UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of report (Date of earliest event reported): October 31, 2019

FUELCELL ENERGY, INC.

(Exact Name of Registrant as Specified in its Charter)

Delaware	**1-14204**	**06-0853042**
(State or Other Jurisdiction of Incorporation)	**(Commission File Number)**	**(IRS 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

Not Applicable
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

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, $0.0001 par value per share	FCEL	The Nasdaq Stock Market LLC (Nasdaq Global Market)

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

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. ☐

Item 1.01. Entry into a Material Definitive Agreement.

Joint Development Agreement with ExxonMobil Research and Engineering Company

FuelCell Energy, Inc. (the "Company") entered into a two-year Joint Development Agreement ("JDA") with ExxonMobil Research and Engineering Company ("EMRE"), 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 reduce carbon dioxide emissions from industrial and power sources, in exchange for (a) payment of (i) an exclusivity and technology access fee of $5,000,000, (ii) research costs of up to $45,000,000, and (iii) milestone-based payments of up to $10,000,000 after certain deliverables are met, and (b) licenses to (i) Program Results (as defined below) developed through the JDA for power and hydrogen applications and (ii) EMRE background intellectual property to practice existing and new carbonate fuel cell technology for power and hydrogen applications.

Pursuant and subject to the terms of the JDA, EMRE will solely own the information, patents and patent applications, and copyrightable works resulting from the JDA (collectively, "Program Results").

Under the JDA, with respect to Program Results, EMRE grants the Company (a) a worldwide, non-exclusive, royalty-free, non-transferable (except as set forth in the JDA), non-sub-licensable (except as set forth in the JDA) right and license to practice Program Results solely to conduct research and development for the purposes of the JDA; and (b) a worldwide, non-exclusive, royalty-free, perpetual, irrevocable (except as set forth in the JDA), sub-licensable, non-transferable (except as set forth in the JDA), right and license to practice Program Results solely for power generation and hydrogen applications. In addition, if EMRE notifies the Company that it has formally decided not to pursue new carbonate fuel cell technology (as set forth in the JDA) for carbon capture applications, then, upon the Company's written request, EMRE will negotiate a grant to the Company, under commercially reasonable terms to be determined in good faith, of a worldwide, non-exclusive, royalty-bearing (with the royalty to be negotiated), non-sub-licensable (except as set forth in the JDA), non-transferable (except as set forth in the JDA), right and license to practice Program Results solely for carbon capture applications.

With respect to Company background intellectual property, to the extent not already granted pursuant to the existing license agreement between the Company and EMRE, which was effective as of June 11, 2019, the Company grants EMRE and its affiliates a worldwide, non-exclusive, royalty-free, irrevocable, perpetual, sub-licensable, non-transferable (except as set forth in the JDA) right and license to practice Company background intellectual property for new carbonate fuel cell technology (as set forth in the JDA) in carbon capture applications and hydrogen applications. In addition, if the Company notifies EMRE that it has formally decided not to pursue new carbonate fuel cell technology (as set forth in the JDA) for power generation applications, then, upon EMRE's written request, the Company will negotiate a grant to EMRE and its affiliates, under commercially reasonable terms to be determined in good faith, of a worldwide, royalty-bearing (with the royalty to be negotiated), non-exclusive, sub-licensable right and license to practice Company background intellectual property for new carbonate fuel cell technology (as set forth in the JDA) in any application outside of carbon capture applications and hydrogen applications.

With respect to EMRE background intellectual property, EMRE grants the Company (a) a worldwide, non-exclusive, royalty-free, non-sub-licensable (except as set forth in the JDA), perpetual, irrevocable (except as set forth in the JDA), non-transferable (except as set forth in the JDA) right and license to practice EMRE background intellectual property for existing carbonate fuel cell technology in any applications outside of carbon capture applications; (b) a worldwide, non-exclusive, royalty-free, non-sub-licensable (except as set forth in the JDA), perpetual, irrevocable (except as set forth in the JDA), non-transferable (except as set forth in the JDA) right and license to practice EMRE background intellectual property for existing carbonate fuel cell technology in carbon capture applications, solely to conduct authorized projects (as set forth in the JDA); and (c) a worldwide, non-exclusive, royalty-free, non-sub-licensable (except as set forth in the JDA), perpetual, irrevocable (except as set forth in the JDA), non-transferable (except as set forth in the JDA) right and license to practice EMRE background intellectual property for new carbonate fuel cell technology (as set forth in the JDA) in power applications and hydrogen applications. In addition, (i) if EMRE fails to notify the Company before the end of the term of the JDA of EMRE's intent to negotiate a subsequent or follow-on commercial agreement, EMRE will negotiate a grant to the Company, under commercially reasonable terms to be determined in good faith, of a worldwide, royalty-free, non-exclusive, non-sub-licensable (except as set forth in the JDA) right and license to practice EMRE background intellectual property for existing carbonate fuel cell technology in carbon capture applications; and (ii) if EMRE notifies the Company that it has formally decided not to pursue new carbonate fuel cell technology (as set forth in the JDA) for carbon capture applications, then, upon the Company's written request, EMRE will negotiate a grant to the Company, under commercially reasonable terms to be determined in good faith, of a worldwide, royalty-bearing (with the royalty to be negotiated), non-exclusive, sub-licensable, right and license to practice EMRE background intellectual property for new carbonate fuel cell technology in any application outside of power applications and hydrogen applications.

Either party may terminate the JDA on 60 days written notice or for failure to perform by the other party upon written notice and after a 30 day cure period, which cure period is extendable to an additional 60 days where the defaulting party has commenced and is diligently pursuing efforts to cure. In addition, EMRE may terminate the JDA upon 15 days written notice if the Company undergoes a Change in Control (as defined in the JDA). In the event of termination for Change in Control, EMRE may terminate any licenses granted to the Company that would otherwise survive termination, taking into account the circumstances surrounding the Change in Control. EMRE may also terminate the JDA upon 15 days written notice in certain bankruptcy events of the Company, in which event, and subject to EMRE's waiver (in its sole discretion) any licenses granted to the Company that would otherwise survive the termination will automatically terminate.

The foregoing summary of the terms of the JDA does not purport to be complete and is qualified in its entirety by reference to the full text of the JDA, a copy of which is attached as Exhibit 10.1 to this Current Report on Form 8-K and incorporated herein by reference.

Credit Facility with Orion Energy Partners Investment Agent, LLC and Related Agreements

Credit Facility

On October 31, 2019, the Company (and certain of its subsidiaries as guarantors) entered into a Credit Agreement (the "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. (collectively, the "Lenders") regarding a $200,000,000 senior secured credit facility (the "Facility"), structured as a delayed draw term loan, to be provided by the Lenders. In conjunction with the closing of the Facility, on October 31, 2019, the Company drew down $14,500,000 (the "Initial Funding") to fully repay debt outstanding with NRG Energy, Inc. ("NRG") and Generate Lending, LLC ("Generate") and to fund dividends to be paid to the holders of the Company's 5% Series B Cumulative Convertible Perpetual Preferred Stock ("Series B Preferred Stock") on or before November 15, 2019. The balance of the Initial Funding was used primarily to pay third party costs and expenses associated with closing on the Facility.

The Initial Funding is secured by corporate assets as described in the Pledge and Security Agreement among the Company, certain of its subsidiaries as guarantors, and the Agent (the "Pledge and Security Agreement"), including the Company's intellectual property assets and the Company's interest in certain fuel cell projects owned by the Company, but not including liens on certain of the Company's assets and projects which are currently subject to other third party financing and for which none of the proceeds of the Initial Funding were applied ("Excluded Assets"). Those corporate subsidiaries whose assets are pledged to the Agent as part of the collateral are also corporate guarantors of the Facility. As of the Initial Funding, the following projects whose assets are not pledged as collateral for the Facility are included in Excluded Assets: (a) the Bridgeport Project; (b) the Pfizer Project; (c) the Riverside Regional Water Quality Control Project; (d) the Santa Rita Jail Project; (e) the Triangle Street Project; (f) the UC Irvine Medical Center Project; (g) the CCSU Project and (h) the Groton Project. These projects continue to be subject to financing arrangements that are in existence with other third parties. Additionally, the Company's corporate headquarters at 3 Great Pasture Road, Danbury, Connecticut and certain scheduled equipment previously pledged to the State of Connecticut to secure the $10,000,000 State of Connecticut loan used to complete the expansion of the Company's Torrington manufacturing facility are Excluded Assets.

Subject to the satisfaction of certain conditions precedent, a second draw (the "Second Funding") of $65,500,000 will be made on or about November 22, 2019 to fully repay outstanding third party debt of the Company with respect to certain other Company projects, including to repay the outstanding construction loan to Fifth Third Bank on the Groton Project and the outstanding loan to Webster Bank on 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), the Tulare BioMAT project (a 2.8 MW project), and the Bolthouse Project (a 5.0 MW project). Simultaneously with the Second Funding, the lien on the Company's intellectual property assets will be released and a lien will be granted to the Agent to secure the Facility on the assets of the Groton Project and CCSU Project as well as with respect to the equity interests in such project companies. Conditions precedent to the Second Funding include issuance of the Second Funding Warrants (as described below), the submission of certain operating budgets, the obtaining of all material authorizations for each of the projects to be funded, the Agent's satisfactory completion of due diligence in the Agent's sole discretion, the Agent's approval of the Second Funding in its sole discretion, investment committee approval of the respective Lenders, execution of the JDA with EMRE (as discussed above), and other reasonable and customary closing conditions.

The Company may draw the remainder of the Facility, $120,000,000, over the first 18 months following the closing and subject to the Agent's approval to fund (referred to as "Permitted Subsequent Funding Uses"): (i) construction costs, inventory and other capital expenditures of additional fuel cell projects with contracted cash flows (under power purchase agreements 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.

The Company will grant to the Agent a right of first offer ("ROFO") with regard to construction financing indebtedness proposed to be incurred by the Company with respect to fuel cell projects intended to be owed by the Company. To the extent that the ROFO is not exercised by the Agent, the Company may obtain construction financing for these projects from third parties. The ROFO does not apply to, and there is no restriction on the Company's right to consummate, take-out financings, including tax equity financings, of any projects upon completion of those projects and such projects' being placed in service.

Cash interest of 9.9% per annum will be paid quarterly in cash. In addition to the cash interest, "PIK" interest of 2.05% per annum will accrue which will be added to the outstanding principal balance of the 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. 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"), in accordance with the Loan Discount Letter entered into between the Company and the Agent as of October 31, 2019 (the "Loan Discount Letter"). Such Loan Discount shall be in all respects fully earned on the Initial Funding Date and non-refundable and non-creditable thereafter.

Outstanding principal on the Facility will be amortized on a straight-line basis over a seven year term in quarterly payments beginning one year after the closing; 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 closing date or October 31, 2027.

The Credit Agreement permits the Company to dispose of or refinance any projects (a "Permitted Project Disposition/Refinancing") provided that the proceeds are deposited in a Company account (the "Project Proceeds Account") which is part of the Agent's collateral and, in the case of any project that has been funded by the Facility (a "Covered Project"), the proceeds from such refinancing or disposition are no less than specific "Payoff Amounts" designated in the Credit Agreement for each such Covered Project. At such time as the Company consummates a Permitted Project Disposition/Refinancing of a project, net proceeds realized from any such refinancing or disposition, after making contributions to a module replacement reserve account, may be deployed by the Company, subject to the approval of the Agent, for Permitted Subsequent Funding Uses. Any proceeds of a Permitted Project Disposition/Refinancing that have not been redeployed during the following twelve month period may be required by the Lenders to be prepaid toward outstanding principal on the Facility and, in connection with any such prepayment, a prepayment premium (the "Prepayment Premium") equal to 20% of the amount being prepaid will be payable. Such Prepayment Premium will be reduced by all previously accrued interest (both cash interest and PIK interest) and a portion of the original issue discount associated with the Loan Discount allocable to the amount being prepaid.

To the extent that the Company makes other prepayments of principal on the Facility, other than in connection with a Permitted Project Disposition/Refinancing, such prepayments will be subject to a Prepayment Premium equal to 30% of the amount being prepaid, provided that all prior accrued interest (including both cash interest and PIK interest) and any original discount (with regard to the Loan Discount) allocable to the amount of the prepayment shall be credited against the Prepayment Premium.

In the event that the conditions precedent for the Second Funding are not satisfied by November 22, 2019 such that the Second Funding is not provided by the Lenders, the Company has the option to terminate the Facility (and Credit Agreement), in which case, the Company will have a period of six months to repay the then outstanding principal on the Facility (i.e., the amount of the Initial Funding) plus a Prepayment Premium equal to 15% of such amount, which Prepayment Premium will be reduced by all interest (both cash interest and PIK interest) accrued on such outstanding principal plus the Loan Discount. Upon such repayment, all liens on the intellectual property and other pledged assets will be released.

In connection with the Company's providing collateral to the Agent for the Facility, the Company will grant security interests to the Agent in all of the Company's bank accounts subject to deposit account security agreements, other than certain bank accounts referred to as "Excluded Accounts" and bank accounts maintained for Excluded Assets. Certain bank accounts will be established pursuant to the terms and conditions of the Credit Agreement, for which security interests will be granted to the Agent, including general corporate accounts, accounts for each of the Covered Projects, a Project Proceeds Account (for the proceeds of Permitted Project Dispositions/Refinancings), a Borrower Waterfall Account (into which net operating cash flow of the Company after payment of operating expenses will be deposited for the payment of debt service to the Agent), a Debt Reserve Account (to fund a reserve for required debt service payments to the State of Connecticut and Connecticut Green Bank), a Preferred Reserve Account (to fund a reserve for required dividends on the Company's Series B Preferred Stock and the Class A Cumulative Redeemable Exchangeable Preferred Stock (the "Series 1 Preferred Stock") (or, in lieu of such dividends, the amount required to redeem shares of Series 1 Preferred Stock in an amount equal to the amount of dividends that would otherwise have been paid in respect thereof)), a Module Replacement Reserve Account (to fund a reserve intended to be for the cost of module replacements for projects owned by the Company that would occur during the outstanding term of the Facility) and certain other accounts. Excluded Accounts consist of bank accounts of the Company used to collateralize performance bonds and other sureties for projects and third party obligations and certain other certain operating accounts of the Company (i.e., payroll, benefits, sales and income tax withholding and related accounts). Bank accounts relating to Excluded Assets are also not collateral for the Facility.

In connection with the Facility and as required by the Credit Agreement, pursuant to an Agent Reimbursement Letter, dated October 31, 2019, between the Agent and the Company (the "Agent Reimbursement Letter"), the Company agreed to pay to the Agent a nonrefundable reimbursement in an amount of $100,000 per annum during the time period that the Facility is outstanding, due and payable in quarterly installments of $25,000. The first quarterly installment was paid in connection with the Initial Funding.

The foregoing summary of the terms of the Credit Agreement, the Pledge and Security Agreement, the Loan Discount Letter, and the Agent Reimbursement Letter does not purport to be complete and is qualified in its entirety by reference to the full text of the Credit Agreement, the Pledge and Security Agreement, the Loan Discount Letter, and the Agent Reimbursement Letter, copies of which are attached as Exhibit 10.2, Exhibit 10.3, Exhibit 10.4, and Exhibit 10.5, respectively, to this Current Report on Form 8-K and incorporated herein by reference.

Warrants

In connection with the closing of the Facility and the Initial Funding, on October 31, 2019, the Company issued to the Lenders warrants to purchase up to a total of 6,000,000 shares of the Company's common stock (the "Initial Funding Warrants"), at an initial exercise price of $0.310 per share. In addition, under the terms of the Credit Agreement, the Company has agreed to issue to the Lenders, on the date of the Second Funding, additional warrants to purchase up to a total of 14,000,000 shares of the Company's common stock (the "Second Funding Warrants" and together with the Initial Funding Warrants, the "Warrants"), with an initial exercise price with respect to 8,000,000 of such shares of $0.242 per share and with an initial exercise price with respect to 6,000,000 of such shares of $0.620 per share.

Under the Credit Agreement, the parties agreed that the loans made on the date of the Initial Funding, together with the Initial Funding Warrants, shall be treated as an investment unit. The purchase price of each such investment unit shall equal the total purchase price paid by the Lenders for such loans on the date of the Initial Funding, with $577,778 of the purchase price of the investment unit allocable to the purchase of the Initial Funding Warrants for U.S. federal income tax purposes. The parties further agreed that the loans funded on the date of the Second Funding, together with the Second Funding Warrants, shall be treated as an investment unit. The purchase price of each such investment unit shall equal the total purchase price paid by the Lenders for such loans on the date of the Second Funding, with $1,228,164 of the purchase price of the investment unit allocable to the purchase of the Second Funding Warrants for U.S. federal income tax purposes.

The Warrants have an eight-year term from the date of issuance, are exercisable immediately beginning on the date of issuance, and include provisions permitting cashless exercises. During the term in which the Warrants are exercisable, the Company is required to reserve from its authorized and unissued common stock a sufficient number of shares to provide for the issuance of common stock upon the exercise of all of the outstanding Warrants. To ensure that it has sufficient shares available for reservation and issuance upon exercise of all of the Warrants, the Company, effective as of October 31, 2019, reduced the number of shares reserved for future issuance and sale under its At Market Issuance Sales Agreement, dated October 4, 2019, between the Company and B. Riley FBR, Inc. (the "Sales Agreement") from 27,939,382 shares to 7,939,382 shares (thus allowing for total aggregate issuances (past and future) of up to 18,000,000 shares under the Sales Agreement) and reserved 20,000,000 shares for issuance upon exercise of the Warrants. Furthermore, under the terms of the Warrants, the Company may not effect the exercise of any portion of a Warrant, and the holder of such Warrant shall not have the right to exercise any portion of such Warrant, to the extent that after giving effect to such exercise, such holder, collectively with its other Attribution Parties (as defined in the Warrant), would beneficially own in excess of 4.99% of the shares of the Company's common stock outstanding immediately after giving effect to such exercise. Except as otherwise expressly provided in the Warrant, prior to the exercise of a Warrant the holder of such Warrant will not have any of the rights of a stockholder of the Company, and will not be entitled to, among other things, vote or receive dividend payments or similar distributions on the shares of common stock purchasable upon exercise of such Warrant.

The Warrants contain customary provisions regarding adjustment to their exercise prices and the type or class of security issuable upon exercise, including, without limitation, adjustments as a result of the Company undertaking or effectuating (a) a stock dividend or dividend of other securities or property, (b) a stock split, subdivision or combination, (c) a reclassification, (d) the distribution by the Company to substantially all of the holders of its common stock (or other securities issuable upon exercise of a Warrant) of rights, options or warrants entitling such holders to subscribe for or purchase common stock (or other securities issuable upon exercise of a Warrant) at a price per share that is less than the average of the closing sales price per share of the Company's common stock for the ten consecutive trading days ending on and including the trading day before such distribution is publicly announced, and (e) a Fundamental Transaction (as defined below) or Change of Control (as defined in the Credit Agreement), as explained further below.

