria described in clause (c) above; and

(e) money market funds that (x)(i) comply with the criteria set forth in SEC Rule 2a-7 under the Investment Company Act of 1940, (ii) are rated AAA by S&P and Aaa by Moody's and (iii) have portfolio assets of at least $5,000,000,000 or (y) invest exclusively in Investments described in clauses (a) through (d) above.

"Cash Interest Amount" means, as of any date, the portion of the aggregate outstanding accrued and unpaid interest in respect of the Loans that shall have accrued at the Cash Interest Rate under Section 2.07(a)(i); provided, that, at any time (including during any period between Quarterly Interest Payment Dates) that interest on the Loans are accruing at the Post-Default Rate, the Cash Interest Amount means the portion of the aggregate outstanding accrued and unpaid interest in respect of the Loans that shall have accrued at (i) the Cash Interest Rate *plus* (ii) 5.00% under Section 2.07(b).

"Cash Interest Rate" means 9.90% per annum.

"Cash Reserve Release Date" means the first date following the Second Funding Date on which all of the events set forth in the following clauses (a), (b) and (c) shall have occurred:

(a) each of (x) the "Commercial Operation Date" (as defined in the PPA in respect of the Tulare Project) shall have occurred in accordance with the PPA in respect of the Tulare Project, and (y) a Permitted Project Disposition/Refinancing shall have been consummated with respect to the Tulare Project;

(b) each of (x) the Groton Project shall have achieved its business plan in accordance with the Groton Construction Budget, (y) the "Commercial Operation Date" (as defined in the PPA in respect of the Groton Project) shall have occurred in accordance with the PPA in respect of the Groton Project, and (z) the Groton Project shall have fulfilled both the "Output Guarantee" and the "Heat Rate Guarantee" (each as defined in the PPA in respect of the Groton Project) in accordance with the PPA in respect of the Groton Project for a period of at least three consecutive months; provided that to determine if the condition in this clause (z) is satisfied in respect of the "Output Guarantee" the measured outputs for the "Output Guarantee" over three consecutive months shall be multiplied by 4 to determine if it meets the annual requirements in the PPA; and

(c) a Permitted Project Disposition/Refinancing shall have been consummated with respect to the Groton Project.

"CCSU Project" means the 1.4 MW Central Connecticut State University project located in New Britain, Connecticut.

"Change of Control" means:

(a) the Borrower shall, directly or indirectly, including through any of its Subsidiaries, in one or more related transactions, sell, assign, transfer, convey or otherwise dispose of all or substantially all of the properties or assets of the Borrower and its Subsidiaries;

(b) any "person" or "group" (within the meaning of the Exchange Act and the rules of the SEC thereunder as in effect on the date hereof) becomes, directly or indirectly, the beneficial owner of Capital Stock of the Borrower representing more than 30% of the aggregate ordinary voting power represented by the issued and outstanding Capital Stock of the Borrower; or

(c) during any period of 24 consecutive months, a majority of the members of the board of directors or other equivalent governing body of the Borrower cease to be composed of individuals (i) who were members of that board or equivalent governing body on the first day of such period, (ii) whose election or nomination to that board or equivalent governing body was approved by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body or (iii) whose election or nomination to that board or other equivalent governing body was approved by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body.

"Closing Date" means the date on which all conditions precedent specified in Section 4.01 are satisfied (or waived by the Administrative Agent and the Lenders in their sole and absolute discretion in accordance with Section 10.02).

"Code" means the Internal Revenue Code of 1986, as amended from time to time (unless as indicated otherwise), the regulations thereunder and publicly available interpretations thereof.

"Collateral" means all Property of the Loan Parties (including all Capital Stock of the Subsidiaries of the Borrower (other than the Excluded Project Companies)), in each case, now owned or hereafter acquired, which is intended to be subject to the security interests or Liens granted pursuant to any of the Security Documents (excluding any assets that are specifically excluded from Collateral pursuant to all such Security Documents).

"Collateral Accounts" means (a) the Borrower Funding Account, the Borrower Waterfall Account, each Covered Project Account, the Project Proceeds Account, the Module Replacement Reserve Account, each Business Unit Account, the Mandatory Prepayment Account, the ECF Offer Account, the Debt Reserve Account and the Preferred Reserve Account and (b) any other account established by a Loan Party (other than any Excluded Accounts).

"Collateral Agent" means Orion Energy Partners Investment Agent, LLC, in its capacity as collateral agent for the Secured Parties under the Security Documents, and any successor thereto pursuant Article VIII.

"Commitment" means, with respect to each Lender, the commitment of such Lender to make Loans to the Borrower pursuant to Section 2.01(a), in an aggregate principal amount not to exceed the amount set forth opposite such Lender's name on Annex I under the heading "Commitment".

"Common Stock" means the common stock of the Borrower.

"Compliance Certificate" has the meaning assigned to such term in Section 5.10(e).

"Condemnation" means any taking, seizure, confiscation, requisition, exercise of rights of eminent domain, public improvement, inverse condemnation, condemnation, expropriation, nationalization or similar action of or proceeding by any Governmental Authority affecting the Business.

"Connecticut Green Bank Credit Agreement" means that certain Loan Agreement, dated as of March 5, 2013, by and between Clean Energy Finance and Investment Authority and Borrower, as heretofore amended, restated, modified or supplemented.

"Construction Budget" means the Bolthouse Construction Budget, the Groton Construction Budget, the Tulare Construction Budget, the Yaphank Construction Budget and each Additional Covered Project Construction Budget, as applicable.

"Construction Schedule" means the Bolthouse Construction Schedule, the Groton Construction Schedule, the Tulare Construction Schedule, the Yaphank Construction Schedule and each Additional Covered Project Construction Schedule, as applicable.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. "Controlling" and "Controlled" have meanings correlative thereto.

"Control Agreement" means a Blocked Account Control Agreement or Springing Account Control Agreement, as applicable.

"Copyrights" means all works of authorship, United States and foreign copyrights (whether or not the underlying works of authorship have been published), designs, whether registered or unregistered, registrations and applications for registration of the foregoing and all extensions, renewals, and restorations thereof.

"Covered Project" or "Covered Projects" means, individually or collectively, as the context requires, (a) each Initial Covered Project, (b) from and after the Second Funding Date, each Second Funding Covered Project, and (c) each Additional Covered Project; provided, that, any Covered Project shall cease to be a Covered Project hereunder upon becoming an Additional Excluded Project hereunder.

"Covered Project Account" means with respect to each Covered Project, a deposit account (as defined in Article 9 of the UCC) of the applicable Covered Project Company in respect of such Covered Project established and maintained at the Depositary Bank, which, in the case of each Initial Covered Project Company and each Second Funding Covered Project Company, shall be established on or prior to the Account Establishment Date and, in the case of each Additional Covered Project Company, shall be established as required by Section 5.18(e), and, in each case, shall at all times thereafter be subject to a Springing Account Control Agreement.

"Covered Project Company" means (a) each Initial Covered Project Company, (b) from and after the Second Funding Date, each Second Funding Covered Project Company, and (c) from time to time after the Closing Date, each Additional Covered Project Company; provided, that, any Covered Project Company shall cease to be a Covered Project Company hereunder upon becoming Additional Excluded Project Company hereunder.

"Debt Prepayment Offer" has the meaning assigned to such term in Section 2.05(b)(iii).

"Debt Reserve Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Default" means any event, condition or circumstance that, with notice or lapse of time or both, would (unless cured or waived) become an Event of Default.

"Depositary Agreement" has the meaning assigned to such term in Section 4.03(i).

"Depositary Bank" means any depositary bank selected by the Borrower and reasonably acceptable to the Administrative Agent.

"Discharge Date" has the meaning assigned to such term in the Security Agreement.

"Disposition" has the meaning assigned to such term in Section 2.05(b)(ii).

"Disposition Proceeds Prepayment Offer" has the meaning assigned to such term in Section 2.05(b)(ii).

"Dollars" or "$" refers to the lawful currency of the United States of America.

"Draw Discounts" has the meaning assigned to such term in Section 2.06(d)(iii).

"ECF Offer Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"ECF Prepayment Offer" has the meaning assigned to such term in Section 2.05(b)(iv).

"EEA Financial Institution" means (a) any credit institution or investment firm established in any EEA Member Country which is subject to the supervision of an EEA Resolution Authority, (b) any entity established in an EEA Member Country which is a parent of an institution described in clause (a) of this definition, or (c) any financial institution established in an EEA Member Country which is a subsidiary of an institution described in clause (a) or (b) of this definition and is subject to consolidated supervision with its parent.

"EEA Member Country" means any of the member states of the European Union, Iceland, Liechtenstein, and Norway.

"EEA Resolution Authority" means any public administrative authority or any person entrusted with public administrative authority of any EEA Member Country (including any delegee) having responsibility for the resolution of any EEA Financial Institution.

"Environmental Claim" means any administrative or judicial action, suit, proceeding, notice, claim or demand by any Person seeking to enforce any obligation or responsibility arising under or relating to Environmental Law or alleging or asserting liability for investigatory costs, cleanup or other remedial costs, legal costs, environmental consulting costs, governmental response costs, damages to natural resources or other property, personal injuries, fines or penalties related to (a) the presence, or Release into the environment, of any Hazardous Material at any location, whether or not owned by the Person against whom such claim is made, or (b) any noncompliance of, or alleged noncompliance of, or liability arising under any Environmental Law. The term "Environmental Claim" shall include, without limitation any claim by any Person for damages, contribution, indemnification, cost recovery, compensation or injunctive relief under any Environmental Law.

"Environmental Laws" means any Applicable Laws regulating or imposing liability or standards of conduct concerning or relating to pollution or the protection of human health, safety and the environment, including all Applicable Laws concerning the presence, use, manufacture, generation, transportation, Release, threatened Release, disposal, arrangement for disposal, dumping, discharge, treatment, storage, handling, control or cleanup of Hazardous Materials.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time.

"ERISA Affiliate" means any trade or business (whether or not incorporated) that, together with the Borrower, is treated as a single employer under Sections 414(b), (c), (m) or (o) of the US Code.

"ERISA Event" means (a) a Reportable Event with respect to any Pension Plan, (b) the failure by any Pension Plan to satisfy the minimum funding standard (within the meaning of Section 412 of the US Code or Section 302 of ERISA) applicable to such plan, whether or not waived, (c) the filing of a notice of intent to terminate a Pension Plan in a distress termination (as described in Section 4041(c) of ERISA), (d) a complete or partial withdrawal by the Borrower or any ERISA Affiliate from a Multiemployer Plan or notification that a Multiemployer Plan is in reorganization or insolvent (within the meaning of Title IV of ERISA), (e) the imposition or incurrence of any liability under Title IV of ERISA, other than PBGC premiums due but not delinquent under Section 4007 of ERISA, upon the Borrower or any ERISA Affiliate, (f) the institution by the PBGC of proceedings to terminate a Pension Plan or Multiemployer Plan, (g) the appointment of a trustee to administer any Pension Plan under Section 4042 of ERISA, or (h) the imposition of a Lien upon the Borrower pursuant to Section 430(k) of the US Code or Section 303(k) of ERISA.

"EU Bail-In Legislation Schedule" means the EU Bail-In Legislation Schedule published by the Loan Market Association (or any successor person), as in effect from time to time.

"Event of Abandonment" means (a) the abandonment by any one or more Loan Parties of all or a material portion of the activities of the Loan Parties, taken as a whole, to operate or maintain the Business, which abandonment shall be deemed to have occurred if one or more Loan Parties collectively fail to operate any material part of the Business of the Loan Parties as a whole for a period of thirty (30) or more consecutive days (it being understood, for the avoidance of doubt, that the operation of the Business by any operators or contractors hired by a Loan Party in the ordinary course of business shall not be deemed to be an abandonment of the Business by such Loan Party); provided that any such failure to operate the Business caused by an Event of Loss or other force majeure event shall not constitute an "Event of Abandonment" so long as, to the extent feasible during such Event of Loss or other force majeure event, the Borrower is diligently attempting to restart operation of the Business or (b) the written announcement by any Loan Party of its intention to do any of the foregoing in clause (a); provided, further, that, with respect to any Loan Party other than a Covered Project Company, the abandonment by such Loan Party of any non-fully funded third party advance technology project shall not be deemed an "Event of Abandonment".

"Event of Default" has the meaning assigned to such term in Section 7.01.

"Event of Loss" means any loss of, destruction of or damage to, or any Condemnation or other taking of any property of any Loan Party or any Existing Foreign Subsidiary.

"Event of Loss Prepayment Offer" has the meaning assigned to such term in Section 2.05(b)(i).

"Exchange Act" means the Securities Exchange Act of 1934, as amended.

"Excluded Account" means deposit accounts that are (i) used exclusively for payroll, payroll taxes, and other employee wage and benefit payments to or for the benefit of the employees of the Loan Parties, (ii) tax accounts, including, without limitation, sales tax accounts and tax withholding accounts, or (iii) cash collateral accounts in respect of Permitted Liens under clause (a)(iii)(y) of the definition of "Permitted Liens".

"Excluded Project" or "Excluded Projects" means, individually or collectively, as the context requires, each of (a) the Bridgeport Project, (b) the Pfizer Project, (c) the Riverside Regional Water Quality Control Plant Project, (d) the Santa Rita Project, (e) until the occurrence of the Triangle Joinder Date, the Triangle Street Project, (f) the UC Irvine Medical Center Project, (g) until the occurrence of the Second Funding Date, the CCSU Project, (h) until the occurrence of the Second Funding Date, the Groton Project, and (i) from time to time after the Closing Date, each Additional Excluded Project.

"Excluded Project Company" means (a) each Initial Excluded Project Company, (b) from time to time after the Closing Date, each Additional Excluded Project Company, and (c) FuelCell Energy Finance, LLC.

"Excluded Taxes" means any of the following Taxes imposed on or with respect to any Agent, any Lender or any other recipient of any payment to be made by or on account of any obligation of any Loan Party hereunder, (a) Taxes imposed on or measured by net income and franchise Taxes (imposed in lieu of net income tax), in each case, (i) imposed by the jurisdiction under the laws of which such recipient is organized, in which its principal office (or other fixed place of business) is located or, in the case of any Lender, in which its applicable lending office is located or (ii) that are Other Connection Taxes, (b) any branch profits Taxes imposed by the jurisdictions listed in clause (a) of this definition, (c) any Taxes attributable to the failure of any Agent, any Lender or any such other recipient to comply with Section 2.09(e), (d) in the case of an Agent or a Lender (other than an assignee pursuant to a request by Borrower under Section 2.11), any United States federal withholding Tax that is imposed on amounts payable to such Agent or Lender under the laws effective at the time such Agent or Lender becomes a party hereto (or designates a new lending office), except to the extent that such Agent or Lender (or its assignor, if any) was entitled, at the time of designation of a new lending office (or assignment), to receive additional amounts from any Loan Party with respect to such withholding Tax pursuant to Section 2.09(a), and (e) any United States federal withholding Taxes imposed under FATCA.

"Existing Foreign Subsidiary" means each of (a) FCE FuelCell Energy Ltd., a Canadian limited company, (b) FCE Korea Ltd., a South Korean limited company, (c) FuelCell Energy EU BV, a Dutch private company with limited liability, and (d) FuelCell Energy Solutions GmbH, a German company with limited liability; provided, that, from and after the date that is 180 days after the date hereof, Versa Power Systems Ltd., a Canadian limited company, shall be deemed an Existing Foreign Subsidiary hereunder.

"FATCA" means Sections 1471 through 1474 of the US Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with) and any current or future regulations or official interpretations thereof, any agreements entered into pursuant to Section 1471(b)(1) of the Code and any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement, treaty or convention among Governmental Authorities and implementing such Sections of the Code.

"FCPA" means the United States Foreign Corrupt Practices Act of 1977, as amended.

"Federal Funds Effective Rate" means, for any day, the weighted average (rounded upwards, if necessary, to the next 1/100 of 1%) of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day that is a Business Day, the average (rounded upwards, if necessary, to the next 1/100 of 1%) of the quotations for such day for such transactions received by the Administrative Agent from three Federal funds brokers of recognized standing selected by it.

"Fifth Amendment" means that certain Fifth Amendment to Credit Agreement, dated as of June 8, 2020, by and among the Borrower, each of the Guarantors party thereto, each of the Lenders party thereto, and the Administrative Agent.

"Fifth Amendment Effective Date" has the meaning ascribed to such term in the Fifth Amendment.

"Financing Documents" means this Agreement, each Note (if requested by a Lender), each Loan Discount Letter, the Agent Reimbursement Letter, the Security Documents, and each certificate, agreement, instrument, waiver, consent or document executed by any Loan Party and delivered to Agent or any Lender in connection with or pursuant to any of the foregoing and designated as a "Financing Document".

"First Secondary Facility Draw Date" means the first date after the Fifth Amendment Effective Date on which the first Secondary Facility Funding Date or the first Reserve Release Date shall occur.

"Foreign Plan" means any employee pension benefit plan, program, policy, arrangement or agreement maintained or contributed to by any Loan Party or with respect to which any Loan Party could reasonably be expected to have any liability, in each case with respect to employees employed outside the United States (as such term is defined in Section 3(10) of ERISA) (other than any arrangement with the applicable Governmental Authority).

"Fourth Amendment" means that certain Fourth Amendment to Credit Agreement, dated as of April 29, 2020, by and among the Borrower, each of the Guarantors party thereto, each of the Lenders party thereto, and the Administrative Agent.

"Fourth Amendment Effective Date" has the meaning ascribed to such term in the Fourth Amendment.

"Fully Funded Third Party Advanced Technology Contract" means that certain contemplated agreement disclosed by the Borrower to, and acknowledged as the "Fully Funded Third Party Advanced Technology Contract" in writing by, the Administrative Agent prior to the Closing.

"Funding Date" has the meaning assigned to such term in Section 2.01(c).

"Funding Office" means the office specified from time to time by the Administrative Agent as its funding office by notice to Borrower and the Lenders.

"Funds Flow Memorandum" means the memorandum, in form and substance mutually acceptable to the Administrative Agent, the Lenders and the Borrower, detailing the proposed flow, and use, of the Loan proceeds on the Initial Funding Date.

"GAAP" means generally accepted accounting principles in effect from time to time in the United States of America, applied on a consistent basis.

"General Business Unit Accounts" means all deposit accounts (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Springing Account Control Agreement.

"Governmental Authority" means any federal, regional, state or local government, or political subdivision thereof or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government and having jurisdiction over the Person or matters in question, including all agencies and instrumentalities of such governments and political subdivisions.

"Government Official" means any official of any Governmental Authority, including, without limitation, all officers or employees of a government department, agency, instrumentality or permitting agency.

"Groton Construction Budget" means the Construction Budget as provided by the Borrower to, and acknowledged as the "Groton Construction Budget" in writing by, the Administrative Agent on November 21, 2019, as may be modified from time to time in accordance with Section 5.21.

"Groton Construction Schedule" means the Construction Schedule as provided by the Borrower to, and acknowledged as the "Groton Construction Schedule" in writing by, the Administrative Agent prior to the Closing Date, as may be modified from time to time in accordance with Section 5.21.

"Groton Estoppel and Acknowledgement" means an Estoppel and Acknowledgement agreement substantially in the form disclosed by the Borrower to, and acknowledged as the "Groton Estoppel and Acknowledgement" in writing by, the Administrative Agent prior to the Second Funding Date.

"Groton Project" means the 7.4 MW Groton Naval Station project located in Groton, Connecticut.

"Guarantee" means as to any Person (the "*guaranteeing person*"), any obligation of (a) the guaranteeing person or (b) another Person (including any bank under any letter of credit), if to induce the creation of such obligation of such other Person, the guaranteeing person has issued a reimbursement, counterindemnity or similar obligation, in either case guaranteeing or in effect guaranteeing any Indebtedness, leases, dividends or other obligations (the "*primary obligations*") of any other third Person (the "*primary obligor*") in any manner, whether directly or indirectly, including any obligation of the guaranteeing person, whether or not contingent, (w) to purchase any such primary obligation or any Property constituting direct or indirect security therefor, (x) to advance or supply funds (i) for the purchase or payment of any such primary obligation or (ii) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor, (y) to purchase Property, securities or services, in each case, primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (z) otherwise to assure or hold harmless the owner of any such primary obligation against loss in respect thereof; provided that the term Guarantee shall not include endorsements of instruments for deposit or collection in the ordinary course of business. The amount of any Guarantee of any guaranteeing person shall be deemed to be the lower of (A) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee is made and (B) the maximum amount for which such guaranteeing person may be liable pursuant to the terms of the instrument embodying

such Guarantee, unless such primary obligation and the maximum amount for which such guaranteeing person may be liable are not stated or determinable, in which case the amount of such Guarantee shall be such guaranteeing person's maximum reasonably anticipated liability in respect thereof as determined by Borrower in good faith.

"Guaranteed Obligations" means, with respect to any Guarantor, the Obligations whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest, reimbursements and fees that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any debtor relief law naming such Person as the debtor in such proceeding, regardless of whether such interest, reimbursements and fees are allowed claims in such proceeding.

"Guarantors" means each Covered Project Company and each Restricted Subsidiary of the Borrower.

"Hazardous Material" means any material, substance or waste that is defined, listed or regulated as hazardous, toxic, a pollutant or a contaminant (or terms of similar regulatory intent and meaning) under applicable Environmental Laws or with respect to which liability or standards of conduct are imposed under any Environmental Laws (including, without limitation, petroleum or petroleum products (including crude oil and any fractions thereof), methane gas, polychlorinated biphenyls, asbestos, pesticides, produced saltwater, fracturing fluid and associated chemicals and radioactive substances).

"Hedging Agreement" means any agreement with respect to any swap, cap, collar, forward, future or derivative transaction or option or similar agreement involving, or settled by reference to, one or more rates, currencies, commodities, equity or debt instruments or securities, or economic, financial or pricing indices or measures of economic, financial or pricing risk or value or any similar transaction or any combination of these transactions.

"Incremental Availability Period" means the period commencing on the first Business Day immediately following the Second Funding Date and ending on the earlier of (a) the 18-month anniversary of the Closing Date and (b) the date on which the incremental term loans contemplated by Section 2.13 in an aggregate principal amount equal to the Incremental Facility Amount are made to the Borrower.

"Incremental Facility Amount" means $120,000,000.

"Indebtedness" of any Person means, without duplication, all (a) indebtedness for borrowed money and every reimbursement obligation with respect to letters of credit, bankers' acceptances or similar facilities, (b) obligations evidenced by bonds, debentures, notes or other similar instruments, (c) obligations to pay the deferred purchase price of property or services, except accounts payable and accrued expenses arising in the ordinary course of business and payable within ninety (90) days past the original invoice or billing date thereof, (d) the Net Hedging Obligations under interest rate or currency Hedging Agreements and all other agreements or arrangements designed to protect against fluctuations in interest rates, commodity prices and currency exchange rates, (e) the capitalized amount (determined in accordance with GAAP) of all

payments due or to become due under all leases and agreements to enter into leases required to be classified and accounted for as a capital lease in accordance with GAAP, (f) reimbursement obligations (contingent or otherwise) pursuant to any performance bonds or collateral security, (g) Indebtedness of others described in clauses (a) through (f) above secured by (or for which the holder thereof has an existing right, contingent or otherwise, to be secured by) a Lien on the property of such Person, whether or not the respective Indebtedness so secured has been assumed by such Person and (h) Indebtedness of others described in clauses (a) through (g) above Guaranteed by such Person. The Indebtedness of any Person shall include the Indebtedness of any partnership in which such Person is a general partner to the extent such Person is liable therefor as a result of such Person's general partner interest in such partnership, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor.

"Indemnified Party" has the meaning assigned to such term in Section 10.03(b).

"Indemnified Taxes" means (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of any Loan Party under any Financing Document and (b) to the extent not otherwise described in (a), Other Taxes.

"Independent Auditor" means KPMG LLP or any "big four" accounting firm as selected by the Borrower and notified to the Administrative Agent, or such other firm of independent public accountants of recognized national standing in the United States selected by the Borrower and acceptable to the Administrative Agent, such approval not to be unreasonably withheld, conditioned or delayed.

"Inventory Cost Notice" has the meaning assigned to such term in Section 5.18(f)(iv)(C)(I).

"Initial Covered Project" or "Initial Covered Projects" means, individually or collectively, as the context requires, each of (a) the Bolthouse Project, (b) the Tulare Project, and (c) the Yaphank Project.

"Initial Covered Project Company" means (a) with respect to the Bolthouse Project, Bakersfield Fuel Cell 1, LLC, (b) with respect to the Tulare Project, Central CA Fuel Cell 2, LLC and (c) with respect to the Yaphank Project, Yaphank Fuel Cell Park, LLC.

"Initial Draw Discounts" has the meaning assigned to such term in Section 2.06(d)(i).

"Initial Excluded Project Company" means (a) with respect to the Bridgeport Project, Bridgeport Fuel Cell, LLC, (b) with respect to the Pfizer Project, Groton Fuel Cell 1, LLC, (c) with respect to the Riverside Regional Water Quality Control Plant Project, Riverside Fuel Cell, LLC, (d) with respect to the Santa Rita Project, SRJFC, LLC, (e) until the occurrence of the Triangle Joinder Date, with respect to the Triangle Street Project, TRS Fuel Cell, LLC, (f) with respect to the UC Irvine Medical Center Project, UCI Fuel Cell, LLC, (g) until the occurrence of the Second Funding Date, with respect to the CCSU Project, New Britain Renewable Energy, LLC and (h) until the occurrence of the Second Funding Date, with respect to the Groton Project, Groton Station Fuel Cell, LLC.

"Initial Funding Commitments" means with respect to each Lender, the commitment of such Lender to make Loans to the Borrower pursuant to Section 2.01(a)(i), in an aggregate principal amount equal to the amount set forth opposite such Lender's name on Annex I under the heading "Initial Funding Commitments".

"Initial Funding Date" means the initial Funding Date on or following the Closing Date on which all conditions precedent specified in Sections 4.02 and 4.04 are satisfied (or waived by the Administrative Agent and the Lenders in their sole and absolute discretion in accordance with Section 10.02), or such other date as may be requested by Borrower and approved by the Administrative Agent in its sole and absolute discretion.

"Initial Funding Warrants" means those certain Warrants, dated as of the Initial Funding Date, issued by the Borrower to the Orion Energy Warrant Holders, substantially in the form of Exhibit L-1 attached hereto.

"Initial Loan Draw Discount" has the meaning assigned to such term in Section 2.06(d)(i).

"Initial Loans" means the Loans made on the Initial Funding Date.

"Initial Reserve Draw Discount" has the meaning assigned to such term in Section 2.06(d)(i).

"Intellectual Property" means (a) the collective reference to all rights, priorities and privileges relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including, without limitation, all Copyrights, Patents, Trademarks and trade secrets, (b) all rights to sue or otherwise recover for any past, present and future infringement, dilution, misappropriation, or other violation or impairment thereof, (c) all proceeds of any of the foregoing, including without limitation license fees, royalties, income payments, claims, damages and proceeds of suit, now or hereafter due and/or payable with respect thereto, (d) all written agreements, licenses and covenants providing for the grant to or from any Person any rights in any such intellectual property that is owned by another Person.

"Investment" means for any Person (a) the acquisition (whether for cash, Property of such Person, services or securities or otherwise) of Capital Stock, bonds, notes, debentures, debt securities, partnership or other ownership interests or other securities of, or any Property constituting an ongoing business, line of business, division or business unit of or constituting all or substantially all the assets of, or the making of any capital contribution to, any other Person, (b) the making of any advance, loan or other extension of credit to, any other Person (including the purchase of Property from another Person subject to an understanding or agreement, contingent or otherwise, to resell such Property to such Person, but excluding any such advance, loan or extension of credit having a term not exceeding ninety (90) days representing the purchase price of inventory or supplies sold in the ordinary course of business), (c) the entering into of any Guarantee with respect to Indebtedness or other liability of any other Person, and (d) any other investment that would be classified as such on a balance sheet of such Person in accordance with GAAP. For purposes of covenant compliance, the amount of any Investment shall be the amount actually invested, without adjustment for subsequent increases or decreases in the value of such Investment but giving effect to any returns or distributions of capital or repayment of principal actually received in case by such Person with respect thereto.

"Investment Committee" means, as of any date, the committee of Orion Energy Partners, L.P., the members of which have a right or duty in their sole and absolute discretion to vote on whether the general partner of the Lenders shall cause the Lenders to make an investment in the form of a loan.

"IP Collateral Documents" means a security agreement or intellectual property security agreement and any other notices, consents, acknowledgments, filings, registrations and recordings requested by the Administrative Agent, in each case, in form and substance acceptable to the Administrative Agent, necessary or advisable to create in favor of the Collateral Agent for the benefit of the Secured Parties a legal, valid and enforceable first-priority Lien on and security interest in all of the Intellectual Property of each of the Loan Parties, prior and superior to all other Liens that may be delivered to Administrative Agent if required pursuant to clause (b) or (c) of Section 5.24; provided, that, the IP Collateral Documents shall provide that the Liens created thereunder in the Intellectual Property of each of the Loan Parties shall automatically terminate and be released upon the execution and delivery of all of the agreements, consents and instruments referred to in clauses (b)(i), (c)(i)(A), (c)(i)(B) and (c)(i)(C) of Section 5.24.

"Lenders" has the meaning assigned to such term in the preamble.

"Lien" means any mortgage, charge, pledge, lien (statutory or other), privilege, security interest, hypothecation, collateral assignment or preference, priority or other security agreement, mandatory deposit arrangement, preferential arrangement or other encumbrance upon (including joint title) or with respect to any property of any kind, real or personal, movable or immovable, now owned or hereafter acquired (including, without limitation, any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing and the filing of any financing statement under the Uniform Commercial Code or comparable law of the relevant jurisdiction).

"Loan Discount Letter" means that certain loan discount letter, dated as of the Closing Date, among Borrower and the Lenders.

"Loan Parties" means, collectively, the Borrower and the Guarantors.

"Loans" means the term loans made by the Lenders to the Borrower pursuant to Section 2.01(a) and, if applicable, Section ~~2.13.~~2.13 or Section 2.14.

"Loss Proceeds" means insurance proceeds, condemnation awards or other similar compensation, awards, damages and payments or relief (exclusive, in each case, of proceeds of business interruption, workers' compensation, employees' liability, automobile liability, builders' all risk liability and general liability insurance) with respect to any Event of Loss.

"Mandatory Cash Interest Amount" means, with respect to each Loan on any Quarterly Payment Date, an amount equal to the total accrued Cash Interest Amount on such Loan as of such Quarterly Payment Date.

"Mandatory Prepayment Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Material Adverse Effect" means a material adverse effect on: (a) the business, assets, properties, operations or financial condition of (i) the Borrower Group Companies (other than the Excluded Project Companies) taken as a whole or (ii) the Borrower Group Companies taken as a whole; (b) the ability of (i) the Borrower Group Companies (other than the Excluded Project Companies) taken as a whole, or (ii) the Borrower Group Companies taken as a whole, to perform its material obligations under the Financing Documents and the Material Agreements in accordance with the terms thereof; (c) the validity of, enforceability of the material rights or remedies of, or benefits available to the Secured Parties under, the Financing Documents; (d) the validity and perfection of the Secured Parties' Liens in a material portion of the Collateral; or (e) the rights or remedies of (i) the Borrower Group Companies (other than the Excluded Project Companies) taken as a whole, or (ii) the Borrower Group Companies taken as a whole, under the Material Agreements, taken as a whole.

"Material Agreements" means:

(a) each of the agreements, contracts or instruments set forth on Schedule 1.01(b);

(b) with respect to any Additional Covered Project that is designated as an Additional Covered Project after the Second Funding Date, any agreements, contracts or instruments designated as "Material Agreements" in a writing executed by the Borrower and the Administrative Agent in connection with the designation of such Additional Covered Project;

(c) any Additional Material Agreement; and

(d) any Replacement Agreement of any of the foregoing.

"Material Counterparty" means each Person (other than any Agent or any Lender) from time to time party to any Material Agreement.

"Maturity Date" means the eighth ($8^{th}$) anniversary of the Closing Date.

"Module Replacement Reserve Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Module Replacement Reserve Payment Amount" means, with respect to any Quarterly Payment Date, the lesser of (i) the aggregate sum of the Project Module Quarterly Reserve Amounts for all of the Covered Projects as of such date, and (ii) the maximum amount necessary to be deposited into the Module Replacement Reserve Account on such date in order for the amount held in the Module Replacement Reserve Account to equal the then effective Required Module Replacement Reserve Amount.

"Multiemployer Plan" means a multiemployer plan as defined in Section 4001(a)(3) of ERISA that is subject to Title IV of ERISA to which any Borrower Group Company contributes or is obligated to contribute, or with respect to which any Borrower Group Company has or could reasonably be expected to have any liability.

"Net Available Amount" means:

(a) in the case of any receipt of termination payments, damages, indemnity payments or other extraordinary payments under the Material Agreements, the aggregate amount of payments received by any Loan Party or any of its Affiliates in respect of such event, net of reasonable costs and expenses incurred by any Loan Party or any of its Affiliates in connection with the collection of such proceeds;

(b) in the case of any Event of Loss, the aggregate amount of Loss Proceeds received by any Loan Party or any of its Affiliates in respect of such Event of Loss, net of reasonable costs and expenses incurred by any Loan Party or any of its Affiliates in connection with the collection of such Loss Proceeds; and

(c) in the case of any Disposition, the aggregate amount received by any Loan Party or any of its Affiliates in respect of such Disposition, net of reasonable costs and expenses incurred by any Loan Party or any of its Affiliates in connection with such Disposition.

"Net Hedging Obligations" means, as of any date, the Termination Value of any Hedging Agreement on such date.

"Nine Month Date" has the meaning assigned to such term in Section 2.06(d)(iii).

"Nine Month Draw Discount" has the meaning assigned to such term in Section 2.06(d)(iii).

"Note" has the meaning assigned to such term in Section 2.04(b)(ii).

"Obligations" means all advances to, and debts (including Accrued Interest, interest accruing after the maturity of the Loans and interest accruing after the filing of any Bankruptcy), liabilities, obligations, Prepayment Premium, fees, Option Premiums, Draw Discounts, covenants and duties of, the Loan Parties arising under any Financing Document, or otherwise with respect to any Loan, in each case whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest, reimbursements and fees that accrue after the commencement by or against any Loan Party of any proceeding under any debtor relief law naming any Loan Party as the debtor in such proceeding, regardless of whether such interest, reimbursements and fees are allowed claims in such proceeding.

"Observer Rights Agreement" has the meaning assigned to such term in Section 4.02(c).

"Officer's Certificate" means, with respect to any Loan Party, a certificate signed by an Authorized Representative of such Loan Party.

"Operating Budget" means a proposed annual operating plan and budget of one or more Borrower Group Companies or Business Units, as applicable, prepared by the Borrower in accordance with Section 5.20(a), of (a) anticipated Business Revenues of such Borrower Group Companies or Business Units, (b) Operating Expenses of such Borrower Group Companies or Business Units and (c) Capital Expenditures of such Borrower Group Companies or Business Units, in each case, detailed monthly for the following calendar year, which annual operating plan and budget shall be substantially in the form of Exhibit E.

"Operating Expenses" means any and all of the expenses paid or payable by or on behalf of one or more Borrower Group Companies or Business Units, as applicable, in relation to the operation and maintenance (except as set forth below) of the Business of such Borrower Group Companies or Business Units, including consumables, payments under any operating lease, taxes (including franchise taxes, property taxes, sales taxes and excluding income taxes), insurance (including the costs of premiums and deductibles and brokers' expenses), costs and fees attendant to obtaining and maintaining in effect the Authorizations relating to the Business payable during such period, payments made to security, police services, and legal, accounting and other professional fees attendant to any of the foregoing items payable during such period, but exclusive of Capital Expenditures and payments in respect of payments of principal and interest in respect of the Obligations or any other Indebtedness. Operating Expenses do not include non-cash charges, including, without limitation, depreciation, amortization, income taxes, non-cash taxes or other bookkeeping entries of a similar nature.

"Option Premium" has the meaning assigned to such term in Section 2.06(c).

"Organizational Documents" means, with respect to any Person, (i) in the case of any corporation, the certificate of incorporation and by-laws (or similar documents) of such Person, (ii) in the case of any limited liability company, the certificate of formation and operating agreement (or similar documents) of such Person, (iii) in the case of any limited partnership, the certificate of formation and limited partnership agreement (or similar documents) of such Person, (iv) in the case of any general partnership, the partnership agreement (or similar document) of such Person and (v) in any other case, the functional equivalent of the foregoing.

"Orion Energy Warrant Holders" means each of the Lenders (or their designees) listed on Annex I.

"Other Connection Taxes" means, with respect to any Agent or any Lender, Taxes imposed as a result of a present or former connection between such Agent or Lender and the jurisdiction imposing such Tax (other than connections arising from such Agent or Lender having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Financing Document, or sold or assigned an interest in any Loan or Financing Document).

"Other Taxes" means any and all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes arising from any payment made under any Financing Document or from the execution, delivery or enforcement of, or otherwise with respect to, any Financing Document, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment (other than an assignment made pursuant to Section 2.11). For the avoidance of doubt, "Other Taxes" shall not include any Excluded Taxes.

"Outstanding Reserve Release Amount" means, as of any date of determination, an amount (which shall not be less than zero) equal to (a) the aggregate amount of all cash that shall have been released from the Applicable Reserves and transferred to a Business Unit Account pursuant to one or more Reserve Releases effected pursuant to Section 5.18(l) at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination, *minus* (b) the aggregate amount of Reserve Replenishments that shall have been consummated pursuant to Section 5.27 at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination.

"Outstanding Secondary Facility Amount" means, as of any date of determination, the sum of (a) the Outstanding Secondary Facility Loan Amount as of such date of determination, *plus* (b) the Outstanding Reserve Release Amount as of such date of determination.

"Outstanding Secondary Facility Loan Amount" means, as of any date of determination, an amount (which shall not be less than zero) equal to (a) the Aggregate Secondary Facility Loan Usage Amount as of such date of determination, *minus* (b) the aggregate principal amount of all Loans prepaid by the Borrower pursuant to Sections 2.05(a)(ii), 2.05(b)(vi) and 2.05(b)(vii) at any time from, and including, the Secondary Facility Commencement Date through, and including, such date of determination.

"Participant" has the meaning assigned to such term in Section 10.04(f).

"Participant Register" has the meaning assigned to such term in Section 10.04(f).

"Patents" means all patentable inventions and designs, United States, foreign, and multinational patents, certificates of invention, and similar industrial property rights, and applications for any of the foregoing, including, without limitation, all reissues, substitutes, divisions, continuations, continuations-in-part, extensions, renewals, and reexaminations thereof.

"PBGC" means the Pension Benefit Guaranty Corporation referred to and defined in ERISA and any successor entity performing similar functions.

"Pension Plan" means any employee pension benefit plan as defined in Section 3(2) of ERISA (other than a Multiemployer Plan) that is subject to the provisions of Title IV or Section 302 of ERISA, or Section 412 of the US Code, and in respect of which any Borrower Group Company is (or, if such plan were terminated, would under Section 4069 of ERISA be deemed to be) an "employer" as defined in Section 3(5) of ERISA or with respect to which any Borrower Group Company has or could reasonably be expected to have any liability.

"Permitted Contest Conditions" means, with respect to any Borrower Group Company, a contest, pursued in good faith, challenging the enforceability, validity, interpretation, amount or application of any law, tax or other matter (legal, contractual or other) by appropriate proceedings timely instituted if (a) such Borrower Group Company diligently pursues such contest, (b) such Borrower Group Company establishes adequate reserves with respect to the contested claim if and to the extent required by GAAP and (c) such contest (i) could not reasonably be expected to result in a Material Adverse Effect and (ii) does not involve any material risk or danger of any criminal or unindemnified civil liability being incurred by the Administrative Agent or the Lenders.

"Permitted Indebtedness" has the meaning assigned to such term in Section 6.02.

"Permitted Lien" means, with respect to any Borrower Group Company, any of the following:

(a) Liens arising by reason of:

(i) Taxes either secured by a bond or which are not yet due or which are being contested pursuant to the Permitted Contest Conditions;

(ii) security, pledges or deposits in the ordinary course of business for payment of workmen's compensation or unemployment insurance or other types of social security benefits; and

(iii) (x) good faith deposits or pledges incurred or created in connection with or to secure the performance of bids, tenders, contracts (other than contracts for the payment of money), leases, statutory obligations, surety bonds or appeal bonds entered into in the ordinary course of business or under Applicable Law and (y) cash collateral given in connection with letters of credit, in each case under this clause (iii), so long as (A) the Indebtedness secured by such Liens is permitted under Section 6.02(i), and (B) such Liens, in the aggregate, do not secure Indebtedness or other obligations in excess of $2,000,000;

(b) Liens of mechanics, carriers, landlords, warehousemen, materialmen, laborers, repairmen's, employees or suppliers or any similar Liens arising by operation of law incurred in the ordinary course of business (i) that are set forth on Schedule 1.01(d), (ii) with respect to obligations which are not overdue by more than forty-five (45) days, or (iii) which are adequately bonded and which are being contested pursuant to the Permitted Contest Conditions;

(c) Liens arising out of judgments, orders or awards that have been adequately bonded, are fully covered by insurance or with respect to which a stay of execution has been obtained pending an appeal or proceeding for review pursuant to the Permitted Contest Conditions;

(d) Liens arising with respect to zoning restrictions, easements, licenses, reservations, covenants, rights-of-way, utility easements, building restrictions and other similar charges or encumbrances on the use of real property which, individually or in the aggregate, do not materially detract from the value of the affected property and do not materially interfere with the ordinary conduct of the business of such Borrower Group Company;

(e) Liens arising under ERISA and Liens arising under the US Code with respect to an employee benefit plan (as defined in Section 3(2) of ERISA) that do not constitute an Event of Default under Section 7.01(j);

(f) to the extent constituting Liens, leases, licenses, subleases or sublicenses granted to others in the ordinary course of business that do not (i) interfere in any material respect with the ordinary conduct of the Business of such Borrower Group Company, (ii) secure any Indebtedness or (iii) individually or in the aggregate detract from the expected value of the property of such Borrower Group Company in any material respect;

(g) Liens arising solely by virtue of any statutory or common law provision relating to banker's liens, rights of set-off or similar rights and remedies and burdening only deposit accounts or other funds maintained with a creditor depository institution, in each case, granted in the ordinary course of business in favor of such creditor depositary institution, provided that no such deposit account is a dedicated cash collateral account or is subject to restrictions against access by the depositor in excess of those set forth by regulations promulgated by the Board and no such deposit account is intended by such Borrower Group Company to provide collateral to the depository institution;

(h) any Lien on any property or asset of such Borrower Group Company existing on the date hereof and set forth in Schedule 6.03; provided that such Lien shall not apply to any other property or asset of such Borrower Group Company;

(i) Liens on the Property of any Excluded Project Company incurred in connection with any Permitted Project Disposition/Refinancing;

(j) Liens created under the Security Documents;

(k) Liens that extend, renew or replace in whole or in part a Lien referred to above; and

(l) Liens on any assets of, or any Capital Stock in, any Excluded Project Company.