If, while a Warrant or any portion thereof is outstanding and unexpired, there is (a) a reorganization (other than a combination, reclassification, exchange or subdivision of shares otherwise provided for in such Warrant), (b) a merger or consolidation of the Company with or into another corporation in which the Company is not the surviving entity, or a reverse triangular merger in which the Company is the surviving entity but the shares of the Company's capital stock outstanding immediately prior to the merger are

converted by virtue of the merger into other property, whether in the form of securities, cash, or otherwise, or (c) a sale or transfer of the Company's properties and assets as, or substantially as, an entirety to any other person (any such event, a "Fundamental Transaction"), then, except in the event of a Fundamental Transaction that constitutes a Change of Control, as part of such Fundamental Transaction, the successor corporation or entity must assume in writing all of the obligations of the Company under such Warrant, such that the holder of such Warrant shall thereafter be entitled to receive, upon exercise of such Warrant, the shares of stock or other securities or property of the successor corporation or entity that the holder would have been entitled to receive if such Warrant had been exercised immediately prior to such Fundamental Transaction.

Notwithstanding the foregoing, at the request of a holder of a Warrant delivered at any time during the period commencing on the earliest to occur of (A) the public disclosure of (1) any Fundamental Transaction in which the successor corporation or entity is not a publicly traded entity whose common equity or ordinary shares, as the case may be, is quoted on or listed for trading on an Eligible Board or Market (as defined in the Warrants) or (2) any Change of Control, as applicable, (B) the consummation of any such Fundamental Transaction or any Change of Control, and (C) such holder first becoming aware of any such Fundamental Transaction or any Change of Control, and ending on the date that is 90 days after the public disclosure of the consummation of such Fundamental Transaction or Change of Control, the Company or the successor corporation or entity (as the case may be) must purchase such Warrant from such holder. The price payable to a holder for a Warrant with respect to which notice is delivered in accordance with the preceding sentence is an amount equal to: (i) in the event that such payment date is on or prior to the second anniversary of the date of issuance of such Warrant, the Black Scholes Value (as defined in the Warrant) of the unexercised portion of such Warrant, or (ii) in the event that such payment date is after the second anniversary of the date of issuance of such Warrant, the difference of (x) the product of (I) the remaining amount of shares of common stock issuable upon the exercise of such Warrant, multiplied by (II) the consideration per share of common stock paid or payable to each holder of common stock in connection with such Fundamental Transaction or Change of Control, minus (y) the aggregate exercise price of such Warrant.

In addition, the Warrants provide that, if while a Warrant, or any portion thereof, remains outstanding and unexpired, common stockholders shall have received, or become entitled to receive, without payment therefor, other or additional stock or other securities or property (other than cash) of the Company by way of dividend, then such Warrant shall represent the right to acquire, in addition to the number of shares of the security receivable upon exercise of such Warrant, and without payment of any additional consideration therefor, the amount of such other or additional stock or other securities or property (other than cash) of the Company that such holder would have been entitled to as if such Warrant had been exercised (without regard to any limitations on exercise set forth therein).

In addition, the Company has granted to the holders of the Warrants certain registration rights. Specifically, the Company has agreed to use its commercially reasonable efforts to effect, as soon as practicable after issuance of the Warrants, but in no event later than March 16, 2020, the registration of resales of all shares of common stock issuable upon exercise of the Warrants on a delayed or continuous basis at then-prevailing market prices. Under the terms of the Warrants, the Company agrees to maintain the effectiveness of such registration at all times following the effective date of such registration statement until the earlier of (x) the date as of which a holder of a Warrant may sell all of the shares of common stock issuable upon the exercise of such Warrant without restriction pursuant to Rule 144 under the Securities Act of 1933, as amended (the "Securities Act"), and without the need for public information under Rule 144(c)(1) (or Rule 144(i)(2), if applicable) of the Securities Act and (y) the date on which the holder of such Warrant shall have sold all of the shares of common stock issuable upon exercise of such Warrant. In the event that (a) such a registration statement is not declared effective by the Securities and Exchange Commission ("SEC") on or before March 16, 2020, including if a final prospectus is not filed under Rule 424(b) on or prior to the fifth business day immediately following the effective date for such registration statement (an "Effectiveness Failure"), (b) on any day after the effective date of such a registration statement, sales of common stock cannot be made pursuant to such registration statement or the prospectus contained therein is not available for use for any reason (a "Maintenance Failure"), or (c) such a registration statement is not effective for any reason or the prospectus contained therein is not available for use for any reason, and either (i) the Company fails to satisfy Rule 144(c)(1), or (ii) the Company has ever been an issuer under Rule 144(i)(1)(i) or becomes such an issuer in the future, and the Company shall fail to satisfy any condition set forth in Rule 144(i)(2) (a "Current Public Information Failure"), such that a holder is unable to sell all of the shares of stock issuable upon exercise of the Warrant without restriction under Rule 144, then, as partial relief to the holder for damages caused by the delay in, or reduction of, its ability to sell all of such shares (and not exclusive of any other remedies available in equity), the Company shall pay to the holder $25,000 in cash on the date of such Effectiveness Failure, Maintenance Failure, or Current Public Information Failure, as applicable, and on every subsequent 30-day anniversary of (I) an Effectiveness Failure until such Effectiveness Failure is cured; (II) a Maintenance Failure until such Maintenance Failure is cured; and (III) a Current Public Information Failure until the earlier of (i) the date such Current Public Information Failure is cured and (ii) such time that such public information is no longer required pursuant to Rule 144 (in each case, pro-rated for periods totaling less than 30 days). In the event that any of such payment is not timely made, such payment shall bear interest at the rate of 1.0% per month, prorated for partial months, until paid in full.

The Warrants were (or will be, as applicable) issued in reliance on the exemption from registration provided by Section 4(a)(2) under the Securities Act and/or Regulation D promulgated thereunder.

The foregoing summary of the terms of the Warrants does not purport to be complete and is qualified in its entirety by reference to the full text of the form of Warrant, a copy of which is attached as Exhibit 10.6, to this Current Report on Form 8-K and incorporated herein by reference.

Observer Right Agreement

In connection with the Facility and as required by the Credit Agreement, the Company granted the Lenders two non-voting Board observer seats (such Board observers, the "Representatives") pursuant to an Observer Right Agreement, dated October 31, 2019, among the Company, certain of its subsidiaries, and the Lenders (the "Observer Right Agreement"). Under the Observer Right Agreement, the Representatives have the right to participate as non-voting observers at all formal meetings of the Board and the Audit and Finance Committee of the Board, but in no event shall the Representatives (i) be deemed members of the Board or the Audit and Finance Committee or (ii) vote on or have the right to propose or offer any motions or resolutions to the Board. In addition, the Representatives are entitled to all notices, minutes, consents and other materials provided to members of the Board or the Audit and Finance Committee (subject to certain customary exceptions), to inspect the properties and books and records of the Company, and to consult with members of management of the Company.

Under the Observer Right Agreement, the Representatives are required to comply with all written policies, procedures, processes, codes, rules, standards and guidelines applicable to Board members, including, but not limited to, the Company's corporate governance guidelines, code of business conduct and insider trading policy. The Observer Right Agreement also includes standard confidentiality provisions regarding information received by the Representatives in their capacity as such.

The initial Representatives are Gerrit Nicholas and Rui Viana.

The Observer Right Agreement, including the observer right, the right to review books and records, and the right to consult with management, will automatically terminate on the later of the Discharge Date (as defined in the Credit Agreement) or the date that neither the Lenders nor any of their respective affiliates own any interest in the Company (including any Warrant or any equity interest acquired upon the exercise of the Warrants).

In connection with the rights provided to the Lenders and the Representatives under the Observer Right Agreement, the Company has entered into an Indemnification Agreement, by and among the Company, certain of its subsidiaries, the Representatives, the Lenders, and certain of the Lenders' affiliates (the "Indemnification Agreement"), which provides for indemnification and advancement of expenses to the Representatives, the Lenders, and their respective affiliates (collectively, the "Indemnitees") to the fullest extent permitted by law. Under the Indemnification Agreement, each Indemnitee is indemnified against all Expenses (as defined in the Indemnification Agreement) actually and reasonably incurred by it or on its behalf if, by reason of a Representative's status as such or service in such capacity, such Indemnitee is, or is threatened to be made a party to or otherwise involved in any Proceeding (as defined in the Indemnification Agreement). The rights to indemnification and advancement of expenses under the Indemnification Agreement are third-party indemnification rights and are not to be provided to the Indemnitees (i) by reason of such Indemnitee being a director or officer of the Company or its subsidiaries, or (ii) as a result of, in connection with, or following a material breach of the Observer Right Agreement.

The foregoing summary of the terms of the Observer Right Agreement and the Indemnification Agreement does not purport to be complete and is qualified in its entirety by reference to the full text of the Observer Right Agreement (which includes, as Exhibit A thereto, a copy of the Indemnification Agreement), a copy of which is attached as Exhibit 10.7 to this Current Report on Form 8-K and incorporated herein by reference.

Item 1.02. Termination of a Material Definitive Agreement.

Engagement with Huron Consulting Services LLC

As previously disclosed, on June 2, 2019, the Company entered into an engagement letter (as amended effective as of August 26, 2019, the "Engagement Letter") with Huron Consulting Services LLC ("Huron"), pursuant to which Huron has been providing, since June 2, 2019, various services related to the Company's restructuring and contingency planning initiatives. In accordance with the Engagement Letter, on June 2, 2019, the Board of Directors of the Company (the "Board") appointed Laura Marcero, a Managing Director of Huron, as Chief Restructuring Officer ("CRO") of the Company and its subsidiaries, and Lee Sweigart, a Senior Director of Huron, as Deputy Chief Restructuring Officer ("DCRO") of the Company and its subsidiaries. Such appointments were effective as of 12:01 a.m. Eastern Time on June 3, 2019. Pursuant to the terms of the Engagement Letter, Huron is entitled to a success fee of $500,000 based upon a successful restructuring, including, but not limited to, a resolution involving right sizing or extension of the business, and/or asset sales, and/or an extension of refinancing of the Company's credit facility, or other events that the Board deems worthy of a success fee.

As a result of the restructuring and payoff of the Company's senior secured credit facility and the execution of the JDA, the Board has determined that Huron has earned a success fee under the Engagement Letter of $500,000. In addition, based on the progress made by the Company since the engagement of Huron, the Board has determined that the Company no longer requires Huron's services, and therefore has terminated the engagement with Huron and the services being provided by Huron through the CRO, the DCRO, and otherwise, effective as of October 31, 2019. Accordingly, as of October 31, 2019, Laura Marcero and Lee Sweigart no longer serve as the CRO and DCRO, respectively, of the Company and its subsidiaries.

Loan Agreement with NRG Energy, Inc.

As previously disclosed, on July 30, 2014, FuelCell Energy Finance, LLC ("FuelCell Finance"), a wholly owned subsidiary of the Company, entered into a loan agreement (as amended from time to time, the "NRG Loan Agreement") with NRG, pursuant to which NRG extended a $40 million revolving construction and term financing facility (the "NRG Facility") to FuelCell Finance for the purpose of accelerating project development by the Company and its subsidiaries. On December 13, 2018, FuelCell Finance's wholly owned subsidiary, Central CA Fuel Cell 2, LLC ("Co-Borrower"), drew a construction loan advance of approximately $5.8 million under the NRG Facility. In conjunction with this advance, the NRG Loan Agreement was amended on December 13, 2018, and this advance became the last advance under the NRG Facility. The NRG Loan Agreement was also subsequently amended on March 29, 2019, June 13, 2019, July 11, 2019, August 8, 2019, and September 30, 2019.

On October 31, 2019, FuelCell Finance and NRG entered into a payoff letter (the "NRG Payoff Letter"), pursuant to which FuelCell Finance paid off all of its indebtedness to NRG and thereby terminated the NRG Loan Agreement.

Pursuant to the Payoff Letter, FuelCell Finance paid, on October 31, 2019, a total of $4,116,534 to NRG (the "NRG Payoff Amount"), representing the outstanding principal, accrued but unpaid interest, fees, costs, and other expenses due and owing to NRG under the note and the related loan documents through the maturity date, in repayment of FuelCell Finance's outstanding indebtedness under the NRG Loan Agreement and related loan documents. Upon acceptance by FuelCell Finance of the NRG Payoff Letter and payment to NRG of the NRG Payoff Amount on October 31, 2019, all of the Company's outstanding indebtedness to NRG under the NRG Loan Agreement was deemed repaid and satisfied in full and the NRG Loan Agreement was automatically terminated.

In addition, in connection with the termination of the NRG Loan Agreement, upon payment to NRG of the NRG Payoff Amount on October 31, 2019, NRG released all of the collateral from the liens under the security documents and the Company, FuelCell Finance and Co-Borrower were unconditionally released from their respective obligations under the NRG loan documents without further action or documentation.

The foregoing summary of the terms of the NRG Payoff Letter does not purport to be complete and is qualified in its entirety by reference to the full text of the NRG Payoff Letter, a copy of which is attached as Exhibit 10.8 to this Current Report on Form 8-K and incorporated herein by reference.

Construction Loan Agreement with Generate Lending, LLC

As previously disclosed, on December 21, 2018, the Company, through its indirect wholly-owned subsidiary FuelCell Energy Finance II, LLC ("FCEF II"), entered into a Construction Loan Agreement (as amended from time to time, the "Generate Loan Agreement") with Generate, pursuant to which Generate agreed to make available to FCEF II a credit facility in an aggregate principal amount of up to $100.0 million. In connection with the execution of the Generate Loan Agreement by Generate and FCEF II and concurrently therewith, Generate, FCEF II and the Company entered into a Right to Finance Agreement, which gave the Generate an exclusive right, subject to certain exclusions and exceptions, to provide construction financing through the Generate facility to all of the Company's stationary fuel cell projects. The Generate Loan Agreement was subsequently amended on June 28, 2019, August 13, 2019 and September 30, 2019.

FCEF II and Generate entered into a payoff letter, dated October 30, 2019 (the "Generate Payoff Letter"), pursuant to which, on October 31, 2019, FCEF II paid off all of its indebtedness to Generate and thereby terminated the Generate Loan Agreement.

Pursuant to the Generate Payoff Letter, FCEF II paid, on October 31, 2019, a total of $7,069,448.92 to Generate (the "Generate Payoff Amount"), representing the principal, accrued and unpaid interest, fees, costs, and expenses payable under the Generate Loan Agreement, in repayment of FCEF II's outstanding indebtedness under the Generate Loan Agreement. Upon receipt by Generate of the Generate Payoff Amount on October 31, 2019, all of FCEF II's outstanding indebtedness to Generate under the Generate Loan Agreement and the other related loan documents was paid in full.

Upon the acceptance of the Generate Payoff Letter by FCEF II and Generate's receipt of the Generate Payoff Amount on October 31, 2019, Generate's commitments to extend further credit to FCEF II or its subsidiaries under the Generate Loan Agreement terminated, all obligations of FCEF II and its subsidiaries under the Generate Loan Agreement were terminated and satisfied in full (other than

certain indemnification obligations or those obligations that by their terms survive the repayment of the obligations under the Generate Loan Agreement), the Generate Loan Agreement and all other loan documents entered into in connection with the Generate Loan Agreement were terminated (other than those provisions that by their terms survive repayment), and all security interests, guarantees and liens created as security for the obligations under the Generate Loan Agreement (including, but not limited to, the collateral) were automatically released.

The foregoing summary of the terms of the Generate Payoff Letter does not purport to be complete and is qualified in its entirety by reference to the full text of the Generate Payoff Letter, a copy of which is attached as Exhibit 10.9 to this Current Report on Form 8-K and incorporated herein by reference.

Item 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.

The information contained above in Item 1.01 is hereby incorporated by reference into this Item 2.03.

Item 3.02. Unregistered Sales of Equity Securities.

The information contained above in Item 1.01 is hereby incorporated by reference into this Item 3.02.

Item 7.01. Regulation FD Disclosure.

On November 5, 2019, the Company issued a press release announcing the cessation of the engagement of Huron and the services being provided by Huron through the CRO, the DCRO, and otherwise. A copy of the press release is filed as Exhibit 99.1 to this Current Report on Form 8-K.

On November 6, 2019, the Company issued a press release announcing the execution of the JDA with EMRE. A copy of the press release is filed as Exhibit 99.2 to this Current Report on Form 8-K.

On November 6, 2019, the Company issued a press release announcing the closing of the Facility with Orion Energy Partners Investment Agent, LLC and certain of its affiliates. A copy of the press release is filed as Exhibit 99.3 to this Current Report on Form 8-K.

The information set forth in this Item 7.01, including Exhibits 99.1, 99.2 and 99.3, is being furnished pursuant to Item 7.01 and shall not be deemed "filed" for purposes of Section 18 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), or otherwise subject to the liabilities of that Section, and it shall not be deemed incorporated by reference in any filing under the Securities Act or under the Exchange Act, whether made before or after the date hereof, except as expressly provided by specific reference in such a filing.

Item 8.01. Other Events.

Reduction of Shares Reserved for Issuance and Issuable Under At Market Issuance Sales Agreement

Effective as of October 31, 2019, the Board reduced the number of shares reserved for future issuance and sale under the Sales Agreement from 27,939,382 shares to 7,939,382 shares (thus allowing for total aggregate issuances (past and future) of up to 18,000,000 shares under the Sales Agreement). In connection with this reduction, on November 6, 2019, the Company filed a prospectus supplement (the "ATM Prospectus Supplement") amending the prospectus supplement dated October 4, 2019 and its accompanying prospectus dated August 21, 2018, related to Sales Agreement, to reduce the number of shares of the Company's common stock available for sale under the ATM Prospectus Supplement pursuant to the Sales Agreement.

As of November 6, 2019 (the date of the ATM Prospectus Supplement), the Company has sold 10,060,618 shares of its common stock under the Sales Agreement for aggregate gross proceeds of $3,034,163 less aggregate commissions of $91,088. Further, as of November 6, 2019, the maximum number of shares of common stock available for potential future sales under the Sales Agreement is up to 7,939,382 shares.

The shares previously sold under the Sales Agreement were issued and sold pursuant to the Company's shelf registration statement on Form S-3 (File No 333-226792), previously filed with the SEC on August 10, 2018, and declared effective by the SEC on August 21, 2018. Prospectus supplements related to the Company's at-the-market equity program were also filed with the SEC on October 4, 2019 and November 6, 2019. This Current Report on Form 8-K does not constitute and shall not constitute an offer to sell or the solicitation of an offer to buy shares of the Company's common stock, nor shall there be any sale of shares of the Company's common stock in any state or jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state or other jurisdiction.

Item 9.01. Financial Statements and Exhibits.

(d) Exhibits.