"Permitted Project Disposition/Refinancing" means any Project Disposition/Refinancing so long as (i) the Project Disposition/Refinancing Proceeds in respect thereof are deposited in the Project Proceeds Account as required by, and to the extent required by, Section 5.18(f), (ii) in the event that such Project Disposition/Refinancing is in respect of a Covered Project Company, the aggregate amount of Project Disposition/Refinancing Proceeds received from such Project Disposition/Refinancing and deposited in the Project Proceeds Account shall be at least equal to the Project Payoff Amount in respect of the Covered Project Company subject to such Project Disposition/Refinancing, and (iii) neither the Borrower nor any other Loan Party shall Guarantee any of the Indebtedness or obligations of the applicable Project Company subject to such Project Disposition/Refinancing.

"Permitted Subsequent Funding Use" means, in each case subject to the approval of the Administrative Agent in its reasonable discretion (or, in the case of Section 2.13, the approval of the Administrative Agent in its sole discretion), the funding of (i) the construction costs, inventory and other capital expenditures for an Additional Covered Project whose contracted cash flows (under a PPA with a creditworthy counterparty (as determined in the Lenders' sole discretion)) meet or exceed a coverage ratio acceptable to the Lenders, and (ii) inventory, working capital and other costs required in connection with the performance of purchase orders, service agreements and other binding customer agreements (in each case, with a creditworthy counterparty (as determined in the Lenders' sole discretion)).

"Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

"Pfizer Project" means the 5.6 MW Fuel Cell project located at the Pfizer facility in Groton, Connecticut.

"PIK Interest Amount" means, as of any date, the portion of the aggregate outstanding accrued and unpaid interest in respect of the Loans that shall have accrued at the PIK Interest Rate under Section 2.07(a)(ii).

"PIK Interest Rate" means 2.05% per annum.

"Post-Default Rate" means a rate per annum which is equal to the lesser of (a) the sum of (i) the Cash Interest Rate *plus* (ii) the PIK Interest Rate *plus* (iii) 5.00% and (b) with respect to each Lender, the maximum nonusurious interest rate, if any, that may be contracted for, taken, reserved, charged or received on the Loans under laws applicable to such Lender which are in effect at the relevant time.

"PPA" means, with respect to any Project or Project Company, any power purchase agreement or other similar agreement for the sale of electricity, energy, output or capacity, in each case, to which such Project Company is a party.

"Preferred Reserve Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Prepayment Premium" means, with respect any prepayment of Loans on any date, an amount (which shall not be less than zero) equal to (i) the product of (A) ~~30~~35% (or (x) in the case such prepayment of Loans is consummated pursuant to Section 5.18(f)(iv)(A) with funds held in the Project Proceeds Account, ~~20~~25%, or (y) in the case such prepayment of Loans is consummated pursuant to Section 2.05(b)(v), 15%), *times* (B) the aggregate principal amount of the Loans subject to such prepayment, *minus* (ii) the sum of (A) the aggregate amount of all interest paid (whether paid in cash or paid-in-kind as Accrued Interest) in respect of the aggregate principal amount of the Loans subject to such prepayment on or prior to such date of prepayment, plus (B) the aggregate loan discount amount in respect of the aggregate principal amount of the Loans subject to such prepayment as set forth in the Loan Discount Letter. Schedule 1.01(a) sets forth an example calculation of the Prepayment Premium.

"Prepayment Premium Event" has the meaning assigned to such term in Section 2.05(c)(iv).

"Prior Indebtedness" means (i) with respect to the Tulare Project and the Project Company in respect of the Tulare Project, all Indebtedness arising under, or pursuant to, that certain Loan Agreement, dated as of July 30, 2014, by and between FuelCell Energy Finance, LLC and NRG Energy, Inc. and all "Loan Documents" (as defined therein), in each case, as heretofore amended, restated, modified or supplemented, (ii) with respect to the Bolthouse Project and the Project Company in respect of the Bolthouse Project, that certain Construction Loan Agreement, dated as of December 21, 2018, by and among FuelCell Energy Finance II, LLC, Bakersfield Fuel Cell 1, LLC, BRT Fuel Cell, LLC, CR Fuel Cell, LLC, Yaphank Fuel Cell Park, LLC, Homestead Fuel Cell 1, LLC, Derby Fuel Cell, LLC, and Generate Lending, LLC and all "Loan Documents" (as defined therein), in each case, as heretofore amended, restated, modified or supplemented, (iii) with respect to the Groton Project and the Project Company in respect of the Groton Project, that

certain Construction Loan Agreement, dated as of February 28, 2019, by and between Groton Station Fuel Cell, LLC and Fifth Third Bank and all "Loan Documents" (as defined therein), in each case, as heretofore amended, restated, modified or supplemented, and (iv) with respect to the CCSU Project and the Project Company in respect of the CCSU Project, that certain Loan Agreement, dated as of April 9, 2019, by and between New Britain Renewable Energy, LLC and Webster Bank, N.A. and all "Loan Documents" (as defined therein), in each case, as heretofore amended, restated, modified or supplemented.

"Project" or "Projects" means, individually or collectively, as the context requires, each Covered Project and each Excluded Project.

"Project Company" means each Covered Project Company and each Excluded Project Company.

"Project Disposition" means, with respect to any Project, (a) any sale, assignment or other Disposition of the Capital Stock of the applicable Project Company in respect of such Project to any Person other than a Loan Party, or (b) any sale, lease, license, transfer, assignment or other Disposition by the applicable Project Company in respect of such Project of all or any material portion of the assets or properties of such Covered Project Company, or of any rights under any Project Document, to any Person other than a Loan Party, but, in the case of this clause (b), excluding (i) sales of fuel cells or other inventory in the ordinary course of business, and (ii) sales or other Dispositions by the applicable Project Company in respect of such Project of worn out or defective equipment, or other equipment no longer used or useful to the Project that is promptly replaced by such Project Company with suitable substitute equipment of substantially the same character and quality and at least equivalent useful life and utility to the extent required by the Project or for performance under the Material Agreements to which such Project Company is a party.

"Project Disposition/Refinancing" means, with respect to any Project, any Project Disposition or Project Refinancing in respect of such Project.

"Project Disposition/Refinancing Proceeds" means (a) with respect to any Project Disposition/Refinancing in respect of a Covered Project, the aggregate net cash proceeds received by the Borrower, the Covered Project Company in respect of such Covered Project or any other Loan Party in respect of such Project Disposition/Refinancing, net of (i) reasonable costs and expenses incurred by the Borrower, the Covered Project Company in respect of such Covered Project or any other Loan Party in connection with such Project Disposition/Refinancing, (ii) any Taxes payable by the Borrower, the Covered Project Company in respect of such Covered Project or any other Loan Party in connection with such Project Disposition/Refinancing, and (iii) the aggregate amount of such proceeds that are required to be retained by such Covered Project Company by the third party lender or investor in respect of such Project Refinancing pursuant to any agreement entered into by such Covered Project Company in connection with such Project Refinancing, and (b) with respect to any Project Disposition/Refinancing in respect of an Excluded Project, the aggregate net cash proceeds received by the Borrower, the Excluded Project Company in respect of such Excluded Project or any other Subsidiary of the Borrower in respect of such Project Disposition/Refinancing, net of (i) reasonable costs and expenses incurred by the Borrower, the Excluded Project Company in respect of such Excluded Project or any other

Subsidiary of the Borrower in connection with such Project Disposition/Refinancing, (ii) any Taxes payable by the Borrower, the Excluded Project Company in respect of such Excluded Project or any other Subsidiary of the Borrower in connection with such Project Disposition/Refinancing, (iii) in the event that such proceeds are received by an Excluded Project Company in respect of a Project Disposition, the aggregate amount of any remaining outstanding Indebtedness or tax equity obligations of such Excluded Project Company after giving effect to such Project Disposition, and (iv) in the event that such proceeds are received by an Excluded Project Company in respect of a Project Refinancing, the aggregate amount of such proceeds that are required to be retained by such Excluded Project Company by the third party lender or investor in respect of such Project Refinancing pursuant to any agreement entered into by such Excluded Project Company in connection with such Project Refinancing.

"Project Documents" means, with respect to any Project, any PPA, interconnection agreement, equipment supply, engineering, procurement, and construction agreement, operation and maintenance agreement, and any other contract, agreement, instrument, permit or authorization relating to the acquisition, development, construction, ownership, development, testing, operation, maintenance, repair, insurance, management, administration or use of such Project or the business of the Project Company in respect of such Project, whether entered into by the Borrower or the applicable Project Company or any of their Affiliates as any of the foregoing may be amended or modified from time to time in accordance with the terms of this Agreement.

"Project Module Quarterly Reserve Amount" means, with respect to any Covered Project that has commenced commercial operations, an amount equal to (i) the Project Module Replacement Cost in respect of such Covered Project, *divided by* (ii) 20.

"Project Module Replacement Cost" means, with respect to any Covered Project that has commenced commercial operations, the aggregate estimated cost necessary to fund one cycle of scheduled module replacements for such Covered Project, as set forth in the then effective Operating Budget for such Covered Project; provided, that, with respect to the Groton Project, at all times on or prior to October 31, 2020, the Project Module Replacement Cost for the Groton Project shall be deemed to equal $0.

"Project Payoff Amount" means (a) with respect to the Bolthouse Project, $5,000,000, (b) with respect to the CCSU Project, $5,000,000, (c) with respect to the Groton Project, $30,000,000, (d) with respect to the San Bernardino Project, $5,000,000, (e) with respect to the Tulare Project, $5,000,000, (f) with respect to the Yaphank Project, $30,000,000, (g) with respect to the Triangle Street Project, $5,000,000, and (h) with respect to any Additional Covered Project, the amount agreed between the Borrower and the Administrative Agent as set forth in Section 2.13(a)(z).

"Project Proceeds Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Blocked Account Control Agreement.

"Project Proceeds Prepayment Notice" has the meaning assigned to such term in Section 5.18(f)(iv)(A)(I).

"Permitted Project Proceeds Use Agreement" has the meaning assigned to such term in Section 5.18(f)(iv)(B)(II).

"Permitted Project Proceeds Use Notice" has the meaning assigned to such term in Section 5.18(f)(iv)(B)(I).

"Project Refinancing" means (a) with respect to any Covered Project, (i) any incurrence of Indebtedness by the applicable Covered Project Company in respect of such Covered Project other than any such Indebtedness permitted to be incurred by such Covered Project Company under Section 6.02 (other than clause (h) thereof), or (ii) any issuance or sale of tax equity investments by the applicable Covered Project Company in respect of such Covered Project, and (b) with respect to any Excluded Project, (i) any refinancing of any Indebtedness of the applicable Excluded Project Company in respect of such Excluded Project, or (ii) any issuance or sale of tax equity investments by the applicable Excluded Project Company in respect of such Excluded Project.

"Projection" has the meaning assigned to such term in Section 3.12(b).

"Property" means any right or interest in or to property of any kind whatsoever, whether real, personal or mixed and whether tangible or intangible.

"Proposed Financing" has the meaning assigned to such term in Section 6.19(a).

"Quarterly Payment Date" means the twenty-first (21st) Business Day after the last Business Day of each January, April, July and October in each fiscal year.

"Register" has the meaning assigned to such term in Section 10.04(c).

"Regulation D" means Regulation D of the Board.

"Regulation U" means Regulation U of the Board.

"Reinvestment Notice" means a written notice executed by an Authorized Representative of Borrower stating that no Default or Event of Default has occurred and is continuing, and that the applicable Loan Party intends and expects to use all or a specified portion of the Loss Proceeds in respect of such Event of Loss to repair or restore the Business.

"Related Fund" means with respect to any Lender, any fund that invests in loans and is managed or advised by the same investment advisor as such Lender, by such Lender or an Affiliate of such Lender.

"Related Parties" means, with respect to any specified Person, such Person's Affiliates and the respective directors, officers, employees, agents and advisors of such Person and such Person's Affiliates.

"Release" means any release, spill, emission, emanation, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into or through the indoor or outdoor environment, including, the movement through ambient air, soil, surface water, ground water, wetlands, land or subsurface strata.

"Remaining Proceeds Amount" has the meaning assigned to such term in Section 5.18(f)(v).

"Replacement Agreement" means any Additional Agreement that is (i) entered into by a Borrower Group Company in replacement of any Material Agreement, (ii) in form and substance reasonably satisfactory to the Administrative Agent and (iii) is with one or more Replacement Obligors.

"Replacement Obligor" means a Person (or guarantor of such Person's obligations) that is approved by the Administrative Agent, such approval to be in the Administrative Agent's reasonable discretion.

"Reportable Event" means any of the events set forth in Section 4043(c) of ERISA, other than events for which the 30-day notice period has been waived.

"Required Debt Reserve Amount" means, as of any Quarterly Payment Date, the aggregate amount of (i) any principal or interest payments that shall become due and payable on or prior to the immediately following Quarterly Payment Date by any Borrower Group Company pursuant to the State of Connecticut Credit Agreement, and (ii) any principal or interest payments that shall become due and payable on or prior to the immediately following Quarterly Payment Date by any Borrower Group Company pursuant to the Connecticut Green Bank Credit Agreement.

"Required Debt Reserve Payment Amount" means, with respect to any Quarterly Payment Date, the maximum amount necessary to be deposited into the Debt Reserve Account on such date in order for the amount held in the Debt Reserve Account to equal the then effective Required Debt Reserve Amount.

"Required Lenders" means at any time, Lenders having Aggregate Exposure Percentages of more than 50%.

"Required Module Replacement Reserve Amount" means, as of any date, the aggregate sum of the Project Module Replacement Costs for all of the Covered Projects as of such date.

"Required Preferred Reserve Amount" means, as of any Quarterly Payment Date, the aggregate amount of (i) any accrued and unpaid dividends that are then required to be paid by the Borrower on or prior to the immediately following Quarterly Payment Date in respect of the outstanding shares of Series B Preferred Stock pursuant to the Organizational Documents of the Borrower; and (ii) any accrued and unpaid dividends that are then required to be paid by the Borrower (or, in lieu of such dividends, the amount required to redeem shares of Series 1 Preferred Stock in an amount otherwise equal to the amount of dividends that would otherwise have been paid in respect thereof) on or prior to the immediately following Quarterly Payment Date in respect of the outstanding shares of Series 1 Preferred Stock pursuant to the Organizational Documents of FCE Fuel Cell Energy Ltd.

"Required Preferred Reserve Payment Amount" means, with respect to any Quarterly Payment Date, the maximum amount necessary to be deposited into the Preferred Reserve Account on such date in order for the amount held in the Preferred Reserve Account to equal the then effective Required Preferred Reserve Amount.

"Reserve Release" means each release of cash from an Applicable Reserve pursuant to Section 5.18(l).

"Reserve Release Date" means the date that any Reserve Release is consummated pursuant to Section 5.18(l).

"Reserve Replenishment" means each deposit of cash by the Borrower into an Applicable Reserve pursuant to Section 5.27.

"Reserve Replenishment Borrowing Request" means any Borrowing Request delivered by the Borrower to the Administrative Agent during the Secondary Facility Availability Period pursuant to Section 2.01(c) to the extent that the sole use of the proceeds of the Secondary Facility Loans requested pursuant to such Borrower Requesting are to consummate a Reserve Replenishment under Section 5.27(b).

"Reserve Replenishment Secondary Facility Loans" means any Secondary Facility Loans made in respect of a Reserve Replenishment Borrowing Request.

"Restoration" means, with respect to any Affected Property, the rebuilding, repair, restoration or replacement of such Affected Property.

"Restricted Payment" means:

(a) all dividends paid by any Borrower Group Company (in cash, Property or obligations) on, or other payments or distributions on account of, or the setting apart of money for a sinking or other analogous fund for, or the purchase, redemption, retirement or other acquisition by any Borrower Group Company of, any portion of any Capital Stock of any Borrower Group Company or any warrants, rights or options to acquire any such Capital Stock (it being acknowledged that the payment of bonuses to management and employees of the Borrower Group Companies shall not constitute a Restricted Payment hereunder); and/or

(b) any payment of development, management or other fees, or of any other amounts, by any Borrower Group Company to any Affiliate thereof; and/or

(c) any other payment in cash, Property or obligations by any Borrower Group Company in respect of any Indebtedness subordinated to the Obligations hereunder.

"Restricted Project Company" means (i) Long Beach Trigen, LLC, (ii) Montville Fuel Cell Park, LLC, (iii) Eastern Connecticut Fuel Cell Properties, LLC, (iv) CR Fuel Cell, LLC, (v) BRT Fuel Cell, LLC, (vi) Derby Fuel Cell, LLC, (vii) Homestead Fuel Cell 1, LLC, (viii) Central CT Fuel Cell 1, LLC, (ix) Farmingdale Fuel Cell, LLC, (x) TRS Fuel Cell, LLC, and (xi) any future Subsidiary of the Borrower formed, created or established for the purposes of developing a Project; provided, that, any Restricted Project Company shall cease to be a Restricted Project Company hereunder upon becoming an Additional Excluded Project Company hereunder.

"Restricted Subsidiary" means each Restricted Project Company and each other Subsidiary of the Borrower that is incorporated, organized or formed under the laws of the United States, any State of the United States or the District of Columbia; provided that no Excluded Project Company, Covered Project Company or Existing Foreign Subsidiary shall be deemed a "Restricted Subsidiary" hereunder.

"Riverside Regional Water Quality Control Plant Project" means the 1.4 MW Riverside Regional Water Quality Control Plant project located in Riverside, California.

"S&P" means Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc., or any successor to the rating agency business thereof.

"San Bernardino Equipment" means the fuel cell module and other equipment set forth on the list previously provided by the Borrower to Administrative Agent in writing and acknowledged by Administrative Agent as the equipment to be transferred to San Bernardino Fuel Cell, LLC.

"San Bernardino Project" means a 1.4 MW project located in San Bernardino, California.

"Sanctioned Country" means, at any time, a country or territory that is subject to comprehensive Sanctions. For the avoidance of doubt, as of the Closing Date, Sanctioned Countries are the Crimea region of Ukraine, Cuba, Iran, North Korea and Syria.

"Sanctioned Person" means, at any time, (a) any Person listed in any Sanctions-related list of designated Persons maintained by the Office of Foreign Assets Control of the U.S. Department of the Treasury or the U.S. Department of State, or by the United Nations Security Council, the European Union or any EU member state, (b) any Person operating, organized or resident in a Sanctioned Country, or (c) any Person owned or controlled by any such Person.

"Sanctions" means economic or financial sanctions or trade embargoes imposed, administered or enforced from time to time by (a) the U.S. government, including those administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury or the U.S. Department of State, or (b) the United Nations Security Council, the European Union or Her Majesty's Treasury of the United Kingdom.

"Santa Rita Project" means the 1.4 MW Santa Rita Jail project located in Dublin, California.

"Sarbanes-Oxley Act" has the meaning assigned to such term in Section 3.05(h).

"SEC" means the United States Securities and Exchange Commission

"SEC Reports" has the meaning assigned to such term in Section 3.05(a).

"Second Amendment" means that certain Second Amendment to Credit Agreement, dated as of January 20, 2020, by and among the Borrower, each of the Guarantors party thereto, each of the Lenders party thereto, and the Administrative Agent.

"Second Amendment Effective Date" has the meaning ascribed to such term in the Second Amendment.

"Second Funding Commitments" means with respect to each Lender, the commitment of such Lender to make Loans to the Borrower pursuant to Section 2.01(a)(ii), in an aggregate principal amount set forth opposite such Lender's name on Annex I under the heading "Second Funding Commitments".

"Second Funding Covered Project" or "Second Funding Covered Projects" means, individually or collectively, as the context requires, each of (a) the CCSU Project, and (b the Groton Project.

"Second Funding Covered Project Company" means (a) with respect to the CCSU Project, New Britain Renewable Energy, LLC and (b) with respect to the Groton Project, Groton Station Fuel Cell, LLC.

"Second Funding Date" means the Funding Date following the Initial Funding Date on which all conditions precedent specified in Sections 4.03 and 4.04 are satisfied, or such other date as may be requested by Borrower and approved by the Administrative Agent in its sole and absolute discretion.

"Second Funding Date Funds Flow Memo" means a funds flow memo agreed by the Borrower and the Administrative Agent over email on or about the Second Funding Date.

"Second Funding Warrants" means those certain Warrants, to be dated as of the Second Funding Date, to be issued by the Borrower to the Orion Energy Warrant Holders, substantially in the form of Exhibit L-2 attached hereto.

"Secondary Facility Availability Period" means the period from, and including, the Secondary Facility Commencement Date through, but excluding, the Secondary Facility Termination Date.

"Secondary Facility Borrowing Request" has the meaning assigned to such term in Section 2.14(a).

"Secondary Facility Commencement Date" means June 5, 2020.

"Secondary Facility Commitment" means with respect to each Lender, the commitment of such Lender to make Loans to the Borrower pursuant to Section 2.01(a)(iii), in an aggregate principal amount equal to the amount set forth opposite such Lender's name on Annex I under the heading "Secondary Funding Commitments".

"Secondary Facility Commitment Percentage" means, with respect to any Lender as of any date of determination, a fraction (expressed as a percentage) (a) the numerator of which is equal to the Secondary Facility Commitment of such Lender as of such date of determination, and (b) the denominator of which is equal to the Aggregate Secondary Facility Commitment Amount as of such date of determination.

"Secondary Facility Funding Date" means each Funding Date during the Secondary Facility Availability Period on which all conditions precedent specified in Sections 4.04 and 4.05 are satisfied, or such other date as may be requested by Borrower and approved by the Administrative Agent in its sole and absolute discretion.

"Secondary Facility IP Collateral Documents" means a security agreement or intellectual property security agreement and any other notices, consents, acknowledgments, filings, registrations and recordings requested by the Administrative Agent, in each case, in form and substance acceptable to the Administrative Agent, necessary or advisable to create in favor of the Collateral Agent for the benefit of the Secured Parties a legal, valid and enforceable first-priority Lien on and security interest in all of the Intellectual Property of each of the Loan Parties, prior and superior to all other Liens; provided, that, the Secondary Facility IP Collateral Documents shall provide that the Liens created thereunder in the Intellectual Property of each of the Loan Parties shall automatically terminate and be released on the occurrence of the Secondary Facility Satisfaction Date. In connection with such termination and release, Administrative Agent shall execute and deliver to Borrower any such other documentation as shall be reasonably requested by Borrower to evidence the termination and release of such Liens.

"Secondary Facility Loan" means any Loan made on any Funding Date during the Secondary Facility Availability Period pursuant to Section 2.01(a)(iii).

"Secondary Facility Required Repayment Date" means September 1, 2021.

"Secondary Facility Satisfaction Date" means the first day on or following the Secondary Facility Termination Date on which the Outstanding Secondary Facility Amount shall have been reduced to zero.

"Secondary Facility Termination Date" has the meaning assigned to such term in Section 2.03(c).

"Secured Obligations" has the meaning assigned to such term in the Security Agreement.

"Secured Parties" means (a) the Agents and (b) the Lenders.

"Securities Act" means the Securities Act of 1933, as amended.

"Security Agreement" means the Pledge and Security Agreement, to be entered into on the Initial Funding Date, among the Loan Parties and the Collateral Agent, substantially in the form attached hereto as Exhibit I.

"Security Documents" means the Security Agreement, the Control Agreements, any Depositary Agreement, all Uniform Commercial Code financing statements required by any Security Document and any other security agreement or instrument to be executed or filed pursuant hereto or any Security Document.

"Series 1 Preferred Stock" means the 5% Class A Cumulative Redeemable Exchangeable Preferred Stock, $0.01 par value per share, of FCE Fuel Cell Energy Ltd.

"Series B Preferred Stock" means the 5% Series B Cumulative Convertible Perpetual Preferred Stock, $0.01 par value per share, of the Borrower.

"Seventh Modification to Lease" means a Seventh Modification to Lease N40085-12-RP-00109 in the form executed by CMEEC and disclosed by the Borrower to, and acknowledged as the "Seventh Modification to Lease" in writing by, the Administrative Agent prior to the Second Funding Date.

"Shortfall Amount" has the meaning assigned to such term in Section 5.10(e).

"Six Month Date" has the meaning assigned to such term in Section 2.06(d)(ii).

"Six Month Draw Discount" has the meaning assigned to such term in Section 2.06(d)(ii).

"Specified Business Unit" means the Borrower's fully funded third party advance technology business unit (which, for the avoidance of doubt, includes the business disclosed by the Borrower to, and acknowledged as the "Borrower's fully funded third party advance technology business" in writing by, the Administrative Agent prior to the Closing).

"Specified Business Unit Account" means a deposit account (as defined in Article 9 of the UCC) of the Borrower established and maintained at the Depositary Bank, which shall be established on or prior to the Account Establishment Date and shall at all times thereafter be subject to a Springing Account Control Agreement.

"Springing Account Control Agreement" means a springing account control agreement, in form and substance reasonably satisfactory to the Collateral Agent and the Administrative Agent, executed by the financial institution at which an account is maintained, pursuant to which such financial institution agrees that such financial institution will comply with instructions or entitlement orders originated by the Collateral Agent as to disposition of funds in such account, without further consent by any other Person.

"State of Connecticut Credit Agreement" means that certain Assistance Agreement, dated as of October 19, 2015, by and between the State of Connecticut acting by the Department of Economic and Community Development and the Borrower, as heretofore amended, restated, modified or supplemented.

"Subsidiary" means, with respect to any Person (the "parent"), any other corporation, limited liability company, partnership, association or other entity (a) of which securities or other ownership interests representing more than 50% of the equity or more than 50% of the ordinary voting power or, in the case of a partnership, more than 50% of the general partnership interests are, as of such date, owned, controlled or held, or (b) that is, as of such date, otherwise controlled, by the parent or one or more subsidiaries of the parent or by the parent and one or more subsidiaries of the parent.

"Target Debt Balance" means, as of each Quarterly Payment Date, an amount equal to the corresponding Dollar amount calculated in accordance with Schedule 1.01(c) for such Quarterly Payment Date. If any Loans are made hereunder on any date after the Initial Funding Date (including, without limitation, any Loans made on the Second Funding Date, any Loans made on any Secondary Facility Funding Date and any Loans made under Section 2.13), each such amount set forth in Schedule 1.01(c) shall be increased to an amount equal to such amount multiplied by the Additional Loan Ratio.

"Taxes" means all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

"Termination Value" means, in respect of any one or more Hedging Agreement, after taking into account the effect of any legally enforceable netting agreement relating to such Hedging Agreements, (a) for any date on or after the date such Hedging Agreements have been closed out and termination value(s) determined in accordance therewith, such termination value(s), and (b) or any date prior to the date referenced in clause (a), the amount(s) determined as the mark-to-market value(s) for such Hedging Agreements, as determined based upon one or more mid-market or other readily available quotations provided by any recognized dealer in such Hedging Agreements (which may include a Lender or any Affiliate of a Lender).

"Third Amendment" means that certain Third Amendment to Credit Agreement, dated as of February 6, 2020, by and among the Borrower, each of the Guarantors party thereto, each of the Lenders party thereto, and the Administrative Agent.

"Third Amendment Effective Date" has the meaning ascribed to such term in the Third Amendment.

"Trademarks" means all domestic, foreign and multinational trademarks, service marks, trade names, corporate names, company names, business names, fictitious business names, trade dress, trade styles, logos, Internet domain names, other indicia of origin or source identification, and general intangibles of a like nature, whether registered or unregistered, and, with respect to the foregoing, all registrations and applications for registration thereof, all extensions and renewals thereof, and all of the goodwill of the business connected with the use of and symbolized by any of the foregoing.

"Trading Market" means whichever of the New York Stock Exchange, the NYSE MKT, the NASDAQ Global Select Market, the NASDAQ Global Market, the NASDAQ Capital Market or the OTCBB on which the Common Stock is listed or quoted for trading on the date in question.

"Transaction Document" means each of the Financing Documents, the Warrants and the Observer Rights Agreement.

"Triangle Joinder Date" has the meaning specified in Section 5.26(b).

"Triangle Street Project" means the 3.7 MW Triangle Street SureSource 4000 project located in Danbury, Connecticut.

"Tulare Construction Budget" means the Construction Budget as provided by the Borrower to, and acknowledged as the "Tulare Construction Budget" in writing by, the Administrative Agent on November 21, 2019, as may be modified from time to time in accordance with Section 5.21.

"Tulare Construction Schedule" means the Construction Schedule as provided by the Borrower to, and acknowledged as the "Tulare Construction Schedule" in writing by, the Administrative Agent prior to the Closing Date, as may be modified from time to time in accordance with Section 5.21.

"Tulare Project" means the 2.8 MW Tulare BioMAT project located in Tulare, California.

"UC Irvine Medical Center Project" means the 1.4 MW UC Irvine Medical Center project located in Orange, California.

"UCC" means the Uniform Commercial Code as in effect from time to time in the State of New York; provided that if, with respect to any filing statement or by reason of any mandatory provisions of law, the perfection or the effect of perfection or non-perfection of the security interests granted to the Collateral Agent pursuant to the applicable Security Document is governed by the Uniform Commercial Code as in effect in a jurisdiction of the United States other than New York, UCC means the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions of each applicable Financing Document and any filing statement relating to such perfection or effect of perfection or non-perfection.

"Uniform Commercial Code" means the Uniform Commercial Code as in effect from time to time in the applicable jurisdiction.

"US Code" means the U.S. Internal Revenue Code of 1986, as amended.

"US Person" means any Person that is a "United States Person" as defined in Section 7701(a)(30) of the Code.

"USA PATRIOT Act" has the meaning assigned to such term in Section 10.15.

"U.S. Wholly Owned Subsidiary" any Subsidiary of the Borrower (i) that is incorporated, organized or formed under the laws of the United States, any State of the United States or the District of Columbia, and (ii) 100% of the Capital Stock of which is directly owned and held by the Borrower or any other Loan Party (other than an Excluded Project Company).

"Warrants" means, collectively, the Initial Funding Warrants and the Second Funding Warrants.

"Warrant Shares" means, collectively, and shares of the Borrower's Common Stock or any other Capital Stock issuable upon exercise of the Warrants.

"Write-Down and Conversion Powers" means, with respect to any EEA Resolution Authority, the write-down and conversion powers of such EEA Resolution Authority from time to time under the Bail-In Legislation for the applicable EEA Member Country, which write-down and conversion powers are described in the EU Bail-In Legislation Schedule.

"Yaphank Project" means the 7.4 MW LIPA Yaphank Solid Waste Management project located in Brookhaven, New York.

"Yaphank Construction Budget" means the Construction Budget as provided by the Borrower to, and acknowledged as the "Yaphank Construction Budget" in writing by, the Administrative Agent on November 21, 2019, as may be modified from time to time in accordance with Section 5.21.

"Yaphank Construction Schedule" means the Construction Schedule as provided by the Borrower to, and acknowledged as the "Yaphank Construction Schedule" in writing by, the Administrative Agent prior to the Closing Date, as may be modified from time to time in accordance with Section 5.21.

Section 1.02 Terms Generally. Except as otherwise expressly provided, the following rules of interpretation shall apply to this Agreement and the other Financing Documents:

(a) the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined;

(b) whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms;

(c) the words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation";

(d) the word "will" shall be construed to have the same meaning and effect as the word "shall";

(e) unless the context requires otherwise, any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein or therein) and shall include any appendices, schedules, exhibits, clarification letters, side letters and disclosure letters executed in connection therewith;

(f) any reference herein to any Person shall be construed to include such Person's successors and assigns to the extent permitted under the Financing Documents and, in the case of any Governmental Authority, any Person succeeding to its functions and capacities;

(g) the words "herein", "hereof" and "hereunder", and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision;

(h) all references herein to Articles, Sections, Appendices, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Appendices, Exhibits and Schedules to, this Agreement; and

(i) the words "asset" and "property" shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

Section 1.03 Accounting Terms . Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with GAAP. If the Borrower notifies the Administrative Agent that the Borrower wishes to amend any provision hereof to eliminate the effect of any change occurring after the date hereof in GAAP or in the application thereof on the operation of such provision, regardless of whether any such notice is given before or after such change in GAAP or in the application thereof, then the Borrower's compliance with such provision shall be determined on the basis of GAAP as in effect and applied immediately before such change shall have become effective until such notice shall have been withdrawn or such provision amended in a manner satisfactory to the Borrower and the Required Lenders; provided that Capital Lease Obligations shall be construed in accordance with GAAP as in effect on the Initial Funding Date, notwithstanding any changes to GAAP occurring after the Initial Funding Date.

ARTICLE II

THE CREDITS

Section 2.01 Loans

.

(a) Commitments.

(i) Subject to the terms and conditions set forth herein (including, without limitation, the conditions set forth in Sections 4.01, 4.02, and 4.04), each Lender agrees to make Loans to Borrower on the Initial Funding Date, as requested by Borrower pursuant to Section 2.01(c), in an aggregate principal amount equal to the Initial Funding Commitments.

(ii) Subject to the terms and conditions set forth herein (including, without limitation, the conditions set forth in Sections 4.01, 4.03, and 4.04), each Lender agrees to make Loans to Borrower on the Second Funding Date, as requested by Borrower pursuant to Section 2.01(c), in an aggregate principal amount equal to the Second Funding Commitments.

(iii) Subject to the terms and conditions set forth herein (including, without limitation, the provisions of Section 2.14 and the conditions set forth in Sections 4.04 and 4.05), each Lender having a Secondary Facility Commitment agrees to make Loans (consisting of Secondary Facility Loans and/or Reserve Replenishment Secondary Facility Loans) to Borrower, from time to time during the Secondary Facility Availability Period, on one or more Secondary Facility Funding Dates as requested by Borrower pursuant to Section 2.01(c) (but subject to Section 2.14), in an aggregate principal amount not to exceed such Lender's Secondary Facility Commitment; provided, that, no Lender shall be

required to make a Secondary Facility Loan under this Section 2.01(a)(iii) if, immediately after giving effect to the making of such Secondary Facility Loan and any contemporaneous Reserve Replenishment in respect thereof, either (A) the Aggregate Secondary Facility Usage Amount would exceed the Aggregate Secondary Facility Commitment Amount, or (B) the aggregate principal amount of all Secondary Facility Loans made by such Lender would exceed such Lender's Secondary Facility Commitment Amount.

(b) No Reborrowing. Amounts prepaid or repaid in respect of any Loan may not be reborrowed.

(c) Procedures for Borrower.

(i) Subject to Sections 4.02, ~~4.03~~4.03, 4.04, 4.05 and/or ~~4.04,~~2.14, as applicable, and except as otherwise provided herein, the Borrower may request the Lenders to make Loans to the Borrower by delivery to the Administrative Agent, on any Business Day, of a Borrowing Request in the form attached as Exhibit C hereto. The date of the proposed borrowing (each such date, a "Funding Date") specified in a Borrowing Request shall be no earlier than twelve (12) Business Days after the delivery of such Borrowing Request; provided, that, notwithstanding the foregoing, the initial Funding Date hereunder shall occur on the Initial Funding Date without giving effect to such required twelve (12) Business Day period. Unless otherwise provided herein, each Borrowing Request shall be irrevocable and shall specify (i) the aggregate principal amount of the borrowing requested, and (ii) the proposed Funding Date (which shall be a Business Day).

(ii) Borrower shall not deliver a Borrowing Request for Loans, and, subject to Sections 2.07(e) and 2.13, the Lenders shall be under no obligation to make available any funds for any Loans, on any Funding Date in an aggregate amount for all Lenders exceeding (A) in the case of the Initial Funding Date, the Initial Funding Commitments, ~~and~~ (B) in the case of the Second Funding Date, the Second Funding Commitments~~.~~, and (C) in the case of any Secondary Facility Funding Date, an amount that, after giving effect to such Secondary Facility Loans made on such Secondary Facility Funding Date, would not result in either (x) the Aggregate Secondary Facility Usage Amount exceeding the Aggregate Secondary Facility Commitment Amount, or (y) the aggregate principal amount of all Secondary Facility Loans made by any Lender exceeding such Lender's Secondary Facility Commitment Amount. Borrower shall not deliver a Secondary Facility Borrowing Request for Secondary Facility Loans if (A) the amount of Secondary Facility Loans requested therein shall be less than $5,000,000 or (B) except with respect to a Secondary Facility Borrowing Request delivered on or after August 15, 2020 requesting an amount of Secondary Facility Loans that, after giving thereto, would result in the Aggregate Secondary Facility Usage Amount equaling the Aggregate Secondary Facility Commitment Amount, the amount of Secondary Facility Loans requested therein, when aggregated with the total amount of Secondary Facility Loans made and Reserve Releases consummated during the 30 day period immediately prior to the Secondary Facility Funding Date specified therein, shall exceed $15,000,000.

(d) Notice by the Administrative Agent to the Lenders. ~~Promptly~~Subject to Section 2.14 with respect to any Borrowing Request in respect of Secondary Facility Loans under Section 2.01(a)(iii), promptly following receipt of a Borrowing Request in accordance with this Section 2.01, the Administrative Agent shall advise each Lender of the details thereof and of the amount of such Lender's Loan to be made as part of the requested borrowing.

(e) Tax Considerations. For U.S. federal income tax purposes, each of the Borrower, the Guarantors and the Lenders agrees: (i) that the Initial Loans, together with the Initial Funding Warrants (including the rights granted thereunder to the Holders, as defined therein), shall be treated as an investment unit, and the purchase price of each such investment unit shall equal the total purchase price paid by the Lenders for the Initial Loans on the Initial Funding Date, and $577,778 of the purchase price of the investment unit shall, for U.S. federal income tax purposes, be allocated to the purchase of the Initial Funding Warrants; (ii) that the Loans funded on the Second Funding Date, together with the Second Funding Warrants (including the rights granted thereunder to the Holders, as defined therein), shall be treated as an investment unit, and the purchase price of each such investment unit shall equal the total purchase price paid by the Lenders for such Loans on the Second Funding Date, and $1,228,164 of the purchase price of the investment unit shall, for U.S. federal income tax purposes, be allocated to the purchase of the Second Funding Warrants; and (iii) to treat the Loans as a debt instrument, and not as a "contingent payment debt instrument," for U.S. federal and state income tax purposes. The Borrower will provide any information reasonably requested from time to time by any Lender regarding the original issue discount associated with the Loans for U.S. federal income tax purposes. Each of Borrower and the Lenders agrees to file tax returns consistent with the allocation set forth in this paragraph. Notwithstanding the foregoing, for all purposes (except for the purpose of this Section 2.01(e)), each Lender shall be treated as having lent the full amount of its pro rata portion of the principal amount of the Loans.

Section 2.02 Funding of the Loans. ~~If~~Subject to Section 2.14 with respect to any Secondary Facility Loans to be made under Section 2.01(a)(iii) on any Secondary Facility Funding Date, if the Borrower has satisfied the conditions set forth in Section ~~4.02~~4.02, 4.03 or ~~4.03,~~4.05, as applicable, and Section 4.04, not later than 12:00 Noon, New York City time, on the applicable Funding Date, each Lender shall make available to the Administrative Agent at the Funding Office an amount in Dollars and in immediately available funds equal to the Loans to be made by such Lender; provided, that, subject to Section 2.14 and the other provisions hereof, with respect to any Secondary Facility Loans to be made under Section 2.01(a)(iii) on any Secondary Facility Funding Date, the portion of such Loans to be made by each Lender on such Secondary Facility Funding Date shall equal, with respect to each such Lender, the product of (x) such Lender's Secondary Facility Commitment Percentage, times (y) the aggregate principal amount of the Secondary Facility Loans to be made by the Lenders under Section 2.01(a)(iii) on such Secondary Facility Funding Date. Administrative Agent shall deposit the aggregate of the amounts made available to Administrative Agent by the Lenders, in like funds as received by Administrative Agent, into the Borrower Funding Account in accordance with the Borrowing Request or as otherwise agreed between the Administrative Agent and the Borrower pursuant to any funds flow memorandum delivered in connection therewith; provided, that, with respect to any Secondary Facility Loans made under Section 2.01(a)(iii) on any Secondary Facility Funding Date, (A) in the event that such Secondary Facility Loans are Reserve Replenishment Secondary Facility Loans, Administrative Agent shall, pursuant to Section 5.27(b), deposit the aggregate of the amounts made available to

Administrative Agent by the Lenders, in like funds as received by Administrative Agent, into the applicable Applicable Reserve (or Applicable Reserves) specified by the Borrower in the applicable Reserve Replenishment Borrowing Request, and (B) in the event that such Secondary Facility Loans are not Reserve Replenishment Secondary Facility Loans, Administrative Agent shall deposit the aggregate of the amounts made available to Administrative Agent by the Lenders, in like funds as received by Administrative Agent, into the Business Unit Account specified by the Borrower in the applicable Borrowing Request. With respect to the Initial Loans, the Administrative Agent shall distribute the funds in accordance with the Funds Flow Memorandum. With respect to the Loans funded on the Second Funding Date, the Administrative Agent shall distribute the funds in accordance with the Second Funding Date Funds Flow Memo.

Section 2.03 Termination and Reduction of the Commitments.

(a) The Initial Funding Commitments shall automatically and without notice be reduced to zero and terminated upon the close of business on October 31, 2019 in the event that the Initial Funding Date has not occurred on or prior to such date.

(b) The Second Funding Commitments shall automatically and without notice be reduced to zero and terminated upon the close of business on December 31, 2019 in the event that the Second Funding Date has not occurred on or prior to such date.

(c) The Secondary Facility Commitments shall automatically and without notice be reduced to zero and terminated on the earliest of (i) the date on which an Event of Default shall occur, (ii) the date on which the Aggregate Secondary Facility Usage Amount shall equal the Aggregate Secondary Facility Commitment Amount, or (iii) September 14, 2020 (the earliest of clauses (i), (ii) and (iii) is herein referred to as the "Secondary Facility Termination Date"). In addition, upon delivery of irrevocable written notice to the Administrative Agent, the Borrower may at any time permanently terminate in full all of the unfunded Secondary Facility Commitments.

(d) ~~(c)~~ In the event that the Lenders shall have not funded at least $65,500,000 in aggregate principal amount of Loans in respect of the Second Funding Commitments (less, for, the avoidance of doubt, certain items in accordance with the Second Funding Date Funds Flow Memo) on or prior to November 22, 2019, the Borrower may, upon delivery to the Administrative Agent of written notice thereof at any time after November 22, 2019 but prior to the earlier of the occurrence of the satisfaction of the foregoing and December 31, 2019 (a "Second Funding Termination Notice"), elect to terminate the Second Funding Commitments and prepay the Obligations under Section 2.05(b)(v).

Section 2.04 Repayment of Loan; Evidence of Debt.

(a) Promise to Repay at Maturity. Borrower hereby unconditionally promises to pay to the Administrative Agent for the account of the Lenders, the unpaid principal amount of the Loans (including all amounts added to principal as Accrued Interest pursuant to Section 2.07(e)) on the Maturity Date then outstanding. Borrower hereby further agrees to pay interest on the unpaid principal amount of each Loan from time to time outstanding from the applicable Funding

Date until payment in full in cash thereof at the rates per annum, and on the dates, set forth in Section 2.07.

(b) Evidence of Debt.

(i) Each Lender may maintain in accordance with its usual practice an account or accounts evidencing the Indebtedness of the Borrower to such Lender resulting from the Loans made by such Lender from time to time, including the amounts of principal and interest payable and paid to such Lender from time to time hereunder. In the case of a Lender that does not request execution and delivery of a Note evidencing the Loans made by such Lender to the Borrower, such account or accounts shall, to the extent not inconsistent with the notations made by the Administrative Agent in the Register, be conclusive and binding on the Borrower absent manifest error; provided that the failure of any Lender to maintain such account or accounts or any error in any such account shall not limit or otherwise affect any obligations of the Borrower.

(ii) The Borrower agrees that, upon the request to the Administrative Agent by any Lender, the Borrower will promptly execute and deliver to such Lender a promissory note (a "Note") substantially in the form of Exhibit B payable to such Lender in an amount equal to such Lender's Loan evidencing the Loans made by such Lender. The Borrower hereby irrevocably authorizes each Lender to make (or cause to be made) appropriate notations on the grid attached to such Lender's Notes (or on any continuation of such grid) with respect to each payment or prepayment of, and each addition of Accrued Interest to, the principal of the Loans evidenced thereby, which notations, if made, shall evidence, inter alia, the date of, the outstanding principal amount of, and the interest rate applicable to the Loans evidenced thereby; provided that (i) notwithstanding any such notation or the absence thereof, as set forth in Section 2.07(f), the Agent's determination of the principal amount of the Loans outstanding at any time shall be conclusive and binding on all parties absent manifest error; and (ii) the failure of any Lender to make any such notations or any error in any such notations shall not limit or otherwise affect any obligations of the Borrower. A Note and the obligation evidenced thereby may be assigned or otherwise transferred in whole or in part only in accordance with Section 10.04(b).

Section 2.05 Prepayment of the Loan.

(a) Optional Prepayments.

(i) The Borrower shall have the right at any time and from time to time, upon at least ten (10) Business Days' written notice to the Administrative Agent stating the prepayment date and aggregate principal amount of the prepayment, to prepay any Loan in whole or in part, and subject to the requirements of this Section 2.05. Each prepayment pursuant to this Section 2.05(a)(i) shall be accompanied by the Prepayment Premium, if any, with respect to the principal amount of the Loans being prepaid. Each partial prepayment of any Loans under this Section 2.05(a)(i) shall be in an aggregate amount for the Loans of all Lenders at least equal to $1,000,000 or an integral multiple of $500,000 in excess thereof (or such lesser amount as may be necessary to prepay the aggregate principal amount then outstanding with respect to all of the Loans of all Lenders).

(ii) At any time after the Secondary Facility Commencement Date but prior to the Secondary Facility Required Repayment Date, the Borrower shall have the right at any time and from time to time, upon at least ten (10) Business Days' prior written notice to the Administrative Agent stating that the Borrower is electing to make a prepayment under this Section 2.05(a)(ii), the prepayment date and aggregate principal amount of the prepayment, to prepay a portion of the outstanding Loans in an amount not in excess of the Outstanding Secondary Facility Loan Amount as of the date of such prepayment, and subject to the requirements of this Section 2.05. Each partial prepayment of any Loans under this Section 2.05(a)(ii) shall be in an aggregate amount for the Loans of all Lenders at least equal to $1,000,000 or an integral multiple of $500,000 in excess thereof (or such lesser amount as may be necessary to prepay an aggregate principal amount equal to the Outstanding Secondary Facility Loan Amount as of the date of such prepayment). For the avoidance of doubt, the Borrower shall be entitled to use funds contained in the Business Unit Accounts to make any prepayment under this Section 2.05(a)(ii) that is otherwise permitted hereunder.

(b) Mandatory Prepayments and Offers to Prepay.

(i) Event of Loss. With respect to any Event of Loss, if the proceeds received by any Loan Party, any Existing Foreign Subsidiary or any Affiliate thereof in respect of such Event of Loss shall be in excess of $1,000,000 per individual Event of Loss or $2,000,000 in the aggregate per calendar year across all Events of Loss, and, in any such case, are not applied to the Restoration of the related Affected Property as permitted by the immediately succeeding sentence, then the Borrower shall offer to prepay the Loans with an amount equal to 100% of the Net Available Amount with respect to such Event of Loss, pursuant to a written notice sent to the Administrative Agent and the Lenders describing in reasonable detail the event giving rise to the obligation under this Section 2.05(b)(i) to make such offer (each such offer to prepay referred to in this Section 2.05(b)(i), a "Event of Loss Prepayment Offer"). Notwithstanding the foregoing, the Borrower may use Loss Proceeds received in respect of any Event of Loss for the reinvestment of such funds in the Restoration of the Affected Property if the Borrower shall have delivered to the Administrative Agent a Reinvestment Notice and a restoration plan reasonably acceptable to the Administrative Agent and such reinvestment is applied in accordance with such approved restoration plan. The Borrower shall cause all Loss Proceeds to be received in respect of any Event of Loss to be deposited in the Mandatory Prepayment Account in accordance with Section 5.18(h) and such Loss Proceeds shall be retained in the Mandatory Prepayment Account in accordance with Section 5.18(h) until such amounts are applied either (x) to the Restoration of the related Affected Property as permitted above or (y) applied to make a prepayment of Loans in connection with an Event of Loss Prepayment Offer pursuant to this clause (i).

(ii) Disposition of Assets. Without limiting the obligation of each Loan Party to obtain the consent of the Required Lenders to any sale, transfer or other disposition of any assets or property other than any Event of Loss (herein, a "Disposition") not otherwise permitted hereunder, in the event that the Net Available Amount of any Disposition of any Loan Party or any Existing Foreign Subsidiary (other than any Disposition consisting of

(x) sales of fuel cells or other inventory in the ordinary course of business or (y) a Permitted Project Disposition/Refinancing) shall exceed $500,000 per individual event or $1,000,000 in the aggregate per calendar year for all such Dispositions, then the Borrower shall offer to prepay the Loans ratably in an amount equal to 100% of the Net Available Amount of the Disposition on the Quarterly Payment Date immediately following receipt by any Loan Party or any Existing Foreign Subsidiary of the relevant proceeds; provided that the Borrower shall not be required to prepay the Loans pursuant to this Section 2.05(b)(ii) to the extent that a Loan Party reinvests the Net Available Amount (or any portion thereof) of any such Disposition in substantially similar assets of a Loan Party that are necessary or useful for the Business pursuant to a transaction not prohibited hereunder and such Net Available Amount is so reinvested within 120 days of such Disposition, and any uninvested portion of such Net Available Amount shall be promptly applied to prepayments as contemplated by this Section 2.05(b)(ii). Any such offer to prepay shall be made pursuant to a written notice sent to the Administrative Agent and the Lenders describing in reasonable detail the event giving rise to the obligation under this Section 2.05(b)(ii) to make such offer (each such offer to prepay referred to in this Section 2.05(b)(ii), a "Disposition Proceeds Prepayment Offer"). The Borrower shall cause all proceeds to any Loan Party or any Existing Foreign Subsidiary of any Disposition (other than any Disposition consisting of (x) sales of fuel cells or other inventory in the ordinary course of business or (y) a Permitted Project Disposition/Refinancing) to be deposited in the Mandatory Prepayment Account in accordance with Section 5.18(h) and such proceeds shall be retained in the Mandatory Prepayment Account in accordance with Section 5.18(h) until such amounts are applied either (x) to reinvest in substantially similar assets of a Loan Party that are necessary or useful for the Business as permitted above or (y) applied to make a prepayment of Loans in connection with a Disposition Proceeds Prepayment Offer pursuant to this clause (ii).

(iii) Incurrence of Debt. ~~If~~Except with respect to any such net cash proceeds required to be applied pursuant to Section 2.05(b)(vii)(1) or 2.05(b)(vii)(2) below during the period from and after the Fifth Amendment Effective Date until the occurrence of the Secondary Facility Satisfaction Date, if any Borrower Group Company issues or incurs any Indebtedness (other than Permitted Indebtedness), Borrower shall, within one (1) Business Day of the receipt by any Borrower Group Company of the net cash proceeds therefrom, offer to prepay the Loans with an amount equal to 100% of the cash proceeds of such Indebtedness, pursuant to a written notice sent to the Administrative Agent and the Lenders describing in reasonable detail the event giving rise to the obligation under this Section 2.05(b)(iii) to make such offer (each such offer to prepay referred to in this this Section 2.05(b)(iii), a "Debt Prepayment Offer"). The Borrower shall cause all proceeds to any Borrower Group Party from an issuance of incurrence of Indebtedness (other than Permitted Indebtedness) to be deposited in the Mandatory Prepayment Account in accordance with Section 5.18(h) and such proceeds shall be retained in the Mandatory Prepayment Account in accordance with Section 5.18(h) until such amounts are applied to make a prepayment of Loans in connection with a Debt Prepayment Offer pursuant to this clause (iii).

(iv) Excess Cash Flow Sweep. On each Quarterly Payment Date, Borrower shall offer to prepay the Loans of each Lender pursuant to a written notice sent to the

Administrative Agent and the Lenders in an amount equal to such Lender's pro rata share of the aggregate amount deposited in the ECF Offer Account on such Quarterly Payment Date pursuant to Section 2.08(e) (each such offer to prepay referred to in this this Section 2.05(b)(iv), an "ECF Prepayment Offer").

(v) Second Funding Termination Prepayment. In the event that the Borrower shall deliver a Second Funding Termination Notice pursuant to Section 2.03(ed), the Borrower shall repay the full outstanding amount of the Loans on or prior to May 15, 2020 following the Second Funding Commitment Termination Date, together with accrued interest thereon and all reimbursements, fees and other Obligations of the Borrower accrued hereunder or under the Financing Documents (including the Prepayment Premium).

(vi) Secondary Facility Required Repayment. On the Secondary Facility Required Repayment Date, the Borrower shall pay to the Administrative Agent, for the account of the Lenders, a principal amount of the outstanding Loans equal to the Outstanding Secondary Facility Loan Amount as of the Secondary Facility Required Repayment Date, together with all accrued and unpaid interest on such principal amount through such date. For the avoidance of doubt, the Borrower shall be entitled to use funds contained in the Business Unit Accounts to make any payment required under this Section 2.05(b)(vi).

(vii) Capital Raise Required Repayment. If, at any time from and after the Fifth Amendment Effective Date until the occurrence of the Secondary Facility Satisfaction Date, any Borrower Group Company (x) issues or incurs any Indebtedness (other than Permitted Indebtedness) (an "Applicable Debt Issuance"), or (y) issues or sells any Capital Stock or any option, warrant or other instrument, security or right that is convertible into or exercisable or exchangeable for any Capital Stock (other than, in the case of this clause (y), (a) any Capital Stock or options issued by the Borrower to any employee, director or independent contractor of the Company approved by the Board of Directors of the Borrower, and (b) any Capital Stock issued by the Borrower pursuant to any warrants, options or other convertible securities outstanding as of the Fifth Amendment Effective Date) (an "Applicable Equity Issuance"), the Borrower shall, within two (2) Business Days of the receipt by any Borrower Group Company of the net cash proceeds therefrom, (1) first, to the extent of the Outstanding Reserve Release Amount as of such date, apply either (i) in the case of an Applicable Debt Issuance, up to one hundred (100%) percent of such net cash proceeds (such amount, the "Applicable Debt Proceeds Amount"), or (ii) in the case of an Applicable Equity Issuance, up to fifty (50%) of such net cash proceeds (such amount, the "Applicable Equity Proceeds Amount"), in either such case, to make a Reserve Replenishment pursuant to Section 5.27(c) in an amount equal to the lesser of (A) the Applicable Debt Proceeds Amount or Applicable Equity Proceeds Amount, as applicable, and (B) the Outstanding Reserve Release Amount as of such date, and (2) second, after making any Reserve Replenishment required pursuant to clause (1) above, apply the remaining Applicable Debt Proceeds Amount or Applicable Equity Proceeds Amount, as applicable, to make a mandatory prepayment of Loans on such date in a principal amount equal to the lesser of (A) the Outstanding Secondary Facility Loan Amount as of such date and (B) the remaining Applicable Debt Proceeds Amount or Applicable Equity Proceeds

Amount, as applicable (after giving effect to any application of any portion of the Applicable Debt Proceeds Amount or Applicable Equity Proceeds Amount, as applicable, under clause (1) above).

Notwithstanding the foregoing clauses (i) through (iv), Borrower shall be permitted to request a waiver of the requirement to deliver an Event of Loss Prepayment Offer, a Disposition Proceeds Prepayment Offer, a Debt Prepayment Offer, or an ECF Prepayment Offer, which waiver may be accepted or rejected by the Administrative Agent in its sole and absolute discretion.

(c) Terms of All Prepayments.

(i) All partial prepayments of the Loans shall be applied, on a pro rata basis to the Loans of each Lender.

(ii) Each prepayment of Loans shall be accompanied by payment of all accrued interest on the amount prepaid, the Prepayment Premium, if any, and any additional amounts required pursuant to Section 2.09; provided that no Prepayment Premium shall be due in respect of any prepayment under Section 2.05(a)(ii), Section 2.05(b)(iv), Section 2.05(b)(vi) or Section 2.05(b)(vii).

(iii) No later than ten (10) Business Days after receiving an Event of Loss Prepayment Offer, a Disposition Proceeds Prepayment Offer, a Debt Prepayment Offer or an ECF Prepayment Offer, each Lender shall advise the Borrower in writing whether it has elected to accept such prepayment offer, which it shall determine in its sole and absolute discretion. Each of the Lenders shall have the right, but not the obligation, to accept or reject such prepayment offer by the Borrower. In connection with any prepayment pursuant to Section 2.05(b)(i) and/or 2.05(b)(ii), the amount of the Loans prepaid shall be calculated so that the total amount of Loans prepaid, the accrued but unpaid interest on such Loans and any Prepayment Premium applicable to such prepayment of Loans shall be no more than the Net Available Amount.

(iv) It is understood and agreed that if the Obligations are accelerated or otherwise become due prior to their maturity date, in each case, in respect of any Event of Default (including, but not limited to, upon the occurrence of a bankruptcy or insolvency event (including the acceleration of claims by operation of law)), the Prepayment Premium that would have applied if, at the time of such acceleration, Borrower had prepaid, refinanced, substituted or replaced any or all of the Loans as contemplated in Section 2.05(a)(i) (any such event, a "Prepayment Premium Event"), will also be due and payable without any further action (including, without limitation, any notice requirements otherwise applicable to Prepayment Premium Events, if any) as though a Prepayment Premium Event had occurred and such Prepayment Premium shall constitute part of the Obligations, in view of the impracticability and extreme difficulty of ascertaining actual damages and by mutual agreement of the parties as to a reasonable calculation of each Lender's lost profits as a result thereof. Any Prepayment Premium payable above shall be presumed to be the liquidated damages sustained by each Lender as the result of the early termination and Borrower agrees that it is reasonable under the circumstances currently existing. The Prepayment Premium shall also be payable in the event the Obligations (and/or this Agreement) are satisfied or released by foreclosure (whether by power of judicial proceeding), deed in lieu of foreclosure or by any other means. EACH LOAN PARTY EXPRESSLY WAIVES (TO THE FULLEST EXTENT IT MAY LAWFULLY DO SO) THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING PREPAYMENT PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION. Each Loan Party expressly agrees (to the fullest extent that each may lawfully do so) that: (A) the Prepayment Premium is reasonable and is the product of an arm's length transaction between sophisticated business people, ably represented by counsel; (B) the Prepayment Premium shall be payable notwithstanding the then prevailing market rates at the time payment is made; (C) there has been a course of conduct between Lenders and the Loan Parties giving specific consideration in this transaction for such agreement to pay the Prepayment Premium; and (D) the Loan Parties shall be estopped hereafter from claiming differently than as agreed to in this paragraph. Each Loan Party expressly acknowledges that its agreement to pay the Prepayment Premium to Lenders as herein described is a material inducement to Lenders to provide the Commitments and make the Loan.

Section 2.06 Reimbursements and Fees.

(a) Agent Reimbursements. The Borrower agrees to pay to each of the Administrative Agent and the Collateral Agent, for its own account, amounts payable in the amounts and at the times separately agreed upon in the Agent Reimbursement Letter.

(b) Payment of Reimbursements. All reimbursements payable hereunder shall be paid on the dates due, in Dollars and immediately available funds, to the Administrative Agent for distribution to the Lenders entitled thereto. Reimbursements paid shall not be refundable under any circumstances absent manifest error.

(c) Option Premium. The Borrower shall pay to the Administrative Agent, for the account of each of the Lenders that shall have made a Secondary Facility Commitment, an option premium (the "Option Premium") in an aggregate amount equal to $1,000,000. The Option

Premium shall be fully earned on the Fifth Amendment Effective Date and shall be due and payable by the Borrower to the Administrative Agent in cash on the earlier of (x) September 14, 2020 and (y) the Secondary Facility Satisfaction Date. The Option Premium shall be allocated among, and paid to, each Lender that shall have made a Secondary Facility Commitment in proportion to the Secondary Facility Commitments of each such Lender as of the Fifth Amendment Effective Date. The Option Premium shall not be subject to offset and, once paid, shall not be refundable for any reason whatsoever.

(d) Draw Discounts.

(i) Initial Draw Discount.

(A) With respect to each Secondary Facility Loan made on any Secondary Facility Funding Date (other than any Reserve Replenishment Secondary Facility Loan), the Borrower shall pay to the Administrative Agent, for the account of each of the Lenders that shall have made a Secondary Facility Commitment, an initial draw discount (each, an "Initial Loan Draw Discount") equal to five (5%) percent of the initial principal amount of such Secondary Facility Loan.

(B) With respect to each Reserve Release consummated on any Reserve Release Date, the Borrower shall pay to the Administrative Agent, for the account of each of the Lenders that shall have made a Secondary Facility Commitment, an initial draw discount (each, an "Initial Reserve Draw Discount", and collectively, together with the Initial Loan Draw Discounts, each, an "Initial Draw Discount", and collectively, the "Initial Draw Discounts") equal to five (5%) percent of the amount of such Reserve Release.

(C) For the avoidance of doubt, (x) no Initial Draw Discount shall be payable hereunder with respect to any Reserve Replenishment Secondary Facility Loan, and (y) an Initial Draw Discount shall be payable hereunder with respect to each Secondary Facility Loan (other than any Reserve Replenishment Secondary Facility Loan) made hereunder and each Reserve Release consummated hereunder.

(D) Each Initial Draw Discount shall be fully earned on the applicable Secondary Facility Funding Date or Reserve Release Date and shall be due and payable by the Borrower to the Administrative Agent in accordance with Section 2.06(d)(iv) below.

(ii) Six Month Additional Draw Discount. In the event that the Secondary Facility Satisfaction Date shall have not occurred on or prior the date that is six months following the First Secondary Facility Draw Date (the "Six Month Date"), the Borrower shall pay to the Administrative Agent, for the account of each of the Lenders that shall have made a Secondary Facility Commitment, an additional draw discount (the "Six Month Draw Discount") equal to ten (10%) percent of the Outstanding Secondary Facility Amount as of the Six Month Date. The Six Month Draw Discount shall be fully earned on the Six

Month Date and shall be due and payable by the Borrower to the Administrative Agent in accordance with Section 2.06(d)(iv) below.

(iii) Nine Month Additional Draw Discount. In the event that the Secondary Facility Satisfaction Date shall have not occurred on or prior the date that is nine months following the First Secondary Facility Draw Date (the "Nine Month Date"), the Borrower shall pay to the Administrative Agent, for the account of each of the Lenders that shall have made a Secondary Facility Commitment, an additional draw discount (the "Nine Month Draw Discount", and together with the Initial Draw Discounts and the Six Month Draw Discount, collectively, the "Draw Discounts") equal to twenty (20%) percent of the Outstanding Secondary Facility Amount as of the Nine Month Date. The Nine Month Draw Discount shall be fully earned on the Nine Month Date and shall be due and payable by the Borrower to the Administrative Agent in accordance with Section 2.06(d)(iv) below.

(iv) Payment of Draw Discounts. All Draw Discounts under this Section 2.06(d) shall be due and payable in cash by the Borrower to the Administrative Agent, for the account of each of the Lenders that shall have made a Secondary Facility Commitment, on the earlier of (x) the Secondary Facility Required Repayment Date and (y) the Secondary Facility Satisfaction Date. The Draw Discounts shall be allocated among, and paid to, each Lender that shall have made a Secondary Facility Commitment in proportion to the Secondary Facility Commitments of each such Lender as of the Fifth Amendment Effective Date. The Draw Discounts shall not be subject to offset and, once paid, shall not be refundable for any reason whatsoever.

Section 2.07 Interest.

(a) Loans. With respect to any Loan, on and after the Funding Date of such Loan, the outstanding principal amount of such Loan (including any Accrued Interest previously added to the principal on a prior Quarterly Payment Date) shall bear interest at an aggregate rate per annum equal to the sum of (i) the Cash Interest Rate plus (ii) the PIK Interest Rate.

(b) Default Interest. If all or a portion of the principal amount of any Loan, interest in respect thereof or any other amount due under the Financing Documents shall not be paid when due (whether at the stated maturity, by acceleration or otherwise) or there shall occur and be continuing any other Event of Default, then, to the extent so elected by the Required Lenders and after the Borrower has been notified in writing by the Administrative Agent, the outstanding principal amount of the Loans (whether or not overdue) (to the extent legally permitted) shall bear interest at a rate per annum equal to the Post-Default Rate, from the date of such nonpayment or occurrence of such Event of Default, respectively, until such amount is paid in full (after as well as before judgment) or until such Event of Default is no longer continuing, respectively.

(c) Payment of Interest. Subject to Section 2.07(e), accrued interest on each Loan shall be payable in arrears in cash on each Quarterly Payment Date and shall be paid in accordance with Sections 2.08(b) and 2.08(d); provided that (i) interest accrued pursuant to paragraph (b) of this Section shall be payable on demand and (ii) in the event of any repayment or prepayment of any Loan, accrued interest on the principal amount repaid or prepaid shall be payable in cash on the date of such repayment or prepayment.

(d) Computation. All interest hereunder shall be computed on the basis of a year of 360 days, and, in each case, shall be payable for the actual number of days elapsed (including the first day but excluding the last). The computation of interest shall be determined by the Administrative Agent, and such determination shall be conclusive absent manifest error.

(e) Payment in Kind. On each Quarterly Payment Date, (i) the Borrower shall pay all of the accrued Cash Interest Amount in respect of the Loans in full in cash, and (ii) the Borrower shall pay all of the accrued PIK Interest Amount in respect of the Loans in full in cash; provided that, in the case of this clause (ii), in the event that on any Quarterly Payment Date the amount available in the Borrower Waterfall Account for distribution pursuant to Section 2.08(d) shall not be sufficient to pay in full in cash the total aggregate PIK Interest Amount on the Loans on such Quarterly Payment Date, the Borrower shall, without penalty, pay a portion of the accrued PIK Interest Amount due and payable on each Loan in kind solely to the extent that there are insufficient funds in the Borrower Waterfall Account available for the payment in full of such accrued PIK Interest Amount in cash (with any portion thereof not paid in kind to be paid in cash). The aggregate outstanding principal amount of the Loans shall be automatically increased on each such Quarterly Payment Date by the amount of such interest paid in kind (and such increased principal shall bear interest at a rate per annum equal to the sum of (i) the Cash Interest Rate plus (ii) the PIK Interest Rate).

(f) Miscellaneous. For the avoidance of doubt, (i) on each Quarterly Payment Date prior to the Maturity Date, any interest on the Loans then due and payable shall be paid, either in cash or in kind, in accordance with this Agreement and (ii) on the Maturity Date, any interest on the Loans then due and payable shall be paid entirely in cash in accordance with this Agreement. All amounts of interest added to the principal of the Loans pursuant to Section 2.07(e) shall bear interest as provided herein, be payable as provided in Section 2.04 and shall be due and payable on the Maturity Date. The Agent's determination of the principal amount of the Loans outstanding at any time shall be conclusive and binding, absent manifest error.

Section 2.08 Quarterly Payment Dates. On each Quarterly Payment Date, the Administrative Agent shall instruct the Depositary Bank to release and distribute 100% of the funds then held in the Borrower Waterfall Account in accordance with the following order of priority:

(a) *First,* to deposit in the Module Replacement Reserve Account an amount equal to the Module Replacement Reserve Payment Amount in respect of such Quarterly Payment Date;

(b) *Second,* on a pari passu basis, to pay (i) a portion of the accrued and unpaid interest on each Loan in an amount equal to the Mandatory Cash Interest Amount in respect of each such Loan as of such Quarterly Payment Date, and (ii) all amounts payable to the Administrative Agent on such Quarterly Payment Date pursuant to the Agent Reimbursement Letter;

(c) *Third,* to deposit in the Debt Reserve Account an amount equal to the Required Debt Reserve Payment Amount in respect of such Quarterly Payment Date;

(d) *Fourth,* to pay all remaining accrued and unpaid interest on each Loan in an amount equal to the total accrued PIK Interest Amount in respect of each such Loan as of such Quarterly Payment Date;

(e) *Fifth,* to deposit in the ECF Offer Account an amount, which shall not be less than zero, equal to (i) the outstanding principal amount of the Loans as of such Quarterly Payment Date, minus (ii) the Target Debt Balance for such Quarterly Payment Date;

(f) *Sixth,* to deposit in the Preferred Reserve Account an amount equal to the Required Preferred Reserve Payment Amount in respect of such Quarterly Payment Date; and

(g) *Seventh,* to deposit all remaining amounts in such Business Unit Accounts as directed by the Borrower.

In the event that, on any Quarterly Payment Date, the amount of funds in the Borrower Waterfall Account are, in the aggregate, insufficient to pay in full the maximum amounts payable on such Quarterly Payment Date under clause (b), (d) or (e) above (the aggregate shortfall amount under clauses (b), (d) or (e) above on any such Quarterly Payment Date is herein referred to as the "Shortfall Amount") in respect of such Quarterly Payment Date, then, on such Quarterly Payment Date, the Administrative Agent shall instruct the Depositary Bank to release funds from the Preferred Reserve Account in an amount equal to the lesser of (A) the Shortfall Amount and (B) the aggregate amount then held in the Preferred Reserve Account and shall apply the proceeds thereof in accordance with the following order of priority:

(i) *First,* on a pari passu basis, to pay (i) a portion of the accrued and unpaid interest on each Loan in an amount equal to the Mandatory Cash Interest Amount in respect of each such Loan as of such Quarterly Payment Date to the extent remaining unpaid, and (ii) all amounts payable to the Administrative Agent on such Quarterly Payment Date pursuant to the Agent Reimbursement Letter to the extent remaining unpaid;

(ii) *Second*, to pay all remaining accrued and unpaid interest on each Loan in an amount equal to the total accrued PIK Interest Amount in respect of each such Loan as of such Quarterly Payment Date; and

(iii) *Third*, to deposit in the ECF Offer Account an amount, which shall not be less than zero, equal to (i) the outstanding principal amount of the Loans as of such Quarterly Payment Date, minus (ii) the Target Debt Balance for such Quarterly Payment Date.

In the event that, on any Quarterly Payment Date, after giving effect to the preceding paragraph, a portion of the Shortfall Amount shall remain unpaid, then, on such Quarterly Payment Date, the Administrative Agent shall instruct the Depositary Bank to release funds from the Debt Reserve Account in an amount equal to the lesser of (A) the remaining portion of the Shortfall Amount and (B) the aggregate amount then held in the Debt Reserve Account and shall apply the proceeds thereof in accordance with the following order of priority:

(i) *First*, on a pari passu basis, to pay (i) a portion of the accrued and unpaid interest on each Loan in an amount equal to the Mandatory Cash Interest Amount in respect of each such Loan as of such Quarterly Payment Date to the extent remaining unpaid, and (ii) all amounts

payable to the Administrative Agent on such Quarterly Payment Date pursuant to the Agent Reimbursement Letter to the extent remaining unpaid;

(ii) *Second*, to pay all remaining accrued and unpaid interest on each Loan in an amount equal to the total accrued PIK Interest Amount in respect of each such Loan as of such Quarterly Payment Date; and

(iii) *Third*, to deposit in the ECF Offer Account an amount, which shall not be less than zero, equal to (i) the outstanding principal amount of the Loans as of such Quarterly Payment Date, *minus* (ii) the Target Debt Balance for such Quarterly Payment Date.

Section 2.09 Taxes.

(a) Payments Free of Taxes. Any and all payments by or on account of any obligation of any Loan Party hereunder or under any other Financing Document shall be made free and clear of and without withholding or deduction for any Taxes; provided that if any Loan Party or Agent shall be required by Applicable Law (as determined in the good faith discretion of the applicable withholding agent) to withhold or deduct any Taxes from such payments, then (i) to the extent such Taxes are Indemnified Taxes, the sum payable shall be increased as necessary so that after making all required withholdings and deductions (including withholdings and deductions applicable to additional sums payable under this Section) the Administrative Agent, the Collateral Agent or the Lender (as the case may be) receives an amount equal to the sum it would have received had no such withholdings or deductions been made, (ii) such Loan Party or Agent shall make or shall cause to be made such withholdings and deductions and (iii) such Loan Party or Agent shall pay or shall cause to be paid the full amount withheld and deducted to the relevant Governmental Authority in accordance with Applicable Law.

(b) Payment of Other Taxes by the Borrower. In addition, the Loan Parties shall pay or cause to be paid any Other Taxes to the relevant Governmental Authority in accordance with Applicable Law.

(c) Indemnification by Borrower. The Loan Parties shall jointly and severally indemnify, or cause to be indemnified, the Administrative Agent, the Collateral Agent and each Lender, within thirty (30) days after written demand therefor, for the full amount of any Indemnified Taxes (including Indemnified Taxes imposed or asserted on or attributable to amounts payable under this Section) paid or payable by the Administrative Agent, the Collateral Agent or such Lender, as the case may be, and any reasonable expenses arising therefrom or with respect thereto whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to the Borrower by the Collateral Agent or a Lender, or by the Administrative Agent on its own behalf or on behalf of the Collateral Agent or a Lender, shall be conclusive absent manifest error.

(d) Evidence of Payments. As soon as practicable after any payment of Indemnified Taxes or Other Taxes by any Loan Party to a Governmental Authority, the relevant Loan Party shall deliver or cause to be delivered to the Administrative Agent the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return

reporting such payment or other evidence of such payment satisfactory to the Administrative Agent.

(e) Forms.

(i) Any of the Administrative Agent, the Collateral Agent or any Lender (including any assignee Lender) that is legally entitled to an exemption from or reduction of withholding tax under the law of the jurisdiction in which any Loan Party is located with respect to payments under any Transaction Document shall deliver to the Borrower (with a copy to the Administrative Agent), at the time or times reasonably requested by the Borrower or Administrative Agent, such properly completed and executed documentation prescribed by Applicable Law as will permit such payments to be made without or at a reduced rate of, withholding. In addition, any of the Administrative Agent, the Collateral Agent or any Lender, if reasonably requested by the Borrower or the Administrative Agent, shall deliver such other documentation prescribed by Applicable Law or reasonably requested by the Borrower or the Administrative Agent as will enable the Borrower or the Administrative Agent to determine whether or not such Lender is subject to any withholding tax or information reporting requirements. Upon the reasonable written request of the Borrower or the Administrative Agent, or if any form or certification previously delivered expires or becomes obsolete or inaccurate, any Lender shall update any such form or certification previously delivered pursuant to this Section 2.09(e). Notwithstanding anything to the contrary in the preceding three sentences, the completion, execution and submission of such documentation (other than such documentation set forth in Section 2.09(e)(ii)(A), (B) and Section 2.09(g)) shall not be required if in the Lender's reasonable judgment such completion, execution or submission would subject such Lender to any material unreimbursed cost or expense or would materially prejudice the legal or commercial position of such Lender.

(ii) Without limiting the generality of the foregoing, in the event that the Borrower is a US Person,

(A) any Lender that is a US Person shall deliver to the Borrower and the Administrative Agent on or prior to the date on which such Lender becomes a party to this Agreement (and from time to time thereafter upon the reasonable request of the Borrower or the Administrative Agent), executed copies of IRS Form W-9 certifying that such Lender is exempt from U.S. federal backup withholding tax;

(B) any Lender who is not a US Person shall, to the extent it is legally entitled to do so, deliver to the Borrower and the Administrative Agent (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Lender becomes a party to this Agreement (and from time to time thereafter upon the reasonable request of the Borrower or the Administrative Agent), whichever of the following is applicable:

(I) in the case of a Lender who is not a US Person claiming the benefits of an income tax treaty to which the United States is a party (x) with respect to payments of interest under this Agreement or any Transaction Document, executed copies of IRS Form W-8BEN or W-8BEN-E establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the "interest" article of such tax treaty and (y) with respect to any other applicable payments under this Agreement or any Transaction Document, IRS Form W-8BEN or W-8BEN-E establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the "business profits" or "other income" article of such tax treaty;

(II) executed copies of IRS Form W-8ECI;

(III) in the case of a Lender who is not a US Person claiming the benefits of the exemption for portfolio interest under Section 881(c) of the Code, (x) a certificate substantially in the form of Exhibit B-1 to the effect that such Lender is not a "bank" within the meaning of Section 881(c)(3)(A) of the Code, a "10 percent shareholder" of the Borrower within the meaning of Section 881(c)(3)(B) of the Code, or a "controlled foreign corporation" described in Section 881(c)(3)(C) of the Code (a "U.S. Tax Compliance Certificate") and (y) executed copies of IRS Form W-8BEN or W-8BEN-E; or

(IV) to the extent a Lender who is not a US Person is not the beneficial owner, executed copies of IRS Form W-8IMY, accompanied by IRS Form W-8ECI, IRS Form W-8BEN or W-8BEN-E, a U.S. Tax compliance certificate substantially in the form of Exhibit B-2 or Exhibit B-3, IRS Form W-9, and/or other certification documents from each beneficial owner, as applicable; provided that if such Lender is a partnership and one or more direct or indirect partners of such Lender are claiming the portfolio interest exemption, such Lender may provide a U.S. Tax compliance certificate substantially in the form of Exhibit B-4 on behalf of each such direct and indirect partner.

(f) If the Administrative Agent, the Collateral Agent or any Lender determines, in its sole discretion exercised in good faith, that it has received a refund of any Indemnified Taxes or Other Taxes as to which it has been indemnified by a Loan Party or with respect to which a Loan Party has paid additional amounts pursuant to this Section 2.09, it shall pay over such refund to the Borrower, net of all of its out-of-pocket expenses (including Taxes with respect to such refund) and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund); provided that the Borrower, upon the request of the Administrative Agent, the Collateral Agent or any Lender, as the case may be, agrees to repay as soon as reasonably practicable the amount paid over to the Borrower (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Administrative Agent, the Collateral Agent or any Lender, as the case may be, in the event the Administrative Agent, the Collateral Agent or any Lender, as the case may be, is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this paragraph (f), in no event will the Administrative Agent, the Collateral Agent or any Lender be required to pay any amount to the Borrower pursuant to this paragraph (f) the payment of which would place the Administrative Agent, the Collateral Agent or the Lender, as the case may be, in a less favorable net after-Tax position than it would have been in if the Tax subject to indemnification and giving rise to such

refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph shall not be construed to require any indemnified party to make available its Tax returns (or any other information relating to its Taxes that it deems confidential) to the indemnifying party or any other Person.

(g) If a payment made to the Administrative Agent, the Collateral Agent or any Lender under this Agreement would be subject to U.S. federal withholding Tax imposed by FATCA if such Administrative Agent, Collateral Agent or Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Code, as applicable), such Administrative Agent, Collateral Agent or Lender shall deliver to the Borrower and the Administrative Agent at the time or times prescribed by law and at such time or times reasonably requested by the Borrower or the Administrative Agent such documentation prescribed by Applicable Law (including as prescribed by Section 1471(b)(3)(C)(i) of the Code) and such additional documentation reasonably requested by the Borrower or the Administrative Agent as may be necessary for the Borrower and the Administrative Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Person's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this clause, "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

Section 2.10 Payments Generally; Pro Rata Treatment; Sharing of Setoffs.

(a) Payments by Borrower. Unless otherwise specified, the Borrower shall make each payment required to be made by it hereunder (whether of principal, interest, reimbursements, fees, or under Section 2.09 or otherwise) or under any other Financing Document (except to the extent otherwise provided therein) prior to 1:00 p.m., New York City time, on the date when due, in immediately available funds, without setoff or counterclaim. Any amounts received after such time on any date may, in the discretion of the Administrative Agent, be deemed to have been received on the next succeeding Business Day for purposes of calculating interest thereon. All such payments shall be made to the Administrative Agent at its offices at Orion Energy Partners Investment Agent, LLC (payment instructions: Bank Name: JPMorgan Chase Bank, N.A., Bank Address: 270 Park Avenue, New York, New York 10017, ABA/Routing No.: 021000021, Account Name: ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, Account No.: 700846822, Swift No.: CHASUS33, Reference: "FuelCell" + [purpose of the payment]) except as otherwise expressly provided in the relevant Financing Document and payments pursuant to Sections 2.09 and 10.03, which shall be made directly to the Persons entitled thereto. The Administrative Agent shall distribute any such payments received by it for account of any other Person to the appropriate recipient promptly following receipt thereof. If any payment hereunder shall be due on a day that is not a Business Day, the date for payment shall be set to the immediately preceding Business Day and, in the case of any payment accruing interest, interest thereon shall be payable for the period up to and including such immediately preceding Business Day, with the day(s) following such immediately preceding Business Day to be included in the calculation of interest for the following quarterly period in accordance with the terms hereof. All amounts owing under this Agreement or under any other Financing Document are payable in Dollars.

(b) Application of Insufficient Payments. If at any time insufficient funds are received by and available to the Administrative Agent to pay fully all amounts of principal, interest, reimbursements, fees and other amounts then due hereunder, such funds shall be applied (i) first, to pay interest, reimbursements, fees and other amounts (except for the amounts required to be paid pursuant to the following clause (ii)) then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of interest, reimbursements, fees and such other amounts then due to such parties, and (ii) second, to pay principal then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of principal then due to such parties.

(c) Pro Rata Treatment. Except to the extent otherwise provided herein: (i) the Loans shall be made from the Lenders, and each termination or reduction of the amount of the Commitments under Section 2.03 shall be applied to the respective Commitments of the Lenders, *pro rata* according to the amounts of their respective applicable Commitments; (ii) each payment or prepayment of principal of the Loans by the Borrower shall be made for account of the Lenders *pro rata* in accordance with the respective unpaid principal amounts of the Loans held by them being paid or prepaid; and (iii) each payment of interest on the Loans by the Borrower shall be made for account of the Lenders *pro rata* in accordance with the amounts of interest on the Loans then due and payable to the respective Lenders.

(d) Sharing of Payments by Lenders. If any Lender shall, by exercising any right of setoff or counterclaim or otherwise, obtain payment or recover any amount in respect of any principal of or interest on any of its Loan resulting in such Lender receiving a greater proportion of the aggregate amount of the Loans and accrued interest thereon then due than the proportion received by any other Lender, then, unless otherwise agreed in writing by the Lenders, the Lender receiving such greater proportion shall purchase (for cash at face value) participations in the Loans of other Lenders to the extent necessary so that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of principal of and accrued interest on their respective Loans; provided that (i) if any such participations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations shall be rescinded and the purchase price restored to the extent of such recovery, without interest, and (ii) the provisions of this paragraph shall not be construed to apply to any payment made by the Borrower pursuant to and in accordance with the express terms of this Agreement or any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans to any assignee or Participant, other than to the Borrower or any Affiliate thereof (as to which the provisions of this paragraph shall apply). Each Loan Party consents to the foregoing and agrees, to the extent it may effectively do so under Applicable Law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against such Loan Party rights of setoff and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of such Loan Party in the amount of such participation.

(e) Presumptions of Payment. Unless the Administrative Agent shall have received notice from the Borrower prior to the date on which any payment is due to the Administrative Agent for account of the Lenders hereunder that the Borrower will not make such payment, the Administrative Agent may assume that the Borrower has made such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute to the Lenders the amount due. In such event, if the Borrower has not in fact made such payment, then each of the Lenders severally agrees to repay to the Administrative Agent forthwith on demand the amount so

distributed to such Lender with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to the Administrative Agent, at the greater of the Federal Funds Effective Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation.

(f) Certain Deductions by the Administrative Agent. If any Lender shall fail to make any payment required to be made by it pursuant to Section 2.02, 2.10(e) or 10.03(c), then the Administrative Agent may, in its discretion (notwithstanding any contrary provision hereof), apply any amounts thereafter received by the Administrative Agent for account of such Lender to satisfy such Lender's obligations under such Sections until all such unsatisfied obligations are fully paid.