The following exhibits are being filed or furnished herewith (as applicable):

Exhibit No.	Description
10.1	Joint Development Agreement, effective as of October 31, 2019, between FuelCell Energy, Inc. and ExxonMobil Research and Engineering Company.
10.2	Credit Agreement, dated as of October 31, 2019, among FuelCell Energy, Inc., the Guarantors party thereto, the Lenders party thereto, and Orion Energy Partners Investment Agent, LLC.
10.3	Pledge and Security Agreement, dated as of October 31, 2019, among FuelCell Energy, Inc., each of the Subsidiaries party thereto, and Orion Energy Partners Investment Agent, LLC.
10.4	Loan Discount Letter dated October 31, 2019 from Orion Energy Partners Investment Agent, LLC to FuelCell Energy, Inc.
10.5	Agent Reimbursement Letter dated October 31, 2019 from Orion Energy Partners Investment Agent, LLC to FuelCell Energy, Inc.
10.6	Form of Warrant issued/to be issued to the Lenders Pursuant to the Credit Agreement.
10.7	Observer Rights Agreement, dated October 31, 2019, among FuelCell Energy, Inc., the Subsidiaries from time to time party thereto, Orion Energy Credit Opportunities Fund II, L.P., Orion Energy Credit Opportunities Fund II PV, L.P., and Orion Energy Credit Opportunities Fund II GPFA, L.P.
10.8	Payoff Letter, dated October 31, 2019, by and between FuelCell Energy Finance, LLC and NRG Energy, Inc.
10.9	Payoff Letter, dated October 30, 2019, by and between FuelCell Energy Finance II, LLC and Generate Lending, LLC.
99.1	Press Release issued by FuelCell Energy, Inc. on November 5, 2019.
99.2	Press Release issued by FuelCell Energy, Inc. on November 6, 2019.
99.3	Press Release issued by FuelCell Energy, Inc. on November 6, 2019.

SIGNATURES

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 hereunto duly authorized.

FUELCELL ENERGY, INC.

Date: November 6, 2019

By: /s/ Michael S. Bishop
Michael S. Bishop
Executive Vice President, Chief Financial Officer and Treasurer

EXHIBIT 10.1

JOINT DEVELOPMENT AGREEMENT

between

FUELCELL ENERGY, INC.

and

EXXONMOBIL RESEARCH AND ENGINEERING COMPANY

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JOINT DEVELOPMENT AGREEMENT

This Agreement is made as of the Effective Date between:

ExxonMobil Research and Engineering Company, a corporation of the State of Delaware having offices at 1545 Route 22 East, Annandale, New Jersey 08801 ("**ExxonMobil**"); and

FuelCell Energy, Inc., a corporation of the State of Delaware having offices at 3 Great Pasture Road, Danbury, Connecticut 06810 ("**FCE**").

ExxonMobil and FCE are engaged in collaborative research and development projects to evaluate and develop Molten Carbonate Fuel Cells (MCFCs) to reduce carbon dioxide emissions (i.e., achieve low cost carbon dioxide capture). ExxonMobil and FCE wish to further the research and development efforts to evaluate and develop new and/or improved MCFCs to reduce carbon dioxide emissions from industrial and power sources ("Scope"). Therefore, in consideration of the foregoing premises and mutual covenants contained herein, ExxonMobil and FCE (each a "Party" and collectively the "Parties") agree as follows:

ARTICLE 1 – DEFINITIONS

1.01 **Definitions**. The terms appearing in this Agreement in initial capital letters, not otherwise defined in the preamble or body of this Agreement, are defined in Appendix A.

ARTICLE 2 – PROGRAM

2.01 **Program / Projects.** The collaborative research and development effort will comprise one or more mutually agreed upon projects within the Scope during the Term of this Agreement (each a "Project" and, collectively, the "Projects" or the "Program"). The details of each Project will be described in a written, mutually agreed upon document ("Project Description") - a template for which is set forth in Appendix B. Each Project Description will specify the scope and content of the Project, the work to be undertaken by each Party and potential third parties, the deliverables, the timing, any payments to be made not otherwise set forth in this Agreement, and any other related objectives and expectations. When completed and signed by duly authorized representatives of both Parties, each Project Description will become part of this Agreement and will be governed by the terms and conditions of this Agreement. Neither Party makes any representations as to the number, frequency, or monetary value of the Projects, except as otherwise set forth herein or in any Project Description.

2.02 **Subcontracting**. ExxonMobil hereby consents to FCE hiring trade contractors commonly used for facility modifications and individual engineering contractors and individual staff from temporary agencies as needed to perform work pursuant to a Project Description, provided that such contractors and staff are under confidentiality and use restrictions no less restrictive than the terms and conditions set forth herein.

2.03 **Work Exclusivity/Independent Work**. During the Term of this Agreement, FCE will not conduct any Work using Generation 1 Technology in Carbon Capture Applications or any Work using Generation 2 Technology, independently or with third parties outside this Agreement, without prior written approval from ExxonMobil. Notwithstanding the foregoing, ExxonMobil hereby grants approval for FCE solely to conduct Authorized Work using Generation 1 Technology with Authorized Third Parties for Carbon Capture Applications and any Work using Generation 2 Technology solely for Power Applications and Hydrogen Applications.

ARTICLE 3 – PROGRAM GOVERNANCE

3.01 **Steering Committee**. Promptly after the Effective Date, the Parties will establish a committee that will oversee technical support and provide overall supervision and administrative guidance for the Program ("Steering Committee" or "SC"), further detailed as follows -

(a) Composition. Each Party will appoint in writing one or more of its employees as SC members. Each Party will have the right to change its SC members at any time by giving written notice of such change to the other Party.

(b) Meetings. Meetings of the SC will be in person or by phone at a location and time agreed to in advance by the SC members.

(c) Other Attendees. In addition to the attendance of SC members, with prior written notice to the other Party's SC members, each Party may also bring to any SC meeting such technical and other advisors as it may deem appropriate, provided that such advisors are employees of a Party or its Affiliates and are under written confidentiality and use restrictions at least as strict as those imposed herein. Otherwise, a Party's additional invitees may attend a SC meeting only with the other Party's advance written approval.

(d) Responsibilities**.** The responsibilities of the SC will include, but are not limited to:

i. *Project Endorsement and Monitoring*. The SC will review and approve each Project Description and amendment thereto prior to execution by the Parties. (However, no Project Description or amendment thereto will be effective unless and until it is executed by duly authorized representatives of both Parties.) The SC will periodically monitor the ongoing status of all Projects, and make adjustments to priorities within and between the Projects.

ii. *Dispute Resolution*. Assist the Parties in resolving any disputes.

(e) Votes. Each Party only gets one vote on the SC regardless of the number of SC members it appoints. Except as otherwise stated in this Agreement, all decisions by the SC will be by unanimous agreement. In the absence of unanimity, ExxonMobil's SC representatives will have final decision making authority with respect to only the following decisions required by the SC: whether and where to seek patent protection and whether to maintain patent assets, subject to the provisions of Paragraph 6.04 (Solicitation of Program Patents Discretionary).

(f) Minutes. All decisions by the SC will be documented in agreed upon minutes distributed to SC members after the meeting.

(g) No Amendment Rights. The SC may recommend but has no authority to amend the terms and conditions of this Agreement.

(h) Costs. ExxonMobil will bear its own costs associated with participating in the SC. FCE's costs and expenses associated with its participation in the SC are included in each Project's budget as Direct Costs.

3.02 **Technical Managers**. Each Party will appoint one manager for each Project ("Technical Manager"). The Technical Managers will be responsible for the coordination of all technical activities arising under such Project, and will serve as their Party's technical liaison with the SC for the Project. Each Party will promptly notify the other Party in writing upon changing the appointments. The Technical Managers for each Project will be the primary technical contacts between the Parties for that Project. The Technical Managers for each Project will jointly:

- direct the work performed under a Project in accordance with the terms and conditions of the Project Description;

- report to the SC on the progress of technical activities conducted under the Project;
- monitor and coordinate all intellectual property activities relative to each Project; and
- make recommendations to the SC on proposed publications containing Program Information.

Unless otherwise mutually agreed, the Technical Managers for a Project will meet in person at least once each calendar quarter during a Project at such locations as the Technical Managers agree. The Technical Managers will communicate regularly by telephone or similar means between such meetings.

ARTICLE 4 – DISCLOSURE, CONFIDENTIALITY AND RESTRICTED USE

4.01 **Program Information Disclosure, Confidentiality and Use Restriction**. FCE will promptly disclose to ExxonMobil, in written or other tangible form, any and all Program Information including any Program Inventions. Except as otherwise permitted under this Agreement, FCE agrees to hold Program Information in confidence, and not to disclose or make it available to any third party without the express prior written consent of ExxonMobil, for a period commencing on the Effective Date and ending twenty (20) years thereafter. Without the express prior written consent of ExxonMobil, FCE agrees to use and practice Program Information only for the Program or as authorized in Article 7 (License to Program Results).

4.02 **Background Information Disclosure, Confidentiality and Use Restriction**. Each Party will make available its Background Information to the other Party that it believes will be useful in carrying out work under the Program. Except as otherwise permitted under this Agreement, each Party agrees to hold the Background Information it receives from the other Party in confidence, and to not disclose or make available the other Party's Background Information to any third party without the express prior written consent of the other Party, for a period commencing on the Effective Date and ending twenty (20) years thereafter. Without the express prior written consent of the other Party, each Party agrees to use and practice the other Party's Background Information only for the Program or as authorized in Article 8 (License to Background Information and Patents).

4.03 **Non-Analysis of Background Samples**. Except as otherwise agreed by the Parties in writing, each Party agrees not to determine or have determined the composition or physical structure of any Background Sample received from the other Party, which includes unused, used and spent Background Samples or portions thereof, whether by analyzing, having analyzed, inspection, reverse engineering or otherwise.

4.04 **Information Handling Obligations**. Each Party will endeavor to mark Confidential Information as follows:

(a) Confidential Information first disclosed in tangible form or electronically will be marked by the Disclosing Party as "confidential" or "proprietary" or with words of similar import when provided, indicating whether the information is "Program Information" or "Background Information";

(b) Confidential Information first disclosed orally or by visual display will be identified by the Disclosing Party as "confidential" or "proprietary" or with words of similar import at first disclosure and subsequently confirmed as confidential in a summary provided in an e-mail or other written communication delivered to the other Party within thirty (30) days after first disclosure, that references the date of the confidential disclosure indicating whether the information is "Program Information" or "Background Information"; and

(c) If a Sample is sent to the other Party, the Sample will be marked by the Disclosing Party as "confidential" or "proprietary" or with words of similar import at the time of disclosure indicating whether the Sample is "Program Information" or "Background Information".

The failure to appropriately mark information/materials as "confidential" or "proprietary" upon initial disclosure to the Receiving Party will not be considered a waiver of confidentiality. Information/materials marked as "proprietary" or "confidential" when first disclosed, without further identification of the category of confidential information, will be presumptively considered and treated as Program Information until the Disclosing Party notifies the Receiving Party otherwise in writing.

4.05 **Exceptions**. For the purposes of this Agreement, the obligations of confidentiality and restricted use herein shall not apply to any information or materials to the extent the Receiving Party can establish by documentary evidence that one or more of the following exceptions apply:

a. the information or material was already in the Receiving Party's or its Affiliate's lawful possession (free of any confidentiality and use restrictions) and was not previously acquired directly or indirectly from the other Party under a current obligation of confidentiality;

b. the information or material was already in the public domain or subsequently entered the public domain after disclosure through no fault of the Receiving Party;

c. the information or material was or is hereafter furnished to the Receiving Party, or its Affiliate, on a non-confidential basis by a third party legally entitled to provide the information or material without restriction;

d. the information or material was independently developed by employees or agents of the Receiving Party or its Affiliate who did not have access to relevant information provided by the Disclosing Party; and/or

e. the information or material was released from the confidentiality obligations of this Agreement by the Disclosing Party's written authorization.

The later occurrence of any one of the aforementioned exceptions will not excuse any failure to adequately protect Confidential Information pursuant to this Agreement prior to the existence of the exception. More specific Confidential Information will not be deemed to be within the foregoing exceptions merely because it is embraced by more general information that is publicly available or in the possession of Receiving Party pursuant to one of the exceptions. Also a combination of features will not be deemed within the foregoing exceptions merely because individual features are publicly available or in Receiving Party's possession pursuant to one of the exceptions.

4.06 **Disclosure to Affiliates, Contractors, and Sub-licensees**. Notwithstanding anything to the contrary in this Agreement, a Receiving Party may disclose a Disclosing Party's Confidential Information to its Affiliates, and said Receiving Party may disclose the Disclosing Party's Confidential Information to their respective contractors providing services in furtherance of a Project as well as to permitted sub-licensees hereunder, provided such Affiliates, contractors, and sub-licensees have agreed to be bound by confidentiality and limited use obligations no less protective of Disclosing Party's Confidential Information than the terms contained herein. The Receiving Party will be liable to the Disclosing Party for any unauthorized disclosure or misuse of the Disclosing Party's Confidential Information by such Affiliates, contractors, and sub-licensees.

4.07 **Compelled Disclosure**. In the event that a Receiving Party (or its Affiliate) is required by law, court order or rule, or government authority to disclose the Confidential Information that Receiving Party is obligated to hold in confidence pursuant to Paragraph 4.01 (Program Information Disclosure, Confidentiality and Use Restriction) and/or Paragraph 4.02 (Background Information Disclosure, Confidentiality and Use Restriction), then the Receiving Party will promptly notify the Disclosing Party prior to disclosure in order to enable the Disclosing Party to seek a protective order at the Disclosing Party's sole expense. In any event, the Receiving Party who is required to disclose such information will request confidential treatment of the information and only disclose the minimum amount of information reasonably necessary to comply with such law, court order or rule, or government authority.

4.08 **Disclosures in Patent Applications**. Notwithstanding anything else in this Agreement, ExxonMobil may disclose the minimum amount of FCE's Confidential Background Information reasonably necessary to support a Program Patent subject to the review process in Paragraph 6.02 (Solicitation of Program Patents).

4.09 **Return/Destruction**. At the Disclosing Party's written request, the Receiving Party agrees to return to Disclosing Party or, at Disclosing Party's option, dispose of or destroy, Disclosing Party's Confidential Background Information and any of Disclosing Party's unused Background Samples. However, notwithstanding anything else in this Paragraph, the Receiving Party may retain such documents and materials to the extent such documents and materials are identified as necessary for beneficial use of a further Project or a license granted herein and the Receiving Party has notified the Disclosing Party in writing of the need for such documents and materials. Any dispute over whether such documents and materials are necessary shall be escalated to senior management for resolution. Furthermore, notwithstanding anything else in this Paragraph 4.09, the Receiving Party may retain one (1) copy of such documents and materials in its secure files for the sole purpose of administering its obligations under this Agreement and the Receiving Party will not be required to purge or cause others to purge electronic archival media automatically generated by backup computer systems if said media will be destroyed pursuant to a systematic records retention process and not otherwise utilized.

4.10 **Third Party Information.** Neither Party will knowingly disclose to the other Party any proprietary or confidential information belonging to a Non-Affiliated Third Party without the Receiving Party's prior written consent.

ARTICLE 5 – PUBLICITY AND PUBLICATIONS

5.01 **Publicity.** During the Term, and except for disclosures pursuant to Paragraphs 4.06 (Disclosure to Affiliates, Contractors and Sub-licensees), 4.07 (Compelled Disclosure), 4.08 (Disclosure in Patent Applications), or as otherwise permitted in this Agreement, the Parties agree that they will not disclose to any Non-Affiliated Third Party that they have entered into this Agreement, nor make any publications or publicity releases concerning the nature of this Agreement, without first acquiring the written consent of the other Party, which consent will not be unreasonably withheld, conditioned or delayed.

Notwithstanding the foregoing, either Party may make such disclosure as it may determine to be required by applicable law (such as filing with the U.S. Securities and Exchange Commission), provided that in such case the Disclosing Party will provide advance notice of such disclosure to the other Party and, where legally permitted, an opportunity to redact its sensitive proprietary information from such disclosure.

Further, during the Term, each Party agrees that it will not use the name, service mark or trademark of the other Party, or any Affiliate of the other Party, or provide any indication from which the identity of the other Party or its Affiliate may reasonably be inferred in any publicity release or other announcement, without first obtaining the written approval of the other Party. Notwithstanding the foregoing, each Party hereby grants approval for the other Party to use its name, service mark or trademark in promotional materials that have a generally accepted description of the Scope, which such generally accepted description shall be mutually agreed to in writing beforehand. An exception to this Paragraph will include U.S. patent prosecution that refers to this Agreement as a "joint research agreement" under 35 U.S.C. § 102(c).

Further, each Party agrees to include appropriate attribution of the other Party in any publicity release, advertising, print, media or other announcement concerning the use of MCFCs for carbon capture, the Program or the Program Results.

5.02 **Publications.** The Parties recognize that Program Information may be suitable for publication either jointly or individually. Unless the other Party specifically requests in writing not to be credited, appropriate recognition of the support or encouragement of the other Party will be included in such publications. The Parties agree to cooperate with each other on the preparation of any such publications. If any proposed publication contains the non-publishing Party's Background Information, such information (including reference thereto) will be deleted at the non-publishing Party's request. No publication that violates Article 4 (Disclosure, Confidentiality and Restricted Use) or Paragraph 5.01 (Publicity) will be permitted without the prior written consent of the other Party which may be obtained from a duly authorized member of each Party.

ARTICLE 6 – OWNERSHIP / PROCUREMENT OF PROGRAM RESULTS

6.01 **Ownership of Program Results.** ExxonMobil will solely own Program Information, Program Patents, and copyrightable works resulting from the Program (collectively, "Program Results"), irrespective of whether the Program Results are conceived, created, developed or acquired by employees or other representatives of FCE, ExxonMobil, or both. FCE will assign, and hereby assigns, to ExxonMobil ownership of Program Results.

6.02 **Solicitation of Program Patents.** ExxonMobil will have the sole responsibility and the exclusive right to prepare, file, prosecute, and maintain Program Patents pursuant to Paragraph 6.01 (Ownership of Program Results). Such right will include the right to determine if, where, and when patent applications are filed, and the scope of such patent applications. Notwithstanding the foregoing, ExxonMobil shall provide FCE notice of its intent to file any patent application containing FCE's Confidential Background Information and an opportunity for FCE to review any such patent application for FCE's Confidential Background Information. If FCE does not respond within thirty (30) days from ExxonMobil seeking such consent, then ExxonMobil may proceed with such filing. The cost of preparing, filing, prosecuting, and maintaining any such patent applications that ExxonMobil decides to pursue and maintain, as well as the cost of maintaining any patents resulting therefrom, will be paid in full by ExxonMobil. For Program Patents, if one or more employees or other representatives of FCE are determined to be inventors, then FCE will:

(i) cause its employees, contractors, and consultants to render reasonable and timely assistance to ExxonMobil and its attorneys or agents;

(ii) assign, and will cause its and its Affiliates' employees, contractors, and consultants to assign, its right, title, and interest in and to such Program Patent to ExxonMobil for filing; and

(iii) cause its and its Affiliate employees, contractors, and consultants, to execute any documents as may be required to effect such assignments, or file, prosecute, and maintain any patent applications or patents that are based on, derived from, or protect such Program Patent.

ExxonMobil will hold formal legal title to all such patent applications, and resulting patents.