Section 2.11 Mitigation Obligations; Replacement of Lenders. If the Borrower is required to pay any Indemnified Taxes or additional amount to any Lender or any Governmental Authority for account of any Lender pursuant to Section 2.09 then such Lender shall (i) file any certificate or document reasonably requested in writing by the Borrower and/or (ii) use reasonable efforts to designate a different lending office for funding or booking its Loan hereunder or to assign its rights and obligations hereunder to another of its offices, branches or affiliates, if, in the sole judgment of such Lender exercised in good faith, such designation or assignment (x) would eliminate or reduce amounts payable pursuant to Section 2.09 in the future and (y) would not subject such Lender to any unreimbursed cost or expense and would not otherwise be disadvantageous to such Lender in any material respect. The Borrower hereby agrees to pay all reasonable costs and expenses incurred by any Lender in connection with any such designation or assignment.

Section 2.12 Acknowledgement and Consent to Bail-In of EEA Financial Institutions. Notwithstanding anything to the contrary in any Financing Document or in any other agreement, arrangement or understanding among any such parties, each party hereto acknowledges that any liability of any EEA Financial Institution arising under any Financing Document, to the extent such liability is unsecured, may be subject to the Write-Down and Conversion Powers of an EEA Resolution Authority and agrees and consents to, and acknowledges and agrees to be bound by:

(a) the application of any Write-Down and Conversion Powers by an EEA Resolution Authority to any such liabilities arising hereunder which may be payable to it by any party hereto that is an EEA Financial Institution; and

(b) the effects of any Bail-In Action on any such liability, including, if applicable:

(c) a reduction in full or in part or cancellation of any such liability;

(d) a conversion of all, or a portion of, such liability into shares or other instruments of ownership in such EEA Financial Institution, its parent undertaking, or a bridge institution that may be issued to it or otherwise conferred on it, and that such shares or other instruments of ownership will be accepted by it in lieu of any rights with respect to any such liability under this Agreement or any other Financing Document; or

(e) the variation of the terms of such liability in connection with the exercise of the Write-Down and Conversion Powers of any EEA Resolution Authority.

Section 2.13 Incremental Facilities. The Borrower may, by written notice to the Administrative Agent from time to time during the Incremental Availability Period, request the establishment of one or more incremental term loan facilities, for the purposes of funding a Permitted Subsequent Funding Use, in an aggregate principal amount not to exceed the Incremental Facility Amount to be documented as an increase in the total amount of the Loans under this Agreement; provided that (i) there shall not be more than three incremental term loan facilities per calendar year and (ii) each incremental term loan facility shall be in a minimum amount of $10,000,000, in each case, unless otherwise agreed to by the Lenders. Each Lender shall participate in such incremental term loan facilities if each of the following conditions have been satisfied:

(a) to the extent that the proceeds of such incremental term loan facility are to be used to finance an Additional Covered Project, (w) such Additional Covered Project shall have been approved by the Lenders in their sole discretion, (x) the applicable Restricted Project Company and the Administrative Agent shall have agreed in writing that such Restricted Project Company shall be an Additional Covered Project Company hereunder, (y) the Borrower or the applicable Additional Project Company shall have entered into Project Documents in respect of such Additional Covered Project in form and substance acceptable to the Administrative Agent in its sole discretion, and (z) the Borrower and the Administrative Agent shall have agreed in writing as to the Project Payoff Amount with respect to such Additional Covered Project;

(b) no Default or Event of Default exists as of the effective date of such incremental term loan facilities or would exist after giving effect thereto;

(c) no development, event or circumstance that has had or could reasonably be expected to have a Material Adverse Effect shall have occurred and be continuing, or shall occur as a result thereof as of the effective date of such incremental term loan facilities;

(d) the representations and warranties of each Loan Party set forth in the Financing Documents shall be true and correct in all material respects on and as of the effective date of such incremental term loan facilities (except where already qualified by materiality or Material Adverse Effect, in which case, in all respects);

(e) the Lenders shall have received Investment Committee approval for such incremental term loan facilities;

(f) the other applicable conditions set forth in Section 4.04 shall have been satisfied as of the effective date of such incremental term loan facilities; and

(g) the terms of any such incremental facility shall be identical to those of the existing Loans, unless otherwise agreed by the Administrative Agent and the Lenders.

For the avoidance of doubt, no Lender shall be required to fund any incremental term loan facility under this Section 2.13 unless each of the foregoing conditions shall have been satisfied and the Lenders shall have otherwise approved such incremental term loan facility. In connection with any such incremental term loan facility, this Agreement and the other Financing Documents shall be amended as necessary to effectuate such increase, such amendments to be acceptable to the Lenders and the Administrative Agent in their reasonable discretion.

Section 2.14 Secondary Facility Matters.

(a) Notwithstanding anything in Section 2.01 or 2.02 to the contrary (but subject to the satisfaction of the conditions set forth in Sections 4.04 and 4.05 on the applicable Funding Date or Reserve Release Date, as applicable), in the event that the Borrower shall deliver a Borrowing Request with respect to a Secondary Facility Loan during the Secondary Facility Availability Period (a "Secondary Facility Borrowing Request"), the Administrative Agent shall have the right to elect to either (i) implement such Secondary Facility Borrowing Request through the funding of such Secondary Facility Loan by the applicable Lenders in accordance with, and subject to the conditions and limitations set forth in, Sections 2.01(a)(iii), 2.01(c), 2.02, 4.04 and 4.05 or (ii) in lieu of implementing such Secondary Facility Borrowing Request through the funding of such Secondary Facility Loan, cause a Reserve Release in an amount equal to the principal amount of the Secondary Facility Loan requested in such Secondary Facility Borrowing Request to be consummated in accordance with, and subject to the conditions and limitations set forth in, Section 5.18(l); provided, that, in the event that such Secondary Facility Borrowing Request is a Reserve Replenishment Borrowing Request, the Administrative Agent may not elect to implement such Secondary Facility Borrowing Request in the manner specified in clause (ii) above and, accordingly, subject to the conditions and limitations set forth in Sections 2.01(a)(iii), 2.01(c), 2.02, 4.04 and 4.05, the Administrative Agent shall implement such Secondary Facility Borrowing Request through the funding of such Secondary Facility Loan by the applicable Lenders in accordance with clause (i) above. The Administrative Agent shall notify the Borrower of its determination to implement any such Secondary Facility Borrowing Request in the manner specified in clause (i) or clause (ii) of the previous sentence within two Business Days after the Administrative Agent's receipt of such Secondary Facility Borrowing Request.

(b) In the event that the Administrative Agent shall elect to implement a Secondary Facility Borrowing Request in the manner specified in clause (a)(i) above, then, subject to the satisfaction of the conditions and limitations set forth in, Sections 2.01(a)(iii), 2.01(c), 2.02, 4.04 and 4.05, the Lenders that have a Secondary Facility Commitment shall fund the Secondary Facility Loan requested in such Secondary Facility Borrowing Request on the requested Funding Date specified therein (which shall be no earlier than twelve (12) Business Days after the delivery of such Secondary Facility Borrowing Request) in accordance with, and subject to the conditions and limitations set forth in, Sections 2.01(a)(iii), 2.01(c), 2.02, 4.04 and 4.05.

(c) In the event that the Administrative Agent shall elect to implement a Secondary Facility Borrowing Request in the manner specified in clause (a)(ii) above, then, subject to the satisfaction of the conditions and limitations set forth in, Sections 4.04, 4.05 and 5.18(l), the Administrative Agent shall cause a Reserve Release in an amount equal to the principal amount of the Secondary Facility Loan requested in such Secondary Facility Borrowing Request to be consummated in accordance with, and subject to the conditions and limitations set forth in, Sections 4.04, 4.05 and 5.18(l) within two Business Days after the delivery of such Secondary Facility Borrowing Request.

(d) Notwithstanding anything to the contrary set forth herein, in no event shall (i) any Lender be required to make any Secondary Facility Loan on any Secondary Facility Funding Date, or (ii) the Administrative Agent be required to effect any Reserve Release on any Reserve Release Date if either (x) any of the conditions specified in Sections 4.04 or 4.05 shall have not been

satisfied in full on such Secondary Facility Funding Date or Reserve Release Date, as applicable, or (y) immediately after giving effect to the making of such Secondary Facility Loan (and any contemporaneous Reserve Replenishment in respect thereof) or the consummation of such Reserve Release, as applicable, the Aggregate Secondary Facility Usage Amount would exceed the Aggregate Secondary Facility Commitment Amount. In the event that the Lenders shall not be required to make any Secondary Facility Loan or the Administrative Agent shall not be required to effect any Reserve Release, in either case, as a result of the foregoing sentence, the Secondary Facility Borrowing Request to which such Secondary Facility Loan or Reserve Release shall relate shall be deemed null and void.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

Each Loan Party represents and warrants to each Agent and the Lenders that:

Section 3.01 Due Organization, Etc.

(a) Each Borrower Group Company is a corporation or limited liability company, duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization. Each Borrower Group Company has all requisite corporate or limited liability company power and authority to own or lease and operate its assets and to carry on its business as now conducted and as proposed to be conducted and each Borrower Group Company is duly qualified to do business and is in good standing in each jurisdiction where necessary in light of its business as now conducted and as proposed to be conducted (including performance of each Material Agreement to which it is party), except where the failure to so qualify could not reasonably be expected to have a Material Adverse Effect. No filing, recording, publishing or other act by any Borrower Group Company, that has not been made or done, is necessary in connection with the existence or good standing of any Borrower Group Company.

(b) The only holders of Capital Stock of each direct and indirect Subsidiary of the Borrower are the Borrower and the Subsidiaries of the Borrower as set forth on Schedule 3.01. All of outstanding Capital Stock of each of each direct and indirect Subsidiary of the Borrower are held by the Borrower or a Subsidiary of the Borrower as set forth on Schedule 3.01 free and clear of all Liens other than Permitted Liens.

Section 3.02 Authorization, Etc. Each of the Loan Parties has full corporate, limited liability company or other organizational powers, authority and legal right to enter into, deliver and perform its respective obligations under each of the Transaction Documents to which it is a party, to consummate each of the transactions contemplated herein and therein, and, in the case of the Borrower, to issue the Warrants and reserve for issuance and issue the Warrant Shares in accordance with the terms hereof and thereof, and has taken all necessary corporate, limited liability company or other organizational action to authorize the execution, delivery and performance by it of each of the Transaction Documents to which it is a party, including, in the case of the Borrower, the issuance of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms hereof and thereof. Each of the Transaction Documents to which a Loan Party is a party has been duly executed and delivered by such Loan

Party and is in full force and effect and constitutes a legal, valid and binding obligation of such Loan Party, enforceable against such Loan Party in accordance with its respective terms, except as enforcement may be limited (i) by Bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or other similar laws affecting creditors' rights generally, (ii) by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) and (iii) by implied covenants of good faith and fair dealing.

Section 3.03 No Conflict. The execution, delivery and performance by each Loan Party of each of the Transaction Documents to which it is a party and all other documents and instruments to be executed and delivered hereunder by it, the consummation of the transactions contemplated herein and therein, and, in the case of the Borrower, the issuance of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms hereof and thereof do not and will not, as applicable, (i) conflict with the Organizational Documents of such Loan Party or any other Borrower Group Company (except, in the case of any Excluded Project Company, where such conflict could not reasonably be expected to have a Material Adverse Effect), (ii) conflict with or result in a breach of, or constitute a default under, any indenture, loan agreement, mortgage, deed of trust or other material instrument or agreement to which any Loan Party or any other Borrower Group Company is a party or by which it is bound or to which any Loan Party's or any other Borrower Group Company's property or assets are subject (except, in the case of any Excluded Project Company, where such conflict, breach or default could not reasonably be expected to have a Material Adverse Effect), (iii) conflict with or result in a breach of, or constitute a default under, in any material respect, any Applicable Law (except, in the case of any Excluded Project Company, where such conflict, breach or default could not reasonably be expected to have a Material Adverse Effect) or (iv) with respect to any Loan Party, result in the creation or imposition of any Lien (other than a Permitted Lien) upon any of such Loan Party's property or the Collateral, except as otherwise set forth on Schedule 3.03. The Borrower is not in violation of the listing requirements of the Trading Market and has no knowledge of any facts that would reasonably lead to delisting or suspension of the Common Stock in the foreseeable future. The issuance by the Borrower of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms of the Warrants shall not have the effect of delisting or suspending the Common Stock from the Trading Market.

Section 3.04 Approvals, Etc.

(a) Except as otherwise set forth on Schedule 3.04, each Borrower Group Company has obtained all material Authorizations required by any Governmental Authority or Trading Market under existing Applicable Law or stock exchange regulations or listing requirements to be issued to, assigned to, or otherwise assumed by, such Borrower Group Company and necessary for (i) the Business, the Covered Projects and the Excluded Projects or (ii) in the case of a Loan Party, the execution, delivery and performance by such Loan Party of the Transaction Documents to which it is a party, including, in the case of the Borrower, the issuance of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms hereof and thereof, other than in each case (x) Authorizations that are not currently necessary and are obtainable in the ordinary course of business, or (y) in the case of any Excluded Project Company, where such failure to so obtain, individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect.

(b) Except as otherwise set forth on Schedule 3.04, Each Borrower Group Company is in compliance with each Authorization by a Governmental Authority or Trading Market currently in effect except where such failure to be in compliance could not reasonably be expected to have a Material Adverse Effect.

Section 3.05 SEC Reports; Financial Statements.

(a) The Borrower has filed all reports, schedules, forms, statements and other documents required to be filed by it under the Exchange Act, including pursuant to Section 13(a) or 15(d) thereof, for the twelve months preceding the date hereof (the "SEC Reports"). As of their respective dates (or, if amended or superseded by a filing prior to the Closing Date, then on the date of such filing), the SEC Reports filed by the Borrower complied in all material respects with the requirements of the Exchange Act and the rules and regulations of the SEC promulgated thereunder, and none of the SEC Reports, when filed by the Borrower, contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The financial statements of the Borrower and its consolidated Subsidiaries included in the SEC Reports comply in all material respects with applicable accounting requirements and the rules and regulations of the SEC with respect thereto as in effect at the time of filing. Such financial statements have been prepared in accordance with GAAP, except as may be otherwise specified in such financial statements or the notes thereto and except that unaudited financial statements may not contain all footnotes required by GAAP or may be condensed or summary statements, and fairly present in all material respects the consolidated financial position of the Borrower and its consolidated Subsidiaries as of and for the dates thereof and the results of operations and cash flows for the periods then ended, subject, in the case of unaudited statements, to normal, year-end audit adjustments. All material contracts (as defined in Item 601 of Regulation S-K under the Securities Act) to which the Borrower or any Subsidiary of the Borrower is a party or to which the property or assets of the Borrower or any Subsidiary of the Borrower are subject are included as part of or identified in the SEC Reports.

(b) Except for (x) the transactions contemplated by the Transaction Documents, including the issuance of the Warrant and the Warrant Shares, and (y) the transactions set forth on Schedule 3.05, no event, liability, fact, circumstance, occurrence or development has occurred or exists with respect to the Borrower or its Subsidiaries or their respective businesses, properties, operations, assets or financial condition, that would be required to be disclosed by the Borrower on a Current Report on Form 8-K at the time this representation is made or deemed made that has not been publicly disclosed at least one Business Day prior to the date that this representation is made.

(c) As of the Closing Date, the unaudited consolidated pro forma balance sheet of the Borrower and its consolidated Subsidiaries dated the Closing Date and delivered to the Administrative Agent pursuant to Section 4.01(e)(iv) (i) presents fairly in all material respects the financial condition of the Borrower and its consolidated Subsidiaries, (ii) discloses all material liabilities (contingent or otherwise) of the Borrower and its consolidated Subsidiaries to the extent required by GAAP and (iii) was prepared in accordance with GAAP. As of the Closing Date, there are no liabilities or obligations of the Borrower or any of its Subsidiaries, whether accrued, contingent, absolute, determined, determinable or otherwise, other than (A) liabilities or

obligations set forth in such *pro forma* balance sheet, (B) liabilities or obligations not required under GAAP to be disclosed and provided for in a consolidated balance sheet of the Borrower and its Subsidiaries, and (C) liabilities or obligations arising in the ordinary course of business of the Borrower and its Subsidiaries, consistent with past practices, since September 30, 2019, which could not reasonably be expected to result in a Material Adverse Effect.

(d) As of the Second Funding Date, the unaudited consolidated pro forma balance sheet of the Borrower and its consolidated Subsidiaries dated the Second Funding Date and delivered to the Administrative Agent pursuant to Section 4.03(f) (i) presents fairly in all material respects the financial condition of the Borrower and its consolidated Subsidiaries, (ii) discloses all material liabilities (contingent or otherwise) of the Borrower and its consolidated Subsidiaries to the extent required by GAAP and (iii) was prepared in accordance with GAAP. As of the Second Funding Date, there are no liabilities or obligations of the Borrower or any of its Subsidiaries, whether accrued, contingent, absolute, determined, determinable or otherwise, other than (A) liabilities or obligations set forth in such *pro forma* balance sheet, (B) liabilities or obligations not required under GAAP to be disclosed and provided for in a consolidated balance sheet of the Borrower and its Subsidiaries, and (C) liabilities or obligations arising in the ordinary course of business of the Borrower and its Subsidiaries, consistent with past practices, since September 30, 2019, which could not reasonably be expected to result in a Material Adverse Effect.

(e) As of any date after the Closing Date, (x) the financial statements delivered to the Lenders pursuant to this Agreement present fairly in all material respects the financial condition, results of operations and cash flows of the Borrower and its consolidated Subsidiaries as of such dates and for such periods, (y) such balance sheets and the notes thereto disclose all material liabilities (contingent or otherwise) of the Borrower and its consolidated Subsidiaries as of the dates thereof to the extent required by GAAP and (z) such financial statements were prepared in accordance with GAAP.

(f) No event, change or condition has occurred that has caused, or could be reasonably expected to cause, a Material Adverse Effect.

(g) The Borrower and each other Borrower Group Company maintains a system of internal accounting controls sufficient to provide reasonable assurance that (i) transactions are executed in accordance with management's general or specific authorizations, (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain asset accountability, (iii) access to assets is permitted only in accordance with management's general or specific authorization and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(h) The Borrower is in compliance in all material respects with applicable requirements of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") and applicable rules and regulations promulgated by the SEC thereunder. The Borrower maintains disclosure controls and procedures (as such term is defined in Rule 13a-15(e) and Rule 15d-15(e) under the Exchange Act).

(i) The Independent Auditor, whose report on the consolidated financial statements of the Borrower is filed with the SEC as part of the Borrower's most recent Annual Report on Form 10-K filed with the SEC, is and, during the periods covered by their report, was an independent registered public accounting firm within the meaning of the Securities Act and the Public Company Accounting Oversight Board (United States). To the Borrower's knowledge, the Independent Auditor is not in violation of the auditor independence requirements of the Sarbanes-Oxley Act with respect to the Borrower.

Section 3.06 Litigation.

(a) There is no pending or, to the knowledge of any Authorized Representative of any Loan Party, threatened (in writing) litigation, investigation, action or proceeding of or before any court, arbitrator or Governmental Authority (in the case of any of the foregoing not involving any Borrower Group Company, to the knowledge of any Authorized Representative of any Loan Party) (i) seeking to restrain or prohibit the consummation of the transactions contemplated by the Transaction Documents or (ii) purporting to affect the legality, validity or enforceability of any of the Transaction Documents.

(b) There is no pending or, to the knowledge of any Authorized Representative of any Loan Party, threatened (in writing) litigation, investigation, action or proceeding of or before any court, arbitrator or Governmental Authority against any Borrower Group Company that affects the Business, any Covered Project or any Excluded Project which (either individually or in the aggregate) could reasonably be expected to have a Material Adverse Effect.

Section 3.07 Environmental Matters. Except as set forth on Schedule 3.07 (and except, in the case of any Excluded Project Company, as could not reasonably be expected to have a Material Adverse Effect):

(a) each of the Borrower Group Companies, the Business, each Covered Project and each Excluded Project is in compliance in all material respects with all applicable Environmental Laws;

(b) each of the Borrower Group Companies, the Business, each Covered Project and each Excluded Project, as applicable, (i) holds or has applied for all material Authorizations required under Environmental Laws (each of which is in full force and effect) required for any of its current operations or for any property owned, leased or otherwise operated by it; and (ii) is in compliance in all material respects with all Authorizations required under Environmental Law;

(c) (x) to the knowledge of any Loan Party, there are no material pending Environmental Claims asserted against any Borrower Group Company, the Business, any Covered Project or any Excluded Project and (y) no Borrower Group Company has received any written notice, claim or information regarding, or otherwise has knowledge of, a past or threatened material Environmental Claim asserted against any Borrower Group Company, the Business, any Covered Project or any Excluded Project, except for such Environmental Claims that have been fully resolved;

(d) except as set forth on Schedule 3.07, there are no outstanding consent decrees, orders, settlements or other agreements concerning any Borrower Group Company, the Business, any Covered Project or any Excluded Project relating to compliance with or liability under Environmental Law;

(e) no Borrower Group Company has, to the knowledge of any Loan Party, no other Person has Released Hazardous Materials at, on, from or under any real property currently or formerly owned, leased or operated by any Borrower Group Company in a manner that would reasonably be expected to result in a material liability of any Borrower Group Company pursuant to Environmental Laws; and

(f) each Loan Party has made available copies of all significant reports, correspondence and other documents in its possession, custody or control regarding compliance by any of the Borrower Group Companies, or potential liability of any of the Borrower Group Companies under Environmental Laws or Authorizations required under Environmental Law.

Section 3.08 Compliance with Laws and Obligations. Subject to Section 3.07, each Borrower Group Company, the Business, each Covered Project and each Excluded Project are in compliance with all Applicable Laws applicable to the Borrower Group Companies, the Business, the Covered Projects and the Excluded Projects, except where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect.

Section 3.09 Material Agreements. As of the Closing Date, each Material Agreement of the Borrower Group Companies (other than the Excluded Project Companies) is listed on Schedule 3.09. The copies of each of the Material Agreements, and any amendments thereto provided or to be provided by the Borrower to the Administrative Agent are, or when delivered will be, true and complete copies of such agreements and documents. Each of the Material Agreements has been duly executed and delivered by the applicable Borrower Group Company party thereto and the applicable Borrower Group Company party thereto has taken all necessary corporate, limited liability company or other organizational action to authorize the execution, delivery and performance by it of each of such Material Agreement. No termination event has occurred under any Material Agreement, each Material Agreement is in full force and effect and enforceable against the parties thereto in accordance with its respective terms (except as enforcement may be limited (i) by Bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or other similar laws affecting creditors' rights generally, (ii) by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) and (iii) by implied covenants of good faith and fair dealing), and no Borrower Group Company has received any material default, expiration, breach or termination notice pursuant to any Material Agreement that has not been cured (except, in the case of any Excluded Project Company, where such default, expiration, breach or termination could not reasonably be expected to have a Material Adverse Effect). The execution, delivery and performance by each Borrower Group Party of each of the Material Agreements to which it is a party and all other documents and instruments executed and delivered thereunder by it and the consummation of the transactions contemplated therein do not and will not, as applicable, (i) conflict with the Organizational Documents of such Borrower Group Company, (ii) conflict with or result in a breach of, or constitute a default under, any indenture, loan agreement, mortgage, deed of trust or other material instrument or agreement to which any Borrower Group Company is a party or by which it is bound or to which any Borrower Group

Company's property or assets are subject, or (iii) conflict with or result in a breach of, or constitute a default under, in any material respect, any Applicable Law. There is no pending or, to the knowledge of any Authorized Representative of any Loan Party, threatened (in writing) litigation, investigation, action or proceeding of or before any court, arbitrator or Governmental Authority (in the case of any of the foregoing not involving any Borrower Group Company, to the knowledge of any Authorized Representative of any Loan Party) (i) seeking to restrain or prohibit the consummation of the transactions contemplated by any Material Agreement or (ii) purporting to affect the legality, validity or enforceability of any of the Material Agreements. Each Borrower Group Company is in compliance in all material respects with the terms of the Material Agreements to which it is a party (except, in the case of any Excluded Project Company, where the failure to be in compliance could not reasonably be expected to have a Material Adverse Effect). To the knowledge of any Authorized Representative of any Loan Party, no Material Counterparty is in default of any of its obligations under any Material Agreement other than (x) defaults which have been previously disclosed in a writing acknowledged by the Administrative Agent and (y) defaults which, individually or in the aggregate, could not reasonably be expected to be materially adverse to the Borrower Group Companies and/or the Lenders.

Section 3.10 Intellectual Property; Licenses.

(a) Each Borrower Group Company owns, or is licensed to use, free and clear of all Liens except for Permitted Liens, all Intellectual Property necessary for its business and, in the case of a Loan Party, that are necessary for the performance by it of its obligations under the Transaction Documents and Material Agreements to which it is a party, in each case, as to which the failure of such Borrower Group Company to so own or be licensed could reasonably be expected to have a Material Adverse Effect, and the use thereof by such Borrower Group Company does not, to the knowledge of any Loan Party, infringe in any material respect upon the rights of any other Person (except, in the case of any Excluded Project Company, where such infringement could not reasonably be expected to have a Material Adverse Effect). All registered Intellectual Property owned, used or licensed by, or otherwise subject to any interests of, any Borrower Group Company (other than any Excluded Project Company) is set forth on Schedule 3.10. No Loan Party has received any claim or assertion (whether in writing, by suit or otherwise) that any Loan Party's ownership, use, marketing, sale or distribution of any inventory, equipment, Intellectual Property or other Property violates another Person's Intellectual Property. To such Loan Party's knowledge, no Person has been or is infringing, misappropriating, diluting, violating or otherwise impairing any Intellectual Property of any Borrower Group Company (except, in the case of any Excluded Project Company, where such infringement, misappropriation, dilution, violation or impairment could not reasonably be expected to have a Material Adverse Effect).

(b) All Intellectual Property owned, used or licensed by any Borrower Group Company is valid, enforceable and subsisting and no event has occurred, and nothing has been done or omitted to have been done, that would affect the validity or enforceability of such Intellectual Property (except, in the case of any Excluded Project Company, where such lack of validity, enforceability or subsistence could not reasonably be expected to have a Material Adverse Effect). All Intellectual Property owned, used or licensed by any Borrower Group Company is in full force and effect and have not lapsed, or been forfeited or cancelled or abandoned and there are no unpaid maintenance, renewal or other fees payable or owing by any such Borrower Group Company for any such Intellectual Property (except, in the case of any Excluded Project Company, where lack

of effect, lapse, forfeiture, cancelation, abandonment or unpaid fee could not reasonably be expected to have a Material Adverse Effect). Each Borrower Group Company has taken reasonable security measures to protect the secrecy, confidentiality and value of all of its Intellectual Property, except where failure to do so would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(c) Except as set forth on Schedule 3.10(c), no Borrower Group Company has licensed to, or granted any rights in, any Intellectual Property owned by any Borrower Group Company to any other Person, other than nonexclusive licenses granted to customers in the ordinary course of business which do not materially interfere with the Business of the Borrower Group Companies or materially affect the value of such Intellectual Property (except, in the case of any Excluded Project Company, for such licenses or grants that could not reasonably be expected to have a Material Adverse Effect).

(d) Each Borrower Group Company has obtained the necessary intellectual property licenses that the Loan Parties reasonably believe are required for the Business, the Covered Projects and the Excluded Projects, the absence of any of which could reasonably be expected to have a Material Adverse Effect.

(e) With respect to each material license in or to Intellectual Property held by any Borrower Group Company (except, in the case of any Excluded Project Company, as could not reasonably be expected to have a Material Adverse Effect): (i) such license is valid and binding and in full force and effect and represents the entire agreement between the respective licensor and licensee with respect to the subject matter of such license; and (ii) such license will not cease to be valid and binding and in full force and effect on terms identical to those currently in effect as a result of the rights and interests granted herein, nor will the grant of such rights and interests constitute a breach or default under such license or otherwise give the licensor or sublicensor a right to terminate such license.

Section 3.11 Taxes. Except as specified on Schedule 3.11, each Borrower Group Company has timely filed or caused to be filed all material tax returns and reports required to have been filed by it and has paid, or has caused to be paid, all material taxes required to have been paid by it, other than taxes that are being contested in accordance with the Permitted Contest Conditions. None of the Borrower Group Companies are party to any tax sharing agreements.

Section 3.12 Disclosure.

(a) None of the written reports, financial statements, certificates or other written information (other than Projections and information of a general economic or industry nature) furnished by or on behalf of any Loan Party to the Administrative Agent or any Lender in connection with the negotiation of this Agreement or delivered hereunder (as modified or supplemented by other written information so furnished), taken as a whole, contains any material misstatement of fact or omits to state any material fact necessary to make such statements therein (when taken as a whole), in the light of the circumstances under which they were made, not materially misleading.

(b) Statements, estimates, forecasts and projections regarding the Loan Parties and the future performance of the Business, the Covered Projects and the Excluded Projects or other expressions of view as to future circumstances (including the initial Operating Budgets, the Construction Budgets and the Construction Schedules) that have been made available to any Secured Party by or on behalf of any Loan Party or any of its representatives or Affiliates (collectively, "Projections") have been prepared in good faith based upon assumptions believed to be reasonable at the time of preparation thereof; provided that it is understood and acknowledged that such Projections are based upon a number of estimates and assumptions and are subject to business, economic and competitive uncertainties and contingencies, that actual results during the period or periods covered by any such Projections may differ from the projected results and such differences may be material and that, accordingly, no assurances are given and no representations, warranties or covenants are made that any of the assumptions are correct, that such Projections will be achieved or that the forward-looking statements expressed in such Projections will correspond to actual results.

Section 3.13 The Warrants.

(a) No registration under the Securities Act is required for the offer and sale of the Warrants and the Warrant Shares by the Borrower to the Lenders pursuant to the terms of the Transaction Documents.

(b) Except as otherwise set forth on Schedule 3.04, the issuance and sale of the Warrants and the Warrant hereunder does not contravene the rules and regulations of the Trading Market, which, for the avoidance of doubt, as of the date hereof, is the NASDAQ Global Market.

(c) Neither the Borrower, nor any of its Affiliates, nor any Person acting on its or their behalf has, directly or indirectly, made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause this offering of the Warrants and the Warrant Shares to be integrated with prior offerings by the Borrower for purposes of the Securities Act which would require the registration of any such securities under the Securities Act. Neither the Borrower nor any person acting on behalf of the Borrower has offered or sold any of the Warrants or Warrant Shares by any form of general solicitation or general advertising.

(d) Neither the Borrower nor any of its Subsidiaries has, and, to the knowledge of the Borrower, no Person acting on their behalf has, directly or indirectly, (i) taken any action designed to cause or to result in the stabilization or manipulation of the price of any security of the Borrower or any of its Subsidiaries to facilitate the sale or resale of any of the Warrants or Warrant Shares, (ii) sold, bid for, purchased, or paid any compensation for soliciting purchases of, any of the Warrants or Warrant Shares, (iii) other than fees paid to Durham Capital and Lazard Frères, paid or agreed to pay to any Person any compensation for soliciting another to purchase any other securities of the Borrower or any of its Subsidiaries in connection with the transactions contemplated by the Transaction Documents, or (iv) paid or agreed to pay any Person for research services with respect to any securities of the Borrower or any of its Subsidiaries.

(e) None of the Borrower or any Subsidiary, any of their respective predecessors, any director, executive officer, other officer of the Borrower or any Subsidiary participating in the offering contemplated hereby, any beneficial owner (as that term is defined in Rule 13d-3 under

the Exchange Act) of 20% or more of the Borrower's outstanding voting equity securities, calculated on the basis of voting power, any "promoter" (as that term is defined in Rule 405 under the Securities Act) connected with the Borrower or any of the Subsidiaries in any capacity at the time of the Initial Funding or Second Funding, any placement agent or dealer participating in the offering of the Warrants or Warrant Shares, any of such agents' or dealer's directors, executive officers, other officers participating in the offering of the Warrants or Warrant Shares (each, a "Covered Person" and, together, "Covered Persons") is subject to any of the "Bad Actor" disqualifications described in Rule 506(d)(1)(i) to (viii) under the Securities Act (a "Disqualification Event"). The Borrower has exercised reasonable care to determine (i) the identity of each person that is a Covered Person; and (ii) whether any Covered Person is subject to a Disqualification Event. The Borrower has complied, to the extent applicable, with its disclosure obligations under Rule 506(e). The Borrower is not for any other reason disqualified from reliance upon Rule 506 of Regulation D under the Securities Act for purposes of the offer and sale of the Warrants and Warrant Shares. The Borrower will notify the Lenders prior to the Initial Funding and the Second Funding of the existence of any Disqualification Event with respect to any Covered Person.

Section 3.14 Reserved.

Section 3.15 Regulatory Restrictions on the Loan. No Loan Party is an "investment company" within the meaning of the Investment Company Act of 1940 of the United States (including the rules and regulations thereunder), as amended.

Section 3.16 Title; Security Documents.

(a) Each Loan Party owns and has good, legal and defensible title to the property purported to be covered by the Security Documents to which it is party free and clear of all Liens other than Permitted Liens; and

(b) the provisions of the Security Documents to which any Loan Party is a party that have been delivered on or prior to the date this representation is made are, effective to create, in favor of the Collateral Agent for the benefit of the Secured Parties, a legal, valid and enforceable first-priority (subject to Permitted Liens) Lien on and security interest in all of the Collateral purported to be covered thereby, and all necessary recordings and filings have been made in all necessary public offices, and all other necessary and appropriate action has been taken, so that the security interest created by each Security Document is a first-priority (subject to Permitted Liens) perfected Lien on and security interest in all right, title and interest of such Loan Party in the Collateral purported to be covered thereby, prior and superior to all other Liens other than Permitted Liens.

Section 3.17 ERISA.

(a) No ERISA Event has occurred or is reasonably expected to occur which has or could reasonably be expected to have a Material Adverse Effect. Each Pension Plan has complied in all material respects with the applicable provisions of ERISA and the Code. No termination of a Pension Plan has occurred resulting in any liability that has remained underfunded and no Lien

against any Borrower Group Company or any of its ERISA Affiliates in favor of the PBGC or a Pension Plan has arisen during the five-year period prior to the date hereof.

(b) None of the Borrower Group Companies has incurred any obligation which has or could reasonably be expected to have a Material Adverse Effect on account of the termination or withdrawal from any Foreign Plan.

Section 3.18 Insurance. Except as set forth in Schedule 3.18, all insurance policies required to be obtained by the Borrower Group Companies pursuant to Section 5.06 and under any Material Agreement, if any, have been obtained and are in full force and effect as required under Section 5.06 and all premiums then due and payable thereon have been paid in full (except, in the case of any Excluded Project Company, where the failure to so obtain or pay could not reasonably be expected to have a Material Adverse Effect); provided, that, such policies are being renewed with policies complying with Section 5.06 on November 1, 2019 at which time all premiums then due and payable with respect to such renewal policies will have been paid in full. No Borrower Group Company has received any notice from any insurer that any insurance policy has ceased to be in full force and effect or claiming that the insurer's liability under any such insurance policy can be reduced or avoided.

Section 3.19 Covered Projects. Each Covered Project has (i) except with respect to the permits and authorizations set forth on Schedule 3.19, all federal, state and local permits and authorizations necessary to construct and operate the Covered Project in accordance with such Covered Project's PPA; (ii) a fully executed PPA that is in good standing, has not lapsed and the counterparties to the PPA have not given written or verbal notice that there is a default under the PPA or that it has terminated or will terminate such PPA; (iii) a fully executed site agreement (or an adequate site license set forth in the applicable PPA) that provides adequate land and facilities to build and operate the Covered Project for the life of the PPA, and the counterparties to the site agreement have not given written or verbal notice that there is a default under the site agreement or that it has terminated or will terminate such site agreement; (iv) except with respect to the permits and authorizations set forth on Schedule 3.19, all federal, state, local and municipal permits and authorizations necessary to interconnect the Covered Project to an electric grid or electric distribution system to deliver the full amount of electricity under the PPA and, the counterparties to such interconnect agreements or arrangements have not given written or verbal notice that there is a default under such interconnect agreement or that it has terminated or will terminate such interconnect agreement; and (v) except with respect to the permits and authorizations set forth on Schedule 3.19, all other agreements, permits and authorizations necessary to construct and operate the Covered Project for the life of the PPA.

Section 3.20 Use of Proceeds. The proceeds the Loans have been used solely in accordance with, and solely for the purposes contemplated by, Section 5.13. No part of the proceeds of any Loan and other extensions of credit hereunder will be used, either directly or indirectly, by any Loan Party to purchase or carry any Margin Stock (as defined in Regulation U) or to extend credit to others for the purpose of purchasing or carrying any Margin Stock or for any purpose that entails a violation of any of the regulations of the Board.

Section 3.21 Capital Stock and Related Matters. All of the Capital Stock in the Borrower and each other Borrower Group Company have been duly authorized and validly issued in accordance with its Organizational Documents, are fully paid and non-assessable and, in the case

of any Subsidiary of the Borrower, are free and clear of all Liens other than Permitted Liens. Except as set forth on Schedule 3.21, neither the Borrower nor any other Borrower Group Company has outstanding any securities convertible into or exchangeable for any of its Capital Stock or any rights to subscribe for or to purchase, or any warrants or options for the purchase of, or any agreements providing for the issuance (contingent or otherwise) of, or any calls, commitments or claims of any character relating to any such Capital Stock.

Section 3.22 Reserved.

Section 3.23 No Agreements with Affiliates. Schedule 3.23 sets forth any and all agreements, transactions or series of related transactions among, on one hand, one or more Borrower Group Companies, and on the other hand, one or more Affiliates of a Borrower Group Company (other than (a) agreements or transactions (i) solely among Loan Parties, or (ii) solely among Existing Foreign Subsidiaries, (b) dividends, distributions or other payments by any Excluded Project Company or any Existing Foreign Subsidiary to any Loan Party and (c) agreements and transactions entered into in the ordinary course of such Borrower Group Company's (and such Affiliate's) business and upon fair and reasonable terms no less favorable to such Borrower Group Company than it would obtain in comparable arm's-length transactions with a Person acting in good faith which is not an Affiliate).

Section 3.24 No Bank Accounts. No Loan Party maintains, or will cause the Depositary Bank or any other Person to maintain, any accounts other than (x) the Collateral Accounts, and (y) the Excluded Accounts.

Section 3.25 No Default or Event of Default. No Default or Event of Default has occurred and is continuing.

Section 3.26 Foreign Assets Control Regulations.

(a) None of the Borrower Group Companies nor any of their respective, principals, owners, officers or directors, nor, to Borrower's knowledge, any of their respective Affiliates or agents (i) is a Sanctioned Person; or (ii) engages in any dealings or transactions in or with a Sanctioned Country or that are otherwise prohibited by Sanctions.

(b) Each of the Borrower Group Companies maintains reasonable policies and procedures to ensure compliance with Sanctions, Anti-Corruption Laws and Anti-Money Laundering Laws (as such compliance is required under this Agreement).

(c) Each of the Borrower Group Companies and their respective officers, directors, employees and, to the Borrower's knowledge, agents are in compliance with Anti-Corruption Laws, Anti-Money Laundering Laws and Sanctions.

(d) No part of the proceeds of the Loans will be used, directly or indirectly (i) in violation of the FCPA, Anti-Money Laundering Laws or Sanctions or (ii) to offer or make payments or to take any other action that would constitute a violation, or implicate any Lender, Administrative Agent, Collateral Agent or their respective Affiliates in a violation, of Anti-Corruption Laws.

(e) Each of the Loan Parties has disclosed all facts known to it regarding (a) all claims, damages, liabilities, obligations, losses, penalties, actions, judgment, and/or allegations of any kind or nature that are asserted against, paid or payable by such Person, any of its Affiliates or any of its representatives in connection with non-compliance with Anti-Corruption Laws, Sanctions or Anti-Money Laundering Laws by such Person, and (b) any investigations involving possible non-compliance with Anti-Corruption Laws, Sanctions or Anti-Money Laundering Laws by such Person or such Affiliate or such representative. No proceeding by or before any Governmental Authority involving any Loan Party with respect to Anti-Corruption Laws, Sanctions or Anti-Money Laundering Laws is pending or, to the knowledge of the Borrower, threatened.

Section 3.27 Commercial Activity; Absence of Immunity. The Loan Parties are subject to civil and commercial law with respect to its obligations under the Transaction Documents, and the making and performance of the Transaction Documents by the Loan Parties constitute private and commercial acts rather than public or governmental acts. The Loan Parties are not entitled to any immunity on the ground of sovereignty or the like from the jurisdiction of any court or from any action, suit, setoff or proceeding, or the service of process in connection therewith, arising under the Financing Documents.

Section 3.28 Acknowledgement Regarding Trading Activities. It is understood and acknowledged by the Borrower that, except as otherwise specifically set forth in any written agreement between the Borrower and the applicable Lender, (i) following the public disclosure of the transactions contemplated by the Transaction Documents, in accordance with the terms thereof, none of the Lenders have been asked by the Borrower or any of its Subsidiaries to agree, nor has any Lender agreed with the Borrower or any of its Subsidiaries, to refrain from effecting any transactions in or with respect to any securities of the Borrower, or "derivative" securities based on securities issued by the Borrower or to hold any of the Warrants or Warrant Shares for any specified term; (ii) each Lender shall not be deemed to have any affiliation with or control over any arm's length counterparty in any "derivative" transaction; and (iv) each Lender may rely on the Borrower's obligation to timely deliver shares of Common Stock upon exercise of the Warrants as and when required pursuant to the Transaction Documents for purposes of effecting trading in the Common Stock of the Borrower. The Borrower further understands and acknowledges that, except as otherwise specifically set forth in any written agreement between the Borrower and the applicable Lender, following the public disclosure of the transactions contemplated by the Transaction Documents one or more Lenders may engage in hedging and/or trading activities (including, without limitation, the location and/or reservation of borrowable shares of Common Stock) at various times during the period that the Warrants and Warrant Shares are outstanding, including, without limitation, during the periods that the value and/or number of the Warrant Shares deliverable with respect to the Warrants are being determined and such hedging and/or trading activities (including, without limitation, the location and/or reservation of borrowable shares of Common Stock), if any, can reduce the value of the existing stockholders' equity interest in the Borrower both at and after the time the hedging and/or trading activities are being conducted. The Borrower acknowledges that, except as otherwise specifically set forth in any written agreement between the Borrower and the applicable Lender, such aforementioned hedging and/or trading activities do not constitute a breach of this Agreement or any other Transaction Document or any of the documents executed in connection herewith or therewith.