6.03 **Cooperation in Soliciting Program Patents**. The Parties agree to cooperate in the preparation, filing, prosecution, and securing of patent applications and patents, all without charge to such other Party. When ExxonMobil's patent counsel sends to FCE documents for review that contains FCE Confidential Background Information, the Parties will follow the review process pursuant to Paragraph 6.02 (Solicitation of Program Patents). Upon FCE's written request, ExxonMobil will provide a courtesy copy of any Program Patent that does not contain any FCE Confidential Background Information prior to filing such document. All Program Patent filings, and the status thereof, will be reported to the Steering Committee.

6.04 **Solicitation of Program Patents Discretionary**. ExxonMobil has the unencumbered right to file or not to file, prosecute, defend, maintain, abandon, or enforce any Program Invention or Program Patent. Notwithstanding the foregoing, in the event ExxonMobil decides not to prosecute, defend, enforce, maintain or decides to abandon any Program Patent, then ExxonMobil will provide notice thereof to FCE, and FCE will then have the right, but not the obligation, to prosecute or maintain the Program Patent and sole responsibility for the continuing costs, taxes, legal fees, maintenance fees and other fees associated with that Program Patent. The ownership of such Program Patent will remain with ExxonMobil.

The abandonment of a pending patent application in favor of a continuation patent application, continuation-in-part patent application, or divisional patent application, or in favor of another application of a related subject (e.g. to overcome a double patenting rejection) and ExxonMobil's decision not to file any Program Patent, will not be deemed to be an election not to continue to prosecute, issue, or maintain any Program Patent under Paragraph 6.04. In addition, (a) the failure to appeal a patent office or any administrative tribunal or judicial decision adverse to any patent or patent application, or (b) in the case of a co-pending non-provisional application in the U.S., (i) failure to enter an international patent application into the national phase, or (ii) to ratify a patent in any country, will not be deemed to be an election not to continue to prosecute, issue, or maintain any Program Patent under Paragraph 6.04.

6.06 **Joint Research Agreement**. The Parties acknowledge and agree that this Agreement is a "joint research agreement" as defined in 35 U.S.C. §100(h). The specification of any patent application filed pursuant to this Agreement may contain (or may be amended to contain) language required to invoke 35 U.S.C. §102(b)(2)(C) and §102(c) as applicable. Notwithstanding anything to the contrary in Paragraph 5.01 (Publicity), ExxonMobil will have the right to invoke these statutory provisions when exercising its rights to file patent applications under this Agreement, without the prior written consent of FCE, subject to the provisions of Paragraph 6.02 (Solicitation of Program Patents). Where ExxonMobil intends to invoke these statutory provisions, FCE, upon request, will cooperate and coordinate its activities with ExxonMobil with respect to any submissions, filings or other activities in support thereof.

6.07 **Inventor Awards**. A Party will not be responsible for any inventor awards or compensation that may be owed to the other Party's employee(s) or to any employees of the other Party's Affiliates, agents, consultants, or contractors, who are inventors of any Program Invention.

6.08 **Disposal of Prior JDA Project Patents**. During the Term of this Agreement and for two (2) years thereafter, in the event that either Party decides to sell or convey its interest in or otherwise dispose of any Prior JDA Project Patent to any Non-Affiliated Third Party, such Party will inform the other Party, who will then have the right of first refusal to purchase or otherwise acquire the sole interest at same or better terms. Any sale of a Prior JDA Project Patent to a Non-Affiliated Third Party is subject to the licenses granted and other obligations set forth in this Agreement.

ARTICLE 7 – LICENSE TO PROGRAM RESULTS

7.01 **Grants to FCE of Program Results.**

(a) FCE's R&D Rights. ExxonMobil grants FCE a worldwide, non-exclusive, royalty-free, non-transferable (except pursuant to Article 14 (Assignment)), non-sub-licensable (except as set forth in this Paragraph 7.01(a)) right and license to practice Program Results solely to conduct research and development for the Program. More particularly, said right and license to practice includes the right to use, reproduce, and create derivative works of Program Information under applicable copyrights and to make, use, and import (but not sell or offer to sell) under the claims of Program Patents, in each case solely for research and development for the Program. Said right and license may be extended to contractors performing work on behalf of FCE but is not otherwise sub-licensable.

(b) FCE's Commercial Rights. ExxonMobil agrees to grant or hereby grants FCE the following rights and licenses:

(1) Power Applications and Hydrogen Applications. ExxonMobil grants FCE a worldwide, non-exclusive, royalty-free, perpetual, irrevocable (except as stated in Paragraphs 12.03 (Failure to Perform), 12.04 (Other Termination), and 12.05 (Bankruptcy)), sub-licensable, non-transferable (except pursuant to Article 14 (Assignment)), right and license to practice Program Results solely for Power Applications and Hydrogen Applications. More particularly, said right and license to practice Program Results solely for Power Applications and Hydrogen Applications includes the right to use, reproduce, and create derivative works of Program Information under applicable copyrights and to make, use, import, and sell or offer to sell under the claims of Program Patents; and

(2) Carbon Capture Applications. In the event ExxonMobil notifies FCE that it has formally decided not to pursue Generation 2 Technology for Carbon Capture Applications, then upon FCE's written request, ExxonMobil agrees to negotiate a grant to FCE, under commercially reasonable terms to be determined in good faith, a worldwide, non-exclusive, royalty-bearing (with the royalty to be negotiated), non-sub-licensable (except as set forth in this Paragraph 7.01(b)(2)), non-transferable (except pursuant to Article 14 (Assignment)), right and license to practice Program Results solely for Carbon Capture Applications. More particularly, said right and license to practice Program Results solely for Hydrogen Applications and Carbon Capture Applications will include the right to use, reproduce, and creative derivative works of Program Information under applicable copyrights and to make, use, import, and sell or offer to sell under the claims of Program Patents. Said right and license will be extendable to contractors performing work on behalf of FCE but will not otherwise sub-licensable. Nothing in this Paragraph 7.01(b)(2) will create an obligation on the part of ExxonMobil to grant FCE a right or license under Program Results if the Parties do not agree on the terms and conditions of such license.

ARTICLE 8 – LICENSE TO BACKGROUND INFORMATION AND PATENTS

8.01 Ownership Retained. Each Party will retain its title and ownership rights to its Background Information and Background Patents in all applicable jurisdictions.

8.02 Grant of Rights to Background Information and Background Patents.

(a) **Grant to ExxonMobil.**

1) Carbon Capture Applications and Hydrogen Applications. To the extent not already granted pursuant to the License Agreement, FCE grants ExxonMobil and its Affiliates a worldwide, non-exclusive, royalty-free, irrevocable, perpetual, sub-licensable, non-transferable (except pursuant to Article 14 (Assignment)) right and license to practice FCE Background Information and FCE Background Patents for Generation 2 Technology in Carbon Capture Applications and Hydrogen Applications. More particularly, said right and license to practice FCE Background Information and FCE Background Patents for Generation 2 Technology in Carbon Capture Applications and Hydrogen Applications includes the right to use, reproduce, and create derivative works of FCE Background Information under applicable copyrights and the right to make, use, import, and sell or offer to sell under the claims of FCE Background Patents.

2) Other Applications. In the event FCE notifies ExxonMobil that it has formally decided not to pursue Generation 2 Technology for Power Applications, then upon ExxonMobil's written request, FCE agrees to negotiate a grant to ExxonMobil and its Affiliates, under commercially reasonable terms to be determined in good faith, a worldwide, royalty-bearing (with the royalty to be negotiated), non-exclusive, sub-licensable right and license to practice FCE Background Information and FCE Background Patents for Generation 2 Technology in any application outside of Carbon Capture Applications and Hydrogen Applications. More particularly, said right and license to practice FCE Background Information and FCE Background Patents for Generation 2 Technology in any application outside of Carbon Capture Applications and Hydrogen Applications will include the right to use, reproduce, and create derivative works of FCE Background Information under applicable copyrights and the right to make, use, import, and sell or offer to sell under the claims of FCE Background Patents. Nothing in this Paragraph 8.02(a)(2) will create an obligation on the part of FCE to grant ExxonMobil a license or right under FCE Background Patents or FCE Background Information if the Parties do not agree on the terms and conditions of such license.

(b) **Grant to FCE.**

1) Generation 1 Technology.

i. Outside of Carbon Capture Applications. ExxonMobil grants FCE a worldwide, non-exclusive, royalty-free, non-sub-licensable (except as set forth herein), perpetual, irrevocable (except as stated in Paragraphs 12.03 (Failure to Perform), 12.04 (Other Termination), and 12.05 (Bankruptcy)), non-transferable (except pursuant to Article 14 (Assignment)) right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 1 Technology in any applications outside of Carbon Capture Applications. More particularly, said right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 1 Technology in any applications outside of Carbon Capture Applications includes the right to use, reproduce, and create derivative works of ExxonMobil Background Information under applicable copyrights and the right to make, use, import, and sell or offer to sell under the claims of ExxonMobil Background Patents. All rights and licenses in this Paragraph (b)(1)(i) may be extended to contractors performing work on behalf of FCE but are not otherwise sub-licensable.

ii. Authorized Third Parties. ExxonMobil grants FCE a worldwide, non-exclusive, royalty-free, non-sub-licensable (except as set forth herein), perpetual, irrevocable (except as stated in Paragraphs 12.03 (Failure to Perform), 12.04 (Other Termination), and 12.05 (Bankruptcy)), non-transferable (except pursuant to Article 14 (Assignment)) right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 1 Technology in Carbon Capture Applications, solely to conduct Authorized Work with Authorized Third Parties. More particularly, said right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 1 Technology in Carbon Capture Applications includes the right to use, reproduce, and create derivative works of ExxonMobil Background Information under applicable copyrights and the right to make, use, and import (but not sell or offer to sell) under the claims of ExxonMobil Background Patents, solely to conduct Authorized Work with Authorized Third Parties. All rights and licenses in this Paragraph (b)(1)(ii) may be extended to contractors performing work on behalf of FCE but are not otherwise sub-licensable.

iii. Carbon Capture Application. In the event that ExxonMobil fails to notify FCE before the end of the Term of the Agreement of ExxonMobil's intent to negotiate a subsequent or follow-on commercial agreement, ExxonMobil agrees to negotiate a grant to FCE, under commercially reasonable terms to be determined in good faith, a worldwide, royalty-free, non-exclusive, non-sub-licensable (except as set forth herein) right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 1 Technology in Carbon Capture Applications . More particularly, said right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 1 Technology in Carbon Capture Applications will include the right to use, reproduce, and create derivative works of ExxonMobil Background Information under applicable copyrights and the right to make, use, import, and sell or offer to sell under the claims of ExxonMobil Background Patents. The rights and licenses in this Paragraph (b)(1)(iii) will be extendable to contractors performing work on behalf of FCE but will not otherwise sub-licensable. Nothing in this section will create an obligation on the part of ExxonMobil to grant FCE a license or right under ExxonMobil Background Patents or ExxonMobil Background Information if the Parties do not agree on the terms and conditions of such license.

2) Generation 2 Technology.

i. Power Applications and Hydrogen Applications. ExxonMobil grants FCE a worldwide, non-exclusive, royalty-free, non-sub-licensable (except as set forth herein), perpetual, irrevocable (except as stated in Paragraphs 12.03 (Failure to Perform), 12.04 (Other Termination), and 12.05 (Bankruptcy)), non-transferable (except pursuant to Article 14 (Assignment)) right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 2 Technology in Power Applications and Hydrogen Applications. More particularly, said right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 2 Technology in Power Applications and Hydrogen Applications includes the right to use, reproduce, and create derivative works of ExxonMobil Background Information under applicable copyrights and the right to make, use, import, and sell or offer to sell under the claims of ExxonMobil Background Patents. The right and license in this Paragraph (b)(2)(i) may be extended to contractors performing work on behalf of FCE but is not otherwise sub-licensable.

ii. Outside of Power Applications and Hydrogen Applications. In the event ExxonMobil notifies FCE that it has formally decided not to pursue Generation 2 Technology for Carbon Capture Applications, then upon FCE's written request, ExxonMobil agrees to grant to FCE, under commercially reasonable terms to be determined in good faith, a worldwide, royalty-bearing (with the royalty to be negotiated), non-exclusive, sub-licensable, right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 2 Technology in any application outside of Power Applications and Hydrogen Applications. More particularly, said right and license to practice ExxonMobil Background Information and ExxonMobil Background Patents for Generation 2 Technology in any application outside of Power Applications includes the right to use, reproduce, and create derivative works of ExxonMobil Background Information under applicable copyrights and the right to make, use, import, and sell or offer to sell under the claims of ExxonMobil Background Patents. Nothing in this section will create an obligation on the part of ExxonMobil to grant FCE a license or right under ExxonMobil Background Patents or ExxonMobil Background Information if the Parties do not agree on the terms and conditions of such license.

(c) **No Further Rights.** Notwithstanding any other provision in this Agreement, under no circumstances will a Party to this Agreement, as a result of this Agreement, have any right under or to the Background Information and Background Patents of the other Party except as set forth in this Article. Any other right and license to Background Information and Background Patents not found in this Article will be subject to a separate license agreement to be negotiated between the Parties, as necessary.

ARTICLE 9 – INFRINGEMENT OF THIRD PARTY PATENTS

9.01 **Notification of Potential Infringement**. If either Party becomes aware of alleged infringement of a third party's intellectual property rights relating to its work under this Agreement, such Party will promptly notify the other Party of such discovery and the Parties will consult with each other and discuss any action to be taken.

9.02 **Defense of Infringement Claims**. Each Party will be responsible for all expenses (including attorney fees) and damages (e.g. royalties, settlement costs) incurred in defense of a claim of infringement by its own equipment, products, or processes, or by equipment, products, or processes of its Affiliates, contractors or consultants.

9.03 **Settlements**. Each Party may resolve any risk or threat, or settle any suits or action related to use of any Program Results, without the prior approval of the other Party unless such resolution or settlement would cause the other Party to be: (a) obligated to make any payment or part with any tangible or intangible property right, or (b) obligated to assume any obligations with respect thereto, or (c) subject to any injunction.

ARTICLE 10 –PAYMENT

10.01 **Project Costs**.

a) ExxonMobil will reimburse FCE for Research Costs (i.e., cumulative FTE Costs and Direct Costs) for each Project subject to total caps set forth herein and in the relevant Project Description. Research Costs of FCE paid for by ExxonMobil will be limited to FTE Costs for time actually spent on the Program and Direct Costs actually incurred and approved in advance by the Steering Committee. The cumulative Research Costs for the Program will not exceed forty-five million United States dollars ($45,000,000 USD) over the Term of the Agreement ("Total Research Cost"). ExxonMobil will reimburse FCE for Research Costs after receipt of invoices on a monthly basis. Invoices for Direct Costs will be supported by relevant third party invoices received by FCE documenting such costs. Materials shall be invoiced as incurred and subject to a thirty percent (30%) service fee. All such payments will be made after ExxonMobil's receipt of invoices in accordance with the invoicing procedures specified in Paragraphs 10.01(b)-(e) and in Paragraph 10.04 (Invoices).

b) First Invoice. FCE will invoice ExxonMobil an advance payment on or promptly after the Effective Date ("Initial Payment"), said Initial Payment not to exceed one-twelfth (1/12) of the Total Research Cost (i.e., three-million and seven-hundred and fifty thousand United States dollars ($3,750,000 USD)). Notwithstanding anything contained herein to the contrary, including Paragraph 10.04 (Invoices), such payment will be made within fifteen (15) days after ExxonMobil's receipt of invoice.

c) Subsequent Monthly Invoices. Within fifteen (15) days after the end of each calendar month that occurs during the remainder of the Term of the Agreement, subject to Paragraph 10.01(e), FCE will calculate and invoice ExxonMobil for the actual amounts incurred (for charges permitted in accordance with the respective Project Description(s)) during the immediately preceding calendar month.

d) End of Term of the Program.

i. By the fifteenth (15th) day of the last month of the Term of the Agreement, ExxonMobil will have been invoiced for the actual charges incurred in all of the prior months of the Term of the Agreement, but the most recently issued invoice will not be due. Therefore, at such time ExxonMobil will not have yet paid for the last two (2) months of the Term of the Agreement. When FCE issues the invoice during the last month of the Term of the Agreement ("8th Inning Invoice"), FCE will apply some or all of the Initial Payment, as applicable, as credit against the amount due.

ii. Within fifteen (15) days after the end of the Term of the Agreement, FCE will issue an invoice ("9th Inning Invoice") for the actual charges incurred during the last month of the Term of the Agreement, subject to Paragraph 10.01(a). FCE will apply any balance of the Initial Payment remaining after the 8th Inning Invoice as a credit towards the amount due on the 9th Inning Invoice. If after applying such credit, a balance of the Initial Payment still remains, FCE will refund the balance to ExxonMobil within thirty (30) days, unless otherwise mutually agreed (such as the Parties mutually agreeing to enter into a new Project and apply the balance as a credit towards amounts payable by ExxonMobil thereunder).

e) Maximum Charges. The invoices sent by FCE under the foregoing procedure for each year of the Agreement may not in the aggregate be more than half the Total Research Cost, without prior written consent of ExxonMobil or amendment to the Project Description. All such payments will be made after ExxonMobil's receipt of invoice in accordance with the invoicing procedures specified Paragraph 10.04 (Invoices).

10.02 **Up-Front Exclusivity and Technology Access Payment**. In exchange for FCE working exclusively with ExxonMobil during the Term of the Agreement, pursuant to Paragraph 2.03 (Work Exclusivity/Independent Work), and ExxonMobil's access to FCE Background Patents, pursuant to Paragraph 8.02(a) (Grant of Rights to Background Information and Background Patents), on the Effective Date, FCE will separately invoice, and ExxonMobil will pay a one-time up-front fee ("Exclusivity and Technology Access Fee") of five million United States dollars ($5,000,000 USD).

Such payment will be made within fifteen (15) days after ExxonMobil's receipt of invoice, notwithstanding anything contained herein to the contrary, including Paragraph 10.04 (Invoices).

10.03 **Milestone Payments.** As further consideration for technical progress in the Program, ExxonMobil shall pay the following sums upon achievement of the following Program milestones ("Milestone Payments"):

(a) ExxonMobil will pay FCE a first Milestone Payment of five million United States dollars ($5,000,000 USD) upon FCE achieving Milestone 1 to ExxonMobil's satisfaction; and

(b) ExxonMobil will pay FCE a second and final Milestone Payment of five million United States dollars ($5,000,000 USD), upon FCE achieving Milestone 2 to ExxonMobil's satisfaction.

All such Milestone Payments will be made after ExxonMobil's receipt of invoice in accordance with the invoicing procedures specified Paragraph 10.04 (Invoices). The obligation to pay any such installment ends upon termination of this Agreement by either Party for any reason prior to FCE achieving the respective milestone.

10.04 **Invoices.** FCE will invoice ExxonMobil for any amount due under a Project at the address (including the email address) in Article 16 (Addresses and Notices). Each invoice will identify this Agreement's identification number LAW-2019-3608, the number of the particular Project Description to which it pertains, and details of FTE Costs (including unique employee identifiers of the FTEs) and Direct Costs. FCE will not include charges relating to more than one Project Description in any given invoice. Except as otherwise specifically provided herein, ExxonMobil agrees to pay FCE the amount of each invoice under this Agreement within thirty (30) days following ExxonMobil's receipt. Notwithstanding the foregoing, if ExxonMobil has a good faith dispute regarding any amounts invoiced by FCE, ExxonMobil may withhold payment for the disputed amount, provided that ExxonMobil pays the undisputed amount and notifies FCE in writing of the specific amount and nature of the dispute promptly upon receipt of FCE's invoice in which case the Parties shall attempt to resolve the dispute in good faith. The Parties shall endeavor to resolve such dispute within fifteen (15) days of notice of the dispute, and ExxonMobil shall remit payment to FCE within fifteen (15) days of resolution of such dispute.

All such payments by ExxonMobil to FCE will be made by wire transfer in United States Dollars. FCE shall provide the Bank Name, Bank Address, Bank Account, and Swift Code in each invoice.

ARTICLE 11 – REPRESENTATIONS, WARRANTIES, INDEMNITIES AND LIABILITIES

11.01 **Mutual Representations and Warranties**. Each Party hereby represents and warrants to the other, to the best of its knowledge, that:

(a) as of the Effective Date:

1. the execution, delivery and performance of this Agreement by such Party does not conflict with any agreement, instrument or undertaking, oral or written, to which it is a party or by which it may be bound, and
2. all necessary consents, approvals and authorizations of all governmental authorities and third parties required to be obtained by such Party in connection with the execution, delivery, and performance of this Agreement have been or will be obtained;

(b) it owns or controls, in the same sense of having the right to license or convey, any Background Information to be provided to the other Party hereunder, and at the date of transmittal to the other Party, such Background Information in the Disclosing Party's good faith belief will not be subject to any encumbrances or restrictions on use by any third party that would materially affect the Receiving Party's exploitation of the rights granted in this Agreement; and

(c) all of its professional and technical personnel who perform services on or for all Projects are under written obligation:

(1) not to disclose secret or confidential information except as authorized under this Agreement or by their employer;

(2) to assign to their employer all Program Inventions; and

(3) to assign to their employer sole ownership of copyrights to all copyrightable works created in connection with any Project.

11.02 **Warranty and Liability Disclaimers**. **RECEIVING PARTY IS RESPONSIBLE FOR DETERMINING HOW TO USE THE INFORMATION AND MATERIALS PROVIDED HEREUNDER. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, DISCLOSING PARTY DISCLAIMS LIABILITY FOR ANY LOSS OR DAMAGE SUSTAINED BY RECEIVING PARTY (BUT NOT ANY THIRD PARTY) THAT MAY OCCUR FROM RECEIVING PARTY'S USE OF, OR RELIANCE ON, SUCH INFORMATION AND MATERIALS AND RECEIVING PARTY RELEASES DISCLOSING PARTY AND ITS AFFILIATES FROM AND FOR ANY SUCH LIABILITY, LOSS OR DAMAGE, EVEN IF CAUSED BY DISCLOSING PARTY'S OR ITS AFFILIATES' NEGLIGENCE EXCEPT AS PROVIDED IN PARAGRAPH 11.04 (EXCEPTIONS TO LIMITATIONS ON LIABILITY). NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, IS MADE REGARDING SUCH INFORMATION AND MATERIAL, OR ITS COMPLETENESS, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.**

11.03 **Indirect or Enhanced Damages**. In no event will either Party be liable to the other Party under this Agreement for any consequential, indirect, special, incidental, punitive or exemplary loss or damage, including, without limitation, business interruption, cost of capital, loss of anticipated revenues and profits, loss of goodwill or increased operating costs, whether arising from contract, warranty, tort, strict liability or otherwise regardless of whether the possibility of such losses or damages have been made known to the first Party, and each Party hereby expressly waives all such rights and remedies, except for breach of any confidentiality or restricted use provisions of this Agreement and except as provided in Paragraph 11.04 (Exceptions to Limitations of Liability).

11.04 **Exceptions to Limitations of Liability.** Notwithstanding anything to the contrary in this Agreement, each Party will bear full responsibility, without limit, for the following:

(i) Gross Negligence or Willful Misconduct attributable to its personnel, and, in no event, will a Party be required to release or indemnify the other Party for Gross Negligence or Willful Misconduct attributable to the other Party; and

(ii) its legal obligations to third parties wherein nothing in this Agreement is intended to impair a party's contribution and indemnity rights under law with respect to third party claims.

ARTICLE 12 – TERM AND TERMINATION

12.01 **Term**. Unless sooner terminated in accordance with this Article, this Agreement will continue in full force beginning on the Effective Date and ending two (2) years thereafter ("Term").

12.02 **Early Termination**. The Parties recognize that circumstances may arise where this Agreement's early termination would be desirable. Accordingly, either Party may terminate this Agreement or all/part of a Project for any reason and at any time upon giving the other Party sixty (60) days prior written notice. In the event of early termination of a Project or this Agreement. In addition, if this Agreement is terminated by ExxonMobil, ExxonMobil will pay FCE reasonable non-refundable expenses incurred by FCE in satisfying authorized commitments entered into by FCE with third parties prior to receipt of the termination notice. FCE will uses its best efforts to minimize termination expenses and will give appropriate credit to ExxonMobil where applicable. The total amount paid FCE under this Agreement or for a Project, including all amounts paid following termination, will not exceed the maximum authorized charge specified in this Agreement or for a Project.

12.03 **Failure to Perform.** If ExxonMobil fails to fulfill a material monetary obligation or FCE fails to execute material tasks or obligations in material compliance with all criteria set forth in a respective mutually agreed upon Project Description, in the time and manner required herein, provided that in the case of FCE's tasks or obligations any non-compliance or delay in meeting said criteria is not due to ExxonMobil or force majeure pursuant to Paragraph 15.01 (Force Majeure), the non-defaulting Party may give written notice of intent to terminate this Agreement, specifying the details of such default. Unless the defaulting Party has remedied such default within the Cure Period, this Agreement may be terminated, without penalty, payment or prejudice to claims then accrued, by written notice to the defaulting Party by the non-defaulting Party specifying the date of termination which will be of immediate effect. In the event of termination under this Paragraph 12.03 where FCE is the defaulting Party, FCE's royalty-free licenses described in Paragraph 7.01(b)(1), 8.02(b)(1)(i), 8.02 (b)(1)(ii), 8.02(b)(1)(iii), and 8.02(b)(2)(i) will immediately convert to royalty-bearing licenses, with the royalty rate to be negotiated by the Parties in good faith.

12.04 **Other Termination.** ExxonMobil may terminate this Agreement upon fifteen (15) days written notice, without penalty, payment or prejudice to claims and obligations then accrued, if FCE undergoes a Change in Control. Subject to requirements of applicable law, FCE will provide notice to ExxonMobil prior to, or promptly after, it becomes aware of any such Change in Control, and if prior notice is prohibited by applicable Law, as soon as practicable or after such notice is no longer prohibited, but in no event later than one (1) business day after any public announcement with respect to any such asset transfer or Change in Control. Notwithstanding anything else in this Agreement, in the event of termination under this Paragraph 12.04 ExxonMobil may terminate any licenses granted to FCE under this Agreement that would otherwise survive termination, taking into account the circumstances surrounding the Change in Control. Any licenses granted to ExxonMobil under this Agreement that would otherwise survive termination will continue to survive termination.

12.05 **Bankruptcy.**

(A) To the extent a court of competent jurisdiction determines that this Agreement is subject to assumption or rejection under Title 11 of the U.S. Code (the "Bankruptcy Code") or the applicable law of a bankruptcy or insolvency proceeding in a non-U.S. jurisdiction:

(i) All rights and licenses granted to ExxonMobil and its Affiliates under or pursuant to this Agreement are, and will otherwise be deemed to be, for all purposes of Section 365(n) of the Bankruptcy Code, licenses of rights to "intellectual property" as defined in section 101 of the Bankruptcy Code.

(ii) If a case is commenced under the Bankruptcy Code by or against FCE and this Agreement is rejected as provided in the Bankruptcy Code, and ExxonMobil or any of its Affiliates elects to retain its rights hereunder as provided in the Bankruptcy Code, then ExxonMobil and its Affiliates shall retain all rights hereunder in perpetuity without further royalty payments of any kind and FCE (in any capacity, including debtor-in-possession) and its successors and assigns (including, without limitations, a trustee) shall not interfere with such rights.

(iii) In the event of bankruptcy or insolvency proceedings of FCE in a non-U.S. jurisdiction, the rights, powers and remedies of ExxonMobil and its Affiliates shall be applied under any applicable laws which are equivalent to Section 365(n) of the Bankruptcy Code, or if there is no such equivalent, the Parties will take all such actions as are permissible under applicable law to permit the continuation of the licenses contained in this Agreement to the maximum extent possible.

(iv) In the event FCE admits in writing its inability generally to pay its debts as they fall due in the general course, becomes or is determined to be insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, or a substantial part thereof, or becomes subject to a proceeding under any statute or act relating to insolvency or the protection of rights of creditors, ExxonMobil receives, at its election, continued access to all Program Information, including the Project materials, equipment, and FCE's Background Information and Background Patents, and ExxonMobil will have access to relevant lab notebooks, computers containing technical information and know-how, journals, ledgers and manuals containing technical information and know-how in each case relating to the Program Information and FCE's Background Information and Background Patents.

(B) To the maximum extent permitted under law, ExxonMobil may terminate this Agreement upon fifteen (15) days written notice, without penalty, payment or prejudice to claims and obligations then accrued, if FCE commences a voluntary case under the Bankruptcy Code or a similar voluntary bankruptcy or insolvency proceeding in a non-U.S. jurisdiction, or if an order for relief is entered in an involuntary case filed against FCE under the Bankruptcy Code, and such case is not dismissed within sixty (60) days of the entry of such order, or if FCE makes a voluntary general assignment for the benefit of creditors, or suffers or permits agrees to the entry of an order appointing a receiver in an action actually pending in a court of competent jurisdiction for that portion of its business or assets related to the Project. In the event of termination under this Paragraph 12.05 and subject to ExxonMobil's waiver (in its sole discretion), any licenses granted to FCE under this Agreement that would otherwise survive termination will automatically terminate and any licenses granted to ExxonMobil under this Agreement that would otherwise survive termination will continue to survive termination.

12.06 Continuing Rights and Obligations. Except as otherwise stated in this Agreement, the following Articles and Paragraphs will survive termination of this Agreement:

- Article 1 (Definitions);
- Article 4 (Disclosure, Confidentiality and Restricted Use);
- Article 6 (Procurement and Ownership of Program Results)
- Article 7 (License to Program Results), subject to Paragraphs 12.03 (Failure to Perform), 12.04 (Other Termination), and 12.05 (Bankruptcy);
- Article 8 (License to Background Information and Patents), subject to Paragraphs 12.03 (Failure to Perform), 12.04 (Other Termination), and 12.05 (Bankruptcy);
- Article 10 (Payment), but only to the extent there are continuing license and/or royalty share obligations pertaining to the commercial use of Program Results, Background Information and/or Background Patents;
- Article 11 (Representations, Warranties, Indemnities and Liabilities);
- Article 12 (Term and Termination) to the extent any clause therein speaks to post termination rights and obligations;
- Article 13 (Arbitration and Governing Law);
- Article 14 (Assignment);
- Article 16 (Addresses and Notices);

- Paragraph 17.03 (Export Controls and Trade Sanctions);
- Article 18 (Records and Audit);
- Article 19 (Taxes);
- Paragraphs 20.02 (Independent Contractors), 20.03 (Independent Entities), 20.06 (No Third-Party Beneficiaries), 20.07 (Internal Conflict), 20.08 (Severability), 20.09 (Amendments; Modification; Waiver), 20.10 (Integration), and 20.11 (Execution); and
- any rights and obligations contained in this Agreement which by their nature should continue.

Any rights and obligations that have accrued to either Party against the other prior to the effective date of termination or expiration of this Agreement in any respect will survive such termination or expiration, and rights that have accrued to an Affiliate of a Party will continue regardless of any change in Affiliate status during the Term of this Agreement or thereafter.

ARTICLE 13 – ARBITRATION AND GOVERNING LAW

13.01 **Governing Law**. The validity and interpretation of this Agreement and the legal relations of the Parties to it will be governed by the laws of the State of New York without recourse to its conflicts of law rules.

13.02 **Arbitration Proceedings**. Both Parties will try to amicably resolve any dispute arising out of or relating to this Agreement by involving representatives of the Parties with authority to settle such disputes. In the event the Parties are unable to agree upon a resolution within a reasonable period of time, not to exceed sixty (60) days after first notice of the difference unless otherwise agreed in writing, any dispute arising out of or relating to this Agreement may be referred to final and binding arbitration before three arbitrators under the Rules of Arbitration of the International Chamber of Commerce. Each Party will appoint one arbitrator within thirty (30) days of notice of such referral and the two (2) so appointed will, within thirty (30) days from the appointment of the last of the two (2) arbitrators, select a third arbitrator who will act as the Chairman. The arbitration will take place in New York City, New York and the proceedings will be conducted in the English language. The arbitrators will decide all questions and settle all disputes strictly in accordance with the provisions of this Agreement, including the relevant indemnities and liability limitations. The arbitrators will have no authority to award exemplary or punitive damages, and the arbitral panel will certify in the decision that no part of the award includes such damages. The Parties waive their rights to seek rulings from any court on issues of law that arise during the arbitration and to challenge the award on the grounds that the arbitrators made errors of law. Awards made pursuant to this Paragraph will be final and binding on the Parties from the date made and judgment upon any award may be entered in any court having jurisdiction. No Party hereto will raise defenses based on sovereign immunity with respect to the arbitration, any judicial proceeding or ancillary thereto or with respect to enforcement of any award, order or judgment rendered in the arbitration or related judicial proceedings.

13.03 **Cost of Arbitration**. The prevailing Party in an arbitration proceeding will be entitled to recover from the other Party reasonable attorneys' fees, reasonable out-of-pocket costs and disbursements, as well as any charges for the cost of the arbitration and the fees of the arbitrators.

13.05 **Injunctive Relief.** No provision of this Agreement will prohibit any Party from approaching any court having competent jurisdiction to seek injunctive relief in case of urgency to prevent disclosure of its Confidential Information.

ARTICLE 14 – ASSIGNMENT

14.01 **Assignment.** The Agreement is not assignable, including any assignment by operation of law (including but not limited to as a result of a merger or other corporate action), by either Party without the prior written consent of the other Party. Any and all assignments of this Agreement or of any part thereof not made in accordance with this Article will be void. Notwithstanding the foregoing, ExxonMobil may assign this Agreement to its Affiliates and FCE may assign this Agreement to any of its wholly-owned and wholly-controlled Affiliates, with prior written notice to the other Party, provided that (i) such assignment by FCE shall be void if at any point such Affiliate ceases to be both wholly-owned and wholly-controlled by FCE, (ii) Article 12, including but not limited to Paragraphs 12.03, 12.04 and 12.05, shall be applicable to both FCE and any Affiliate assignee of FCE, and (iii) no assignment pursuant to this sentence will relieve the Parties of their obligations under this Agreement.

14.02 **Assignees Bound.** Any assignee permitted in Paragraph 14.01 (Assignment) will agree in writing to be bound by all the obligations of the assigning Party under this Agreement, and a copy of such written agreement will be promptly provided to the other Party. Any Party making an assignment of this Agreement as permitted in Paragraph 14.01 (Assignment) will remain bound by the continuing obligations of confidentiality and nonuse applicable to such Party prior to the assignment.

ARTICLE 15 – FORCE MAJEURE

15.01 A Party will not be liable to the other Party and will not be considered in breach of this Agreement for delays or failures in performance resulting from causes beyond the reasonable control of that Party, including, but not limited to, acts of God, labor disputes or disturbances, material shortages or rationing, riots, acts of war, new governmental regulations, communication or utility failures, or casualties. In such instance, the Party so affected will promptly notify the other Party in writing of such prevention, restriction or interference. ExxonMobil or FCE, as the case may be, will be excused from performing such obligations to the extent of such prevention, restriction or interference; provided, however, that the Party so prevented, restricted or interfered with will take all appropriate and reasonable steps to remedy such failure or delay and will resume its performance under this Agreement with all proper dispatch whenever such causes are removed.

ARTICLE 16 – ADDRESSES AND NOTICES

16.01 All notices, demands, requests, or other communications which a Party may desire or be required to give under this Agreement to the other Party will be in writing addressed as follows or to such other address designated by notice in writing:

ExxonMobil: ExxonMobil Research and Engineering Company
1545 Route 22 East
Annandale, NJ 08801-0900
Attention: Timothy Barckholtz, Senior Scientific Advisor
Email: tim.barckholtz@exxonmobil.com

FCE: FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Anthony Leo, Executive Vice President
Email: tleo@fce.com

With a copy to:

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Legal Department

Such notice, demand, request, or other communications will be deemed to have been sufficiently given by and will be effective upon the earliest of: (a) delivering the same to a reputable courier service that requires a signature upon delivery; (b) mailing the same by registered or certified first-class mail, postage prepaid, return receipt requested; (c) if an e-mail is provided, then by e-mail with receipt confirmation followed by mailing the same or (d) actual receipt by the addressee.

ARTICLE 17 – COMPLIANCE

17.01 **Business Standards.** The Parties have established and maintain standards, policies, and/or guidelines ("Policies") applicable to lawful and ethical conduct when conducting their business activities. Upon written request, a Party will provide to the other Party a copy of, or electronic access to, such Policies. The Parties agree to comply with such Policies when conducting activities under this Agreement. These Policies pertain to, but may not be limited to, gifts/entertainment/and other things of value and drugs and alcohol. These Policies are communicated to the Parties' employees, along with an expectation that the employees will comply with these Policies.

17.02 **Compliance with Laws**. All actions by each Party related to this Agreement will comply with applicable laws and regulations. Notwithstanding anything in this Agreement to the contrary, no provision will be interpreted or applied so as to require a Party or its Affiliates, to do, or to refrain from doing, anything which would constitute a violation of, or be penalized by, any applicable laws and regulations or result in a loss of economic benefit under such laws or regulations.

17.03 **Export Control and Trade Sanctions.** Neither Party will furnish, deliver, or release the technology, services, software, or commodities made available to it hereunder to any individual, entity, or destination, or for any use, except in full accordance with all applicable laws, regulations, and requirements of the United States with regard to export control and trade sanctions. Both Parties agree and understand that each will be responsible for ongoing compliance with all such applicable laws, regulations, and requirements. It will be a material breach if a Receiving Party takes any action or uses any of a Disclosing Party's information in any manner which would violate United States laws, regulations, or requirements restricting the export, re-export, transfer or release to certain entities or destinations, including to persons within the Receiving Party or its Affiliates, or to unrelated Third Parties.

ARTICLE 18 – RECORDS AND AUDIT

18.01 **Recordkeeping**. FCE will keep, or cause to be kept, true books, records, and accounts in accordance with Generally Accepted Accounting Principles and containing all information necessary for the accurate determination of all amounts payable to FCE under this Agreement, and any other obligations under this Agreement. Such books, records and accounts will be maintained for a period of at least three (3) years following the termination or expiration of this Agreement, provided there are no pending disputes between the Parties. In the case of a dispute, the books, records, and accounts will be maintained for one (1) year following resolution of such dispute.