ARTICLE IV

CONDITIONS

Section 4.01 Conditions to the Closing Date. The occurrence of the Closing Date, the effectiveness of this Agreement and the obligations of each Agent and each Lender hereunder are subject to the receipt by the Administrative Agent (except as set forth otherwise below) of each of the following documents, and the satisfaction of the conditions precedent set forth below, each of which must be satisfied to the reasonable satisfaction of the Administrative Agent and each Lender (unless waived in accordance with Section 10.02):

(a) Execution of this Agreement. This Agreement shall have been duly executed and delivered by each Loan Party and shall be in full force and effect.

(b) Corporate Documents. The following documents, each certified as of the Closing Date as indicated below:

(i) copies of the Organizational Documents, together with any amendments thereto, of each Loan Party and a certificate of good standing or its equivalent (if any) for the applicable jurisdiction for each such party (in each case such good standing certificate or its equivalent dated no more than thirty five (35) days prior to the Closing Date);

(ii) an Officer's Certificate of each Loan Party dated as of the Closing Date, certifying:

(A) that attached to such certificate is a true and complete copy of the Organizational Documents referred in clause (i) above for such Loan Party;

(B) that attached to such certificate is a true and complete copy of resolutions duly adopted by the board of directors, member(s), partner(s) or other authorized governing body of such Loan Party authorizing the transactions contemplated by the Financing Documents, and that such resolutions or other evidence of authority have not been modified, rescinded or amended and are in full force and effect;

(C) that the certificate of incorporation, certificate of formation, charter or other Organizational Documents (as the case may be) referred in clause (i) above for such Loan Party has not been amended since the date of the certification furnished pursuant to clause (i) above;

(D) as to the incumbency and specimen signature of each officer, member or partner (as applicable) of such Loan Party executing the Financing Documents to which such Loan Party is or is intended to be a party (and each Lender may conclusively rely on such certificate until it receives notice in writing from such Loan Party); and

(E) as to the qualification of such Loan Party to do business in each jurisdiction where its operations require qualification to do business and as to the

absence of any pending proceeding for the dissolution or liquidation of such Loan Party.

(c) Material Agreements. A copy of each of the Material Agreements executed as of the Closing Date and any amendments thereto shall have been made available to the Administrative Agent and the Lenders for their review.

(d) Authorizations. All material Authorizations required by any Governmental Authority or Trading Market under existing Applicable Law or stock exchange regulations or listing requirements to be issued to, assigned to, or otherwise assumed by any Borrower Group Company and necessary for (i) the Business, the Covered Projects and the Excluded Projects (except, in the case of the Projects, the permits and authorizations set forth on Schedule 3.19) or (ii) in the case of a Loan Party, except as otherwise set forth on Schedule 3.04, the execution, delivery and performance by such Loan Party of the Transaction Documents to which it is a party, including the issuance of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms hereof and thereof, other than, in each case, Authorizations that are not currently necessary and are obtainable in the ordinary course of business, (A) have been duly obtained and, to the knowledge of Borrower, validly issued, (B) are in full force and effect and not subject to any pending or, to the knowledge of Borrower, threatened, appeal or legal proceeding that could reasonably be expected to result in a material adverse modification to or withdrawal, cancellation, suspension or revocation of such Authorization, (C) are issued to, assigned to, or otherwise assumed by, a Loan Party (or such Loan Party is entitled to the benefit thereof), (D) are free from any unsatisfied condition the failure of which to satisfy could reasonably be expected to have a Material Adverse Effect and (E) with respect to such Authorizations, all applicable statutory, judicial and administrative review periods have expired.

(e) Construction Budgets, Construction Schedules, Operating Budgets and Financial Statements. The Borrower shall have delivered to the Administrative Agent:

(i) A copy of the Construction Budget in respect of each Covered Project in form and substance satisfactory to the Administrative Agent.

(ii) A copy of the Construction Schedule in respect of each Covered Project in form and substance satisfactory to the Administrative Agent.

(iii) A copy of the Operating Budget in respect of each Covered Project in form and substance satisfactory to the Administrative Agent.

(iv) An unaudited consolidated pro forma balance sheet of the Borrower and its consolidated Subsidiaries dated the Closing Date in form and substance satisfactory to the Administrative Agent.

(f) Regulatory Information. Each Lender shall have received all documentation and other written information required by under applicable anti-money laundering rules and regulations, including the USA PATRIOT Act.

(g) Representations and Warranties. The representations and warranties of each Loan Party set forth in the Financing Documents shall be true and correct in all material respects on and

as of the Closing Date (except where already qualified by materiality or Material Adverse Effect, in which case, in all respects).

(h) No Default or Event of Default; No Material Adverse Effect. No Default or Event of Default shall have occurred and be continuing on, or shall result as a result of the transactions contemplated to occur on, the Closing Date. As of the Closing Date, no development, event or circumstance that has had or could reasonably be expected to have a Material Adverse Effect shall have occurred and be continuing, or shall result as a result of the transactions contemplated to occur on the Closing Date.

(i) Lien Searches. Copies of UCC, judgment lien, tax lien and litigation lien search reports, which reports will be dated a recent date reasonably acceptable to the Administrative Agent, listing all effective financing statements that name any Loan Party as debtor and that are filed in the jurisdictions in which the UCC-1 financing statements will be filed in respect of the Collateral, none of which shall cover the Collateral except to the extent evidencing Permitted Liens.

(j) Borrowing Request. A Borrowing Request in accordance with Section 2.01.

(k) Officer's Certificate. An Officer's Certificate of the Borrower dated as of the Closing Date certifying that each of the conditions set forth in this Section 4.01 have been satisfied.

Section 4.02 Conditions to the Initial Funding Date. The occurrence of the Initial Funding Date and each Lender's obligations to make the Initial Loans pursuant to Section 2.01 are subject to the receipt by the Administrative Agent (to the extent not already supplied pursuant to Section 4.01 and except as set forth otherwise below) of each of the following documents, and the satisfaction of the conditions precedent set forth below, each of which must be satisfied to the reasonable satisfaction of the Administrative Agent and each Lender (unless waived in accordance with Section 10.02):

(a) Payoff and Releases; Security Documents; Collateral Perfection Matters.

(i) The Borrower shall have delivered to the Administrative Agent evidence to the reasonable satisfaction of Administrative Agent demonstrating that, as of the First Funding Date (after giving effect to the use of the proceeds of the Loans made on the First Funding Date), all Prior Indebtedness of the Project Companies in respect of the Tulare Project and Bolthouse Project shall have been repaid in full and, after giving effect thereto, neither of such Project Companies shall have any third party indebtedness for borrowed money that will survive after the First Funding Date other than the Obligations hereunder. The Administrative Agent shall have received customary pay-off letters and lien termination documentation (which shall release the applicable lender's Lien's on all assets of the Borrower Group Companies) relating to all such Prior Indebtedness.

(ii) The Security Documents shall have been duly executed and delivered by the Persons intended to be parties thereto and shall be in full force and effect.

(iii) The security interests in and to the Collateral intended to be created under the Security Documents shall have been created in favor of the Collateral Agent for the

benefit of the Secured Parties, are in full force and effect and the necessary notices, consents, acknowledgments, filings, registrations and recordings to preserve, protect and perfect the security interests in the Collateral have been made immediately prior to the Initial Funding Date such that the security interests granted in favor of the Collateral Agent for the benefit of the Secured Parties are filed, registered and recorded and will constitute a first priority, perfected security interest in the Collateral free and clear of any Liens, other than Permitted Liens, and all related recordation, registration and/or notarial fees of such Collateral have been paid to the extent required.

(iv) Appropriately completed UCC financing statements (Form UCC-1) or UCC financing statement amendments (Form UCC-3), which have been duly authorized for filing by the appropriate Person, naming the Loan Parties as debtors and Collateral Agent as secured party, in form appropriate for filing under each jurisdiction as may be necessary to perfect the security interests purported to be created by the Security Documents, covering the applicable Collateral.

(v) Copies of UCC, judgment lien, tax lien and litigation lien search reports, which reports will be for the period between the Closing Date and a recent date acceptable to the Administrative Agent in its sole and absolute discretion, listing all effective financing statements that name any Loan Party as debtor and that are filed in the jurisdictions in which the UCC-1 financing statements will be filed in respect of the Collateral, none of which shall cover the Collateral except to the extent evidencing Permitted Liens.

(vi) Appropriately completed copies of all other recordings and filings of, or with respect to, the Security Documents as may be requested by Collateral Agent and necessary to perfect the security interests purported to be created by the Security Documents.

(vii) Evidence that the Collateral Agent shall have received the certificates representing the shares of Capital Stock constituting "certificated securities" under the UCC that are pledged pursuant to the Security Agreement, as applicable, together with an undated stock power for each such certificate executed in blank by a duly Authorized Representative of the applicable Loan Party.

(viii) Evidence that all other actions requested by Collateral Agent and necessary to perfect and protect the security interests purported to be created by the Security Documents entered into on or prior to the Initial Funding Date have been taken immediately prior to the Initial Funding Date.

(b) Opinions of Counsel. Written opinions (dated the Initial Funding Date and addressed to the Administrative Agent, the Lenders and the Collateral Agent) of Foley & Lardner LLP, counsel to the Loan Parties, in form and substance acceptable to the Administrative Agent and covering such matters as reasonably requested by the Administrative Agent.

(c) Initial Funding Warrants; VCOC Matters; Other Transaction Documents.

(i) The Borrower shall have issued and delivered to each Orion Energy Warrant Holder an executed Initial Funding Warrant, representing the right to initially purchase such number of shares of Common Stock set forth opposite such Orion Energy Warrant Holder's name on Annex I under the heading "Initial Funding Warrants".

(ii) A board observer rights agreement containing such terms as will permit each of the Lenders to qualify as a "venture capital operating company" within the meaning of Department of Labor Regulation 29 C.F.R. Section 2510.3-101, dated as of the Initial Funding Date, in form and substance satisfactory to the Administrative Agent (the "Observer Rights Agreement").

(iii) The Loan Discount Letter and the Agent Reimbursement Letter, in each case, executed by the parties thereto.

(d) [Reserved].

(e) No Suspensions of Trading in Common Stock; Listing. Trading in the Common Stock shall not have been suspended by the SEC or any Trading Market at any time since the date of execution of this Agreement and, at any time prior to the Initial Funding Date, trading in securities generally as reported by Bloomberg L.P. shall not have been suspended or limited, or minimum prices shall not have been established on securities whose trades are reported by such service, or on any Trading Market, nor shall a banking moratorium have been declared either by the United States or New York State authorities nor shall there have occurred any material outbreak or escalation of hostilities or other national or international calamity which, in each case, makes it impracticable to acquire the Initial Funding Warrants on the Initial Funding Date.

(f) Authorizations. All material Authorizations required by any Governmental Authority or Trading Market under existing Applicable Law or stock exchange regulations or listing requirements to be issued to, assigned to, or otherwise assumed by any Borrower Group Company and necessary for (i) the Business, the Covered Projects and the Excluded Projects (except, in the case of the Projects, the permits and authorizations set forth on Schedule 3.19) or (ii) in the case of a Loan Party, except as otherwise set forth on Schedule 3.04, the execution, delivery and performance by such Loan Party of the Transaction Documents to which it is a party, including the issuance of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms hereof and thereof, other than, in each case, Authorizations that are not currently necessary and are obtainable in the ordinary course of business, (A) have been duly obtained and, to the knowledge of Borrower, validly issued, (B) are in full force and effect and not subject to any pending or, to the knowledge of Borrower, threatened, appeal or legal proceeding that could reasonably be expected to result in a material adverse modification to or withdrawal, cancellation, suspension or revocation of such Authorization, (C) are issued to, assigned to, or otherwise assumed by, a Loan Party (or such Loan Party is entitled to the benefit thereof), (D) are free from any unsatisfied condition the failure of which to satisfy could reasonably be expected to have a Material Adverse Effect and (E) with respect to such Authorizations, all applicable statutory, judicial and administrative review periods have expired.

(g) Funds Flow Memorandum. The Funds Flow Memorandum, which shall be in form and substance satisfactory to the Administrative Agent in its sole and absolute discretion.

(h) Insurance Deliverables.

(i) The Borrower shall have obtained the insurance required to be in effect under Section 5.06 to the extent required as of the Initial Funding Date and such insurance shall be in full force and effect, and the Borrower shall have furnished the Administrative Agent with certificates signed by the insurer or an agent authorized to bind the insurer, together with loss payee endorsements in favor of the Collateral Agent, evidencing such insurance, identifying underwriters, the type of insurance, the insurance limits and the policy terms, and stating that such insurance (x) is, in each case, in full force and effect and (y) complies with Section 5.06 and that all premiums then due and payable on such insurance have been paid.

(ii) Reasonably satisfactory evidence that the Borrower has in place insurance required to be in effect under Section 5.06.

Section 4.03 Conditions to Second Funding Date. The occurrence of the Second Funding Date and each Lender's obligations to make the Loans on the Second Funding Date pursuant to Section 2.01 are subject to the receipt by the Administrative Agent (to the extent not already supplied pursuant to Section 4.01 or Section 4.02 and except as set forth otherwise below) of each of the following documents, and the satisfaction of the conditions precedent set forth below, each of which must be satisfied to the reasonable satisfaction of the Administrative Agent and each Lender (unless waived in accordance with Section 10.02):

(a) Second Funding Project Company. Evidence, in form and substance acceptable to the Administrative Agent, that each Project Company in respect of the Second Funding Covered Projects shall have become a Loan Party and Guarantor hereunder for all purposes of the Financing Documents.

(b) Payoff and Releases; Security Documents; Collateral Perfection Matters.

(i) The Borrower shall have delivered to the Administrative Agent evidence to the reasonable satisfaction of Administrative Agent demonstrating that, as of the Second Funding Date (after giving effect to the use of the proceeds of the Loans made on the Second Funding Date), all Prior Indebtedness of the Project Companies in respect of the Groton Project and CCSU Project shall have been repaid in full and, after giving effect thereto, neither of such Project Companies shall have any third party indebtedness for borrowed money (other than such indebtedness set forth on Schedule 4.03(b)) that will survive after the Second Funding Date other than the Obligations hereunder. The Administrative Agent shall have received customary pay-off letters and lien termination documentation (which shall release the applicable lender's Lien's on all assets of the Borrower Group Companies) relating to all such Prior Indebtedness.

(ii) The Security Documents shall have been duly executed and delivered by the Persons intended to be parties thereto and shall be in full force and effect.

(iii) The security interests in and to the Collateral intended to be created under the Security Documents shall have been created in favor of the Collateral Agent for the benefit of the Secured Parties, are in full force and effect and the necessary notices, consents, acknowledgments, filings, registrations and recordings to preserve, protect and

perfect the security interests in the Collateral have been made immediately prior to the Second Funding Date such that the security interests granted in favor of the Collateral Agent for the benefit of the Secured Parties are filed, registered and recorded and will constitute a first priority, perfected security interest in the Collateral free and clear of any Liens, other than Permitted Liens, and all related recordation, registration and/or notarial fees of such Collateral have been paid to the extent required.

(iv) Appropriately completed UCC financing statements (Form UCC-1) or UCC financing statement amendments (Form UCC-3), which have been duly authorized for filing by the appropriate Person, naming the Loan Parties as debtors and Collateral Agent as secured party, in form appropriate for filing under each jurisdiction as may be necessary to perfect the security interests purported to be created by the Security Documents, covering the applicable Collateral.

(v) Copies of UCC, judgment lien, tax lien and litigation lien search reports, which reports will be for the period between the Closing Date and a recent date acceptable to the Administrative Agent in its sole and absolute discretion, listing all effective financing statements that name any Loan Party as debtor and that are filed in the jurisdictions in which the UCC-1 financing statements will be filed in respect of the Collateral, none of which shall cover the Collateral except to the extent evidencing Permitted Liens.

(vi) Appropriately completed copies of all other recordings and filings of, or with respect to, the Security Documents as may be requested by Collateral Agent and necessary to perfect the security interests purported to be created by the Security Documents.

(vii) Evidence that the Collateral Agent shall have received the certificates representing the shares of Capital Stock constituting "certificated securities" under the UCC that are pledged pursuant to the Security Agreement, as applicable, together with an undated stock power for each such certificate executed in blank by a duly Authorized Representative of the applicable Loan Party.

(viii) Evidence that all other actions requested by Collateral Agent and necessary to perfect and protect the security interests purported to be created by the Security Documents entered into on or prior to the Second Funding Date have been taken immediately prior to the Second Funding Date.

(c) Opinions of Counsel. Written opinions (dated the Second Funding Date and addressed to the Administrative Agent, the Lenders and the Collateral Agent) of Foley & Lardner LLP, counsel to the Loan Parties, in form and substance acceptable to the Administrative Agent and covering such matters as reasonably requested by the Administrative Agent.

(d) Second Funding Warrants. The Borrower shall have issued and delivered to each Orion Energy Warrant Holder an executed Second Funding Warrant, representing the right to initially purchase such number of shares of Common Stock set forth opposite such Orion Energy Warrant Holder's name on Annex I under the heading "Second Funding Warrants".

(e) No Suspensions of Trading in Common Stock; Listing. Trading in the Common Stock shall not have been suspended by the SEC or any Trading Market at any time since the date of execution of this Agreement and, at any time prior to the Second Funding Date, trading in securities generally as reported by Bloomberg L.P. shall not have been suspended or limited, or minimum prices shall not have been established on securities whose trades are reported by such service, or on any Trading Market, nor shall a banking moratorium have been declared either by the United States or New York State authorities nor shall there have occurred any material outbreak or escalation of hostilities or other national or international calamity which, in each case, makes it impracticable to acquire the Second Funding Warrants on the Second Funding Date.

(f) Operating Budgets; Pro Forma Balance Sheet.

(i) A copy of the Operating Budget in respect of each Business Unit that the Borrower plans to submit to its Board of Directors for approval.

(ii) The Borrower shall have delivered to the Administrative Agent an unaudited consolidated pro forma balance sheet of the Borrower and its consolidated Subsidiaries dated the Second Funding Date in form and substance satisfactory to the Administrative Agent.

(g) Authorizations. All material Authorizations required by any Governmental Authority or Trading Market under existing Applicable Law or stock exchange regulations or listing requirements to be issued to, assigned to, or otherwise assumed by any Borrower Group Company and necessary for (i) the Business, the Covered Projects and the Excluded Projects or (ii) in the case of a Loan Party, except as otherwise set forth on Schedule 3.04, the execution, delivery and performance by such Loan Party of the Transaction Documents to which it is a party, including the issuance of the Warrants and the reservation for issuance and issuance of the Warrant Shares in accordance with the terms hereof and thereof, other than, in each case, Authorizations that are not currently necessary and are obtainable in the ordinary course of business, (A) have been duly obtained and, to the knowledge of Borrower, validly issued, (B) are in full force and effect and not subject to any pending or, to the knowledge of Borrower, threatened, appeal or legal proceeding that could reasonably be expected to result in a material adverse modification to or withdrawal, cancellation, suspension or revocation of such Authorization, (C) are issued to, assigned to, or otherwise assumed by, a Loan Party (or such Loan Party is entitled to the benefit thereof), (D) are free from any unsatisfied condition the failure of which to satisfy could reasonably be expected to have a Material Adverse Effect and (E) with respect to such Authorizations, all applicable statutory, judicial and administrative review periods have expired.

(h) Insurance Deliverables.

(i) The Borrower shall have obtained the insurance required to be in effect under Section 5.06 to the extent required as of the Initial Funding Date and such insurance shall be in full force and effect, and the Borrower shall have furnished the Administrative Agent with certificates signed by the insurer or an agent authorized to bind the insurer, together with loss payee endorsements in favor of the Collateral Agent, evidencing such insurance, identifying underwriters, the type of insurance, the insurance limits and the policy terms, and stating that such insurance (x) is, in each case, in full force and effect and

(y) complies with Section 5.06 and that all premiums then due and payable on such insurance have been paid.

(ii) Reasonably satisfactory evidence that the Borrower has in place insurance required to be in effect under Section 5.06.

(i) Establishment of Accounts; Depositary Agreement.

(i) Evidence that each of the Collateral Accounts described in clause (a) of the definition thereof has been established in accordance with the terms thereof.

(ii) If requested by the Administrative Agent, a depositary agreement in form and substance acceptable to the Administrative Agent (the "Depositary Agreement"), executed by the Loan Parties, the Depositary Bank and the Collateral Agent, reflecting the provisions described in Section 5.18.

(j) Satisfactory Completion of Diligence. The Administrative Agent shall be satisfied, in its sole discretion, with the results of its due diligence with respect to the Borrower, the other Borrower Group Companies and the Projects.

(k) Agent Approval. The Administrative Agent shall have approved, in its sole discretion, the occurrence of the Second Funding Date.

(l) Investment Committee Approval. The Lenders shall have received Investment Committee approval for the making the Loans on the Second Funding Date.

(m) Fully Funded Third Party Advanced Technology Contract. The Borrower and the counterparty previously identified to the Administrative Agent in writing shall have executed and delivered the Fully Funded Third Party Advanced Technology Contract and the Fully Funded Third Party Advanced Technology Contract shall have become effective.

Section 4.04 Conditions to Each Funding Date and Each Reserve Release Date. The occurrence of each Funding Date (including the Initial Funding Date and each Secondary Facility Funding Date) and each Lender's obligations to make the Loans pursuant to Section ~~2.01 are~~ 2.01, and the occurrence of each Reserve Release Date and the Administrative Agent's obligation to consummate a Reserve Release in respect thereof, are, in each such case, subject to the receipt by the Administrative Agent (except as set forth otherwise below) of each of the following documents, and the satisfaction of the conditions precedent set forth below, each of which must be satisfied to the reasonable satisfaction of the Administrative Agent and each Lender (unless waived in accordance with Section 10.02):

(a) Fees and Expenses. The Borrower has arranged for payment on such Funding Date (including arrangement for payment out of the proceeds of Loan to be made on such Funding Date in accordance with Section 5.13) or such Release Date of all reasonable and documented out-of-pocket fees, reimbursements and expenses then due and payable pursuant to the Financing Documents.

(b) Borrowing Request. Agent and the Lenders shall have received a Borrowing Request in accordance with Section 2.01(c), executed and delivered by an Authorized Representative of the Borrower.

(c) Representations and Warranties. The representations and warranties of each Loan Party set forth in the Financing Documents shall be true and correct in all material respects on and as of such Funding Date or such Release Date (except where already qualified by materiality or Material Adverse Effect, in all respects).

(d) No Default or Event of Default; No Material Adverse Effect. No Default or Event of Default shall have occurred and be continuing on, or shall result as a result of the transactions contemplated to occur on, such Funding Date or such Release Date. As of such Funding Date or such Release Date, no development, event or circumstance that has had or could reasonably be expected to have a Material Adverse Effect shall have occurred and be continuing, or shall result from the transactions contemplated to occur on such Funding Date.

(e) Notes. Each Lender that has requested a Note or Notes, as applicable, prior to such Funding Date pursuant to Section 2.04(b) shall have received a duly executed Note or Notes, as applicable, dated such Funding Date, payable to such Lender in a principal amount equal to such Lender's Loan.

(f) Construction Budget. Each of the Covered Project Companies and the Covered Projects shall be in compliance with the applicable Construction Budget.

(g) Construction Schedule. Each of the Covered Project Companies and the Covered Projects shall be in compliance with the applicable Construction Schedule.

Section 4.05 Conditions to Each Secondary Facility Funding Date and Each Reserve Release Date. The occurrence of each Secondary Facility Funding Date and each Lender's obligations to make the Secondary Facility Loans on each Secondary Facility Funding Date pursuant to Section 2.01, and the occurrence of each Reserve Release Date and the Administrative Agent's obligation to consummate a Reserve Release in respect thereof, are, in each such case, subject to the receipt by the Administrative Agent of each of the following documents, and the satisfaction of the conditions precedent set forth below, each of which must be satisfied to the reasonable satisfaction of the Administrative Agent and each Lender (unless waived in accordance with Section 10.02):

(a) Secondary Facility IP Collateral Documents. The Loan Parties shall have executed and delivered to the Administrative Agent the Secondary Facility IP Collateral Documents, in each case, in form and substance acceptable to the Administrative Agent.

(b) Secondary Facility Availability Period. Such Secondary Facility Funding Date or such Reserve Release Date, as applicable, shall occur during the Secondary Facility Availability Period.

(c) Usage Amounts and Commitments. In the case of a Secondary Facility Funding Date, immediately after giving effect to the making of the Secondary Facility Loans on such Secondary Facility Funding Date (and any contemporaneous Reserve Replenishment in respect thereof), (i) the Aggregate Secondary Facility Usage Amount would not exceed the Aggregate Secondary Facility Commitment Amount, and (ii) the aggregate principal amount of all Secondary Facility Loans made by each Lender would not exceed such Lender's Secondary Facility Commitment Amount. In the case of a Reserve Release Date, immediately after giving effect to the consummation of the Reserve Release on such Reserve Release, the Aggregate Secondary Facility Usage Amount would not exceed the Aggregate Secondary Facility Commitment Amount.

(d) Minimum Amounts. The aggregate amount of Secondary Facility Loans to be made on such Secondary Facility Funding Date or the amount of the Reserve Release to be consummated on such Reserve Release Date, as applicable, shall not be less than $5,000,000.

(e) Maximum Amounts. Except to the extent that (i) the Secondary Facility Funding Date or Reserve Release Date, as applicable, shall be on or after August 15, 2020 and (ii) after giving effect to the Secondary Facility Loans to be made on such Secondary Facility Funding Date or the amount of the Reserve Release to be consummated on such Reserve Release Date, the Aggregate Secondary Facility Usage Amount shall equal the Aggregate Secondary Facility Commitment Amount, the aggregate amount of Secondary Facility Loans to be made on such Secondary Facility Funding Date or the amount of the Reserve Release to be consummated on such Reserve Release Date, as applicable, when aggregated with the total amount of Secondary Facility Loans made and Reserve Releases consummated during the 30 day period immediately prior to such Secondary Facility Funding Date or Reserve Release Date, as applicable, shall not exceed $15,000,000.

(f) Initial Secondary Facility Funding Date. Solely in the case of the initial Secondary Facility Funding Date (but not with respect to any Reserve Release Date) occurring after the Fifth Amendment Effective Date, the Administrative Agent shall have received (i) such certificates and documents of the type specified in Section 4.01(b) that shall be reasonably requested by the Administrative Agent, and (ii) written opinions (dated the date of such initial Secondary Facility Funding Date and addressed to the Administrative Agent, the Lenders and the Collateral Agent) of Foley & Lardner LLP, counsel to the Loan Parties, in form and substance acceptable to the Administrative Agent and covering such matters as reasonably requested by the Administrative Agent.

Section 4.06 ~~**Section 4.05**~~ Satisfaction of Conditions. Except to the extent that Borrower has disclosed in the Borrowing Request that an applicable condition specified in Section 4.01, Section 4.02, Section ~~**4.03**~~4.03, Section 4.04 or Section ~~**4.04,**~~4.05, as applicable, will not be satisfied as of the Closing Date ~~**or**~~, the applicable Funding Date or the applicable Release Date, as applicable, Borrower shall be deemed to have made a representation and warranty as of such time that the conditions specified in Section 4.01, Section 4.02, Section ~~**4.03**~~4.03, Section 4.04 or Section ~~**4.04,**~~4.05, as applicable, have been satisfied. No such disclosure by Borrower that a

condition specified in Section 4.01, Section 4.02, Section ~~4.03~~4.03, Section 4.04 or Section ~~4.04,~~4.05, as applicable, will not be satisfied as of Closing Date ~~or~~, the applicable Funding Date or the applicable Release Date, as applicable, shall affect the right of (x) each Lender not to make the Loans requested to be made by it if such condition has not been satisfied at such time or (y) the Administrative Agent not to consummate the applicable Reserve Release if such condition has not been satisfied at such time.

## ARTICLE V

## AFFIRMATIVE COVENANTS

Each Loan Party hereby agrees that, from and after the Closing Date until the Discharge Date:

Section 5.01 Corporate Existence; Etc. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, at all times preserve and maintain in full force and effect its existence as a corporation or a limited liability company, as applicable, in good standing under the laws of the jurisdiction of its organization and its qualification to do business and its good standing in each jurisdiction in which the character of properties owned by it or in which the transaction of its business as conducted or proposed to be conducted makes such qualification necessary.

Section 5.02 Conduct of Business. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, operate, maintain and preserve or cause to be operated, maintained and preserved, the Business, the Covered Projects and the Excluded Projects in accordance in all material respects with the requirements of the Material Agreements to which it is a party and in compliance, in all material respects, with Applicable Laws and Authorizations by Governmental Authorities and the terms of its insurance policies (except, in the case of any Excluded Project Company, where such failure could not reasonably be expected to have a Material Adverse Effect).

Section 5.03 Compliance with Laws and Obligations. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, comply in all material respects with (i) applicable Environmental Laws and occupational health and safety regulations and (ii) all other Applicable Laws and Authorizations by Governmental Authorities (except, with respect to clause (ii), in the case of any Excluded Project Company, where a failure to so comply could not reasonably be expected to have a Material Adverse Effect). Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, comply with and perform its respective contractual obligations in all material respects, and enforce against other parties their respective contractual obligations in all material respects, under each Material Agreement to which it is a party. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, comply with and not violate applicable Sanctions, Anti-Money Laundering Laws, the FCPA or any other Anti-Corruption Laws and shall not undertake or cause to be undertaken any Anti-Corruption Prohibited Activity.

Section 5.04 Governmental Authorizations. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, obtain, preserve and maintain in full force and effect (or where appropriate, promptly renew in a timely manner), or cause to be obtained and maintained in full force and effect all material Authorizations (including all material Authorizations required by Environmental Law) required by any Governmental Authority under any Applicable Law for (i) the Business, the Covered Projects and the Excluded Projects (except, in the case of any Excluded Project Company, where a failure to so obtain, preserve and maintain could not reasonably be expected to have a Material Adverse Effect) or (ii) the execution, delivery and performance by such Loan Party of the Transaction Documents to which it is a party, in each case, at or before the time the relevant Authorization becomes necessary for such purposes.

Section 5.05 Maintenance of Title. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, maintain (a) good title to the property owned by such Person necessary for the conduct of the Business, the Covered Projects and the Excluded Projects free and clear of Liens, other than Permitted Liens; (b) legal and valid and subsisting leasehold interests to the properties leased by such Person necessary for the conduct of the Business, the Covered Projects and the Excluded Projects free and clear of Liens, other than Permitted Liens and (c) legal and valid possessory rights to the properties possessed and not otherwise held in fee or leased by such Person necessary for the conduct of the Business, the Covered Projects and the Excluded Projects.

Section 5.06 Insurance.

(a) Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, maintain insurance with insurance companies rated A- (or the then equivalent grade) or better, with a minimum size rating of VII (or the then equivalent grade) by A.M. Best Company (or an equivalent rating by another nationally recognized insurance rating agency of similar standing if A.M. Best Company shall no longer publish its Best's Credit Ratings or if S&P shall no longer publish its ratings for insurance companies, as the case may be) or other insurance companies of recognized responsibility satisfactory to the Administrative Agent against at least such risks and in at least such amounts as are customarily maintained by prudent similar businesses and as may be required by Applicable Law and as are required by the Material Agreements and/or Security Documents. Coverage at a minimum shall include such insurance as is substantially similar to the insurance as in effect at the Initial Funding Date. All such insurance, to the extent covering any Loan Party, Covered Project or any of their respective assets or properties, shall (a) provide that no cancellation or material modification thereof shall be effective until at least thirty (30) days (or, in the case of cancellation for non-payment of premiums, ten (10) days) after receipt by the Administrative Agent of written notice thereof, (b) name the Collateral Agent, on behalf of the Lenders and the Agents, as an additional insured party thereunder, (c) in respect of any such policy relating to the Property of the Loan Parties, in the case of each casualty (i.e. property) insurance policy, name the Administrative Agent as lender's loss payee and (d) waive subrogation in favor of all additional insured parties. On the Closing Date and from time to time thereafter deliver to the Administrative Agent upon its reasonable request information in reasonable detail as to the insurance then in effect, stating the names of the insurance companies, the amounts and rates of the insurance, the dates of the expiration thereof and the properties and risks covered thereby.

(b) Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, maintain (or cause to be maintained) the insurance required to be maintained pursuant to the Material Agreements in accordance with the terms of the same.

(c) Loss Proceeds of the insurance policies provided or obtained by or on behalf of the Loan Parties or any of the Covered Projects shall be required to be paid by the respective insurers directly to the Mandatory Prepayment Account, as applicable. If any Loss Proceeds that are required under the preceding sentence to be paid to the Mandatory Prepayment Account are received by any other Loan Party or any other Person, such Loss Proceeds shall be received in trust for the Collateral Agent, shall be segregated from other funds of the recipient, and shall be forthwith paid into the Mandatory Prepayment Account in the same form as received (with any necessary endorsement).

Section 5.07 Keeping of Books. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, maintain an accounting and control system, management information system and books of account and other records, which together adequately reflect truly and fairly the financial condition of such Person and the results of operations in accordance with GAAP and all Applicable Laws.

Section 5.08 Access to Property/Records. Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, permit (i) officers and designated representatives of the Administrative Agent to visit and inspect any of its properties accompanied by executive officers or designated representatives of such Person and (ii) officers and designated representatives of the Administrative Agent to examine and make copies of the books of record and accounts of such Person (provided that a Loan Party shall have the right to be present) and discuss the affairs, finances and accounts of such Person with the chief financial officer, the chief operating officer and the chief executive officer of such Person (subject to reasonable requirements of safety and confidentiality, including requirements imposed by Applicable Law or by contract), in each case, with at least three (3) Business Days advance notice to such Person and during normal business hours of such Person; provided that, the Loan Parties shall not be required to reimburse the Administrative Agent for more than one inspection per calendar year as long as no Event of Default has occurred.

Section 5.09 Taxes . Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, pay and discharge, before the same shall become delinquent all material Taxes imposed upon it or upon its property to the extent required under Applicable Law that, if unpaid, might become a Lien (other than a Permitted Lien of the type referenced in clause (a)(i) of the definition of Permitted Lien) upon its property; provided that such Person shall not be required to pay or discharge any such Tax for so long as such Person satisfies the Permitted Contest Conditions in relation to such tax, assessment, charge or claim. The Borrower shall cause each Excluded Project Company to reimburse the Borrower for any tax liabilities incurred or paid by the Borrower or any other Loan Party arising out of the business, assets or operations of such Excluded Project Company.

Section 5.10 Financial Statements; Other Reporting Requirements . The Borrower shall furnish to the Administrative Agent:

(a) as soon as available and in any event within thirty (30) days after the end of each calendar month, commencing with the month in which the Closing Date occurs, a monthly report containing such information as Borrower customarily relies upon to monitor its performance (including commercial updates), in the form attached hereto as Exhibit F, which shall include operational and financial performance for the business in reasonable detail and an updated corporate monthly liquidity forecast for the following 3 years;

(b) as soon as available and in any event within forty-five (45) days after the end of each of the first three fiscal quarters annually, commencing with the fiscal quarter in which the Closing Date occurs, quarterly unaudited consolidated financial statements of the Borrower and its consolidated Subsidiaries for such fiscal quarter, including the unaudited consolidated balance sheet as of the end of such quarterly period and the related unaudited statements of income, retained earnings and cash flows for such quarterly period and for the portion of such fiscal year ending on the last day of such period, all in reasonable detail; provided that such reports shall be deemed provided if filed on EDGAR;

(c) as soon as available and in any event within ninety (90) days after the end of each fiscal year, commencing with fiscal year ending on October 31, 2019, audited consolidated financial statements for such fiscal year for the Borrower and its consolidated Subsidiaries, including therein the consolidated balance sheet as of the end of such fiscal year and the related statements of income, retained earnings and cash flows for such year, and the respective directors' and auditors' reports, all in reasonable detail and accompanied by an audit opinion thereon by the Independent Auditor, which opinion shall state that said financial statements present fairly, in all material respects, the financial position of the Borrower and its consolidated Subsidiaries at the end of, and for, such fiscal year in accordance with GAAP;

(d) within thirty (30) days following the end of each calendar month until each Covered Project contemplated by a Construction Budget and/or Construction Schedule has achieved project completion, a construction report prepared by the Borrower on the progress of such Covered Project and achievement of milestones (including project completion) during the immediately preceding calendar month as compared to the applicable Construction Budget and Construction Schedule, including (i) in the event of any material deviation from the applicable Construction Budget and/or Construction Schedule, the reason for such material deviation and such other information requested by the Administrative Agent in connection therewith, (ii) any factors which have had or could reasonably be expected to have a Material Adverse Effect on the Business or such Covered Project, (iii) the status of any Governmental Approval by any Governmental Authority necessary for the development of such Covered Project that has not already been obtained, including the dates of applications submitted or to be submitted and the anticipated dates of actions by applicable Governmental Authorities with respect to such Governmental Approval, and (iv) an estimated date on which project completion will be achieved for such Covered Project;

(e) at the time of the delivery of the financial statements under subsections (b) and (c) above, a certificate of an Authorized Representative of the Borrower (i) certifying that such financial statements fairly present in all material respects the financial condition and results of operations of the Borrower and its consolidated Subsidiaries on the dates and for the periods

indicated in accordance with GAAP, subject, in the case of interim financial statements, to the absence of footnotes and normally recurring year-end adjustments, and (ii) certifying that no Default or Event of Default has occurred and is continuing, or if a Default or Event of Default has occurred and is continuing, a statement as to the nature thereof (such certificate, the "Compliance Certificate");

(f) within thirty (30) days after each policy renewal date, a certificate of an Authorized Representative of the Borrower certifying that the insurance requirements of Section 5.06 have been implemented and are being complied with by the Loan Parties and on or prior to the expiration of each policy required to be maintained pursuant to Section 5.06, certificates of insurance with respect to each renewal policy and each other insurance policy required to be in effect under this Agreement that has not previously been furnished to the Administrative Agent under this Agreement. If at any time requested by the Administrative Agent, the Borrower shall deliver to the Administrative Agent a duplicate of any policy of insurance required to be in effect under this Agreement;

(g) within forty-five (45) days following the end of each fiscal quarter, an environmental, social and governance report in respect of the applicable fiscal year in the form attached hereto as Exhibit J;

(h) within thirty (30) days after the end of each calendar month, a certificate of an Authorized Representative of the Borrower certifying as to the compliance (or non-compliance) of the Loan Parties with the requirements set forth in Schedule 5.21 as of the end of such calendar month; and

(i) promptly after the Administrative Agent's request therefor, such other information regarding the business, assets, operations or financial condition of the Borrower and its Subsidiaries as the Administrative Agent may request.

Section 5.11 Notices . The Borrower shall promptly (and, unless a subsection of this Section 5.11 is expressly made subject to another time period, within ten (10) Business Days) upon an Authorized Representative of any Loan Party obtaining knowledge thereof (or as otherwise provided in the case of clauses (a) and (g) below), give notice to the Administrative Agent of:

(a) within five (5) Business Days after the earlier of (i) an Authorized Representative of any Loan Party obtaining knowledge thereof and (ii) receipt of any notice thereof, the occurrence of any material default under any Material Agreements;

(b) any agreement or transaction (or series of related transactions) entered into with an Affiliate of any Borrower Group Company (other than (x) agreements or transactions (i) solely among Loan Parties, (ii) solely among Existing Foreign Subsidiaries, (y) dividends, distributions or other payments by any Excluded Project Company or any Existing Foreign Subsidiary to any Loan Party, or (z) agreements and transactions entered into in the ordinary course of such Borrower Group Company's (and such Affiliate's) business and upon fair and reasonable terms no less favorable to such Borrower Group Company than it would obtain in comparable arm's-length transactions with a Person acting in good faith which is not an Affiliate) with a value in excess of $250,000 over the term of such agreement or transaction (or series of related transactions);

(c) any notice or communication in respect of any actual or alleged breach, termination, violation of law, or material dispute given to or received (i) from creditors of any Borrower Group Company generally or (ii) in connection with any Material Agreement;

(d) notice received by it with respect to the cancellation of, adverse change in, or default under, any insurance policy required to be maintained in accordance with Section 5.06;

(e) the filing or commencement of any litigation, investigation, action or proceeding (including any Environmental Claim) of or before any court, arbitrator or Governmental Authority against or affecting any Borrower Group Company, the Business, any Covered Project or any Excluded Project (x) in which the amount involved is in excess of $250,000, (y) has resulted in or, if adversely determined, could reasonably be expected to result in a Material Adverse Effect or (z) which relates to a material Authorization (including all material Authorizations required by Environmental Law) necessary for the Business, any Covered Project or any Excluded Project;

(f) within three (3) Business Days, the occurrence of a Default or an Event of Default;

(g) within ten (10) Business Days of such documents becoming available, true and complete copies of any amendment of any Material Agreement and of any Material Agreements executed after the Closing Date;

(h) the occurrence of any ERISA Event, together with a written notice setting forth the nature thereof and the action, if any, that the applicable Borrower Group Company or ERISA Affiliate proposes to take with respect thereto; and

(i) (x) the sale, lease, transfer or other Disposition of, in one transaction or a series of transactions, all or any part of the property of any Borrower Group Company in excess of $250,000 in the aggregate per calendar year and (y) the entry of any contract contemplated by, and any Disposition pursuant to, Section 6.07(e)(iii) (including the fair market value of any such Disposition).

Section 5.12 [Reserved].

Section 5.13 Use of Proceeds.

(a) The proceeds of the Loans funded on the Initial Funding Date shall be used solely in accordance with the Funds Flow Memorandum. The proceeds of any Loans funded on the Second Funding Date shall be used solely as set forth in the Second Funding Date Funds Flow Memo. The proceeds of any Secondary Facility Loans made on any Secondary Facility Funding Date shall be used solely (i) in the case of any Reserve Replenishment Secondary Facility Loans, for the purposes of being deposited into one or more Applicable Reserves pursuant to a Reserve Replenishment in accordance with Section 5.27, and (ii) in the case of any Secondary Facility Loans other than Reserve Replenishment Secondary Facility Loans, for general corporate purposes of the Borrower or the Guarantors in accordance with either (x) the then effective Operating Budget of the Borrower, or (y) the cash use forecast delivered by the Borrower to the Administrative Agent on June 6, 2020.