18.02 **Audit Rights**. At the request of ExxonMobil, FCE will permit, at reasonable intervals and during regular business hours, during the Term of this Agreement and at least three (3) years thereafter, but no more than once per fiscal year, an independent certified public accounting firm of nationally recognized standing selected by ExxonMobil (and approved by FCE, which approval will not be unreasonably withheld) to inspect, during regular business hours, such books, records, and accounts and any part of the applicable operations and facilities of FCE relevant to this Agreement, and to have access to FCE's knowledgeable personnel, as may be necessary to determine the completeness and accuracy of any accounting and payments required to be made under this Agreement and compliance with other terms of this Agreement, subject to the following:

(a) ExxonMobil and its employees or other representatives will have the right to reproduce for its internal records any of the documents kept by FCE in accordance with Paragraph 18.01 (Recordkeeping), such reproduced documents shall be subject to the confidentiality and use provisions contained in Article 4; and

(b) all expenses of each such audit, including any pre-approved reasonable expenses incurred by FCE for such audit, will be for the account of ExxonMobil.

FCE will cause any subcontractors to preserve documentation and allow ExxonMobil to audit such books, records, and accounts of subcontractors by way of auditing FCE.

18.03 **Accurate Records.** Both Parties agree that all records relating to any Project, including invoices, financial reports, accounting reports, and other financial records relating to any Project will be complete and reflect accurately the facts about all activities and transactions, and both Parties may rely on all such records as being complete and accurate in any further recordings and reports made by the Parties for any purpose. If either Party becomes aware that any such records are inaccurate or incomplete, that Party will promptly notify the other Party in writing and provide accurate and complete information.

ARTICLE 19 – TAXES

19.01 **Tax Responsibility**. Each Party will be responsible for and will bear its own tax liabilities, of whatever kind and imposed by whatever taxing entity or entities incurred in connection with the existence or any performance of any activities under this Agreement or the granting of licenses or other rights and considerations hereunder.

19.02 **Tax Cooperation**. Each Party will reasonably cooperate with the other Party to assist the other Party in providing information to support tax filings associated with this Agreement.

ARTICLE 20 – ADDITIONAL PROVISIONS

20.01 **Site Requirements.** Each Party agrees that if any employees of the Party or its Affiliates visit, or are physically located at, the facilities of the other Party, during the course of the Program, then such employees will abide by all site requirements of the other Party made known to them, including but not limited to, site requirements pertaining to safety, security, health and the environment.

20.02 **Independent Contractors**. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement, or any course of action by either Party pursuant to this Agreement, will be construed or deemed to constitute or create a joint venture, partnership, agency or employment relationship between the Parties or between either Party and the employees or other representatives of the other Party.

20.03 **Independent Entities**. Each Party enters into this Agreement solely on its own behalf and not on behalf of any other person or entity. Each Party warrants that it is an independent legal entity with the power and authority to enter into Agreements solely on its own behalf. No Party hereto will assert any defense of sovereign immunity that may be available to it in any resolution of any dispute under this Agreement; all such defenses are expressly waived by the Parties.

20.04 **Future Work**. This Agreement shall not constitute or imply any promise or intention: (a) to enter into any other agreement of any nature, (b) to make any purchase of products or services by either Party or its Affiliates, or (c) to make any commitment by either Party, its Affiliates, or licensees with respect to present or future marketing or supply of any product or service.

Notwithstanding the foregoing, prior to the end of the Term of this Agreement and subject to FCE achieving Milestone 1 and Milestone 2 to ExxonMobil's satisfaction, the Parties agree to negotiate in good faith commercially reasonable terms for the demonstration of Generation 2 Technology at one or more of ExxonMobil's commercial facilities.

20.05 **Workplace Harassment.** Each Party's employees, agents, and subcontractors who will perform work hereunder or communicate with the other Party's employees, agents, customers, or contractors will not engage in any harassment of the other Party's employees, agents, customers, or contractors. The term "harassment" as used herein includes all forms of unlawful harassment based on race, color, sex, religion, national origin, citizenship status, age, genetic information, physical or mental disability, veteran, sexual orientation, gender identity or other legally protected status; as well as all other forms of harassment, which, while not unlawful, are inappropriate in a business setting. If any of one Party's employees, agents, or subcontractors who perform work hereunder or communicate with the other Party's employees, agents, customers, or contractors have not been informed of the standard of conduct above, the one Party will inform them. Each Party will promptly notify the other Party contact for the applicable services of any report or complaint of harassment or of any violation of the above standard of conduct. Each Party will cooperate with the other Party in any investigation the other Party may make, including making each Party's employees, agents and subcontractors available for questioning by the other Party's designated investigators. Each Party agrees not to retaliate against anyone who reports an incident of harassment or who cooperates in any investigation of a report of an incident.

20.06 **No Third Party Beneficiaries**. No third parties are intended to be third party beneficiaries under this Agreement. None of the provisions of this Agreement will be enforceable by a third party. For the avoidance of doubt, permitted assignees of a Party pursuant to Article 14 (Assignment) will not be considered third parties for purposes of this Paragraph.

20.07 **Internal Conflict.** In the event of a conflict between the provisions in the body of this Agreement and any Project Description, the terms of the body of this Agreement will control.

20.08 **Severability**. The provisions of this Agreement are deemed severable. The invalidity or unenforceability of any provision of this Agreement will not affect the validity or enforceability of any other provision hereof which can be given effect without the invalid or unenforceable provision, and to this end the provisions of this Agreement are declared to be severable and the balance of this Agreement will be construed and enforced as if this Agreement did not contain such invalid or unenforceable provision.

20.09 **Amendment; Modification; Waiver.** This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by authorized representatives of each party hereto. No waiver by any party of any of the provisions hereof will be effective unless explicitly set forth in writing and signed by the waiving party. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement will operate or be construed as a waiver thereof; nor will any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

20.10 **Integration.** The Parties have entered into the following related agreements: Prior JDA, Non-Disclosure Agreement, License Agreement, and Memorandum of Understanding. This Agreement (including, for the avoidance of doubt, any fully executed Project Descriptions) constitutes the entire agreement between the Parties and it supersedes all negotiations, representations or agreements, oral or written, express or implied, as to its specific subject matter. Notwithstanding the foregoing, the status of the related agreements shall be as follows:

Prior JDA. As of the Effective Date of this Agreement, the Prior JDA is terminated. Any rights and obligations that were to survive termination of the Prior JDA (pursuant to Section 14.06 of the Prior JDA) are also terminated, except the confidentiality and use restrictions on Prior JDA Background Information and Prior JDA Project Results. Such confidentiality and use restrictions, as set forth in the Prior JDA, will survive termination but will be superseded and replaced by the confidentiality and use restrictions set forth in Article 4 (Disclosure, Confidentiality, and Restricted Use) of this Agreement.

Memorandum of Understanding. As of the Effective Date of this Agreement, the Memorandum of Understanding is terminated, but the confidentiality obligations set forth in the Memorandum of Understanding shall survive termination.

Non-Disclosure Agreement and License Agreement. This Agreement does not modify, abrogate, terminate or supersede any other prior written agreements between the Parties except as specifically noted herein, and such agreements will continue to be applicable in accordance with their terms. For clarity, this Agreement does not modify, abrogate, terminate or supersede the terms and conditions of the Non-Disclosure Agreement or the License Agreement.

20.11 **Arm's Length Transaction**. This Agreement represents a negotiated, arm's length transaction. The transactions contemplated under this Agreement are being made by each Party for reasonably equivalent value and fair consideration. The transactions contemplated in this Agreement will not constitute a fraudulent transfer or fraudulent conveyance or any act with similar consequences or potential consequences under 11 U.S.C. Section 548 and other similar laws, or otherwise give rise to any right of any creditor of a Party whatsoever to lodge any claim against the other Party or avoid the transactions hereunder.

20.12 **Execution.** This Agreement may be executed in counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument. Where provided for in applicable law, this Agreement may be executed and delivered electronically. If executing this Agreement using a handwritten signature, a Party may deliver a copy of such signature via electronic transmission and may provide the other Party a duplicate original so each Party retains an original for its records.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in their respective corporate names by their duly authorized officers.

FUELCELL ENERGY, INC.		**EXXONMOBIL RESEARCH AND ENGINEERING COMPANY**	
By:	/s/ Jason B. Few	By:	/s/ Vijay Swarup
Name:	Jason B. Few	Name:	Vijay Swarup
Title:	President, Chief Executive Officer and Chief Commercial Officer	Title:	VP R&D
Date:	November 5, 2019	Date:	November 5, 2019

APPENDIX A – DEFINITIONS

"**Affiliate(s)**" means any legal entity which, directly or indirectly, at the time in question, controls, is controlled by, or is under common control with the designated Party. For the purposes of this definition, "control" is defined as direct or indirect ownership of fifty percent (50%) or more of the voting interest or economic interest in the controlled entity or such other relationship whereby the controlling entity determines or has the right to determine the majority of the Board of Directors or an equivalent governing body of the controlled entity.

"**Agreement**" means this agreement, together with the appendices attached to this agreement and any Project Descriptions, extensions, renewals, or amendments hereof agreed to in writing and signed by the Parties.

"**Authorized Third Parties**" means Drax Group Plc. and Alberta Innovates Corporation, and, subject to FCE obtaining the prior written consent of ExxonMobil, which consent will not be unreasonably withheld, conditioned, or delayed, the respective successors, assigns, joint venturers, partners and contractors of each of them.

"**Authorized Work**" means non-commercial activities restricted to research and development, pilot plant, deployment, and demonstration projects, and commercial activities for which FCE has obtained the prior written consent of ExxonMobil.

"**Background Information**" in connection with a designated Party means technical information, data, know-how, expertise, materials (including hardware, samples, models, algorithms, and software), calculations, innovations, inventions, discoveries, improvements, formulations, manufacturing techniques, equipment designs, methods, processes, and the like, of the designated Party or its Affiliates that is:

(a) owned or controlled by the designated Party or its Affiliates (in the sense of having the right to license without accounting to others); and

(b) conceived, created, developed, or acquired by the designated Party or its Affiliates:

(1) prior to the Effective Date of this Agreement; or

(2) at any time, but independently of any Project prior to the termination of this Agreement.

Background Information includes Background Samples but does not include Program Information.

Background Information further includes any business or financial information of the indicated Party relating to the subject matter of this Agreement that is disclosed to the other Party under this Agreement, including, but not limited to, financial data, costs, margins, overhead, returns on capital employed, marketing strategies, and licensing strategies and terms.

"**Background Patents**" in connection with a designated Party means all patents and patent applications (including continuations, continuations-in-part, or divisions thereof, any patent resulting therefrom, and reissues, re-exams or extensions thereof, and revisions thereof arising from oppositions, *inter or ex parte* proceedings, or other patent office or judicial proceedings) of all countries, whenever filed, that are:

(a) owned or controlled by the designated Party or its Affiliates (in the sense of having the right to license without accounting to others); and

(b) based solely on Background Information and not included in the definition of Project Patents.

"**Background Sample(s)**" means ExxonMobil Background Sample(s) and/or FCE Background Sample(s) depending on the context in which the term is utilized.

"**Bankruptcy Code**" is defined in Paragraph 12.05 (Bankruptcy).

"**Capture Rate**" means the percentage of CO_2 transferred from the cathode inlet to the anode outlet.

"**Carbon Capture Applications**" means applications in which the MCFCs concentrate carbon dioxide from industrial or power sources, and for any other purpose attendant thereto or associated therewith.

"**Carbonate Transference**" means the current density that is due to carbonate transfer as a percentage of total current density.

"**Change in Control**" means the occurrence of any one or more of the following at any time after the date hereof with respect to FCE:

a) a merger or consolidation with any Person which results in the holders of the voting securities of FCE outstanding immediately prior thereto (other than the acquirer, its "affiliates" and "associates" (as such terms are used in the Securities Exchange Act of 1934)) ceasing to represent at least fifty percent (50%) of the combined voting power of the surviving entity (or, if applicable, its parent company) immediately after such merger or consolidation;

b) any Major Competitor is or becomes the beneficial owner by purchasing directly from FCE, voting securities representing ten percent (10%) or greater than the actual voting power of any such entity;

c) the sale to any Major Competitor of all or substantially all of the business of FCE to which this Agreement relates (whether by merger, consolidation, sale of stock, sale of assets or other similar transaction);

d) any Person (which shall not be any trustee or other fiduciary holding securities under an employee benefit plan of such Person, or any corporation owned directly or indirectly by the stockholders of such Person, in substantially the same proportion as their ownership of stock of such Person), together with any of such Person's "affiliates" or "associates", as such terms are used in the Securities Exchange Act of 1934, becoming the beneficial owner of fifty percent (50%) or more of the combined voting power of the outstanding securities of FCE or by contract or otherwise having the right to control the board of directors or equivalent governing body of FCE or the ability to cause the direction of management of FCE (or, if applicable, its parent company);

e) the approval by such entity's board of directors or shareholders of any reorganization or transaction that would cause any of the situations described in clauses (a) through (d) to occur; or

f) the approval by the board of directors or other governing body or the shareholders or other equity holders of FCE of any plan or proposal for its liquidation or dissolution.

The occurrence or non-occurrence of a Change in Control does not alter or limit section 14.01 of this Agreement.

"**Confidential Background Information**" means, collectively, any and all Background Information that a Party is required to keep confidential pursuant to the terms and conditions of this Agreement.

"**Confidential Information**" means, collectively, any and all Confidential Program Information, Confidential Background Information, and any other types of information, that a Party is required to keep confidential pursuant to the terms and conditions of this Agreement.

"**Confidential Program Information**" means, collectively, any and all Program Information that FCE is required to keep confidential pursuant to the terms and conditions of this Agreement.

"**Cure Period**" means a period commencing on the date the defaulting Party receives the written notice of breach or default from the non-defaulting Party pursuant to Paragraph 12.03 and continuing until thirty (30) calendar days thereafter; provided, however, that if prior to the expiration of this period the defaulting Party provides the non-defaulting Party with written evidence that the breach or default cannot reasonably be cured within such period and the defaulting Party has promptly commenced and is diligently pursuing efforts to cure the breach or default, then the Cure Period shall continue as long as such diligent efforts to cure continue, but not beyond the date that is sixty (60) days after the expiration of the initial thirty (30) calendar day Cure Period.

"**Definition Agreement**" means the agreement between the Parties effective as of October 31, 2019, bearing ExxonMobil Document No. LAW-2019-3850.

"**Disclosing Party**" means the Party that discloses, directly or indirectly, information or other materials to the Receiving Party hereunder.

"**Direct Costs**" means reimbursable costs, approved in advance by the Steering Committee, which are (i) operational expenditures of FCE associated with the Program not included in the FTE Cost, including subcontractors, (ii) material or capital expenditures of FCE associated with the Program; and (iii) approved FCE travel costs to attend SC meetings or conferences, and use of contractors in furtherance of a Project.

"**Effective Date**" means October 31, 2019.

"**Exclusivity and Technology Access Fee**" is defined in Paragraph 10.02 (Up-front Exclusivity and Technology Access Fee Payment).

"**ExxonMobil**" is defined in the preamble.

"**ExxonMobil Background Information**" means Background Information that: (a) was developed or acquired by ExxonMobil independently of a Project, and (b) is provided by ExxonMobil for use in a Project under this Agreement. ExxonMobil Background Information does not include Program Information.

"**ExxonMobil Background Sample**" means a non-commercial sample of material, component, device, or the like that: (a) was developed or acquired by ExxonMobil independently of the Project, and (b) is provided by ExxonMobil for use in a Project under this Agreement. ExxonMobil Background Samples does not include Program Samples.

"**FCE**" is defined in the preamble.

"**FCE Background Information**" means Background Information that: (a) was developed or acquired by FCE independently of a Project, and (b) is provided by FCE for use in a Project under this Agreement. FCE Background Information does not include Program Information.

"**FCE Background Sample**" means a non-commercial sample of material, component, device, or the like that: (a) was developed or acquired by FCE independently of a Project, and (b) is provided by FCE for use in a Project under this Agreement. FCE Background Samples does not include Program Samples.

"**FTE**" means a full-time employee of FCE or an equivalent thereof, dedicated to the conduct of the Program based on a total of one thousand eight hundred and fifty-six (1,856) hours per year of direct project work per year. FTEs will include engineers, scientists, and any other functions mutually agreed to by the Steering Committee. Non-devoted personnel (e.g., FCE's Board of Directors, management, secretarial, administrative, human resources, finance, purchasing, shipping and receiving, information technology specialists, lawyers, cleaning and food service personnel) are not FTEs. Individuals may be counted as fractional FTEs by using the individual's total hours of work for FCE on the Program (as opposed to total hours of work) as the numerator and 1,856 as the denominator. For clarity, the phrase "direct project work" means the applicable person is engaged in activities contemplated to be performed by Project Description and excludes time incurred by a person on indirect work-related functions, such as time spent on management, training, general meetings, workplace events, completing time cards, and similar administrative functions, except for attendance at Steering Committee meetings.

"**FTE Costs**" means the product of the FTE Rate and the hours worked of the total number of FTEs.

"**FTE Rate**" means the hourly amount agreed to by the Parties per FTE. As of the Effective Date, the FTE Rate for scientists and engineers is three-hundred and twenty-seven United States dollars ($327.00 USD) and the FTE Rate for all other FTEs is one-hundred and ninety-four United States dollars ($194.00 USD). Increases in the FTE Rate must be approved by the Steering Committee.

"**Generation 1 Technology**" is defined in the Definition Agreement.

"**Generation 2 Technology**" is defined in the Definition Agreement.

"**Gross Negligence**" means any act or failure to act (whether sole, joint or concurrent) which seriously and substantially deviates from a diligent course of action or which is in reckless disregard of or indifference to the harmful consequences.

"**Hydrogen Applications**" means applications in which the MCFCs are used solely for hydrogen generation in combination with power generation or combined heat and power generation.

"**Initial Payment**" is defined in Paragraph 10.01(b) (Project Costs).

"**Inlet CO_2 Concentration**" means CO_2 concentration in the cathode inlet measured at room temperature conditions (about 23 ^oC) via gas chromatography, as calibrated according to conventional methods.

"**Inlet O_2 Concentration**" means O_2 concentration in the cathode inlet measured at room temperature conditions (about 23 ^oC) via gas chromatography, as calibrated according to conventional methods.

"**Inlet Water Concentration**" means water concentration in the cathode inlet measured at room temperature conditions (about 23^oC) via gas chromatography, as calibrated according to conventional methods.

"**8th Inning Invoice**" is defined in Paragraph 10.01(d) (Project Costs).

"**9th Inning Invoice**" is defined in Paragraph 10.01(d) (Project Costs).

"**License Agreement**" means the agreement between the Parties effective June 11, 2019 entitled License Agreement bearing ExxonMobil Document No. LAW-2019-3245.

"**Major Competitor**" means a company with a market capitalization in excess of fifty billion United States dollars ($50 billion USD) and whose principal business involves exploration for, and/or production of, crude oil and/or natural gas, manufacture of petroleum products and/or transportation and/or sale of crude oil, natural gas, and/or petroleum products.

"**Memorandum of Understanding**" means the non-binding agreement between ExxonMobil and FCE effective August 26, 2019.

"**Milestone 1**" is defined in the Definition Agreement.

"**Milestone 2**" is defined in the Definition Agreement.

"**Milestone Payments**" is defined in Paragraph 10.03 (Milestone Payments).

"**Molten Carbon Fuel Cells**" or "**MCFCs**" means a powerplant system including MCFC Stacks and Balance of Plant based on a fuel cell that comprises an electrolyte, an anode, and a cathode wherein the electrolyte comprises one or more carbonate salts that are molten (liquid) at operating temperatures. An "MCFC Stack" is a set of fuel cells connected electrically in series, arranged vertically or horizontally, that share common ducting for the cathode and anode streams. The ducting is considered part of the MCFC Stack. Further, the MCFC Stack may include "Reformer Units", which are non-electrochemical units that catalytically reform the anode feed to H2 and CO, but do so without producing any electricity. "Balance of Plant" or "BOP" means all other equipment besides the MCFC Stack that is required to operate the MCFC as a stand-alone device, i.e., not in CO_2 capture mode or in H_2/syngas generation mode. For power generation this can include the dc-to-ac power conversion, fuel and water processing, air supply, and heat exchange equipment.

"**Non-Affiliated Third Party**" means a third party who is not Party or an Affiliate of a Party.

"**Non-Disclosure Agreement**" means the agreement between the Parties effective December 7, 2018 entitled Mutual Non-Disclosure Agreement bearing ExxonMobil Document No. EM11762.

"**Party**" and "**Parties**" is defined in the preamble.

"**Person**" means any trust, natural person, firm or partnership, company, corporation, or other entity that is given, or is recognized as having, legal personality by the law of any jurisdiction, country, state or territory, unincorporated body and association (including joint venture and consortium), any emanation of a sovereign state or government, whether national, provincial, local or otherwise, any international organization or body (whether or not having legal personality), and any other juridical entity, in each case wherever resident, domiciled, incorporated or formed, and more than one of the foregoing acting as a group.

"**Policies**" are defined in Paragraph 17.01 (Business Standards).

"**Potential Decay Rate**" is defined in the Definition Agreement.

"**Power Applications**" means applications in which the MCFCs are solely used for power generation, combined heat and power generation, or both.

"**Power Density**" means the product of the average cell or stack current density and the average cell potential.

"**Prior JDA**" means the agreement between the Parties effective April 30, 2016 entitled Joint Development Agreement bearing ExxonMobil Document No. EM09080.

"**Prior JDA Background Information**" means Background Information as defined in the Prior JDA.

"**Prior JDA Project Patents**" means Project Patents as defined in the Prior JDA, which by definition are jointly-owned by the Parties.

"**Prior JDA Project Results**" means Project Results as defined in the Prior JDA, which by definition are jointly-owned by the Parties.

"Project(s)" is defined in Paragraphs 2.01 (Program / Projects).

"**Project Description**" is defined in Paragraph 2.01 (Program / Projects).

"**Program**" is defined in Paragraph 2.01 (Program / Projects).

"**Program Information**" means all information and associated copyrights, whether or not patentable, that is conceived, created, developed or acquired in or for the Program during the Term of the Agreement from any source (including from any employee of either Party or its Affiliates, or from any Party's or its Affiliates' contractors or consultants, whether alone or jointly with one or more others) in the course of and as a result of working directly on the Program. Program Information shall be owned by ExxonMobil and its Affiliates.

Program Information specifically includes Program Inventions and Program Samples. Program Information also includes improvements to either Party's Background Information conceived, created, developed or acquired in or for the Program and resulting directly from activities performed in the course of and as a result of working directly on the Program.

"**Program Inventions**" means Program Information that is characterized as inventions, discoveries, or improvements (whether patentable or not) that are conceived, created, developed, or acquired by or on behalf a Party or its Affiliates during the Term of this Agreement and one (1) year thereafter, and in the course of and as a result of working directly on the Program. Program Inventions shall also include Project Inventions (as defined in the Prior JDA) that have not been filed with any national, regional, or international patent body or organization by the Effective Date of this Agreement. Program Inventions shall be owned by ExxonMobil and its Affiliates.

"**Program Patents**" means all patents and patent applications (including continuations, continuations-in-part, or divisions thereof, any patent resulting therefrom, and reissues, re-exams or extensions thereof, and revisions thereof arising from oppositions, *inter or ex partes* proceedings, or other patent office or judicial proceedings) filed with any national, regional, or international patent body or organization after the Effective Date of this Agreement, that are based upon and/or claim one or more features of Program Inventions. Program Patents shall be owned by ExxonMobil and its Affiliates.

"**Program Results**" means, collectively Program Information, Program Patents, and copyrightable works resulting from the Program.

"**Program Sample**" means a sample of material, component, device, or the like that is developed during the Term of this Agreement, in the course of and as a result of working directly on the Program.

"**Receiving Party**" means the Party that receives, directly or indirectly, information or other materials from the Disclosing Party.

"**Research Costs**" means Direct Costs plus FTE Costs.

"**Scope**" is defined in the preamble.

"**Steering Committee**" or "**SC**" is defined in Paragraph 3.01 (Steering Committee).

"**Sample**" means collectively FCE Background Sample, ExxonMobil Background Sample, and Program Sample.

"**Technical Manager**" is defined in Paragraph 3.02 (Technical Managers).

"**Term**" or "**Term of this Agreement**" is defined in Paragraph 12.01 (Term).

"**Total Research Cost**" is defined in Paragraph 10.01(a) (Project Costs).

"**Willful Misconduct**" means an intentional disregard of good and prudent standards of performance or of any of the substantive terms of this Agreement.

"**Work**" means any activities of any kind, including but not limited to, research and development, pilot plant, manufacture testing, demonstration, or commercial development/deployment.

APPENDIX B – SAMPLE PROJECT DESCRIPTION FORMAT

PROJECT DESCRIPTION No. ____

Project Name: _____

LAW-2019-3608

FCE Agreement No. :_____

Date: _____

Receiving Company Name & Address

Attention: _____

Dear _____,

This Project Description No. **[NUMBER]** is issued pursuant to the Joint Development Agreement, effective [**EFFECTIVE DATE**] between ExxonMobil Research and Engineering Company ("ExxonMobil") and FuelCell Energy, Inc. ("FCE"), bearing ExxonMobil Agreement No. LAW-2019-3608 ("Agreement")**.** Each Party's activities hereunder will be conducted in accordance with and subject to the terms and conditions of the Agreement. The specific terms which will apply to this Project are described below.

1. PROJECT DESCRIPTION/OBJECTIVES:

   _____

2. TIME SCHEDULE:

   Commencement Date: _____

   Completion Date: _____

3. STEERING COMMITTEE MEMBERS / TECHNICAL MANAGERS:

   FCE: _____

   ExxonMobil: _____

4. PROJECT BUDGET

Task	**1A**	**1B**	**1C**	**….**
Number of FTEs				
FTE Cost				
Direct Costs				
TOTAL				

5. DELIVERABLES:

   _____

If the foregoing is satisfactory, please have a duly authorized representative of your company sign duplicate originals of this Project Description and return both to for counter-execution on behalf of our company. A fully-executed original will be returned for your files.

Very truly yours,

EXXONMOBIL RESEARCH AND ENGINEERING COMPANY

By: _____

Name: _____

Title: _____

Date: _____

ACCEPTED AND AGREED TO:

FUELCELL ENERGY, INC.

By: _____

Name: _____

Title: _____

Date: _____

Exhibit 10.2

CREDIT AGREEMENT

dated as of

October 31, 2019

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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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 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.

"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.

"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.

"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 prior to the Closing Date, 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.

"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.

"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) 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.

"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".

"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).

"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 prior to the Closing Date, 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 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 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) 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 Loans" means the Loans made on the Initial Funding Date.

"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.

"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.

"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) any Additional Material Agreement; and

(c) 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 (8th) 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.

"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, 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.

"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.

"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), and (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.

"Permitted Release" means any release and distribution to a Business Unit Account from (i) the Project Proceeds Account of either (A) the proceeds from a Project Disposition/Refinancing in respect of an Excluded Project Company that shall have been deposited into the Projects Proceeds Account under Section 5.18(f)(i) (after giving effect to any required transfer of all or a portion of such funds into Module Replacement Reserve Account as set forth in such Section 5.18(f)(ii)) or (B) a distribution of funds from an Excluded Project Company or an Existing Foreign Subsidiary that shall have been deposited into the Project Proceeds Account under Section 5.18(f)(iii) or (ii) the Net Available Amount of a Disposition of any Existing Foreign Subsidiary or Excluded Project Company that shall have been deposited into the Mandatory Prepayment Account under Section 5.18(h)(i).

"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% (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%, 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 Tulare Project, $5,000,000, (e) with respect to the Yaphank Project, $30,000,000, and (f) 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.

"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) San Bernardino Fuel Cell, LLC, (iii) Montville Fuel Cell Park, LLC, (iv) Eastern Connecticut Fuel Cell Properties, LLC, (v) CR Fuel Cell, LLC, (vi) BRT Fuel Cell, LLC, (vii) Derby Fuel Cell, LLC, (viii) Homestead Fuel Cell 1, LLC, (ix) Central CT Fuel Cell 1, LLC, (x) Farmingdale 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.

"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 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 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.

"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.

"Shortfall Amount" has the meaning assigned to such term in Section 5.10(e).

"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 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).

"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 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 prior to the Closing Date, 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 prior to the Closing Date, 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.

(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 and/or 4.04, 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.

(d) Notice by the Administrative Agent to the Lenders. 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 the Borrower has satisfied the conditions set forth in Section 4.02 or 4.03, 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. 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. With respect to the Initial Loans, the Administrative Agent shall distribute the funds in accordance with the Funds Flow Memorandum.

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) In the event that (i) 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, (x) any loan discount amount contemplated by the Loan Discount Letter and (y) any expenses payable in accordance with Section 10.03(a)(A)) into the Borrower Funding Account, or (ii) the Administrative Agent shall have not instructed the Depositary Agent to apply the Loans deposited in the Borrower Funding Account pursuant to clause (i) in accordance with Schedule 5.13 as set forth in Section 5.18(b), in each case, 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 conditions in clauses (i) and (ii) above 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. 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 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) 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) 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).

(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 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(c), 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).

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(b)(iv).

(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) (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.

(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.

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.

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. The occurrence of each Funding Date (including the Initial Funding Date) and each Lender's obligations to make the Loans pursuant to Section 2.01 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) 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) 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 (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. As of such Funding 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 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 or Section 4.04, as applicable, will not be satisfied as of the Closing Date or applicable Funding 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 or Section 4.04, as applicable, have been satisfied. No such disclosure by Borrower that a condition specified in Section 4.01, Section 4.02, Section 4.03 or Section 4.04, as applicable, will not be satisfied as of Closing Date or the applicable Funding Date, as applicable, shall affect the right of each Lender not to make the Loans requested to be made by it 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 on Schedule 5.13.

(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. 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. On each Funding Date on or after the Second Funding Date, the Administrative Agent shall deposit the proceeds of the Loans funded on such Funding Date into the Borrower Funding Account. 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. The Administrative Agent shall instruct the Depositary Bank to release and distribute the amounts contained in the Borrower Funding Account (i) with respect to the amounts funded into the Borrower Funding Account on the Second Funding Date, for the purposes, and in the amounts, set forth on Schedule 5.13, and (ii) with respect to any amounts funded into the Borrower Funding Account on any Funding Date after the Second Funding Date, 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 the applicable 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 permitted to be retained in such Covered Project Account on such date as set forth in the applicable 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) 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), 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);

(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) in the event that the Borrower shall desire to make a Permitted Release of all or any portion of the amounts then held in the Project Proceeds Account, the Borrower shall provide written notice thereof to the Administrative Agent, and, upon receipt of such notice, the Administrative Agent shall instruct the Depositary Bank to withdraw funds from the Project Proceeds Account in an amount equal to the Permitted Release so requested by the Borrower and transfer such funds to a Business Unit Account specified by the Borrower; and

(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).

(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; provided, that, in the event that the Borrower shall desire to make a Permitted Release of all or any portion of the amounts then held in the Mandatory Prepayment Account, the Borrower shall provide written notice thereof to the Administrative Agent, and, upon receipt of such notice, the Administrative Agent shall instruct the Depositary Bank to withdraw funds from the Mandatory Prepayment Account in an amount equal to the Permitted Release so requested by the Borrower and transfer such funds to a Business Unit Account specified by the Borrower;

(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 (10th) 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 (10^{th}) 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) 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.

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 $5,000,000 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 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;

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) 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: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

FUELCELL ENERGY FINANCE II, INC., as Guarantor

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

BAKERSFIELD FUEL CELL 1, LLC., as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CENTRAL CA FUEL CELL 2, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

YAPHANK FUEL CELL PARK, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

LONG BEACH TRIGEN, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

SAN BERNARDINO FUEL CELL, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

MONTVILLE FUEL CELL PARK, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

EASTERN CONNECTICUT FUEL CELL PROPERTIES, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CR FUEL CELL, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

BRT FUEL CELL, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

DERBY FUEL CELL, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

HOMESTEAD FUEL CELL, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CENTRAL CT FUEL CELL 1, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

FARMINGDALE CT FUEL CELL 1, LLC, as Guarantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC,
as Administrative Agent and Collateral Agent

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES FUND II, L.P., as Lender

By: Orion Energy Credit Opportunities Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holding, LLC
Its: General Partner

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES FUND II PV, L.P., as Lender

By: Orion Energy Credit Opportunities Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holding, LLC
Its: General Partner

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES FUND II GPFA, L.P.,
as Lender

By: Orion Energy Credit Opportunities Fund II GP, L.P.
Its: General Partner

By: Orion Energy Credit Opportunities Fund II Holding, LLC
Its: General Partner

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

EXHIBIT A
TO
CREDIT AGREEMENT

Form of Assignment and Assumption

This Assignment and Assumption (the "Assignment and Assumption") is dated as of the Effective Date set forth in item 9 below and is entered into by and between [the][each][1] Assignor identified in item 1 below ([the][each, an] "Assignor") and [the][each][2] Assignee identified in item 2 below ([the][each, an] "Assignee"). [It is understood and agreed that the rights and obligations of [the Assignors][the Assignees][3] hereunder are several and not joint.][4] Capitalized terms used but not defined herein shall have the meanings given to them in the Credit Agreement identified in item 7 below (as amended, restated, supplemented or otherwise modified and in effect from time to time, the "Credit Agreement"), receipt of a copy of which is hereby acknowledged by [the][each] Assignee. The Standard Terms and Conditions set forth in Annex 1 (the "Standard Terms and Conditions") attached hereto are hereby agreed to and incorporated herein by reference and made a part of this Assignment and Assumption as if set forth herein in full.

For an agreed consideration, [the][each] Assignor hereby irrevocably sells and assigns to [the Assignee][the respective Assignees], and [the][each] Assignee hereby irrevocably purchases and assumes from [the Assignor][the respective Assignors], subject to and in accordance with the Standard Terms and Conditions and the Credit Agreement, as of the Effective Date inserted by the Administrative Agent as contemplated in item 9 below (the "Effective Date") (i) all of [the Assignor's][the respective Assignors'] rights and obligations in [its capacity as a Lender] [their respective capacities as Lenders] under the Credit Agreement and any other Financing Document or other documents or instruments delivered pursuant thereto to the extent related to the amount and percentage interest identified in item 8 below of all of such outstanding rights and obligations of [the Assignor][the respective Assignors] related to the tranche identified below and (ii) to the extent permitted to be assigned under Applicable Law, all claims, suits, causes of action and any other right of [the Assignor (in its capacity as a Lender)][the respective Assignors (in their respective capacities as Lenders)] against any Person, whether known or unknown, arising under or in connection with the Credit Agreement or other Financing Document, any other documents or instruments delivered pursuant thereto or the loan transactions governed thereby or in any way based on or related to any of the foregoing, including, but not limited to, contract claims, tort claims, malpractice claims, statutory claims and all other claims at law or in equity related to the rights and obligations sold and assigned pursuant to clause (i) above (the rights and obligations sold and assigned by [the] [any] Assignor to [the] [any] Assignee pursuant to clauses (i) and (ii) above being referred to herein collectively as [the][an] "Assigned Interest"). Each such sale and assignment is without recourse to [the][any] Assignor and, except as expressly provided in this Assignment and Assumption, without representation or warranty by [the][any] Assignor.

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1 *Note to Form*: For bracketed language here and elsewhere in this form relating to the Assignor(s), if the assignment is from a single Assignor, choose the first bracketed language. If the assignment is from multiple Assignors, choose the second bracketed language.

2 *Note to Form*: For bracketed language here and elsewhere in this form relating to the Assignee(s), if the assignment is to a single Assignee, choose the first bracketed language. If the assignment is to multiple Assignees, choose the second bracketed language.

3 *Note to Form*: Select as appropriate.

4 *Note to Form*: Include and adjust as appropriate if there are either multiple Assignors or multiple Assignees.

1. Assignor[s]: _____

2. Assignee[s]: _____

[if applicable, for each Assignee, indicate [Affiliate][Related Fund] of [identify Lender]]

3. Borrower: FuelCell Energy, Inc.

4. Guarantors: [TBD]

5. Administrative Agent: Orion Energy Partners Investment Agent, LLC

6. Collateral Agent: Orion Energy Partners Investment Agent, LLC

7. Credit Agreement: The Credit Agreement dated as of October 31, 2019 among the Borrower, the Guarantors, the Lenders from time to time party thereto, the Administrative Agent and the Collateral Agent.

8. Assigned Interest[s]:

Assignor[s]	Assignee[s]	Aggregate Amount of Commitment/Loans of Assignor[s]	Amount of Commitment/ Loans Assigned	Percentage Assigned of Commitment/ Loans[5]
		$	$	%
		$	$	%
		$	$	%

9. Effective Date:, 20__[6]

10. [[Each][The] Assignor attaches the Note[s] held by it [and requests that the Administrative Agent exchange such Note[s] for new Note[s] payable to the [respective] Assignee in [an amount/amounts] equal to the [Commitment][and] [Loan[s]] assumed by the [respective] Assignee pursuant hereto [and to the [respective] Assignor in [an amount/amounts] equal to the [Commitment][and][Loan[s]] retained by the [respective] Assignor].][7]

5 *Note to Form*: Set forth, to at least 9 decimals, as a percentage of the Commitment/Loans of all Lenders thereunder.

6 *Note to Form*: To be inserted by Administrative Agent and to be the effective date of recordation of transfer in the register therefor (following receipt of Borrower's consent, if applicable).

7 *Note to Form*: Include if the Assignee holds a Note, adjusting language as appropriate if the Assignee also elects to hold Notes.