(b) The proceeds of the Loans will not be used in violation of Anti-Corruption Laws or applicable Sanctions.

Section 5.14 Security . The Loan Parties shall preserve and maintain the security interests granted under the Security Documents and undertake all actions which are necessary or appropriate to: (a) maintain the Collateral Agent's security interest in the Collateral in full force and effect at all times (including the priority thereof (subject to Permitted Liens)), and (b) preserve and protect the Collateral and protect and enforce the Loan Parties' rights and title and the rights of the Collateral Agent and the other Secured Parties to the Collateral (subject to Permitted Liens), including the making or delivery of all filings and recordations, the payment of all reimbursements, fees and other charges and the issuance of supplemental documentation.

Section 5.15 Further Assurances . The Loan Parties shall execute, acknowledge where appropriate, and deliver, and cause to be executed, acknowledged where appropriate, and delivered, from time to time promptly at the reasonable request of any Agent all such instruments and documents as are necessary or appropriate to carry out the intent and purpose of the Financing Documents (including filings, recordings or registrations required to be filed in respect of any Security Document or assignment thereto) necessary to maintain, to the extent permitted by Applicable Law, the Collateral Agent's perfected security interest in the Collateral (subject to Permitted Liens) to the extent and in the priority required pursuant to the Security Documents.

Section 5.16 Additional Loan Parties; Security in Newly Acquired Property and Revenues .

(a) The Borrower shall notify the Administrative Agent within five (5) Business Days after it or any other Loan Party forms, creates, establishes or acquires any Subsidiary (other than an Excluded Project Company), and promptly thereafter (and in any event within ten (10) Business Days) cause such Person to (i) become a Restricted Subsidiary, Guarantor and Loan Party hereunder by executing and delivering to the Administrative Agent a joinder to this Agreement, in form and substance acceptable to the Administrative Agent, or such other document as the Administrative Agent shall reasonably deem appropriate for such purpose, (ii) take all such action and execute such agreements, documents and instruments requested by the Administrative Agent, including the execution and delivery of a joinder to the Security Agreement, in form and substance acceptable to the Administrative Agent, and the execution and delivery of such other Security Documents that may be necessary to grant to the Collateral Agent, for the benefit of the Secured Parties, a perfected first priority security interest and Lien in any Collateral owned by such new Subsidiary and (iii) deliver to the Administrative Agent documents of a type similar to those delivered by the Loan Parties on the Closing Date and Initial Funding Date under Section 4.01 and 4.02 and, if reasonably requested by the Administrative Agent, favorable opinions of counsel to such Person (which shall cover, among other things, the legality, validity, binding effect and enforceability of the documentation referred to in clauses (i) and (ii) of this subsection), all in form, content and scope satisfactory to the Administrative Agent.

(b) In the event that any Restricted Project Company becomes an Additional Covered Project Company hereunder, then, contemporaneously with such Restricted Project Company becoming an Additional Covered Project Company hereunder, such Additional Covered Project Company shall deliver to the Administrative Agent a proposed Operating Budget for such Additional Covered Project Company and a proposed Construction Schedule and Construction Budget for the Additional Covered Project in respect of such Additional Covered Project Company, in each case, in forms consistent with the then effective Operating Budgets, Construction Schedules and Construction Budgets for the existing Covered Project Companies and existing Covered Projects, as applicable. No such proposed Operating Budget, Construction Schedule and Construction Budget shall be effective until approved by the Administrative Agent (such approval not to be unreasonably withheld, conditioned or delayed). In the event that, pursuant to the immediately preceding sentence, any Operating Budget, Construction Schedule or Construction Budget for an Additional Covered Project Company and Additional Covered Project is not approved by the Administrative Agent, such Additional Covered Project Company shall not commence such Additional Covered Project until such Operating Budget, Construction Schedule and Construction Budget are so approved by the Administrative Agent. Once so approved, such Construction Schedule and Construction Budget shall thereupon be deemed the Additional Covered Project Construction Schedule and Additional Covered Project Construction Budget for such Additional Covered Project for the purposes of this Agreement.

(c) Without limiting any other provision of any Financing Document, if any Loan Party shall at any time acquire interests in property in a single transaction or series of transactions, as applicable, not otherwise subject to the Lien created by the Security Documents having a value of at least $500,000 individually, promptly upon such acquisition, such Loan Party shall execute, deliver and record a supplement to the Security Documents or other documents, subjecting such interest to the Lien created by the Security Documents.

Section 5.17 Material Agreements . Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, (a) duly and punctually perform and observe all of its material covenants and obligations contained in each Material Agreement to which it is a party, (b) take all reasonable and necessary action to prevent the termination or cancellation of any Material Agreement in accordance with the terms of such Material Agreement or otherwise (except for the expiration of any Material Agreement in accordance with its terms and not as a result of a breach or default thereunder) and (c) enforce against the relevant Material Counterparty each material covenant or obligation of such Material Agreement, as applicable, in accordance with its terms.

Section 5.18 Collateral Accounts.

(a) Account Establishment Date. The Loan Parties shall at all times from and after the Account Establishment Date (i) maintain the Collateral Accounts in accordance with the Financing Documents, (ii) cause all Blocked Control Collateral Accounts to be subject to a Blocked Account Control Agreement, and (iii) cause all Springing Control Collateral Accounts to be subject to a Springing Account Control Agreement.

(b) Borrower Funding Account.

(i) On or prior to the Account Establishment Date, the Borrower shall open and establish the Borrower Funding Account at the Depositary Bank. Following the opening and establishment of the Borrower Funding Account, the Borrower shall at all times thereafter maintain the Borrower Funding Account and cause the Borrower Funding Account to be subject to a Blocked Account Control Agreement.

(ii) The Borrower shall not have any right to withdraw any amounts from the Borrower Funding Account or to direct the Depositary Bank to release or distribute any amounts contained in the Borrower Funding Account.

(iii) On the Second Funding Date, pursuant to the Second Funding Date Funds Flow Memo, an aggregate amount of $5,000,000 shall be deposited into the Borrower Funding Account (such $5,000,000 is herein referred to as the "Cash Reserve"). From and after the Second Funding Date, the Cash Reserve shall remain held in the Borrower Funding Account and shall not be released or distributed from the Borrower Funding Account for any purpose; provided, that, upon the occurrence of the Cash Reserve Release Date, the Administrative Agent shall instruct the Depositary Bank to release the Cash Reserve from the Borrower Funding Account and transfer such funds to a Business Unit Account specified by the Borrower.

(iv) On each Funding Date after the Second Funding Date (other than a Secondary Facility Funding Date), the Administrative Agent shall deposit the proceeds of the Loans funded on such Funding Date into the Borrower Funding Account. With respect to any amounts funded into the Borrower Funding Account on any Funding Date after the Second Funding Date (other than a Secondary Facility Funding Date), the Administrative Agent shall instruct the Depositary Bank to release and distribute the amounts contained in the Borrower Funding Account for the purposes, and in the amounts, as agreed in writing by the Lenders and the Borrower in connection with such Funding Date.

(c) Borrower Waterfall Account. On or prior to the Account Establishment Date, the Borrower shall open and establish the Borrower Waterfall Account at the Depositary Bank. Following the opening and establishment of the Borrower Waterfall Account, the Borrower shall at all times thereafter maintain the Borrower Waterfall Account and cause the Borrower Waterfall Account to be subject to a Blocked Account Control Agreement. With respect to the Borrower Waterfall Account:

(i) on each Quarterly Payment Date, amounts shall be deposited into the Borrower Waterfall Account from (x) the Business Units Accounts pursuant to Section 5.18(d)(v), and (y) the Project Company Accounts pursuant to Section 5.18(e)(v);

(ii) neither the Borrower nor any other Borrower Group Company shall have any right to withdraw any amounts from the Borrower Waterfall Account or to direct the Depositary Bank to release or distribute any amounts contained in the Borrower Waterfall Account; and

(iii) on each Quarterly Payment Date, the Administrative Agent shall instruct the Depositary Bank to release and distribute 100% of the funds then held in the Borrower Waterfall Account in accordance with Section 2.08.

(d) Business Unit Accounts. On or prior to the Account Establishment Date, the Borrower shall cause the Specified Business Unit to open and establish the Specified Business Unit Account at the Depositary Bank and shall cause all other Business Units to open and establish, collectively, one or more Business Unit Accounts at the Depositary Bank. Following the opening and establishment of each such Business Unit Account, the applicable Business Unit shall at all times thereafter maintain such Business Account and cause such Business Unit Account to be subject to a Springing Account Control Agreement. With respect to each Business Unit and its applicable Business Unit Account:

(i) the Borrower shall cause such Business Unit to cause all revenues or other payments or amounts of any kind received or receivable by such Business Unit (other than any such amounts that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18) to be deposited into such Business Unit Account;

(ii) the Borrower shall cause such Business Unit to use its commercially reasonable efforts to instruct and cause all Persons making payments of any kind to such Business Unit (other than any such payments that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18) to make such payments directly into such Business Unit Account;

(iii) in the event that, notwithstanding clause (ii) above, such Business Unit shall receive payment of any amounts (other than any such amounts that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18) in any manner other than payment of such amounts directly into such Business Unit Account, the Borrower shall cause such Business Unit to immediately deposit such amounts into such Business Unit Account;

(iv) with respect to the Specified Business Unit Account, upon the receipt of any funds in the Specified Business Unit Account, (x) the Borrower shall be permitted to withdraw and transfer 60% of such amounts to a General Business Unit Account and (y) except as set forth in clause (vi) below, neither the Borrower nor any other Borrower Group Company shall be permitted to withdraw, transfer or otherwise use the remaining 40% of amounts deposited into the Specified Business Unit Account;

(v) the General Business Unit shall be permitted, from time to time, to withdraw and apply amounts from such General Business Unit Accounts at such times, in such amounts and for such purposes as set forth in the applicable Operating Budget for such General Business Unit; and

(vi) on each Quarterly Payment Date, the Borrower shall cause such Business Unit to instruct the Depositary Bank to release and distribute to the Borrower Waterfall Account an amount contained in such Business Unit Account equal to (x) the total aggregate amount then contained in such Business Unit Account, minus (y) in the case of

all Business Unit Accounts other than the Specified Business Unit Account, the amount required to be retained in such Business Unit Account on such date as set forth in the applicable Operating Budget in respect of such Business Unit for the then occurring fiscal quarter (it being acknowledged and agreed that, for the avoidance of doubt, the entire amount of funds remaining in the Specified Business Unit Account, after the withdraw of 60% thereof referred to in clause (iv) above, shall be transferred to the Borrower Waterfall Account on each Quarterly Payment Date).

(e) Covered Project Accounts. On or prior to the Account Establishment Date, the Borrower shall cause each Initial Covered Project Company and each Second Funding Covered Project Company to open and establish a Covered Project Account at the Depositary Bank. In the event that any Subsidiary of the Borrower shall become an Additional Covered Project Company following the Account Establishment Date, the Borrower shall cause such Subsidiary to, on or prior to the date such Subsidiary shall become an Additional Covered Project Company, open and establish a Covered Project Account at the Depositary Bank. Following the opening and establishment of each such Covered Project Account, the applicable Covered Project Company shall at all times thereafter maintain such Covered Project Account and cause such Covered Project Account to be subject to a Springing Account Control Agreement. With respect to each Covered Project Company and its applicable Covered Project Account:

(i) such Covered Project Company shall cause all revenues or other payments or amounts of any kind received or receivable by such Covered Project Company (other than any such amounts that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18) to be deposited into such Covered Project Account;

(ii) such Covered Project Company shall use its commercially reasonable efforts to instruct and cause all Persons making payments of any kind to such Covered Project Company (other than any such payments that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18) to make such payments directly into such Covered Project Account;

(iii) in the event that, notwithstanding clause (ii) above, such Covered Project Company shall receive payment of any amounts (other than any such amounts that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18) in any manner other than payment of such amounts directly into such Covered Project Account, such Covered Project Company shall immediately deposit such amounts into such Covered Project Account;

(iv) neither such Covered Project Company nor any other Borrower Group Company shall have any right to withdraw any amounts from such Covered Project Account or to direct the Depositary Bank to release or distribute any amounts contained in such Covered Project Account; and

(v) the Administrative Agent shall (i) instruct the Depositary Bank to release and distribute the amounts contained in such Covered Project Account from time to time in accordance with, and subject to the satisfaction of any applicable conditions set forth in, the applicable Construction Budget and/or Operating Budget in respect of such Covered Project Company, and (ii) on each Quarterly Payment Date, instruct the Depositary Bank to release and distribute to the Borrower Waterfall Account an amount contained in such Covered Project Account equal to (x) the total aggregate amount then contained in such Covered Project Account, minus (y) the amount required or permitted to be retained in such Covered Project Account on such date as set forth in the applicable Construction Budget and/or Operating Budget in respect of such Covered Project Company.

(f) Project Proceeds Account. On or prior to the Account Establishment Date, the Borrower shall open and establish the Project Proceeds Account at the Depositary Bank. Following the opening and establishment of the Project Proceeds Account, the Borrower shall at all times thereafter maintain the Project Proceeds Account and cause the Project Proceeds Account to be subject to a Blocked Account Control Agreement. With respect to the Project Proceeds Account:

(i) in the event that any Project Company shall consummate a Project Disposition/Refinancing, the Borrower shall cause 100% of the Project Disposition/Refinancing Proceeds in respect of such Project Disposition/Refinancing to be immediately deposited into the Project Proceeds Account;

(ii) in the event that, at any time that any Project Disposition/Refinancing Proceeds are deposited into the Project Proceeds Account pursuant to clause (i) above in respect of any Project Disposition/Refinancing (other than any Project Disposition/Refinancing with respect to a specific Project Company to the extent that (x) such specific Project Company shall have previously consummated a prior Project Disposition/Refinancing following the Closing Date and (y) a portion of the proceeds from such prior Project Disposition/Refinancing in respect of such specific Project Company shall have previously been deposited in the Module Replacement Reserve Account pursuant to this clause (ii)), the amount then held in the Module Replacement Reserve Account is less than the then effective Required Module Replacement Reserve Amount, the Administrative Agent shall instruct the Depositary Bank to release and distribute to the Module Replacement Reserve Account an amount contained in the Project Proceeds Account equal to the lesser of (x) $5,000,000 (or, in the event that such Project Disposition/Refinancing is with respect to the Bolthouse Project or the Tulare Project, $1,000,000) and (y) the maximum amount necessary to be deposited into the Module Replacement Reserve Account on such date in order for the amount held in the Module Replacement Reserve Account to equal the then effective Required Module Replacement Reserve Amount;

(iii) in the event that any Loan Party or Existing Foreign Subsidiary shall receive any distributions, dividends, proceeds or other payments from any Excluded Project Company (other than any such amounts that are specifically required to be deposited into a separate Collateral Account pursuant to this Section 5.18), the Borrower shall cause such

Loan Party or Existing Foreign Subsidiary to immediately deposit all such distributions, dividends, proceeds or other payments into the Project Proceeds Account;

(iv) neither the Borrower nor any other Borrower Group Company shall have any right to withdraw any amounts from the Project Proceeds Account or to direct the Depositary Bank to release or distribute any amounts contained in the Project Proceeds Account; provided, that:

(A) in the event that the Borrower shall desire that all or any portion of the amounts then held in the Project Proceeds Account be applied to make an optional prepayment of Loans pursuant to Section 2.05(a)(i):

(I) the Borrower shall provide written notice thereof to the Administrative Agent (a "Project Proceeds Prepayment Notice") at least ten (10) Business Days' prior to the request date of prepayment, which Project Proceeds Prepayment Notice shall set forth (i) the aggregate amount of funds then held in the Project Proceeds Account that shall be applied to make an optional prepayment of Loans pursuant to Section 2.05(a)(i), and (ii) the date on which such prepayment shall be made; and

(II) upon receipt of such Project Proceeds Prepayment Notice, the Administrative Agent shall, on the date of such prepayment as specified in such Project Proceeds Prepayment Notice, instruct the Depositary Bank to release and distribute funds from the Project Proceeds Account in the amount specified in the Project Proceeds Prepayment Notice to the Administrative Agent to be applied by the Administrative Agent to an optional prepayment of Loans in accordance with Section 2.05(a)(i);

(B) in the event that the Borrower shall desire that all or any portion of the amounts then held in the Project Proceeds Account be applied to a Permitted Subsequent Funding Use:

(I) the Borrower shall provide written notice to the Administrative Agent of its request that such amounts be applied for a Permitted Subsequent Funding Use (a "Permitted Project Proceeds Use Notice"), which Permitted Project Proceeds Use Notice shall (i) describe in reasonable detail the Permitted Subsequent Funding Use to which the Borrower is requesting such amounts be applied and (ii) a schedule outlining the timing and amounts that for which such amounts shall be applied to such Permitted Subsequent Funding Use; and

(II) upon receipt of such Permitted Project Proceeds Use Notice, the Administrative Agent shall be permitted, in its sole discretion, to approve or reject the release and application of such amounts requested pursuant to such Permitted Project Proceeds Use Notice; provided, that, in the event that the Borrower and the Administrative Agent, in its sole discretion, shall agree in writing as to release and application of any such

amounts from the Project Proceeds Account for a Permitted Subsequent Funding Use (such written agreement, a "Permitted Project Proceeds Use Agreement"), the Administrative Agent shall thereafter instruct the Depositary Bank to release and distribute funds from the Project Proceeds Account in such amounts, and at such times, as set forth in the Permitted Project Proceeds Use Agreement;

(C) in the event that the Borrower shall desire that all or any portion of the amounts then held in the Project Proceeds Account be applied to fund inventory costs in respect of any Covered Project:

(I) the Borrower shall provide written notice to the Administrative Agent of its request that such amounts be applied to fund inventory costs in respect of any Covered Project (an "Inventory Cost Notice"), which Inventory Cost Notice shall (i) set forth the aggregate amount of funds then held in the Project Proceeds Account that shall be applied to fund inventory costs in respect of any Covered Project (together with reasonable documentation establishing such inventory costs), and (ii) a schedule outlining the timing, amounts and third party payee in respect of such inventory costs;

(II) upon receipt of such Inventory Cost Notice, the Administrative Agent shall be permitted, in its sole discretion, to approve or reject the release and application of such amounts requested pursuant to such Inventory Cost Notice; provided, that, in the event that the Administrative Agent, in its sole discretion, shall agree to the release and application of any such amounts from the Project Proceeds Account as described in such Inventory Cost Notice, the Administrative Agent shall instruct the Depositary Bank to release and distribute funds from the Project Proceeds Account in such amounts, at such times, and to such third party payees at set forth in such Inventory Cost Notice; and

(D) [Intentionally Omitted];

(v) in the event that any Project Disposition/Refinancing Proceeds in respect of any Project Disposition/Refinancing remain in the Project Proceeds Account on the date that is one year following the date of such Project Disposition/Refinancing (such amounts, the "Remaining Proceeds Amount"), the Administrative Agent shall, on the date that is one year following the date of such Project Disposition/Refinancing on the date of such prepayment as specified in such Project Proceeds Prepayment Notice, instruct the Depositary Bank to release and distribute funds from the Project Proceeds Account in an amount equal to the Remaining Proceeds Amount to the Administrative Agent to be applied by the Administrative Agent to an optional prepayment of Loans in accordance with Section 2.05(a)(i); and

(vi) notwithstanding the foregoing provisions of this Section 5.18(f), solely with respect to any Project Disposition/Refinancing Proceeds received in connection with any Project Disposition/Refinancing in respect of the Tulare Project (such Project Disposition/Refinancing Proceeds, the "Tulare Disposition/Refinancing Proceeds"), such Tulare Disposition/Refinancing Proceeds shall be applied as follows:

(A) the Borrower shall cause 100% of the Tulare Disposition/Refinancing Proceeds to be immediately deposited into the Project Proceeds Account in accordance with Section 5.18(f)(i) above;

(B) a portion of the Tulare Disposition/Refinancing Proceeds in an aggregate amount equal to $1,000,000 shall be transferred from the Project Proceeds Account to the Module Replacement Reserve Account in accordance with Section 5.18(f)(ii) above; and

(C) all remaining Tulare Disposition/Refinancing Proceeds (after giving effect to the transfer contemplated by clause (B) above) shall be retained in the Project Proceeds Account and shall only be applied in accordance with the foregoing provisions of this Section 5.18(f); provided, that, notwithstanding the foregoing provisions of this clause (C), so long as the Triangle Joinder Date shall have occurred, a portion of the remaining Tulare Disposition/Refinancing Proceeds held in the Project Proceeds Account shall be applied as follows:

(I) on the Triangle Joinder Date, a portion of the Tulare Disposition/Refinancing Proceeds in an aggregate amount equal to $75,000 shall be transferred from the Project Proceeds Account to the Debt Reserve Account and shall be held in the Debt Reserve Account in accordance with Section 5.18(j);

(II) on the first Quarterly Payment Date occurring after the Triangle Joinder Date, a portion of the Tulare Disposition/Refinancing Proceeds in an aggregate amount equal to $100,000 shall be transferred from the Project Proceeds Account to the Module Replacement Reserve Account and shall be held in the Module Replacement Reserve Account in accordance with Section 5.18(g) (it being acknowledged and agreed that, upon the transfer of the $100,000 to the Module Replacement Reserve Account under this clause (II) on such Quarterly Payment, the Module Replacement Reserve Payment Amount otherwise required to be deposited into the Module Replacement Reserve Account on such Quarterly Payment Date pursuant to Section 2.08(a) shall be reduced by $100,000);

(III) on the first Quarterly Payment Date occurring after the Triangle Joinder Date, a portion of the Tulare Disposition/Refinancing Proceeds in an aggregate amount equal to $1,700,000 shall be transferred from the Project Proceeds Account to the Borrower Waterfall Account solely for the purposes of funding the aggregate Mandatory Cash Interest Amount in respect of the Loans payable on such Quarterly Payment Date pursuant to Section 2.08(b);

(IV) on February 11, a portion of the Tulare Disposition/Refinancing Proceeds in an aggregate amount equal to $1,100,000 shall be released from the Project Proceeds Account and shall be applied by the Borrower solely to pay the aggregate amount of accrued and unpaid dividends in respect of the Series B Preferred Stock and Series 1 Preferred Stock required to be paid on such date; and

(V) all remaining Tulare Disposition/Refinancing Proceeds (after giving effect to any transfers and payments contemplated by the foregoing clauses (I) through (IV)) shall be retained in the Project Proceeds Account and shall only be applied in accordance with the foregoing provisions of this Section 5.18(f).

(vii) notwithstanding the foregoing provisions of this Section 5.18(f): (A) on the first date on or after the Fourth Amendment Effective Date on which the Borrower shall have contributed and transferred to San Bernardino Fuel Cell, LLC all right, title and interest in and to the San Bernardino Equipment, there shall be released from the Project Proceeds Account, and transferred to a General Business Unit Account designated by Borrower, an amount equal to $2,300,000 (and Administrative Agent shall instruct the Depositary Bank to release the foregoing amounts from the Project Proceeds Account); and (B) an additional $1,200,000 shall be released from the Project Proceeds Account and transferred to the Covered Project Account for the San Bernardino Project (and Administrative Agent shall instruct the Depositary Bank to release the foregoing amounts from the Project Proceeds Account) at such time as all of the following conditions have been satisfied:

(I) San Bernardino Fuel Cell, LLC shall have established the Covered Project Account for the San Bernardino Project in accordance with Section 5.18(e);

(II) There shall have been approved for the San Bernardino Project a California Self Generation Incentive Grant in an amount equal to no less than $1,000,000;

(III) Southern California Edison shall have approved entering into a generator interconnection agreement with San Bernardino Fuel Cell, LLC with respect to the San Bernardino Project;

(IV) Southern California Gas Company shall have provided a Fuel Affidavit approval to The City of San Bernardino with respect to the San Bernardino Project;

(V) San Bernardino Fuel Cell, LLC shall have procured the ADG Skid Air Permit with respect to the San Bernardino Project;

(VI) The City of San Bernardino Municipal Water District, in accordance with the terms and conditions of the power purchase agreement it has entered into with San Bernardino Fuel Cell, LLC, shall have executed a consent for collateral assignment of such power purchase agreement with Administrative Agent containing terms and conditions similar to those agreed to in collateral assignments entered into between Administrative Agent and power purchasers of other Covered Projects;

(VII) San Bernardino Fuel Cell, LLC shall have recorded in the land records of San Bernardino County, California a memorandum evidencing its site license for the real property site of the San Bernardino Project;

(VIII) As of, and after giving effect to, such release and transfer of $1,200,000 from the Project Proceeds Account to the Project Account for the San Bernardino Project, the amount of cash held in the Project Account for the San Bernardino Project shall be at least equal to the aggregate amount of remaining expenditures set forth in the Additional Covered Project Construction Budget in respect of the San Bernardino Project in order to complete the San Bernardino Project in accordance with the Additional Covered Project Construction Schedule for the San Bernardino Project; and

(IX) The Administrative Agent shall have approved such release in writing.

(g) Module Replacement Reserve Account. On or prior to the Account Establishment Date, the Borrower shall open and establish the Module Replacement Reserve Account at the Depositary Bank. Following the opening and establishment of the Module Replacement Reserve Account, the Borrower shall at all times thereafter maintain the Module Replacement Reserve Account and cause the Module Replacement Reserve Account to be subject to a Blocked Account Control Agreement. With respect to the Module Replacement Reserve Account:

(i) amounts shall from time to time be deposited in the Module Replacement Reserve Account in accordance with Sections 2.08(a) and 5.18(f)(ii);

(ii) neither the Borrower nor any other Borrower Group Company shall have any right to withdraw any amounts from the Module Replacement Reserve Account or to direct the Depositary Bank to release or distribute any amounts contained in the Module Replacement Reserve Account; and

(iii) on each date specified in the applicable Operating Budget in respect of a Covered Project Company for the payment of amounts in connection with a scheduled module replacement in respect of the applicable Covered Project Company, the Administrative Agent shall instruct the Depositary Bank to release and distribute funds contained in the Module Replacement Reserve Account in an amount specified in the applicable Operating Budget in respect of such Covered Project Company to fund the costs of such scheduled module replacement.

(h) Mandatory Prepayment Account. On or prior to the Account Establishment Date, the Borrower shall open and establish the Mandatory Prepayment Account at the Depositary Bank. Following the opening and establishment of the Mandatory Prepayment Account, the Borrower shall at all times thereafter maintain the Mandatory Prepayment Account and cause the Mandatory Prepayment Account to be subject to a Blocked Account Control Agreement. With respect to the Mandatory Prepayment Account:

(i) amounts shall from time to time be deposited in the Mandatory Prepayment Account in accordance with Section 2.05(b)(i), 2.05(b)(ii) and 2.05(b)(iii);

(ii) neither the Borrower nor any other Borrower Group Company shall have any right to withdraw any amounts from the Mandatory Prepayment Account or to direct the Depositary Bank to release or distribute any amounts contained in the Mandatory Prepayment Account;

(iii) in the event that an Event of Loss Prepayment Offer, Disposition Proceeds Prepayment Offer or Debt Payment Offer is consummated pursuant to Section 2.05(b)(i), 2.05(b)(ii) or 2.05(b)(iii), as applicable, with respect to any amounts then held in the Mandatory Prepayment Account, then, on or prior to the tenth ($10^{th}$) Business Day following the date of such Event of Loss Prepayment Offer, Disposition Proceeds Prepayment Offer or Debt Payment Offer, the Administrative Agent shall instruct the Depositary Bank to (x) release and distribute funds from the Mandatory Prepayment Account in an amount equal to the aggregate amount payable to the Lenders that shall have accepted the applicable prepayment offer in accordance with Section 2.05(c)(iii) to the applicable Lenders accepting such offer and (y) release and distribute the remaining portion of the applicable funds in the Mandatory Prepayment Account (after giving effect to the payment of the amounts under clause (x)) to a Business Unit Account specified by the Borrower;

(iv) in the case of amounts deposited in the Mandatory Prepayment Account in connection with an Event of Loss pursuant to Section 2.05(b)(i), to the extent that the Borrower is then permitted to apply such amounts to the Restoration of the related Affected Property in accordance with Section 2.05(b)(i), the Administrative Agent shall instruct the Depositary Bank to release and distribute funds from the Mandatory Prepayment Account

in such amounts, at such times, and to such third party payees as provided in any restoration plan approved by the Administrative Agent pursuant to Section 2.05(b)(i); and

(v) in the case of amounts deposited in the Mandatory Prepayment Account in connection with a Disposition pursuant to Section 2.05(b)(ii), to the extent that the Borrower is then permitted to reinvest such amounts in accordance with Section 2.05(b)(ii), the Administrative Agent shall instruct the Depositary Bank to release and distribute funds from the Mandatory Prepayment Account in such amounts, at such times, and to such third party payees for the purposes of reinvesting such amounts as permitted under Section 2.05(b)(ii).

(i) ECF Offer Account. On or prior to the Account Establishment Date, the Borrower shall open and establish the ECF Offer Account at the Depositary Bank. Following the opening and establishment of the ECF Offer Account, the Borrower shall at all times thereafter maintain the ECF Offer Account and cause the ECF Offer Account to be subject to a Blocked Account Control Agreement. With respect to the ECF Offer Account:

(i) amounts shall from time to time be deposited in the ECF Offer Account in accordance with Section 2.08(e);

(ii) upon the consummation of the applicable ECF Prepayment Offer with respect to any amounts then held in the ECF Offer Account, then, on or prior to the tenth (10th) Business Day following the date of such ECF Prepayment Offer, the Administrative Agent shall instruct the Depositary Bank to (x) release and distribute funds from the ECF Offer Account in an amount equal to the aggregate amount payable to the Lenders that shall have accepted the applicable ECF Prepayment Offer in accordance with Section 2.05(c)(iii) to the applicable Lenders accepting such ECF Prepayment Offer and (y) release and distribute the remaining portion of the applicable funds in the ECF Offer Account (after giving effect to the payment of the amounts under clause (x)) to a Business Unit Account specified by the Borrower.

(j) Debt Reserve Agreement. On or prior to the Account Establishment Date, the Borrower shall open and establish the Debt Reserve Account at the Depositary Bank. Following the opening and establishment of the Debt Reserve Account, the Borrower shall at all times thereafter maintain the Debt Reserve Account and cause the Debt Reserve Account to be subject to a Blocked Account Control Agreement. With respect to the Debt Reserve Account:

(i) amounts shall from time to time be deposited in the Debt Reserve Account in accordance with Section 2.08(c);

(ii) neither the Borrower nor any other Borrower Group Company shall have any right to withdraw any amounts from the Debt Reserve Account or to direct the Depositary Bank to release or distribute any amounts contained in the Debt Reserve Account; and

(iii) in the event that, pursuant to the second paragraph of Section 2.08, all or a portion of the funds in the Debt Reserve Account are to be applied to a portion of the Shortfall Amount, the Administrative Agent shall instruct the Depositary Bank to release

from the Debt Reserve Account the amount specified in the second paragraph of Section 2.08 and distribute such funds in accordance with the second paragraph of Section 2.08.

(k) Preferred Reserve Agreement. On or prior to the Account Establishment Date, the Borrower shall open and establish the Preferred Reserve Account at the Depositary Bank. Following the opening and establishment of the Preferred Reserve Account, the Borrower shall at all times thereafter maintain the Preferred Reserve Account and cause the Preferred Reserve Account to be subject to a Blocked Account Control Agreement. With respect to the Preferred Reserve Account:

(i) amounts shall from time to time be deposited in the Preferred Reserve Account in accordance with Section 2.08(f);

(ii) neither the Borrower nor any other Borrower Group Company shall have any right to withdraw any amounts from the Preferred Reserve Account or to direct the Depositary Bank to release or distribute any amounts contained in the Preferred Reserve Account; and

(iii) in the event that, pursuant to the third paragraph of Section 2.08, all or a portion of the funds in the Preferred Reserve Account are to be applied to a portion of the Shortfall Amount, the Administrative Agent shall instruct the Depositary Bank to release from the Preferred Reserve Account the amount specified in the third paragraph of Section 2.08 and distribute such funds in accordance with the third paragraph of Section 2.08.

(l) Reserve Releases. Notwithstanding anything to the contrary set forth herein, during the Secondary Facility Availability Period, in the event that the Administrative Agent shall elect, pursuant to Section 2.14, to consummate a Reserve Release under this Section 5.18(l) in connection with any Secondary Facility Borrowing Request, then cash held in any Applicable Reserve may be released from such Applicable Reserve and transferred to a Business Unit Account to the extent provided in, and subject to the conditions set forth in, this Section 5.18(l).

(i) In the event that the Administrative Agent shall elect to consummate a Reserve Release under this Section 5.18(l) in connection with any Secondary Facility Borrowing Request, on or prior to the date that is two Business Days following the delivery of the applicable Secondary Facility Borrowing Request, (A) the Administrative Agent shall notify the Borrower of the Applicable Reserve (or Applicable Reserves) from which the Administrative Agent shall effect such Reserve Release, and (B) instruct the Depositary Bank to release and transfer an aggregate amount of cash equal to the amount of the Secondary Facility Loan requested in the applicable Secondary Facility Borrowing Request from such Applicable Reserve (or Applicable Reserves) to a Business Unit Account designated by the Borrower.

(ii) Notwithstanding anything to the contrary set forth herein, in no event shall the Administrative Agent be required to effect any Reserve Release under this Section 5.18(l) if either (x) any of the conditions specified in Sections 4.04 or 4.05 shall have not been satisfied in full on the Reserve Release Date in respect of such Reserve Release, or (y) immediately after giving effect to such Reserve Release, the Aggregate Secondary

Facility Usage Amount would exceed the Aggregate Secondary Facility Commitment Amount. In the event that the Administrative Agent shall not be required to effect a Reserve Release as a result of the foregoing sentence, the Secondary Facility Borrowing Request to which such Reserve Release shall relate shall be deemed null and void.

(m) ~~(I)~~ General

(i) . In the event that, at any time, any amounts or funds that are required to be deposited in or transferred to a specific Collateral Account as set forth above shall, for any reason, be deposited in, or received by, any other Collateral Account or other account of any Borrower Group Company, the Loan Parties agree that, until such time as such amounts or funds are transferred to and deposited in the Collateral Account to which such amounts are required to be deposited pursuant to the foregoing, the applicable receiving account, and the applicable Borrower Group Company, should hold such amounts in trust for the benefit of the Collateral Account to which such amounts are required to be deposited pursuant to the foregoing.

Section 5.19 Intellectual Property.

(a) Each Loan Party shall, and shall cause each of its Subsidiaries that is not a Loan Party to, own, or be licensed to use, all Intellectual Property that such Person reasonably believes is necessary for the conduct of the Business, each Covered Project and each Excluded Project, in each case, as to which the failure of such to so own or be licensed could reasonably be expected to have a Material Adverse Effect.

(b) If a Loan Party licenses any Intellectual Property from another Person and such Intellectual Property is material to the conduct of the business of any Loan Party, and the license is rejected in an insolvency proceeding, such Loan Party shall use commercially reasonable efforts to maintain its rights under the license, which efforts shall include making an election under Section 365(n) of the Bankruptcy Code, if an election is available to such Loan Party.

(c) Each Loan Party agrees that, should it hereafter (i) obtain an ownership interest in any issued Copyrights, Trademarks, or Patents, (ii) obtain an exclusive license to any Copyrights, Trademarks, or Patents, (iii) either by itself or through any agent, employee, licensee, or designee, file any application for the registration or issuance of any Copyrights, Trademarks or Patents with the United States Patent and Trademark Office or the United States Copyright Office, or (iv) should it file a statement of use or an amendment to allege use with respect to any "intent-to-use" Trademark application (the items in clauses (i), (ii), (iii) and (iv), collectively, the "After-Acquired Intellectual Property"), then, unless it constitutes Excluded Assets under the Security Agreement, any such After-Acquired Intellectual Property shall automatically become part of the Collateral, and such Loan Party shall give written notice thereof within 60 days of the registration or issuance thereof to the Collateral Agent in accordance herewith.

(d) Each Loan Party agrees to use commercially reasonable efforts so as not to permit the inclusion in any contract to which it hereafter becomes a party of any provision that could or may in any way materially impair or prevent the creation of a security interest in, or the assignment of, such Loan Party's rights and interests in any property described in Section 5.19(c) that is material to the business of any Loan Party, other than the Financing Documents.

(e) Each Loan Party shall promptly notify the Collateral Agent if it knows or has reason to know that any registered or issued Copyrights, Trademarks or Patents that it or any of its Subsidiaries that is not a Loan Party owns or licenses becomes (i) abandoned or dedicated to the public or placed in the public domain, (ii) invalid or unenforceable, (iii) subject to any adverse determination or development regarding such Person's ownership, registration or use or the validity or enforceability of such item of Intellectual Property (including the institution of, or any adverse development with respect to, any action or proceeding in the United States Patent and Trademark Office, the United States Copyright Office, any state registry, any foreign counterpart of the foregoing, or any court) or (iv) the subject of any reversion or termination rights.

(f) Each Loan Party shall not, and shall cause each of its Subsidiaries that is not a Loan Party to not, intentionally infringe, misappropriate, dilute, or otherwise violate the Intellectual Property rights of any other Person in any manner which could reasonably be expected to have a Material Adverse Effect. In the event that any Person initiates, or threatens in writing to initiate, any action or proceeding alleging that any Loan Party or any Subsidiary of a Loan Party that is not a Loan Party, or the conduct of the business of such Loan Party or such Subsidiary that is not a Loan Party business, infringes, misappropriates, dilutes, or otherwise violates the Intellectual Property of any other Person, and such action or proceeding could reasonably be expected to have a Material Adverse Effect, such Loan Party shall promptly notify the Collateral Agent after it learns thereof.

Section 5.20 Operating Budgets.

(a) Submission of Operating Budgets. The Borrower shall, on or prior to the Closing Date, deliver to the Administrative Agent the proposed Operating Budget for each Covered Project Company for the 2020 fiscal year. The Borrower shall, on or prior to the Second Funding Date, deliver to the Administrative Agent the Operating Budget for the Business Units for the 2020 fiscal year in the form that the Borrower plans to submit to its Board of Directors for approval. Not later than thirty (30) days prior to the beginning of each fiscal year following the Closing Date, the Borrower shall submit to the Lenders a draft of its proposed Operating Budget for each Business Unit and each Covered Project Company for the succeeding fiscal year. Any such Operating Budget for any Covered Project Company submitted by the Borrower pursuant to this Section 5.20(a) shall not be effective until approved by the Administrative Agent in accordance with Section 5.20(b) below. Any such Operating Budget for any Business Unit submitted by the Borrower pursuant to this Section 5.20(a) shall become effective upon the approval thereof by the Board of Directors of the Borrower. The Operating Budget for any Business Unit may be amended or modified from time to time with the approval of the Board of Directors of the Borrower.

(b) Approval of Operating Budget For Covered Project Companies. Each Operating Budget for a Covered Project Company delivered pursuant to Section 5.20(a) shall not be effective until approved by the Administrative Agent (such approval not to be unreasonably withheld, conditioned or delayed). In the event that, pursuant to the immediately preceding sentence, any Operating Budget for a Covered Project Company is not approved by the Administrative Agent or the Borrower has not submitted a proposed Operating Budget for a Covered Project Company in accordance with the terms and conditions herein, the Operating Budget for such Covered Project Company for the immediately preceding calendar year shall apply until the Operating Budget for such Covered Project Company for the then current fiscal year is approved. Copies of each final

Operating Budget adopted shall be furnished to the Administrative Agent promptly upon its adoption.

(c) Compliance with the Operating Budget. Following the Closing Date, Operating Expenses and Capital Expenditures shall be made by the Loan Parties in compliance with the applicable Operating Budget.

Section 5.21 Construction of Covered Projects . The Loan Parties shall cause each Covered Project to be constructed and completed in accordance with the applicable Construction Schedule and Construction Budget for such Covered Project, as adjusted or revised in accordance with the following sentence. The Loan Parties may from time to time adopt an amended Construction Budget or Construction Schedule for a Covered Project upon the written approval of the Administrative Agent (such approval not to be unreasonably withheld, conditioned or delayed).

Section 5.22 Physical Reserve . The Borrower shall, at all times, maintain a minimum of one new C1420 module in its finished goods inventory that is not allocated to any Project or purchase order.

Section 5.23 Collateral Account Report . The Borrower shall provide to the Administrative Agent, within five (5) Business Days of the end of each calendar month, in electronic format, an itemized summary of all withdrawals from the Collateral Accounts made during such calendar month.

Section 5.24 Project Requirements.

(a) No later than December 31, 2019 (or such later date as the Administrative Agent may, in its sole discretion, agree in writing), Central CA Fuel Cell 2, LLC and the counterparty previously identified to the Administrative Agent in writing prior to the Second Funding Date shall execute and deliver the Biogas Sale and Purchase Agreement and the Biogas Sale and Purchase Agreement shall become effective.

(b) No later than December 31, 2019 (or such later date as the Administrative Agent may, in its sole discretion, agree in writing), either (i) Groton Station Fuel Cell, LLC shall enter into an Approved REC Contract and such Approved REC Contract shall become effective, or (ii) the Loan Parties shall execute and deliver the IP Collateral Documents.

(c) No later than January 31, 2020 (or such later date as the Administrative Agent may, in its sole discretion, agree in writing), either:

(i) all of the following shall occur:

(A) each of (x) Groton Station Fuel Cell, LLC and Connecticut Municipal Electric Energy Cooperative ("CMEEC") shall execute and deliver the Groton Estoppel and Acknowledgement, (y) the United States of America, acting by and through the Department of the Navy, shall have approved the Groton Estoppel and Acknowledgement in the manner contemplated by Section 19 of the Groton Estoppel and Acknowledgement, and (z) the Groton Estoppel and Acknowledgement shall become effective;

(B) the Borrower shall cause the CMEEC to execute and deliver a customary estoppel certificate, in form and substance reasonably acceptable to the Administrative Agent, in respect of the PPA in respect of the Groton Project; and

(C) Groton Station Fuel Cell, LLC, CMEEC and the United States of America, acting by and through the Department of the Navy, shall execute and deliver the Seventh Modification to Lease and the Seventh Modification to Lease shall become effective; or

(ii) the Loan Parties shall execute and deliver the IP Collateral Documents.

Section 5.25 Canadian Class A Preferred Shares . The Borrower shall, and shall cause FCE FuelCell Energy Ltd. ("FCE Canada") to, on or prior to November 1, 2021, either (i) pay and satisfy in full all of their respective obligations in respect of, and fully redeem and cancel, all of the shares of Series 1 Preferred Stock of FCE Canada, or (ii) deposit in a newly created account of FCE Canada or the Borrower (the "Series 1 Account") cash in an amount sufficient to pay and satisfy in full all of their respective obligations in respect of, and to effect a redemption and cancellation in full of, all of the shares of Series 1 Preferred Stock of FCE Canada. In the event that FCE Canada or the Borrower shall elect to satisfy their obligations under the foregoing sentence pursuant to clause (ii) thereof, then, from and after the deposit of such cash in the Series 1 Account, FCE Canada and the Borrower shall thereafter not use any amounts contained in the Series 1 Account for any purpose other than the payment and satisfaction in full of all of their respective obligations in respect of, and the redemption and cancellation in full of, all of the shares of Series 1 Preferred Stock of FCE Canada.

Section 5.26 Triangle Joinder .

(a) Within ten days following the Third Amendment Effective Date, the Borrower shall cause TRS Fuel Cell, LLC to (i) become a Restricted Subsidiary, Guarantor and Loan Party hereunder by executing and delivering to the Administrative Agent a joinder to this Agreement, in form and substance acceptable to the Administrative Agent, (ii) execute and deliver to the Administrative Agent a joinder to the Security Agreement, in form and substance acceptable to the Administrative Agent, pursuant to which, by executing such joinder, there will be granted to the Collateral Agent, for the benefit of the Secured Parties, a perfected first priority security interest and Lien in any Collateral owned by TRS Fuel Cell, LLC and (iii) deliver to the Administrative Agent all certificates representing the membership interests of TRS Fuel Cell, LLC.

(b) For the purposes hereof, the term "Triangle Joinder Date" shall mean the first date following the Third Amendment Effective Date on which the Borrower and TRS Fuel Cell, LLC shall have executed and delivered to the Administrative Agent each of the agreements and documents required by, and have otherwise satisfied all of the obligations under, Section 5.26(a) above, in each case, as determined by the Administrative Agent in its reasonable judgment.

(c) The Borrower shall take all actions necessary to cause the Triangle Joinder Date to occur on or prior to ten days following the Third Amendment Effective Date.

(d) As soon as reasonably practicable following the Triangle Joinder Date, the Borrower and TRS Fuel Cell, LLC shall deliver to the Administrative Agent (i) all such other

agreements, documents and instruments reasonably requested by the Collateral Agent for the purposes of granting and perfecting a first priority security interest to the Collateral Agent, for the benefit of the Secured Parties, in all assets of TRS Fuel Cell, LLC, and (ii) all such other documents and instruments of a type similar to those delivered by the Loan Parties on the Closing Date and Initial Funding Date under Section 4.01 and 4.02 (including, without limitation, favorable opinions of counsel to TRS Fuel Cell, LLC (which shall cover, among other things, the legality, validity, binding nature and enforceability of the documentation referred to in clause (a) above and this clause (d))), all in form, content and scope satisfactory to the Administrative Agent.

(e) Within thirty days following the Third Amendment Effective Date, the Borrower shall cause TRS Fuel Cell, LLC to establish a Covered Project Account with respect to the Triangle Street Project and enter into a Springing Account Control Agreement with respect to such Covered Project Account, in each case, in accordance with Section 5.18(e).

Section 5.27 Reserve Replenishment.

(a) At any time at which the Outstanding Reserve Release Amount shall be greater than zero, the Borrower shall have the right from time to time to transfer cash from any Business Unit Account into the Applicable Reserves pursuant to this clause (a); provided, that, for the purposes of this Section 5.27, the Borrower shall not be permitted to transfer an amount of cash into any Applicable Reserve in excess of the Applicable Reserve Release Amount in respect of such Applicable Reserve as of such date. On any date on which the Borrower shall consummate a Reserve Replenishment pursuant to this clause (a), the Borrower shall provide written notice of such Reserve Replenishment to the Administrative Agent, which notice shall specify the amount of such Reserve Replenishment and the Applicable Reserve into which such Reserve Replenishment is transferred.

(b) In the event that any Reserve Replenishment Secondary Facility Loan is made pursuant to Sections 2.01(a)(iii), 2.01(c) and 2.02, the Administrative Agent shall, on the Secondary Facility Funding Date in respect of such Reserve Replenishment Secondary Facility Loan, deposit the proceeds of such Reserve Replenishment Secondary Facility Loan into the Applicable Reserve specified by the Borrower in the applicable Reserve Replenishment Borrowing Request; provided, that, for the avoidance of doubt, in no event shall the Borrower be permitted to deliver a Reserve Replenishment Borrowing Request with respect to a particular Applicable Reserve in an amount in excess of the Applicable Reserve Release Amount in respect of such Applicable Reserve as of the applicable Secondary Facility Funding Date.

(c) Notwithstanding anything to the contrary set forth herein, on any date required pursuant to Section 2.05(b)(vii), the Borrower shall be required to transfer an amount of cash from the Business Unit Accounts into the Applicable Reserves equal to the amount of the Reserve Replenishment required to be made on such date under Section 2.05(b)(vii); provided, that, for the purposes of this clause (c), the Borrower shall be required to consummate such Reserve Replenishment in a manner such that the amount of cash transferred into any Applicable Reserve on such date shall not exceed the Applicable Reserve Release Amount in respect of such Applicable Reserve as of such date. On any date on which the Borrower shall consummate a Reserve Replenishment pursuant to this clause (c), the Borrower shall provide written notice of such Reserve Replenishment to the Administrative Agent, which notice shall specify the amount

of such Reserve Replenishment and the Applicable Reserve into which such Reserve Replenishment is transferred.

(d) Notwithstanding anything to the contrary set forth herein, on the Secondary Facility Required Repayment Date, the Borrower shall be required to transfer an aggregate amount of cash from the Business Unit Accounts into the Applicable Reserves necessary to result in, after giving effect to all such transfers under this clause (d) on the Secondary Facility Required Repayment Date, (i) the Outstanding Reserve Release Amount being equal to zero, and (ii) the Applicable Reserve Release Amount with respect to each of the Applicable Reserves being equal to zero. In addition, on the Secondary Facility Required Repayment Date, the Borrower shall pay all Draw Discounts required to be paid on such date pursuant to Section 2.06(d)(iv).

(e) For the avoidance of doubt, no amounts that are required to be deposited into Applicable Reserve pursuant to Section 5.18 or any other provision of this Agreement or any other Financing Document shall be deemed to be a Reserve Replenishment under this Section 5.27.

(f) Following the consummation of any Reserve Replenishment in respect of any Applicable Reserve pursuant to this Section 5.27, the cash so deposited into such Applicable Reserve shall thereafter be subject to all of the provisions and restrictions set forth in this Agreement, including but not limited to any applicable restrictions on the use of such cash set forth in this Section 5.18.

Section 5.28 Secondary Facility IP Collateral Documents . No later than the tenth (10th) Business Day following the Fifth Amendment Effective Date (or such later date as the Administrative Agent may, in its sole discretion, agree in writing), the Loan Parties shall execute and deliver to the Administrative Agent the Secondary Facility IP Collateral Documents.

ARTICLE VI

NEGATIVE COVENANTS

Each Loan Party agrees that from and after the Closing Date until the Discharge Date:

Section 6.01 Subsidiaries; Equity Issuances . No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, (a) form or have any Subsidiary other than (i) the Loan Parties, (ii) the Existing Foreign Subsidiaries, (iii) the Excluded Project Companies, (iv) any newly created U.S. Wholly Owned Subsidiary that becomes a Loan Party hereunder and whose Capital Stock and assets become subject to the Security Documents as contemplated by the Security Documents, and (v) in the event that (A) the Borrower shall have complied with its obligations under Section 6.19 with respect to a Proposed Financing and (B) such Proposed Financing has been consummated in accordance with Section 6.19 with an alternative financing source that is not the Administrative Agent or its Affiliates, any new Additional Excluded Project Company established in respect of the Project in respect of such Proposed Financing, or (b) subject to Section 6.04 hereof, own, or otherwise Control any Capital Stock in, any other Person.

Section 6.02 Indebtedness . No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, create, incur, assume or suffer to exist any Indebtedness, other than (without duplication) (each of the following, "Permitted Indebtedness"):

(a) Indebtedness incurred under the Financing Documents;

(b) current accounts payable incurred in the ordinary course of business of a Borrower Group Company that either (i) are not more than sixty (60) days past due or which are being contested in accordance with the Permitted Contest Conditions or (ii) as have been provided in writing with receipt acknowledged by the Administrative Agent prior to Closing;

(c) Indebtedness of a Borrower Group Company existing on the date hereof and set forth in Schedule 6.02 and extensions, renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof except by an amount equal to a reasonable premium or other amount paid, and reasonable fees and expenses incurred, in connection with such extension, renewal or replacement or change any direct or contingent obligor with respect thereto or shorten the average life to maturity thereof;

(d) Guarantees by (i) any Loan Party of Indebtedness otherwise permitted hereunder of any other Loan Party, or (ii) any Existing Foreign Subsidiary of Indebtedness otherwise permitted hereunder of any other Existing Foreign Subsidiary;

(e) obligations (contingent or otherwise) of any Borrower Group Company existing or arising under any Hedging Agreement permitted under Section 6.14;

(f) (i) unsecured intercompany Indebtedness solely among the Loan Parties; provided that such Indebtedness shall be pledged to the Collateral Agent under the Security Documents, and (ii) unsecured intercompany Indebtedness solely among Existing Foreign Subsidiaries;

(g) other unsecured Indebtedness in an aggregate principal amount not exceeding $500,000 at any time outstanding (as such amount may be increased with the consent of the Administrative Agent in its sole and absolute discretion);

(h) (x) Indebtedness of a Project Company incurred in connection with a Project Refinancing so long as such Project Refinancing constitutes a Permitted Project Disposition/Refinancing and (y) with respect to any Excluded Project Company, any incurrence of Indebtedness not constituting a Project Refinancing;

(i) (i) with respect to any Borrower Group Company other than an Existing Foreign Subsidiary or an Excluded Project Company, (A) Indebtedness of such Borrower Group Company under (x) completion guarantees, performance, bid or surety bonds, statutory or insurance bonds, in each case incurred in the ordinary course of business and for the benefit of any Borrower Group Company other than an Existing Foreign Subsidiary or an Excluded Project Company or (y) letters of credit or bankers' acceptances issued, and completion guarantees provided for, in lieu of a performance, bid or surety bond permitted under the foregoing clause (x) and (B) (x) Guarantees by the Borrower of any Indebtedness permitted under the foregoing clause (A), and (y) Guarantees by the Borrower of any Indebtedness permitted under the following clause (ii)(A)(x) or (ii)(A)(y), so long as, in the case of this clause (y), that aggregate principal amount of Indebtedness outstanding under this clause (y) shall not exceed $1,000,000 at any time, and (ii) with respect to any Existing Foreign Subsidiary, (A) Indebtedness of such Existing Foreign Subsidiary under (x) completion guarantees, performance, bid or surety bonds, statutory or insurance bonds, in each case incurred in the ordinary course of business and for the benefit of any Existing Foreign Subsidiary or (y) letters of credit or bankers' acceptances issued, and completion guarantees provided for, in lieu of a performance, bid or surety bond permitted under the foregoing clause (x) and (B) Guarantees by any Existing Foreign Subsidiary of any Indebtedness permitted under the foregoing clause (A); and

(j) other unsecured Indebtedness of an Existing Foreign Subsidiary in an aggregate principal amount not exceeding $500,000 at any time outstanding (as such amount may be increased with the consent of the Administrative Agent in its sole discretion).

Section 6.03 Liens, Etc.

No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, create, incur, assume or suffer to exist any Lien upon or with respect to any of its properties of any character (including accounts receivables) whether now owned or hereafter acquired, or assign any accounts or other right to receive income, other than Permitted Liens.

Section 6.04 Investments, Advances, Loans . No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, make any advance, loan or extension of credit to, or make any acquisitions or Investments (whether by way of transfers of property, contributions to capital, acquisitions of stock, securities, evidences of Indebtedness or otherwise) in, or purchase any stock, bonds, notes, debentures or other securities of, any other Person, except (a) equity investments by (i) any Loan Party in the common Capital Stock of any other Loan Party, or (ii) any Existing Foreign Subsidiary in the common Capital Stock of any other Existing Foreign Subsidiary, (b) intercompany loans solely to the extent permitted under Section 6.02(f), (c) Cash

Equivalent Investments, (d) Guarantees by a Borrower Group Company permitted by Section 6.02, (e) bank deposits in the ordinary course of business, (f) Investments by a Borrower Group Company consisting of extensions of credit in the nature of deposits, accounts receivable or notes receivable arising from the grant of trade credit in the ordinary course of business, and Investments received in satisfaction or partial satisfaction thereof from financially troubled account debtors to the extent reasonably necessary in order to prevent or limit loss, (g) non-cash consideration received by a Borrower Group Company, to the extent permitted by the Financing Documents, in connection with the Disposition of property permitted by this Agreement, (h) Investments listed on Schedule 6.04 as of the Closing Date, (i) loans or advances by a Borrower Group Company to employees, officers or directors in the ordinary course of business of the Borrower or any of its Subsidiaries, in each case only as permitted by Applicable Law, but in any event not to exceed $500,000 in the aggregate at any time, (j) discounts given to customers of any Borrower Group Company in the ordinary course of business, (k) any investment consisting of the contribution by a Loan Party of the Capital Stock of any Existing Foreign Subsidiary to any other Existing Foreign Subsidiary, and (l) an acquisition of an Excluded Project Company by an existing Excluded Project Company so long as (i) the entire aggregate purchase price in respect of such acquisition shall be financed and paid by the applicable acquired Excluded Project Company and (ii) no Loan Party or Existing Foreign Subsidiary shall expend any money or assets or incur any liability or obligation in connection with, or resulting from, such acquisition.

Section 6.05 Principal Place of Business; Business Activities.

(a) Each Loan Party shall maintain its principal place of business at the address specified in Section 10.01, and no Loan Party shall change such principal place of business unless it has given at least thirty (30) days' prior notice thereof to the Administrative Agent and the Collateral Agent and such Loan Party has taken all steps then required pursuant to the Security Agreements to ensure the maintenance and perfection of the security interests created or purported to be created thereby. Each Loan Party shall maintain at its principal place of business originals or copies of its principal books and records.

(b) No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, at any time to any material extent conduct any activities other than those related to the Business and the other Material Agreements and any activities incidental to the foregoing.

Section 6.06 Restricted Payments. No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, declare or make, or agree to pay or make, directly or indirectly, any Restricted Payment other than:

(a) (i) any Loan Party may make dividends or distributions to any other Loan Party, (ii) any Existing Foreign Subsidiary may make dividends or distributions to any other Existing Foreign Subsidiary and (iii) any Excluded Project Company and any Existing Foreign Subsidiary may make dividends or distributions to any Loan Party;

(b) the Loan Parties may make Restricted Payments consisting of cash payments in respect of outstanding restricted stock units issued to the management or employees of the Borrower; and

(c) so long as (i) no Event of Default shall have occurred and is continuing, there is then funds in the Preferred Reserve Account in an amount equal to at least the Required Preferred Reserve Amount in respect of the immediately prior Quarterly Payment Date, and (ii) the Borrower does not reasonably expect there to exist a Shortfall Amount as of the immediately following Quarterly Payment Date, the Borrower may pay (A) make Restricted Payments to the holders of the Series B Preferred Stock for the purposes of paying the accrued and unpaid dividends that are then required to be paid in respect of the outstanding shares of Series B Preferred Stock pursuant to the Organizational Documents of the Borrower, and (B) make Restricted Payments to the holders of the Series B Preferred Stock for the purposes of paying the accrued and unpaid dividends that are then required to be paid in respect of the outstanding shares of Series 1 Preferred Stock pursuant to the Organizational Documents of FCE Fuel Cell Energy Ltd. (or, in lieu of paying such dividends, redeeming shares of Series 1 Preferred Stock in an amount otherwise equal to the amount of dividends that would otherwise have been paid in respect thereof).

Section 6.07 Fundamental Changes; Asset Dispositions and Acquisitions . No Loan Party shall and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to:

(a) in one transaction or a series of transactions, merge into or consolidate with, or acquire all or any substantial part of the assets or any class of stock or other ownership interests of, any other Person or sell, transfer or otherwise Dispose of all or substantially all of its assets to any other Person; provided that (i) the Borrower may participate in a merger or consolidation with any Person if (w) no Default is continuing, (x) any such merger or consolidation would not cause a Default hereunder, (y) if the Borrower merges or consolidates with any Person, the Borrower shall be the surviving Person and (z) such merger is approved by the Administrative Agent in its reasonable discretion; (ii) any Project Company may consummate any Permitted Project Disposition/Refinancing; (iii) any Borrower Group Company may participate in a merger or consolidation in connection with any acquisition permitted under Section 6.04 or any Disposition otherwise permitted under this Section 6.07;

(b) change its legal form, liquidate or dissolve; provided that any Project Company may consummate any Permitted Project Disposition/Refinancing;

(c) make or agree to make any amendment to its Organizational Documents to the extent that such amendment could reasonably be expected to be materially adverse to the interests of the Agents or the Lenders (in their capacities as such and not in their capacities as a holder of the Warrants or any other Capital Stock of the Borrower);

(d) purchase, acquire or lease any assets other than:

(i) in the case of the Borrower, any Existing Foreign Subsidiary and any other Borrower Group Company other than a Project Company, the purchase or lease of assets reasonably required for the Business of such Person in accordance with the applicable Operating Budget for the applicable Business Unit;

(ii) in the case of any Covered Project Company, the purchase or lease of assets reasonably required for the applicable Covered Project in accordance with the applicable Operating Budget of the applicable Covered Project;

(iii) in the case of any Loan Party or any Existing Foreign Subsidiary, the purchase or lease of assets reasonably required in connection with the Restoration of the applicable Affected Property of such Person to the extent permitted under Section 2.05(b)(i);

(iv) any Capital Expenditures or otherwise investments in assets necessary or useful for the business of the Business from the proceeds of any Disposition to the extent permitted hereunder; or

(v) pursuant to Investments permitted to be consummated under Section 6.04; or

(e) convey, sell, lease, transfer or otherwise Dispose of, in one transaction or a series of transactions, all or any part of the property owned by any Borrower Group Company in excess of $250,000 per year in the aggregate other than:

(i) sales or other Dispositions by any Borrower Group Company of worn out or defective equipment, or other equipment no longer used or useful to the Business of such Borrower Group Company or, in the case of a Project Company, the applicable Covered Project or Excluded Project in respect of such Project Company, in each case, that is promptly replaced by such Borrower Group Company with suitable substitute equipment of substantially the same character and quality and at least equivalent useful life and utility to the extent required by the Business (or the applicable Covered Project or Excluded Project) of such Borrower Group Company or for performance under the Material Agreements to which it is a party;

(ii) Dispositions of assets, including Capital Stock, from (x) a Loan Party to another Loan Party, (y) an Existing Foreign Subsidiary to another Existing Foreign Subsidiary, or (z) an Excluded Project Company or Existing Foreign Subsidiary to a Loan Party;

(iii) sales of Cash Equivalent Investments in the ordinary course of business and for fair market value;

(iv) licensing of Intellectual Property in the ordinary course of business, so long as it does not (i) interfere in any material respect with the ordinary conduct of the Business of the Borrower Group Companies or (ii) materially affect the value of such Intellectual Property;

(v) the sale of fuel cells or other inventory in the ordinary course of business;

(vi) the consummation of any Permitted Project Disposition/Refinancing by any Project Company; and

(vii) any other Disposition (other than a Permitted Project Disposition/Refinancing) so long as (a) at least 75% of the consideration in respect of such Disposition is cash, (b) the consideration in respect of such Disposition is at least equal to the fair market value of the assets being sold, transferred, leased or disposed, (c) the

aggregate proceeds in respect of all Disposition consummated pursuant to this clause (vii) during any 12 consecutive month period does not exceed $1,000,000 in the aggregate, and (iv) the Net Available Amount in respect of such Disposition shall be applied in accordance with Section 2.05(b)(ii).

Section 6.08 Accounting Changes . No Loan Party shall change its fiscal year.

Section 6.09 Amendment or Termination of Material Agreements . No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries (other than an Excluded Project Company), directly or indirectly:

(a) amend, modify, supplement or grant a consent, approval or waiver under, or permit or consent to the amendment, modification, supplement, consent, approval or waiver of, any Material Agreement without the prior written consent of the Administrative Agent, such consent not to be unreasonably withheld, conditioned or delayed; provided, that, with respect to any Material Agreement of a Project Company, (i) to the extent such Material Agreement is an interconnection agreement, such interconnection agreement may be amended or modified without the consent of the Administrative Agent so long as such amendment or modification (x) does not result in or require an increase in the Operating Budget for such Project Company, (y) does not reduce the capacity of such Project Company, and (z) is not otherwise materially adverse to the interest of the Lenders, (ii) to the extent such Material Agreement is a supply agreement, such supply agreement may be amended or modified without the consent of the Administrative Agent so long as such amendment or modification (x) does not result in or require an increase in the Operating Budget for such Project Company, (y) does not reduce the supply of product or material to such Project Company contemplated thereby, and (z) is not otherwise materially adverse to the interest of the Lenders, and (iii) to the extent such Material Agreement is an lease agreement, such lease agreement may be amended or modified without the consent of the Administrative Agent so long as such amendment or modification (x) does not result in or require an increase in the Operating Budget for such Project Company, (y) does not reduce the size of the leased property or the tenor of the lease, and (z) is not otherwise materially adverse to the interest of the Lenders;

(b) subject to the right of the applicable Borrower Group Company to enter into Replacement Agreements as set forth in Section 7.01(k), directly or indirectly transfer, terminate, cancel or permit or consent to the transfer, termination or cancellation (including by exercising any contractual option to terminate, or failing to exercise any contractual option to extend) of any Material Agreement without the written consent of the Administrative Agent, such consent not to be unreasonably withheld, conditioned or delayed; or

(c) enter into an Additional Material Agreement without the prior written consent of the Administrative Agent not to be unreasonably withheld, conditioned or delayed.

Section 6.10 Transactions with Affiliates . No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, directly or indirectly enter into any transaction or series of related transactions with an Affiliate of any Borrower Group Company, except for (a) transactions set forth on Schedule 3.23 hereto, (b) transactions involving payments or consideration not in excess of $100,000 in the aggregate for all transactions under this clause (b) during the term of this Agreement entered into in the ordinary course of such Borrower Group Company's (and such Affiliate's) business and upon fair and reasonable terms no less favorable to such Borrower Group Company than it would obtain in comparable arm's-length transactions

with a Person acting in good faith which is not an Affiliate, (c) transactions between or among (i) the Loan Parties not involving any other Affiliate, or (ii) the Existing Foreign Subsidiaries not involving any other Affiliate, and (d) any Restricted Payment permitted by Section 6.06. No Borrower Group Company shall become a party to, or otherwise become obligated under, any tax sharing agreements.

Section 6.11 Collateral Accounts . No Loan Party shall open or maintain, or instruct any Person to open or maintain, any securities accounts, deposit accounts or other bank accounts other than (x) Excluded Accounts and (y) the Collateral Accounts as contemplated by Section 5.18. Prior to the Discharge Date (as defined in the Security Agreement), no Loan Party shall change (or permit any other Person to change) the name or account number of any Collateral Account or close any Collateral Account, in each case, without the prior written consent of the Collateral Agent. No amounts may be transferred or withdrawn from any Collateral Account other than in accordance with and as permitted by Section 5.18.

Section 6.12 Guarantees . No Loan Party shall, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, Guarantee, endorse, contingently agree to purchase or otherwise become liable for Indebtedness or obligations of any other Person except as otherwise permitted under the terms of the Financing Documents.

Section 6.13 Hazardous Materials . No Loan Party will, and no Loan Party shall permit any of its Subsidiaries that is not a Loan Party to, cause any Releases of Hazardous Materials at, on, from or under any real property formerly owned, leased or operated by any Borrower Group Company, except to the extent such Release is otherwise in compliance in all material respects with all Applicable Laws and applicable insurance policies.

Section 6.14 No Speculative Transactions . No Loan Party shall, without the prior written consent of the Administrative Agent, enter into, or suffer to exist, any Hedging Agreement or any other speculative transaction other than interest rate Hedging Agreements entered into in the ordinary course of business and not for speculative purposes.

Section 6.15 Reserved.

Section 6.16 Reserved .

Section 6.17 Withdrawals from the Collateral Accounts . No Loan Party shall, and no Loan Party shall permit any other Borrower Group Company to, make any withdrawals from the Collateral Accounts other than in accordance with Section 5.18.

Section 6.18 Capital Expenditures . No Loan Party will, and no Loan Party shall permit any other Borrower Group Company (other than an Excluded Project Company) make any Capital Expenditures other than (i) Capital Expenditures permitted to be made pursuant to Section 6.07(d), and (ii) Capital Expenditures in accordance with the applicable Construction Budget, Construction Schedule and Operating Budget for such Loan Party.

Section 6.19 Right of First Offer .

(a) In the event that the Borrower or any other Borrower Group Company shall desire to obtain any construction financing or a financing to acquire a Project then under construction (a "Proposed Financing") with respect to any new fuel cell project to be developed, owned, constructed or operated by any Borrower Group Company, prior to engaging in any negotiations with any other potential financing source with respect to such Proposed Financing, the Borrower shall deliver written notice to the Administrative Agent of such Borrower Group Company's desire to obtain such Proposed Financing, which notice shall set forth a reasonably detailed description of the applicable new fuel cell project and the desired Proposed Financing in respect thereof.

(b) Upon the Administrative Agent's receipt of such notice, the Administrative Agent shall have the exclusive right, for a period of fifteen (15) Business Days, to develop a proposal to arrange or provide the Proposed Financing.

(i) In the event that the Administrative Agent shall not present the Borrower with a proposal for such Proposed Financing within such fifteen Business Day period, the Borrower shall thereafter be entitled to (A) engage in discussions and negotiations with other potential financing sources with respect to such Proposed Financing and (B) consummate such Proposed Financing with any other third party financing source; provided, that, in the event that the Borrower or such other Borrower Group Company shall not consummate such Proposed Financing within one hundred eighty (180) days of the expiration of such fifteen Business Day period, neither the Borrower nor any other Borrower Group Company shall be entitled to consummate such Proposed Financing without again complying with the provisions of this Section 6.19.

(ii) In the event that the Administrative Agent shall, within such fifteen Business Day period, present the Borrower with a proposal for such Proposed Financing together with a representation that the Administrative Agent and its Affiliates have cash on hand or legally binding commitments to obtain from their respective limited partners or other investors, in either case, sufficient cash necessary to fund such Proposed Financing, the Borrower shall consider such proposal in good faith and shall engage in good faith negotiations with the Administrative Agent with respect thereto. In the event that the Borrower shall, after good faith negotiations with the Administrative Agent, decline to accept the Administrative Agent's proposal for such Proposed Financing, (x) the Borrower shall thereafter be entitled to engage in discussions and negotiations with other potential financing sources with respect to such Proposed Financing; provided, that, neither the Borrower nor any other Borrower Group Company shall be entitled to consummate such Proposed Financing with any such other financing source unless the interest rate, repayment terms and drawdown terms of such Proposed Financing being provided by such other financing source are, in the reasonable discretion of the Borrower, more favorable to the Borrower or the other applicable Borrower Group Company than the terms proposed by the Administrative Agent, and (y) in the event that the Borrower or such other Borrower Group Company shall not consummate such Proposed Financing within one hundred eighty (180) days of the date of the Administrative Agent's proposal in respect thereof, neither the Borrower nor any other Borrower Group Company shall be entitled to

consummate such Proposed Financing without again complying with the provisions of this Section 6.19.

Section 6.20 Restricted Debt Payments . No Borrower Group Company shall repay and Indebtedness in respect of the State of Connecticut Credit Agreement or the Connecticut Green Bank Credit Agreement unless (i) such repayment represents principal and interest then due and payable pursuant to the State of Connecticut Credit Agreement or the Connecticut Green Bank Credit Agreement, (ii) there is then funds in the Debt Reserve Account in an amount equal to at least the Required Debt Reserve Amount in respect of the immediately prior Quarterly Payment Date, and (iii) the Borrower does not reasonably expect there to exist a Shortfall Amount as of the immediately following Quarterly Payment Date.

## ARTICLE VII

## EVENTS OF DEFAULT

Section 7.01 Events of Default . If any of the following events ("Events of Default") shall occur:

(a) the Borrower shall fail to pay any principal of any Loan (including any Accrued Interest that has been added to principal) when and as the same shall become due and payable, whether at the due date thereof or, in the case of payments of principal due pursuant to Section 2.05(b), at a date fixed for prepayment thereof, or otherwise; or

(b) the Borrower shall fail to pay, when the same shall be due and payable, (i) any interest on any Loan or (ii) any reimbursement, fee or any other amount (other than an amount referred to in clause (a) or (b)(i) of this Article) payable under this Agreement or under any other Financing Document when and as the same shall become due and payable, and, in the case of this clause (b)(ii) only, such failure shall continue unremedied for a period of five (5) Business Days after the occurrence thereof; or

(c) any representation or warranty made by or deemed made by any Loan Party in this Agreement or any other Financing Document, or in any certificate furnished to any Secured Party by or on behalf of any Loan Party in accordance with the terms hereof or thereof shall prove to have been incorrect in any material respect (to the extent not already qualified by materiality) as of the time made or deemed made, confirmed or furnished; provided that, except in the case of Section 3.05(b), (i) if the fact, event or circumstance resulting in such false or incorrect representation or warranty is capable of being cured, corrected or otherwise remedied, (ii) such fact, event or circumstance resulting in such false or incorrect representation or warranty shall have been cured, corrected or otherwise remedied within thirty (30) days (or if such inaccurate representation or warranty is not susceptible to cure within thirty (30) days, and the Loan Parties are proceeding with diligence and in good faith to cure such default and such default is susceptible to cure, such additional period of time (not to exceed thirty (30) additional days) as may be necessary to cure such incorrect representation or warranty) from the earlier of (x) the date an Authorized Officer of any Loan Party obtains knowledge thereof and (y) the date notice is given to any Loan Party, and (iii) such representation or warranty (as cured, corrected or remedied) could not reasonably be expected to result in a Material Adverse Effect, then such false or incorrect

representation or warranty shall not constitute a Default or Event of Default for purposes of the Financing Documents; or

(d) any Loan Party shall fail to observe or perform any covenant or agreement, as applicable, contained in the following Sections:

(i) Sections 5.01 (as to existence), 5.11(f), 5.13, 5.24, 5.25, ~~5.26~~5.26, 5.27(c), 5.27(d), 5.28 or Article VI; or

(ii) Sections 5.06(a), 5.10(b), 5.10(c), 5.20(c) or 5.21 and such failure has continued unremedied for a period of twenty (20) Business Days after the occurrence thereof; or

(iii) Sections 5.10(g) and such failure has continued unremedied for thirty (30) days after the occurrence thereof; or

(e) any Loan Party shall fail to observe or perform any covenant, condition or agreement contained in this Agreement or any other Financing Document to which it is a party (other than those specified in clause (a), (b), (c) or (d) of this Section), and in each case such failure shall continue unremedied for a period of thirty (30) days after the earlier of (i) written notice thereof to any Loan Party and (ii) knowledge of such default by an Authorized Officer of any Loan Party; provided that, if (A) such default cannot be cured within such 30-day period, (B) such default is susceptible of cure and (C) such Loan Party is proceeding with diligence and in good faith to cure such default, then such thirty (30) day cure period shall be extended to such date, not to exceed a total of sixty (60) days, as shall be necessary for such Loan Party to diligently cure such default; or

(f) a Bankruptcy occurs with respect to any Borrower Group Company; or

(g) a final non-appealable judgment or order for the payment of money is entered against any Borrower Group Company in an amount exceeding $1,000,000 (exclusive of judgment amounts covered by insurance or bond where the insurer or bonding party has admitted liability in respect of such judgment); or

(h) (i) any Security Document (A) is revoked, terminated or otherwise ceases to be in full force and effect (except in connection with its expiration in accordance with its terms in the ordinary course (and not related to any default thereunder) and except to the extent such revocation, termination or cessation is caused by any act or omission of the Agent or the Lenders), or the enforceability thereof shall be challenged in writing by any Loan Party, (B) ceases to provide (to the extent permitted by law and to the extent required by the Financing Documents) a first priority perfected Lien on the assets purported to be covered thereby in favor of the Collateral Agent, free and clear of all other Liens (other than Permitted Liens), or (C) becomes unlawful or is declared void or (ii) any Financing Document (A) is revoked, terminated or otherwise ceases to be in full force and effect (except in connection with its expiration in accordance with its terms in the ordinary course (and not related to any default thereunder) and except to the extent such revocation, termination or cessation is caused any act or omission by the Agent or the Lenders), or (B) becomes unlawful or is declared void; or

(i) an ERISA Event has occurred which, either individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect; or

(j) a Change of Control has occurred; or

(k) any Material Agreement shall at any time for any reason cease to be valid and binding and in full force and effect (in each case, except in connection with its expiration in accordance with its terms in the ordinary course (and not related to any default thereunder)); provided that any such event with respect to a Material Agreement shall not be an Event of Default if (x) the applicable Person has, within thirty (30) days after the occurrence of such relevant circumstance, entered into a Replacement Agreement, or (y) no Borrower Group Company other than an Excluded Project Company is a party to, or otherwise has rights or obligations under, such Material Agreement and the failure of such Material Agreement to continue to be valid and binding and in full force and effect would not reasonably be expected to result in a Material Adverse Effect; or

(l) any Borrower Group Company shall default in the observance or performance of any other term, covenant, condition or agreement under any Material Agreement and either (i) such default shall continue beyond any applicable period of grace set forth in such Material Agreement, or (ii) such Borrower Group Company shall fail to diligently pursue a cure for such default; provided that any such event with respect to a Material Agreement shall not be an Event of Default if no Borrower Group Company other than an Excluded Project Company is a party to, or otherwise has rights or obligations under, such Material Agreement and the applicable default in the observance or performance thereof would not reasonably be expected to result in a Material Adverse Effect; or

(m) any Authorization by a Governmental Authority necessary for the execution, delivery and performance of any obligation under the Transaction Documents or any Material Agreement is terminated or ceases to be in full force or is not obtained, maintained, or complied with, unless such failure (i) could not reasonably be expected to result in a Material Adverse Effect during the cure period (or the additional cure period) under the following clause (ii) and (ii) is remedied within ninety (90) days after the occurrence thereof or such longer period as is necessary, if not fully remedied within such period, as is reasonably required so long as such remediation is diligently pursued in good faith and such default remains susceptible of cure; or

(n) an uninsured Event of Loss or a Condemnation, in each case with respect to a portion of the property of any Borrower Group Company in excess of $1,000,000 in value shall occur; or

(o) an Event of Abandonment shall occur; or

(p) any Loan Party thereto shall (i) default in any material respect in the observance or performance of any material agreement or material condition contained in the Observer Rights Agreement and such material default shall continue after the expiration of any cure period therefor or (ii) default in the observance or performance of any agreement or condition contained in any Warrant and such default shall continue after the expiration of any cure period therefor; or

(q) if, for any reason, the Secondary Facility Satisfaction Date shall have not occurred on or prior to the Secondary Facility Required Repayment Date;

then, and in every such event (other than an event with respect to any Loan Party described in clause (f) of this Article), and at any time thereafter during the continuance of such event, the Administrative Agent shall, at the request of the Required Lenders, by notice to the Borrower, take any or all of the following actions, at the same or different times: (i) terminate the Commitments, and thereupon the Commitments shall terminate immediately; and (ii) declare the Loans and all other amounts due under the Financing Documents (including the Prepayment Premium, if applicable) then outstanding to be due and payable in whole (or in part, in which case any principal not so declared to be due and payable may thereafter be declared to be due and payable), and thereupon the principal of the Loans so declared to be due and payable, together with accrued interest thereon and all reimbursements, fees and other obligations of the Borrower accrued hereunder or under the Financing Documents (including the Prepayment Premium, if applicable), shall become due and payable immediately, without presentment, demand, protest or other notice of any kind, all of which are hereby waived by each Loan Party; and in case of any event with respect to a Loan Party described in clause (f) of this Section, the Commitments shall automatically terminate and the principal of the Loans then outstanding, together with accrued interest thereon and all reimbursements, fees and other obligations of the Borrower accrued hereunder and under the Financing Documents (including the Prepayment Premium, if applicable), shall automatically become due and payable, without presentment, demand, protest or other notice of any kind, all of which are hereby waived by the Loan Parties. Upon the occurrence and during the continuance of any Event of Default, in addition to the exercise of remedies set forth in clauses (i) and (ii) above, each Secured Party shall be, subject to the terms of the Security Agreement, entitled to exercise the rights and remedies available to such Secured Party under and in accordance with the provisions of the other Financing Documents to which it is a party or any Applicable Law. For the purpose of enabling the Collateral Agent to exercise the rights and remedies under this Section 7.01 (including in order to take possession of, collect, receive, assemble, process, appropriate, remove, realize upon, sell, assign, license out, convey, transfer or grant options to purchase any Collateral) at such time as the Collateral Agent shall be lawfully entitled to exercise such rights and remedies, each Loan Party hereby grants to the Collateral Agent, for the benefit of the Collateral Agent and each other Secured Party, a nonexclusive and assignable license (exercisable without payment of royalty or other compensation to any Loan Party), subject, in the case of Intellectual Property licenses, to the terms of the applicable license, and subject, in the case of Trademarks, to sufficient rights to quality control and inspection in favor of the Loan Parties to avoid the risk of invalidation of such Trademarks, to use, practice, license, sublicense, and otherwise exploit any and all Intellectual Property now owned or held or hereafter acquired or held by any Loan Party.

Notwithstanding anything to the contrary contained in Section 7.01, in the event that a an Event of Default has occurred (or, but for the operation of this paragraph, would trigger) with respect to a Covered Project Company that has a Project Payoff Amount of $5,000,000 or less, then if prior to the expiration of the fifth Business Day subsequent to the occurrence of such Event of Default, the Borrower shall (i) voluntarily prepay the Loans under Section 2.05(a)(i) in an amount equal to the Project Payoff Amount in respect of such Covered Project Company or (ii) consummate a Permitted Project Company Disposition/Refinancing in respect of such Covered Project Company, then (i) the applicable Event of Default shall be deemed cured for the purposes

of this Agreement, and (ii) such Covered Project Company shall thereafter be deemed an Excluded Project Company hereunder; provided, that, the Borrower shall be entitled to exercise its rights under this paragraph with respect to no more than one Covered Project Company per calendar year.

Section 7.02 Application of Proceeds

. The proceeds of any collection, sale or other realization of all or any part of the Collateral (including any amount in the Collateral Accounts) shall be applied in the following order of priority:

(a) first, to any fees, costs, charges, expenses and indemnities then due and payable to Administrative Agent and Collateral Agent under any Financing Document *pro rata* based on such respective amounts then due to such Persons;

(b) second, to the respective outstanding fees, costs, charges, expenses and indemnities then due and payable to the other Secured Parties under any Financing Document *pro rata* based on such respective amounts then due to such Persons;

(c) third, to any accrued but unpaid interest on the Obligations owed to the Secured Parties pro rata based on such respective amounts then due to the Secured Parties;

(d) fourth, to any principal amount of the Obligations owed to the Secured Parties pro rata based on such respective amounts then due to the Secured Parties;

(e) fifth, to any other unpaid Obligations then due and payable to Secured Parties, *pro rata* based on such respective amounts then due to the Secured Parties; and

(f) sixth, after final payment in full of the amounts described in clauses *first* through *fifth* above and the Discharge Date (as defined in the Security Agreement) shall have occurred, to the Borrower or as otherwise required by Applicable Law.

It is understood that the Loan Parties shall remain liable to the extent of any deficiency between the amount of the proceeds of the Collateral and the aggregate of the sums referred to in clauses *first* through *fifth* above.

## ARTICLE VIII

## THE AGENTS

Section 8.01 Appointment and Authorization of the Agents.

(a) Each of the Lenders hereby irrevocably appoints each Agent to act on its behalf as its agent hereunder and under the other Financing Documents and authorizes each Agent in such capacity, to take such actions on its behalf and to exercise such powers as are delegated to it by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto. Each Agent, by executing this Agreement, hereby accepts such appointment.

(b) Each Agent is hereby authorized to execute, deliver and perform each of the Transaction Documents to which such Agent is intended to be a party. Each Agent hereby agrees, and each Lender hereby authorizes such Agent, to enter into the amendments and other modifications of the Security Documents (subject to Section 10.02(b)).

Section 8.02 Rights as a Lender . Each Agent shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not an Agent, and such Person and its Affiliates may accept deposits from, lend money to and generally engage in any kind of business with the Borrower or any of Subsidiary or other Affiliate thereof as if it were not an Agent hereunder.

Section 8.03 Duties of Agent; Exculpatory Provisions . No Agent shall have any duties or obligations except those expressly set forth herein and in the other Financing Documents. Without limiting the generality of the foregoing, no Agent (a) shall be subject to any fiduciary or other implied duties, regardless of whether a Default or Event of Default has occurred and is continuing, (b) shall have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Financing Documents that such Agent is required to exercise as directed in writing by the Required Lenders, and (c) shall, except as expressly set forth herein and in the other Financing Documents, have any duty to disclose, and shall not be liable for the failure to disclose, any information relating to the Borrower or any of its Subsidiaries that is communicated to or obtained by the financial institution serving as an Agent or any of its Affiliates in any capacity. No Agent shall be liable for any action taken or not taken by it with the consent or at the request of the Required Lenders or in the absence of its own gross negligence or willful misconduct as determined by a court of competent jurisdiction in a final, non-appealable decision. No Agent shall be deemed to have knowledge of any Default or Event of Default unless and until written notice thereof is given to such Agent by the Borrower or a Lender, and no Agent shall be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with this Agreement or any other Financing Document, (ii) the contents of any certificate, report or other document delivered hereunder or thereunder or in connection herewith or therewith, (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein, (iv) the validity, enforceability, effectiveness or genuineness of this Agreement, any other Financing Document or any other agreement, instrument or document, or (v) the satisfaction of any condition set forth in Article IV or elsewhere herein or therein, other than to confirm receipt of items expressly required to be delivered to such Agent.

Section 8.04 Reliance by Agent . Each Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing believed by it to be genuine and to have been signed or sent by the proper Person. Each Agent also may rely upon any statement made to it orally or by telephone and believed by it to be made by the proper Person, and shall not incur any liability for relying thereon. Each Agent may consult with legal counsel, independent accountants and other experts selected by it, and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts.

Section 8.05 Delegation of Duties . Each Agent may perform any and all its duties and exercise its rights and powers by or through any one or more sub-agents appointed by such Agent. Each Agent and any such sub-agent may perform any and all its duties and exercise its rights and powers through their respective Related Parties. The exculpatory provisions of the preceding paragraphs shall apply to any such sub-agent and to the Related Parties of each Agent and any such sub-agent, and shall apply to their respective activities as well as activities as each Agent.

Section 8.06 Withholding of Taxes by the Administrative Agent; Indemnification . To the extent required by any Applicable Law, the Administrative Agent may withhold from any payment to any Lender an amount equivalent to any applicable withholding Taxes. If any Governmental Authority asserts a claim that the Administrative Agent did not properly withhold Taxes from amounts paid to or for the account of any Lender because the appropriate form was not delivered or was not properly executed or because such Lender failed to notify the Administrative Agent of a change in circumstance which rendered the exemption from, or reduction of, withholding Taxes ineffective or for any other reason, or if the Administrative Agent reasonably determines that a payment was made to a Lender pursuant to this Agreement without deduction of applicable withholding tax from such payment, such Lender shall promptly indemnify the Administrative Agent fully for all amounts paid, directly or indirectly, by Administrative Agent as Taxes or otherwise, including any penalties or interest and together with all expenses (including legal expenses, allocated internal costs and out-of-pocket expenses) incurred. Each Lender shall severally indemnify the Administrative Agent, within ten (10) days after demand therefor, for (i) any Indemnified Taxes attributable to such Person (but only to the extent that the Borrower has not already indemnified the Administrative Agent for such Indemnified Taxes and without limiting the obligation of the Borrower to do so), (ii) any Taxes attributable to such Person's failure to comply with the provisions of Section 10.04(f) relating to the maintenance of a Participant Register and (iii) any Excluded Taxes attributable to such Person, in each case, that are payable or paid by the Administrative Agent in connection with any Financing Document, and any reasonable expenses arising therefrom or with respect thereto, whether or not such Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to any Lender by the Administrative Agent shall be conclusive absent manifest error. Each Lender hereby authorizes the Administrative Agent to set off and apply any and all amounts at any time owing to such Lender under any Financing Document or otherwise payable by the Administrative Agent to the Lender from any other source against any amount due to the Administrative Agent under this Section 8.06.

Section 8.07 Resignation of Agent . Each Agent may resign at any time upon thirty (30) days' notice by notifying the Lenders and the Borrower, and any Agent may be removed at any time by the Required Lenders (with a prior written notice to the Borrower). Upon any such resignation or removal, the Required Lenders shall have the right, with the consent of the Borrower (such consent not to be unreasonably withheld), to appoint a successor. If no successor shall have been so appointed by the Required Lenders and approved by the Borrower and shall have accepted such appointment within thirty (30) days after the retiring Agent gives notice of its resignation or after the Required Lenders' removal of the retiring Agent, then the retiring Agent may, on behalf of the Lenders, appoint a successor Agent, which shall be a Lender with an office in New York, New York, an Affiliate of a Lender or a financial institution with an office in New York, New York having a combined capital and surplus that is not less than $250,000,000. Upon the acceptance of its appointment as Agent hereunder by a successor, such successor shall succeed to

and become vested with all the rights, powers, privileges and duties of the retiring (or retired) Agent and the retiring Agent shall be discharged from its duties and obligations hereunder (if not already discharged therefrom as provided above in this paragraph). The reimbursements and fees payable by the Borrower to a successor Agent shall be the same as those payable to its predecessor unless otherwise agreed between the Borrower and such successor. After the Agent's resignation or removal hereunder, the provisions of this Article and Section 10.03 shall continue in effect for its benefit in respect of any actions taken or omitted to be taken by it while it was acting as Agent.

Section 8.08 Non-Reliance on Agent or Other Lenders . Each Lender acknowledges that it has, independently and without reliance upon any Agent, the Affiliates of any Agent or any other Lender and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender also acknowledges that it will, independently and without reliance upon any Agent, the Affiliates of any Agent or any other Lender and based on such documents and information as it shall from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Financing Document or any related agreement or any document furnished hereunder or thereunder.

Section 8.09 No Other Duties; Etc. The parties agree that neither the Administrative Agent nor the Collateral Agent shall have any obligations, liability or responsibility under or in connection with this Agreement and the other Financing Documents and that none of the Agents shall have any obligations, liabilities or responsibilities except for those expressly set forth herein and in the other Financing Documents. The Collateral Agent shall have all of the rights (including indemnification rights), powers, benefits, privileges, exculpations, protections and immunities granted to the Collateral Agent under the other Financing Documents, all of which are incorporated herein *mutatis mutandis*.

## ARTICLE IX

## GUARANTY

Section 9.01 Guaranty.

(a) For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each Guarantor hereby unconditionally and irrevocably, jointly and severally, Guarantees the full and punctual payment and performance (whether at stated maturity, upon acceleration or otherwise) of all Guaranteed Obligations, in each case as primary obligor and not merely as surety and with respect to all such Guaranteed Obligations howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent, now or hereafter existing, or due or to become due. This is a guaranty of payment and not merely of collection.

(b) All payments made by any Guarantor under this Article IX shall be payable in the manner required for payments by the Borrower hereunder, including: (i) the obligation to make all such payments in Dollars, free and clear of, and without deduction for, any Taxes, and subject to the gross-up and indemnity as provided under Section 2.09, (ii) the obligation to pay interest at the Post-Default Rate and (iii) the obligation to pay all amounts due under the Loans in Dollars.

(c) Any term or provision of this guaranty to the contrary notwithstanding the aggregate maximum amount of the Guaranteed Obligations for which such Guarantor shall be liable under this guaranty shall not exceed the maximum amount for which such Guarantor can be liable without rendering this guaranty or any other Financing Document, as it relates to such Guarantor, void or voidable under Applicable Law relating to fraudulent conveyance or fraudulent transfer.

Section 9.02 Guaranty Unconditional. The Guaranteed Obligations shall be unconditional and absolute and, without limiting the generality of the foregoing, shall not be released, discharged or otherwise affected by:

(a) any extension, renewal, settlement, compromise, waiver or release in respect of any obligations of any Loan Party under the Financing Documents and/or any Commitments under the Financing Documents, by operation of law or otherwise (other than with respect to any such extension, renewal, settlement, compromise, waiver or release agreed in accordance with the terms hereunder as expressly applying to the Guaranteed Obligations),

(b) any modification or amendment of or supplement to this Agreement or any other Financing Document (other than with respect to any modification, amendment or supplement agreed in accordance with the terms hereunder as expressly applying to the Guaranteed Obligations),

(c) any release, impairment, non-perfection or invalidity of any Collateral,

(d) any change in the corporate existence, structure or ownership of any Loan Party or any other Person, or any event of the type described in Sections 5.01, 6.01 or 6.07 with respect to any Person,

(e) the existence of any claim, set-off or other rights that any Guarantor may have at any time against any Loan Party, any Secured Party or any other Person, whether in connection herewith or with any unrelated transactions,

(f) any invalidity or unenforceability relating to or against any Loan Party for any reason of any Financing Document, or any provision of Applicable Law purporting to prohibit the performance by any Loan Party of any of its obligations under the Financing Documents (other than any such invalidity or unenforceability with respect solely to the Guaranteed Obligations),

(g) the failure of any Material Counterparty to make payments owed to any Loan Party, or

(h) any other act or omission to act or delay of any kind by any Loan Party, any Secured Party or any other Person or any other circumstance whatsoever that might, but for the provisions of this Section 9.02, constitute a legal or equitable discharge of the obligations of any Loan Party under the Financing Documents.

Section 9.03 Discharge Upon Payment in Full; Reinstatement in Certain Circumstances; Release of Guarantor .

(a) The Guaranteed Obligations shall remain in full force and effect until all of the Borrower's obligations under the Financing Documents shall have been paid or otherwise performed in full and all of the Commitments shall have terminated.

(b) If at any time any payment made under this Agreement or any other Financing Document is rescinded or must otherwise be restored or returned upon the insolvency, bankruptcy, reorganization or similar event of any Loan Party or any other Person or otherwise, then the Guaranteed Obligations with respect to such payment shall be reinstated at such time as though such payment had been due but not made at such time.

(c) Upon any event or transaction permitted by this Agreement that results in any Restricted Subsidiary or Covered Project Company becoming (x) an Excluded Project Company hereunder or (y) ceasing to be a Subsidiary of the Borrower hereunder, such Restricted Subsidiary or such Covered Project Company, as applicable, shall (ii) automatically cease to be a Guarantor and Loan Party hereunder, and (ii) automatically be released from its Guarantee obligations under this Article IX and all other obligations under this Agreement and the other Financing Agreements. In the event that a Guarantor is released in accordance with the foregoing sentence, the Administrative Agent shall provide the Borrower will such confirmations of such release as reasonably requested by the Borrower.

Section 9.04 Waiver by the Guarantors.

(a) Each Guarantor hereby irrevocably and unconditionally waives, to the fullest extent permitted by Applicable Law: (i) notice of acceptance of the guaranty provided in this Article IX and notice of any liability to which this guaranty may apply, (ii) all notices that may be required by Applicable Law or otherwise to preserve intact any rights of any Secured Party against any Loan Party, including any demand, presentment, protest, proof of notice of non-payment, notice of any failure on the part of any Loan Party to perform and comply with any covenant, agreement, term, condition or provision of any agreement and any other notice to any other party that may be liable in respect of the Guaranteed Obligations (including any Loan Party) except any of the foregoing as may be expressly required hereunder, (iii) any right to the enforcement, assertion or exercise by any Secured Party of any right, power, privilege or remedy conferred upon such Person under the Financing Documents or otherwise and (iv) any requirement that any Secured Party exhaust any right, power, privilege or remedy, or mitigate any damages resulting from any Default or Event of Default under any Financing Document, or proceed to take any action against any Collateral or against any Loan Party or any other Person under or in respect of any Financing Document or otherwise, or protect, secure, perfect or ensure any Lien on any Collateral.

(b) Each Guarantor agrees and acknowledges that the Administrative Agent and each holder of any Guaranteed Obligations may demand payment of, enforce and recover from any Guarantor or any other Person obligated for any or all of such Guaranteed Obligations in any order and in any manner whatsoever, without any requirement that the Administrative Agent or such holder seek to recover from any particular Guarantor or other Person first or from any Guarantors or other Persons *pro rata* or on any other basis.

Section 9.05 Subrogation . Upon any Guarantor making any payment under this Article IX, such Guarantor shall be subrogated to the rights of the payee against any Loan Party with respect to such obligation; provided that no Guarantor shall enforce any payment by way of subrogation, indemnity, contribution or otherwise, or exercise any other right, against any Loan Party (or otherwise benefit from any payment or other transfer arising from any such right) so long as any obligations under the Financing Documents (other than on-going but not yet incurred indemnity obligations) remain unpaid and/or unsatisfied.

Section 9.06 Acceleration . All amounts then subject to acceleration under Section 7.01 of this Agreement shall be payable by the Loan Parties hereunder immediately upon demand by the Administrative Agent.

## ARTICLE X

## MISCELLANEOUS

Section 10.01 Notices . Except as otherwise expressly provided herein or in any Financing Document, all notices and other communications provided for hereunder or thereunder shall be (i) in writing and (ii) sent by overnight courier (if for inland delivery) or international courier (if for overseas delivery); provided, that such notice or communication may be sent by email so long as (x) such email or electronic transmission is promptly followed by a communication or notice in sent in accordance with (i) and (ii) above, (y) any Loan Party is delivering documents and information required to be provided under Article IV, Article V or Article VI, or (z) the express terms of any Financing Document permit electronic transmissions, in each case, to a party hereto at its address and contact number specified below, or at such other address and contact number as is designated by such party in a written notice to the other parties hereto:

(a) Borrower or Guarantors:

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Jason Few
Email: jfew@fce.com

With a copy which shall not constitute notice to:

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Jennifer Arasimowicz, General Counsel
Email: jarasimowicz@fce.com

(b) Administrative Agent and Collateral Agent:

Orion Energy Partners Investment Agent, LLC
350 Fifth Avenue #6740
New York, NY 10118
Attention: Gerrit Nicholas; Rui Viana; Mark Friedland;
Timothy Mister; Sue Yang

Email: Gerrit@OrionEnergyPartners.com;
Rui@OrionEnergyPartners.com;
Mark@OrionEnergyPartners.com;
Timothy@OrionEnergyPartners.com;
Sue@OrionEnergyPartners.com

(c) If to a Lender, to it at its address (mail or email) set forth in its Administrative Questionnaire.

All notices and communications shall be effective when received by the addressee thereof during business hours on a Business Day in such Person's location as indicated by such Person's address in paragraphs (a) to (c) above, or at such other address as is designated by such Person in a written notice to the other parties hereto.

Section 10.02 Waivers; Amendments.

(a) No Deemed Waivers; Remedies Cumulative. No failure or delay on the part of any Agent or any Lender in exercising any right, power or privilege hereunder or under any other Financing Document and no course of dealing between any Loan Party, or any Loan Party's Affiliates, on the one hand, and any Agent or Lender on the other hand, shall impair any such right, power or privilege or operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege hereunder or under any other Financing Document preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder or thereunder. The rights, powers and remedies herein or in any other Financing Document expressly provided are cumulative and not exclusive of any rights, powers or remedies which any party thereto would otherwise have. No notice to or demand on the Borrower in any case shall entitle the Borrower to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of any Agent or any Lender to any other or further action in any circumstances without notice or demand.

(b) Amendments. No amendment or waiver of any provision of this Agreement or any other Financing Document (other than any Security Document, each of which may only be waived,

amended or modified in accordance with such Security Document), and no consent to any departure by the Borrower shall be effective unless in writing signed by the Required Lenders and the Borrower and acknowledged by the Administrative Agent; provided that no such amendment, waiver or consent shall: (i) postpone any date fixed by this Agreement or any other Financing Document for any payment or mandatory prepayment of principal, interest, fees or other amounts due to the Lenders (or any of them), or postpone the scheduled date of expiration of any Commitment, without the written consent of each Lender directly affected thereby; (ii) reduce the principal of, or the rate of interest specified herein on, any Loan, or any fees or other amounts payable hereunder or under any other Financing Document, without the written consent of each Lender directly affected thereby; (iii) change the *pro rata* agreements in Section 7.02 without the consent of each Lender affected thereby; (iv) change any provision of this Section or the definition of "Required Lenders" or any other provision hereof specifying the number or percentage of Lenders required to waive, amend or modify any rights hereunder or make any determination or grant any consent hereunder, without the written consent of each Lender; or (v) release or (other than as expressly permitted herein or in the Security Agreement) share any material portion of the Collateral without the written consent of each Lender; and provided further that (A) no amendment, waiver or consent shall, without the written consent of the relevant Agent in addition to the Lenders required above, affect the rights or duties of such Agent under this Agreement or any other Financing Document and (B) any separate reimbursement or fee agreement between the Borrower and the Administrative Agent in its capacity as such or between the Borrower and the Collateral Agent in its capacity as such may be amended or modified by such parties. Notwithstanding anything herein to the contrary, (x) the Loan Parties and the Agents may (but shall not be obligated to) amend or supplement any Security Document without the consent of any Lender to cure any ambiguity, defect or inconsistency which is not material, or to make any change that would provide any additional rights or benefits to the Lenders and (y) any Loan Party may amend, modify or supplement any annexes or schedules to the Security Documents as expressly provided therein (without the consent of any Agent, Lender or other secured party).

Section 10.03 Expenses; Indemnity; Etc.

(a) Costs and Expenses. The Borrower agrees to pay or reimburse each of the Agents and the Lenders for: (i) all reasonable and documented out-of-pocket costs and expenses of the Agents and the Lenders (including the reasonable fees and expenses of Greenberg Traurig LLP, New York counsel to the Administrative Agent and the Collateral Agent, and experts engaged by the Agents or the Lenders from time to time) in connection with (A) the negotiation, preparation, execution, delivery and performance of this Agreement and the other Financing Documents and the extension of credit under this Agreement (whether or not the transaction contemplated hereby and thereby shall be consummated) (provided, that, the Borrower shall not be required to pay or reimburse the Agents and the Lenders under this clause (i)(A) for costs and expenses in an amount in excess of the expense budget previously agreed upon by the Borrower and the Administrative Agent) or (B) any amendment, modification or waiver of any of the terms of this Agreement or any other Financing Documents, (ii) all reasonable and documented out-of-pocket costs and expenses of the Lenders (including payment of the fees and reimbursements provided for herein) and the Agents (including reasonable and documented outside counsels' fees and expenses and reasonable and documented outside experts' fees and expenses) in connection with (A) any Default or Event of Default and any enforcement or collection proceedings resulting from such Default or Event of Default or in connection with the negotiation of any restructuring or "work-out" (whether

or not consummated) of the obligations of any Loan Party under this Agreement or the obligations of any Material Counterparty under any other Financing Document or Material Agreement and (B) the enforcement of this Section 10.03 or the preservation of their respective rights, (iii) all costs, expenses, Taxes, assessments and other charges incurred in connection with any filing, registration, recording or perfection of any security interest contemplated by any Security Document or any other document referred to therein, and (iv) all reasonable and documented out-of-pocket costs and expenses of the Agents and the Lenders (including the reasonable and documented fees and expenses of the experts and consultants engaged by the Agents or the Lenders) in connection with the Lenders' due diligence review.

(b) Indemnification by the Borrower. Each Loan Party agrees to indemnify and hold harmless each of the Agents and the Lenders and their affiliates and their respective directors, officers, employees, administrative agents, attorneys-in-fact and controlling persons (each, an "Indemnified Party") from and against any and all losses, claims, damages and liabilities, joint or several, to which such Indemnified Party may become subject related to or arising out of any transaction contemplated by the Financing Documents or the execution, delivery and performance of the Financing Documents or any other document in any way relating to the Financing Documents and the transactions contemplated by the Financing Documents (including, for avoidance of doubt, any liabilities arising under or in connection with Environmental Law) and will reimburse any Indemnified Party for all expenses (including reasonable and documented outside counsel fees and expenses) as they are incurred in connection therewith. No Loan Party shall be liable under the foregoing indemnification provision to an Indemnified Party to the extent that any loss, claim, damage, liability or expense is found in a final non-appealable judgment by a court of competent jurisdiction to have resulted from such Indemnified Party's gross negligence or willful misconduct. Each Loan Party also agrees that no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to it, or any of its security holders or creditors related to or arising out of the execution, delivery and performance of any Financing Document or any other document in any way relating to the Financing Documents or the other transactions contemplated by the Financing Documents, except to the extent that any loss, claim, damage or liability is found in a final non-appealable judgment by a court of competent jurisdiction to have resulted from such Indemnified Party's gross negligence or willful misconduct as determined by a court of competent jurisdiction. To the extent permitted by Applicable Law, no Loan Party shall assert and each Loan Party hereby waives, any claim against any Indemnified Party, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any Financing Document or any agreement or instrument contemplated hereby, any Loan or the use of the proceeds thereof. Paragraph (b) of this Section shall not apply with respect to Taxes other than any Taxes that represent losses, claims, damages, etc. arising from any non-Tax claim.

(c) Indemnification by Lenders. To the extent that the Borrower fails to pay any amount required to be paid to any Agent, their affiliates or agents under paragraph (a) or (b) of this Section, each Lender severally agrees to pay ratably in accordance with the aggregate principal amount of the Loans held by the Lender to such Agent, affiliate or agent such unpaid amount; provided that the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against such Agent, affiliate or agent in its capacity as such.

(d) Settlements; Appearances in Actions. The Borrower agrees that, without each Indemnified Party's prior written consent, it will not settle, compromise or consent to the entry of any judgment in any pending or threatened claim, action or proceeding in respect of which indemnification could be sought by or on behalf of such Indemnified Party under this Section (whether or not any Indemnified Party is an actual or potential party to such claim, action or proceeding), unless such settlement, compromise or consent includes an unconditional release of such Indemnified Party from all liability arising out of such claim, action or proceeding. In the event that an Indemnified Party is requested or required to appear as a witness in any action brought by or on behalf of or against the Borrower or any Affiliate thereof in which such Indemnified Party is not named as a defendant, the Borrower agrees to reimburse such Indemnified Party for all reasonable expenses incurred by it in connection with such Indemnified Party's appearing and preparing to appear as such a witness, including the reasonable and documented fees and disbursements of its legal counsel. In the case of any claim brought against an Indemnified Party for which the Borrower may be responsible under this Section 10.03, the Agents and Lenders agree (at the expense of the Borrower) to execute such instruments and documents and cooperate as reasonably requested by the Borrower in connection with the Borrower's defense, settlement or compromise of such claim, action or proceeding.

Section 10.04 Successors and Assigns.

(a) Assignments Generally. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that (i) the Loan Parties may not assign or otherwise transfer any of their rights or obligations hereunder without the prior written consent of each Lender (and any attempted assignment or transfer by any Loan Party without such consent shall be null and void) and (ii) no Lender may assign or otherwise transfer its rights or obligations hereunder except in accordance with this Section 10.04. Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby, Participants (to the extent provided in paragraph (f) of this Section) and, to the extent expressly contemplated hereby, the Indemnified Parties referred to in Section 10.03(b) and the Related Parties of each of the Administrative Agent and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.

(b) Assignments by Lenders. Any Lender may assign to one or more Persons all or a portion of its rights and obligations under this Agreement (including all or a portion of its Loan at the time owing to it); provided that:

(i) except in the case of an assignment to a Lender or an Affiliate or Related Fund of a Lender, the amount of the Loans of the assigning Lender subject to each such assignment (determined as of the date the Assignment and Assumption with respect to such assignment is delivered to the Administrative Agent) shall not be less than $500,000 unless the Borrower and the Administrative Agent otherwise consent;

(ii) except in the case of an assignment to a Lender or an Affiliate or Related Fund of a Lender, the Borrower and the Administrative Agent must each give its prior written consent to such assignment; provided that (x) in the case of the Administrative Agent, such consent shall not be unreasonably withheld, conditioned or delayed and (y) in

the case of the Borrower, such consent shall not be unreasonably withheld, conditioned or delayed if such assignment is to an Approved Fund and such consent shall be given in the Borrower's sole discretion if the assignment is to any other Person (other than a Lender, an Affiliate or Related Fund of a Lender or an Approved Fund) (and provided further that, in the case of the Borrower, such consent shall be deemed to be given if the Borrower has not responded within five (5) Business Days of any request for consent);

(iii) each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement;

(iv) except in the case of an assignment to an Affiliate, the parties to each assignment shall execute and deliver to the Administrative Agent an Assignment and Assumption, together with a processing and recordation fee of $3,500; and

(v) the assignee, if it shall not be a Lender, shall deliver to the Administrative Agent an Administrative Questionnaire;

provided further that any consent of the Borrower otherwise required under this clause (b) shall not be required if any Event of Default has occurred and is continuing and shall be deemed given if the Borrower has not responded to a request for such consent within five (5) Business Days of the request. Upon acceptance and recording pursuant to paragraph (d) of this Section, from and after the effective date specified in each Assignment and Assumption, the assignee thereunder shall be a party hereto and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto but shall continue to be entitled to the benefits of Sections 2.09, 2.10 and 10.03). Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this paragraph shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with paragraph (f) of this Section.

(c) Maintenance of Register by the Administrative Agent. The Administrative Agent, acting for this purpose as an agent of the Borrower, shall maintain at one of its offices in New York City a copy of each Assignment and Assumption delivered to it and a register for the recordation of the names and addresses of the Lenders, principal amount of the Loans owing to each Lender pursuant to the terms hereof from time to time and the amount of any Accrued Interest owing from time to time (the "Register"). The entries in the Register shall be conclusive absent manifest error, and the Borrower, the Administrative Agent and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by the Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(d) Effectiveness of Assignments. Upon its receipt of a duly completed Assignment and Assumption executed by an assigning Lender and an assignee, the assignee's completed

Administrative Questionnaire (unless the assignee shall already be a Lender hereunder), the processing and recordation fee referred to in paragraph (b) of this Section and any written consent to such assignment required by paragraph (b) of this Section, the Administrative Agent shall accept such Assignment and Assumption and record the information contained therein in the Register. No assignment shall be effective for purposes of this Agreement unless it has been recorded in the Register as provided in this paragraph.

(e) Limitations on Rights of Assignees. An assignee Lender shall not be entitled to receive any greater payment under Sections 2.09 or 2.10 than the assigning Lender would have been entitled to receive with respect to the interest assigned to such assignee (based on the circumstances existing at the time of the assignment), unless the Borrower's prior written consent has been obtained therefor.

(f) Participations. Any Lender may, without the consent of the Borrower or the Administrative Agent, sell participations to one or more banks or other entities (a "Participant") in all or a portion of such Lender's rights and obligations under this Agreement and the other Financing Documents (including all or a portion of the Loans owing to it); provided that (i) such Lender's obligations under this Agreement and the other Financing Documents shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, (iii) the Loan Parties, the Administrative Agent and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement and the other Financing Documents. Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and the other Financing Documents and to approve any amendment, modification or waiver of any provision of this Agreement or any other Financing Document; provided that, such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver described in the first proviso to Section 10.02(b) that affects such Participant. Subject to paragraph (g) of this Section, the Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.09 and 2.10 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section. Each Lender that sells a participation shall, acting solely for this purpose as a non-fiduciary agent of the Borrower, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Loans or other obligations under the Financing Documents held by it (the "Participant Register"); provided that no Lender shall have any obligation to disclose all or any portion of the Participant Register (including the identity of any Participant or any information relating to a Participant's interest in any Commitments, Loan or its other obligations under any Financing Document) to any Person except to the extent that such disclosure is necessary to establish that such participation complies with Section 10.15 and that such commitment, loan, letter of credit or other obligation is in registered form under Section 5f.103-1(c) of the Treasury Regulations and Section 1.163-5(b) of the Proposed Treasury Regulations (or any amended or successor version). The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each Person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary. For the avoidance of doubt, the Administrative Agent (in its capacity as Administrative Agent) shall have no responsibility for maintaining a Participant Register.

(g) Limitations on Rights of Participants. A Participant shall not be entitled to receive any greater payment under Sections 2.09 or 2.10 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant. A Participant shall not be entitled to the benefits of Section 2.09 unless the Participant agrees, for the benefit of the Borrower, to comply with Section 2.09(e) as though it were a Lender (it being understood that the documentation required under Section 2.09(e) shall be delivered to the participating Lender).

(h) Certain Pledges.

(i) Any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement to secure obligations of such Lender, including any such pledge or assignment to a Federal Reserve Bank, the European Central Bank or any other central bank or similar monetary authority in the jurisdiction of such Lender, and this Section shall not apply to any such pledge or assignment of a security interest; provided that no such pledge or assignment of a security interest shall release a Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto; and provided further that any payment in respect of such pledge or assignment made by any Loan Party to or for the account of the pledging or assigning Lender in accordance with the terms of this Agreement shall satisfy such Loan Party's obligations hereunder in respect of such pledged or assigned Loan to the extent of such payment.

(ii) Notwithstanding any other provision of this Agreement, any Lender may, without informing, consulting with or obtaining the consent of any other Party to the Financing Documents and without formality under any Financing Documents, assign by way of security, mortgage, charge or otherwise create security by any means over, its rights under any Financing Document to secure the obligations of that Lender to any Person that would be a permitted assignee (without the consent of the Borrower or any Agent) pursuant to Section 10.04(b) including (A) to the benefit of any of its Affiliates and/or (B) within the framework of its, or its Affiliates, direct or indirect funding operations.

(i) No Assignments to the Borrower or Affiliates. Anything in this Section to the contrary notwithstanding, no Lender may assign or participate any interest in any Loan held by it hereunder to any Loan Party or any Affiliate of the Borrower without the prior written consent of each other Lender.

Section 10.05 Survival . All covenants, agreements, representations and warranties made by the Loan Parties herein and in the certificates or other instruments delivered in connection with or pursuant to this Agreement shall be considered to have been relied upon by the other parties hereto and shall survive the execution and delivery of this Agreement and the making of any Loan, regardless of any investigation made by any such other party or on its behalf and notwithstanding that the Administrative Agent or any Lender may have had notice or knowledge of any Default or Event of Default or incorrect representation or warranty at the time any credit is extended hereunder, and shall continue in full force and effect as long as the principal of or any accrued interest on any Loan or any reimbursement, fee or any other amount payable under this Agreement (other than any contingent indemnification or reimbursement amount not then due and payable) is outstanding and unpaid. The provisions of Sections 2.09, 2.10, 10.03, 10.13, 10.14 and Article VIII shall survive and remain in full force and effect regardless of the consummation of the

transactions contemplated hereby, the repayment of the Loan, the expiration or termination of the Commitments or the termination of this Agreement or any provision hereof.

Section 10.06 Counterparts; Integration; Effectiveness . This Agreement may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement and the other Financing Documents to which a Loan Party is party constitute the entire contract between and among the parties relating to the subject matter hereof and thereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Except as provided in Section 4.01, this Agreement shall become effective when it shall have been executed by the Administrative Agent and when the Administrative Agent shall have received counterparts hereof which, when taken together, bear the signatures of each of the other parties hereto, and thereafter shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Delivery of an executed counterpart of a signature page to this Agreement by electronic transmission shall be effective as delivery of a manually executed counterpart of this Agreement.

Section 10.07 Severability . Any provision of this Agreement held to be invalid, illegal or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions hereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.

Section 10.08 Right of Setoff . If an Event of Default shall have occurred and be continuing, each Lender and any of its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held, and any other indebtedness at any time owing, by such Lender or any such Affiliate to or for the credit or the account of the Borrower against any of and all the obligations of the Borrower now or hereafter existing under this Agreement held by such Lender, irrespective of whether or not such Lender shall have made any demand under this Agreement and although such obligations may be unmatured or denominated in a currency other than Dollars. The rights of each Lender or any such Affiliate under this Section are in addition to other rights and remedies (including other rights of setoff) which such Lender may have.

Section 10.09 Governing Law; Jurisdiction; Etc.

(a) Governing Law. This Agreement shall be construed in accordance with and governed by the law of the State of New York.

(b) Submission to Jurisdiction. Any legal action or proceeding with respect to this Agreement or any other Financing Document to which a Loan Party is a party shall, except as provided in clause (d) below, be brought in the courts of the State of New York, or of the United States District Court for the Southern District of New York, in each case, seated in the County of New York and, by execution and delivery of this Agreement, each party hereto hereby irrevocably accepts for itself and in respect of its property, generally and unconditionally, the jurisdiction of the aforesaid courts. Each party hereto agrees that a judgment, after exhaustion of all available

appeals, in any such action or proceeding shall be conclusive and binding upon it, and may be enforced in any other jurisdiction, including by a suit upon such judgment, a certified copy of which shall be conclusive evidence of the judgment.

(c) Waiver of Venue. Each party hereto hereby irrevocably waives any objection that it may now have or hereafter have to the laying of the venue of any suit, action or proceeding arising out of or relating to this Agreement or any other Financing Document to which it is a party brought in the Supreme Court of the State of New York or in the United States District Court for the Southern District of New York, in each case, seated in the County of New York and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

(d) Rights of the Secured Parties. Nothing in this Section 10.09 shall limit the right of the Secured Parties to refer any claim against a Loan Party to any court of competent jurisdiction anywhere else outside of the State of New York, nor shall the taking of proceedings by any Secured Party before the courts in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction whether concurrently or not.

(e) WAIVER OF JURY TRIAL. EACH PARTY TO THIS AGREEMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION ARISING UNDER ANY FINANCING DOCUMENT OR IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO ANY FINANCING DOCUMENT, OR THE TRANSACTIONS RELATED THERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER FOUNDED IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE SIGNATORIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.

(f) Reserved.

(g) Waiver of Immunity. To the extent that any Loan Party has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution, sovereign immunity or otherwise) with respect to itself or its property, it hereby irrevocably waives such immunity, to the fullest extent permitted by law, in respect of its obligations under this Agreement and the other Financing Documents.

Section 10.10 Headings . Article and Section headings and the Table of Contents used herein are for convenience of reference only, are not part of this Agreement and shall not affect the construction of, or be taken into consideration in interpreting, this Agreement.

Section 10.11 Confidentiality .

(a) Each of the Agents and the Lenders agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (i) to its and its Affiliates' directors, officers, employees, board members (and members of committees thereof), current or prospective limited partners, agents, consultants, Persons providing administration and settlement services and other professional advisors, including accountants, auditors, legal counsel and other advisors with a need to know (for purposes of this Section 10.11, the "Representatives") (it being understood that the Representatives will be informed of the confidential nature of such Information and instructed to keep such Information confidential, and that the applicable Agent or Lender responsible for such disclosure shall be responsible for any non-compliance with the foregoing by any such Representatives that do not have a separate confidentiality obligation to such Agent or Lender), (ii) to the extent requested by any applicable regulatory or supervisory body or authority, by applicable laws or regulations or by any subpoena, oral question posed at any deposition, interrogatory or similar legal process (including, for the avoidance of doubt, to the extent requested in connection with any pledge or assignment pursuant to Section 10.04(h)); provided that the party from whom disclosure is being required shall give notice thereof to the Borrower as soon as practicable (unless restricted from doing so and except where disclosure is to be made to a regulatory or supervisory body or authority during the ordinary course of its supervisory or regulatory function), (iii) to any other party to this Agreement, (iv) subject to an agreement containing provisions substantially the same as those of this paragraph, to any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights or obligations under this Agreement, (v) with the written consent of the Borrower, (vi) to the extent such Information (A) becomes publicly available other than as a result of a breach of this paragraph or (B) becomes available to any Agent or any Lender on a nonconfidential basis from a source other than the Borrower and such source is not, to the knowledge of such Agent or Lender, subject to subject to a confidentiality agreement with any Loan Party or (vii) to any Person with whom any Loan Party, an Agent or a Lender has entered into (or potentially may enter into), whether directly or indirectly, any transaction under which payments are to be made or may be made by reference to one or more Financing Documents and/or the Loan Parties or to any of such Person's Affiliates and Representatives. For the purposes of this paragraph, "Information" means all information received from any Loan Party relating to any Loan Party, or its respective business, other than any such information that is available to the Agents or any Lender on a nonconfidential basis prior to disclosure by a Loan Party. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

(b) Upon written request, but no later than ten (10) Business Days thereafter, by any Loan Party, each Agent and Lender agrees to promptly return or destroy all copies of confidential Information and all notes, correspondence, documents or other records based thereon or which contain confidential Information ("Derivate Documents") which are then in the such Agent's or Lender's possession. Notwithstanding the foregoing, the Agents and Lenders and their Representatives shall be entitled to (i) retain copies of all Information provided to such Agent or Lender for legal, regulatory, and compliance purposes, in a manner consistent with the such Agent's or Lender's document archiving procedures, and which information shall remain confidential for the term of this Agreement so long as such Information is retained in a manner consistent with such Agent's or Lender's internal confidentiality policies, or (ii) to the extent that such Agent or Lender and its Representatives have copies of computer records and files containing

Information, which have been created as a result of automatic archiving or backup procedures, may retain such number of copies of the Information for legal, regulatory, and compliance purposes, in a manner consistent with such Agent's or Lender's and its Representatives' document archiving procedure, and which information shall remain confidential so long as such Information is retained in a manner consistent with such Agent's or Lender's and its Representatives' internal confidentiality policies. Each Loan Party remains the owner of all its Information contained in all Derivate Documents. In addition, the Agents and Lenders shall not be obligated to return or destroy any Information contained in any documents or packages prepared for its board of directors or like body, but may retain such documents or packages in a manner consistent with such Agent's or Lender's internal confidentiality policies.

(c) Notwithstanding anything to the contrary contained herein, the parties hereto acknowledge that the Administrative Agent, the Orion Energy Warrant Holders, their respective affiliates and advisors and investors in funds managed by the foregoing Persons (collectively, the "Orion Energy Persons") are subject to compliance obligations mandated by various regulators, governmental agencies and taxation authorities; and in satisfaction of those compliance obligations, the Orion Energy Persons may disclose confidential Information in response to a broad information request not specifically targeted at Borrower, as required by such regulators, governmental agencies, and taxation authorities without notice to the Borrower and without obtaining assurances that information will be treated confidentially; and such disclosure shall not be a violation of this agreement; provided that if such regulators, governmental agencies and taxation authorities make information requests specifically targeted at or regarding the Borrower or any of its affiliates, the Orion Energy Persons will promptly notify the Borrower of such information request.

Section 10.12 Non-Recourse . Anything herein or in any other Financing Document to the contrary notwithstanding, the obligations of the Loan Parties under this Agreement and each other Financing Document to which each Loan Party is a party, and any certificate, notice, instrument or document delivered pursuant hereto or thereto, are obligations solely of such Loan Party and do not constitute a debt, liability or obligation of (and no recourse shall be made with respect to) any of their respective Affiliates (other than the Loan Parties), or any shareholder, partner, member, officer, director or employee of such Affiliates (collectively, the "Non-Recourse Parties"). No action under or in connection with this Agreement or any other Financing Document to which each Loan Party is a party shall be brought against any Non-Recourse Party, and no judgment for any deficiency upon the obligations hereunder or thereunder shall be obtainable by any Secured Party against any Non-Recourse Party, except that the foregoing shall not limit the obligations or liabilities of any Guarantor under the Financing Documents. Notwithstanding any of the foregoing, it is expressly understood and agreed that nothing contained in this Section shall in any manner or way (i) restrict the remedies available to any Agent or Lender to realize upon the Collateral or under any Financing Document, or constitute or be deemed to be a release of the obligations secured by (or impair the enforceability of) the Liens and security interests and possessory rights created by or arising from any Financing Document or (ii) release, or be deemed to release, any Non-Recourse Party from liability for its own willful misrepresentation, fraudulent actions, gross negligence or willful misconduct or from any of its obligations or liabilities under any Financing Document to which such Non-Recourse Party is a party.

Section 10.13 No Third Party Beneficiaries . The agreement of the Lenders to make the Loans to the Borrower on the terms and conditions set forth in this Agreement, is solely for the benefit of the Loan Parties, the Agents and the Lenders, and no other Person (including any Material Counterparty, contractor, subcontractor, supplier, workman, carrier, warehouseman or materialman furnishing labor, supplies, goods or services to or for the benefit of the Business) shall have any rights under this Agreement or under any other Financing Document or Material Agreement as against the Agent or any Lender or with respect to any extension of credit contemplated by this Agreement.

Section 10.14 Reinstatement . The obligations of the Loan Parties under this Agreement shall be automatically reinstated if and to the extent that for any reason any payment by or on behalf of any Loan Party in respect of the Secured Obligations is rescinded or must be otherwise restored by any holder of any of the Secured Obligations, whether as a result of any proceedings in Bankruptcy or reorganization or otherwise, and the Borrower agrees that it will indemnify each Secured Party on demand for all reasonable costs and expenses (including fees of counsel) incurred by such Secured Party in connection with such rescission or restoration, including any such costs and expenses incurred in defending against any claim alleging that such payment constituted a preference, fraudulent transfer or similar payment under any Bankruptcy, insolvency or similar law.

Section 10.15 USA PATRIOT Act . Each Lender hereby notifies the Loan Parties that pursuant to the requirements of the USA PATRIOT Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "USA PATRIOT Act"), it is required to obtain, verify and record information that identifies such Loan Party, which information includes the name and address of such Loan Party and other information that will allow such Lender to identify such Loan Party in accordance with the USA PATRIOT Act.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

FUELCELL ENERGY, INC., as Borrower

By:
Name:
Title:

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC,
as Administrative Agent and Collateral Agent

By:
Name:
Title:

**ANNEX C**

**Restated Annex I to Credit Agreement**

See Attached

**ANNEX D**

**Restated Exhibit C to Credit Agreement**

See Attached

**Exhibit 31.1**

**CERTIFICATION**

I, Jason B. Few, certify that:

1. I have reviewed this quarterly report on Form 10-Q of FuelCell Energy, Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

   (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared:

   (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

   (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation, and

   (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):

   (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

   (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

June 12, 2020

/s/ Jason B. Few

Jason B. Few
President and Chief Executive Officer
(Principal Executive Officer)

**Exhibit 31.2**

**CERTIFICATION**

I, Michael S. Bishop, certify that:

1. I have reviewed this quarterly report on Form 10-Q of FuelCell Energy, Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

   (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

   (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

   (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation, and

   (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):

   (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

   (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

June 12, 2020

/s/ Michael S. Bishop

Michael S. Bishop
Executive Vice President, Chief Financial Officer and Treasurer
(Principle Financial Officer and Principle Accounting Officer)

**Exhibit 32.1**

**CERTIFICATION PURSUANT TO**
**18 U.S.C. SECTION 1350,**
**AS ADOPTED PURSUANT TO**
**SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the quarterly report of FuelCell Energy, Inc. (the "Company") on Form 10-Q for the quarter ended April 30, 2020 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, Jason B. Few, President and Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. § 1350, as adopted pursuant to § 906 of the Sarbanes-Oxley Act of 2002, that:

(1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78m or 78o(d)); and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

June 12, 2020

/s/ Jason B. Few

Jason B. Few
President and Chief Executive Officer
(Principal Executive Officer)

A signed original of this written statement has been provided to the Company and will be retained by the Company and furnished to the SEC or its staff upon request.

**Exhibit 32.2**

**CERTIFICATION PURSUANT TO**
**18 U.S.C. SECTION 1350,**
**AS ADOPTED PURSUANT TO**
**SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the quarterly report of FuelCell Energy, Inc. (the "Company") on Form 10-Q for the quarter ended April 30, 2020 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, Michael S. Bishop, Chief Financial Officer of the Company, certify, pursuant to 18 U.S.C. § 1350, as adopted pursuant to § 906 of the Sarbanes-Oxley Act of 2002, that:

(1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78m or 78o(d)); and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

June 12, 2020

/s/ Michael S. Bishop

Michael S. Bishop
Executive Vice President, Chief Financial Officer and Treasurer
(Principal Financial Officer and Principal Accounting Officer)

A signed original of this written statement has been provided to the Company and will be retained by the Company and furnished to the SEC or its staff upon request.