The terms set forth in this Assignment and Assumption are hereby agreed to as of the Effective Date:[8]

ASSIGNOR[S]

[NAME OF ASSIGNOR]

By: _____
Name:
Title:

[NAME OF ASSIGNOR]

By: _____
Name:
Title:

ASSIGNEE[S]

[NAME OF ASSIGNEE]

By: _____
Name:
Title:

(a) [NAME OF ASSIGNEE]

By: _____
Name:
Title:

8 *Note to Form*: Add signature blocks as necessary.

Accepted by:

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, as Administrative Agent

By: _____
Name:
Title:

[Consented to:]

[**FUELCELL ENERGY, INC.**, as Borrower][9]

By: _____
Name:
Title:

9 *Note to Form*: To be included when the Borrower's consent is required pursuant to Section 10.04(b).

STANDARD TERMS AND CONDITIONS FOR ASSIGNMENT AND ASSUMPTION

1. Representations and Warranties.

1.1 Assignor[s]. [The][Each] Assignor (a) represents and warrants that (i) it is the legal and beneficial owner of [the][the relevant] Assigned Interest, (ii) [the][such] Assigned Interest is free and clear of any lien, encumbrance or other adverse claim and (iii) it has full power and authority, and has taken all action necessary, to execute and deliver this Assignment and Assumption and to consummate the transactions contemplated hereby; and (b) assumes no responsibility with respect to (i) any statements, warranties or representations made in or in connection with the Credit Agreement or any other Financing Document, (ii) the execution, legality, validity, enforceability, genuineness, sufficiency or value of the Financing Documents or any collateral thereunder, (iii) the financial condition of the Borrower, any of its Affiliates or any other Person obligated in respect of any Financing Document or (iv) the performance or observance by the Borrower, any of its Affiliates or any other Person of any of their respective obligations under any Financing Document.

1.2 Assignee[s]. [The][Each] Assignee (a) represents and warrants that (i) it has full power and authority, and has taken all action necessary, to execute and deliver this Assignment and Assumption and to consummate the transactions contemplated hereby and to become a Lender under the Credit Agreement, (ii) it meets all the requirements to be an assignee under Section 10.04(b) of the Credit Agreement (subject to such consents, if any, as may be required under Section 10.04(b) of the Credit Agreement), (iii) from and after the Effective Date, it shall be bound by the provisions of the Credit Agreement as a Lender thereunder and, to the extent of [the][the relevant] Assigned Interest, shall have the obligations of a Lender thereunder, (iv) it is sophisticated with respect to decisions to acquire assets of the type represented by the Assigned Interest and either it, or the person exercising discretion in making its decision to acquire the Assigned Interest, is experienced in acquiring assets of such type, (v) it has received a copy of the Credit Agreement and the other Financing Documents to which the Assignor[s] [was][were] party, and has received or has been accorded the opportunity to receive copies of the most recent financial statements delivered pursuant to Section 5.10 of the Credit Agreement, as applicable, and such other documents and information as it deems appropriate to make its own credit analysis and decision to enter into this Assignment and Assumption and to purchase [the][such] Assigned Interest, (vi) [it has duly executed and delivered to the Administrative Agent an Administrative Questionnaire,][10] (vii) it has,

10 *Note to Form*: Delete if there is an assignment to a Lender pursuant to Section 10.04(b)(v) of the Credit Agreement.

independently and without reliance upon the Administrative 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 Assignment and Assumption and to purchase [the][such] Assigned Interest, and (viii) if it is entitled to an exemption from or reduction of withholding tax under the law of the jurisdiction in which the Borrower is organized (or any treaty to which such jurisdiction is a party), attached to the Assignment and Assumption is any documentation required to be delivered by pursuant to the terms of the Credit Agreement, duly completed and executed by [the][such] Assignee; and (b) agrees that (i) [it will pay to the Administrative Agent, on or before the Effective Date, a processing and recordation fee in an amount of US $3,500.00,][11] (ii) it will, independently and without reliance on the Administrative Agent, [the] [any] Assignor or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Financing Documents, and [(ii)] [(iii)] it will perform in accordance with their terms all of the obligations which by the terms of the Financing Documents are required to be performed by it as a Lender.

2. Payments. From and after the Effective Date, the Administrative Agent shall make all payments in respect of [the][each] Assigned Interest (including payments of principal, interest, fees and other amounts) to [the][the relevant] Assignor for amounts which have accrued to but excluding the Effective Date and to [the][the relevant] Assignee for amounts which have accrued from and after the Effective Date. Each party hereto agrees that it will hold any interest, fees or other amounts that it may receive to which the other party hereto shall be entitled pursuant to the preceding sentence for account of such other party and pay, in like money and funds, any such amounts that it may receive to such other party promptly upon receipt.

3. General Provisions. This Assignment and Assumption shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns. This Assignment and Assumption may be executed in any number of counterparts, which together shall constitute one instrument. Delivery of an executed counterpart of a signature page of this Assignment and Assumption by telecopy shall be effective as delivery of a manually executed counterpart of this Assignment and Assumption. This Assignment and Assumption shall be governed by, and construed in accordance with, the law of the State of New York.

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11 *Note to Form*: Delete with respect to Affiliate Assignees in accordance with Section 10.04(b)(iv) of the Credit Agreement.

EXHIBIT B
TO
CREDIT AGREEMENT

Form of Note

$[●] [●], 20[●]

New York, New York

FOR VALUE RECEIVED, the undersigned (the "Borrower"), hereby promises to pay to [●] (the "Lender"), at the office of the Administrative Agent as provided for by the Credit Agreement referred to below, for the account of the Lender, the principal sum of $[●] (or such lesser amount as shall equal the aggregate unpaid principal amount of the Loans made by the Lender to the Borrower under the Credit Agreement), in lawful money of the United States of America and in immediately available funds, on the dates and in the principal amounts provided in the Credit Agreement, and to pay interest on the unpaid principal amount of each such Loan, at such office, in like money and funds, for the period commencing on the date of such Loan until such Loan shall be paid in full, at the rate per annum and on the dates provided in the Credit Agreement.

The date, amount and interest rate of each Loan made by the Lender to the Borrower, and each payment made on account of the principal thereof, shall be recorded by the Lender on its books and, prior to any transfer of this Note, endorsed by the Lender on the schedule attached hereto or any continuation thereof, provided that the failure of the Lender to make any such recordation or endorsement shall not affect the obligations of the Borrower to make a payment when due of any amount owing under the Credit Agreement or hereunder in respect of the Loans made by the Lender.

This Note evidences Loans made by the Lender under the Credit Agreement dated as of October 31, 2019 (as amended, restated, supplemented or otherwise modified and in effect from time to time, the "Credit Agreement") among, the Borrower, the Subsidiaries of the Borrower from time to time party thereto as Guarantors, the Lenders from time to time party thereto, the Administrative Agent and the Collateral Agent. Terms used but not defined in this Note have the respective meanings assigned to them in the Credit Agreement.

The Credit Agreement provides for the acceleration of the maturity of this Note upon the occurrence of certain events and for prepayments of the Loans upon the terms and conditions specified therein.

Except as permitted by Section 10.04(b) of the Credit Agreement, this Note may not be assigned by the Lender to any other Person.

This Note shall be governed by, and construed in accordance with, the law of the State of New York.

FUELCELL ENERGY, INC.,
as Borrower

By: _____
Name:
Title:

Exhibit B-2

Schedule of Loans

This Note evidences Loans made under the within described Credit Agreement to the Borrower, on the dates, in the principal amounts and bearing interest at the rates set forth below, subject to the payments and prepayments of principal set forth below:

Date	Principal Amount of loan	Interest Rate	Amount Paid or Prepaid	Notation made by

EXHIBIT B-1
TO
CREDIT AGREEMENT

FORM OF
U.S. TAX COMPLIANCE CERTIFICATE

(For Foreign Lenders That Are Not Partnerships For U.S. Federal Income Tax Purposes)

Reference is hereby made to the Credit Agreement dated as of October 31, 2019 (as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"), among FuelCell Energy, Inc. (the "Borrower"), the Subsidiaries of the Borrower from time to time party thereto as Guarantors, Orion Energy Partners Investment Agent, LLC (the "Administrative Agent"), and each lender from time to time party thereto.

Pursuant to the provisions of Section 2.09 of the Credit Agreement, the undersigned hereby certifies that (i) it is the sole record and beneficial owner of the Loan(s) (as well as any Note(s) evidencing such Loan(s)) in respect of which it is providing this certificate, (ii) it is not a bank within the meaning of Section 881(c)(3)(A) of the Code, (iii) it is not a ten percent shareholder of the Borrower within the meaning of Section 871(h)(3)(B) of the Code and (iv) it is not a controlled foreign corporation related to the Borrower as described in Section 881(c)(3)(C) of the Code.

The undersigned has furnished the Administrative Agent and the Borrower with a certificate of its non-U.S. Person status on IRS Form W-8BEN or IRS Form W-8BEN-E. By executing this certificate, the undersigned agrees that (1) if the information provided on this certificate changes, the undersigned shall promptly so inform the Borrower and the Administrative Agent, and (2) the undersigned shall have at all times furnished the Borrower and the Administrative Agent with a properly completed and currently effective certificate in either the calendar year in which each payment is to be made to the undersigned, or in either of the two calendar years preceding such payments.

Unless otherwise defined herein, terms defined in the Credit Agreement and used herein shall have the meanings given to them in the Credit Agreement.

[NAME OF LENDER]

By: _____
Name:
Title:

Date: _____, 20[ ]

EXHIBIT B-2
TO
CREDIT AGREEMENT

FORM OF
U.S. TAX COMPLIANCE CERTIFICATE

(For Foreign Participants That Are Not Partnerships For U.S. Federal Income Tax Purposes)

Reference is hereby made to the Credit Agreement dated as of October 31, 2019 (as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"), among FuelCell Energy, Inc. (the "Borrower"), the Subsidiaries of the Borrower from time to time party thereto as Guarantors, Orion Energy Partners Investment Agent, LLC (the "Administrative Agent"), and each lender from time to time party thereto.

Pursuant to the provisions of Section 2.09 of the Credit Agreement, the undersigned hereby certifies that (i) it is the sole record and beneficial owner of the participation in respect of which it is providing this certificate, (ii) it is not a bank within the meaning of Section 881(c)(3)(A) of the Code, (iii) it is not a ten percent shareholder of the Borrower within the meaning of Section 871(h)(3)(B) of the Code, and (iv) it is not a controlled foreign corporation related to the Borrower as described in Section 881(c)(3)(C) of the Code.

The undersigned has furnished its participating Lender with a certificate of its non-U.S. Person status on IRS Form W-8BEN or IRS Form W-8BEN-E. By executing this certificate, the undersigned agrees that (1) if the information provided on this certificate changes, the undersigned shall promptly so inform such Lender in writing, and (2) the undersigned shall have at all times furnished such Lender with a properly completed and currently effective certificate in either the calendar year in which each payment is to be made to the undersigned, or in either of the two calendar years preceding such payments.

Unless otherwise defined herein, terms defined in the Credit Agreement and used herein shall have the meanings given to them in the Credit Agreement.

[NAME OF PARTICIPANT]

By: _____
Name:
Title:

Date: _____, 20[ ]

EXHIBIT B-3
TO
CREDIT AGREEMENT

FORM OF
U.S. TAX COMPLIANCE CERTIFICATE

(For Foreign Participants That Are Partnerships For U.S. Federal Income Tax Purposes)

Reference is hereby made to the Credit Agreement dated as of October 31, 2019 (as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"), among FuelCell Energy, Inc. (the "Borrower"), the Subsidiaries of the Borrower from time to time party thereto as Guarantors, Orion Energy Partners Investment Agent, LLC (the "Administrative Agent"), and each lender from time to time party thereto.

Pursuant to the provisions of Section 2.09 of the Credit Agreement, the undersigned hereby certifies that (i) it is the sole record owner of the participation in respect of which it is providing this certificate, (ii) its direct or indirect partners/members are the sole beneficial owners of such participation, (iii) with respect such participation, neither the undersigned nor any of its direct or indirect partners/members is a bank extending credit pursuant to a loan agreement entered into in the ordinary course of its trade or business within the meaning of Section 881(c)(3)(A) of the Code, (iv) none of its direct or indirect partners/members is a ten percent shareholder of the Borrower within the meaning of Section 871(h)(3)(B) of the Code and (v) none of its direct or indirect partners/members is a controlled foreign corporation related to the Borrower as described in Section 881(c)(3)(C) of the Code.

The undersigned has furnished its participating Lender with IRS Form W-8IMY accompanied by one of the following forms from each of its partners/members that is claiming the portfolio interest exemption: (i) an IRS Form W-8BEN or IRS Form W-8BEN-E or (ii) an IRS Form W-8IMY accompanied by an IRS Form W-8BEN or IRS Form W-8BEN-E from each of such partner's/member's beneficial owners that is claiming the portfolio interest exemption. By executing this certificate, the undersigned agrees that (1) if the information provided on this certificate changes, the undersigned shall promptly so inform such Lender and (2) the undersigned shall have at all times furnished such Lender with a properly completed and currently effective certificate in either the calendar year in which each payment is to be made to the undersigned, or in either of the two calendar years preceding such payments.

Unless otherwise defined herein, terms defined in the Credit Agreement and used herein shall have the meanings given to them in the Credit Agreement.

[NAME OF PARTICIPANT]

By: _____
Name:
Title:

Date: _____, 20[ ]

EXHIBIT B-4
TO
CREDIT AGREEMENT

FORM OF
U.S. TAX COMPLIANCE CERTIFICATE

(For Foreign Lenders That Are Partnerships For U.S. Federal Income Tax Purposes)

Reference is hereby made to the Credit Agreement dated as of October 31, 2019 (as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"), among FuelCell Energy, Inc. (the "Borrower"), the Subsidiaries of the Borrower from time to time party thereto as Guarantors, Orion Energy Partners Investment Agent, LLC (the "Administrative Agent"), and each lender from time to time party thereto.

Pursuant to the provisions of Section 2.09 of the Credit Agreement, the undersigned hereby certifies that (i) it is the sole record owner of the Loan(s) (as well as any Note(s) evidencing such Loan(s)) in respect of which it is providing this certificate, (ii) its direct or indirect partners/members are the sole beneficial owners of such Loan(s) (as well as any Note(s) evidencing such Loan(s)), (iii) with respect to the extension of credit pursuant to this Credit Agreement or any other Financing Document, neither the undersigned nor any of its direct or indirect partners/members is a bank extending credit pursuant to a loan agreement entered into in the ordinary course of its trade or business within the meaning of Section 881(c)(3)(A) of the Code, (iv) none of its direct or indirect partners/members is a ten percent shareholder of the Borrower within the meaning of Section 871(h)(3)(B) of the Code and (v) none of its direct or indirect partners/members is a controlled foreign corporation related to the Borrower as described in Section 881(c)(3)(C) of the Code.

The undersigned has furnished the Administrative Agent and the Borrower with IRS Form W-8IMY accompanied by one of the following forms from each of its partners/members that is claiming the portfolio interest exemption: (i) an IRS Form W-8BEN or IRS Form W-8BEN-E or (ii) an IRS Form W-8IMY accompanied by an IRS Form W-8BEN or IRS Form W-8BEN-E from each of such partner's/member's beneficial owners that is claiming the portfolio interest exemption. By executing this certificate, the undersigned agrees that (1) if the information provided on this certificate changes, the undersigned shall promptly so inform the Borrower and the Administrative Agent, and (2) the undersigned shall have at all times furnished the Borrower and the Administrative Agent with a properly completed and currently effective certificate in either the calendar year in which each payment is to be made to the undersigned, or in either of the two calendar years preceding such payments.

Unless otherwise defined herein, terms defined in the Credit Agreement and used herein shall have the meanings given to them in the Credit Agreement.

[NAME OF LENDER]

By: _____
Name:
`

Date: _____, 20[ ]

EXHIBIT C
TO
CREDIT AGREEMENT

Form of Borrowing Request

[INSERT DATE]

Orion Energy Partners Investment Agent, LLC,
as Administrative Agent and Collateral Agent
350 5th Ave #6740
New York, NY 10118
Attention: [_____]
Email: [_____]

RE: FuelCell Energy, Inc.

Ladies and Gentlemen:

The undersigned refers to that certain Credit Agreement, dated as of October 31, 2019 (as amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement"), among FuelCell Energy, Inc. (the "Borrower"), the Subsidiaries of the Borrower from time to time party thereto as Guarantors, the Lenders from time to time party thereto, the Administrative Agent and the Collateral Agent. All capitalized terms used herein shall have the respective meanings specified in the Credit Agreement unless otherwise defined herein.

The undersigned hereby requests a borrowing of Loans under the Credit Agreement (the "Proposed Borrowing"), as follows:

(1) The aggregate amount of the Proposed Borrowing by the Borrower is $[_].[12]

(2) The date of the Proposed Borrowing is [●][13], 20[●], which is a Business Day and the [Initial][Second] Funding Date (the "Drawdown Date").

The undersigned Authorized Representative of the Borrower, in [his][her] capacity as an Authorized Representative and not in [his] [her] personal capacity, hereby certifies that, as of the date of this Borrowing Request and the Drawdown Date:

i. (x) all material Authorizations as at the date hereof required by any Governmental Authority under any Applicable Law to be issued to, assigned to, or otherwise

12 *Note to Form*: The aggregate amount of the Borrowing on any Funding Date shall not exceed the aggregate Commitment applicable to such Funding Date.

13 *Note to Form*: In accordance with Section 2.01(c) of the Credit Agreement, each Funding Date shall be no earlier than 12 Business Days after delivery of this Borrowing Request, unless consented to by the Administrative Agent.

assumed by any Loan Party and necessary for (i) the Business or (ii) the execution, delivery and performance by such Loan Party of the Transaction Documents to which it is a party, other than, in each case, Authorizations that are not currently necessary and are obtainable in the ordinary course of business, (i) have been duly obtained and, to the knowledge of Borrower, validly issued, (ii) 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, (iii) are issued to, assigned to, or otherwise assumed by such Loan Party or (or such Loan Party is entitled to the benefit thereof), (iv) are free from any unsatisfied condition the failure of which to satisfy could reasonably be expected to have a Material Adverse Effect and (y) all applicable statutory, judicial and administrative review periods have expired;

ii. a copy of each of the Material Agreements executed as of the Closing Date and any amendments thereto, has been made available to the Administrative Agent;

iii. the representations and warranties of each Loan Party set forth in the Credit Agreement and the other Financing Documents are true and correct in all material respects (except where already qualified by materiality or Material Adverse Effect or in the case of any representation and warranty in Section 3.14 of the Credit Agreement, in all respects);

iv. no Default or Event of Default has occurred and is continuing on, or will result as a result of the transactions contemplated to occur on the date hereof or the Drawdown Date;

v. to the knowledge of the Borrower (after reasonable inquiry and diligence of the appropriate officers of the Borrower), no development, event or circumstance that has had or could reasonably be expected to have a Material Adverse Effect has occurred and is continuing, or will result from the transactions contemplated to occur on the date hereof or the Drawdown Date; and

vi. the Borrower is in compliance with the Operating Budget (subject to the last sentence of Section 5.20(c) of the Credit Agreement).

[*signature page follows*]

FUELCELL ENERGY, INC.,
as Borrower

By: _____
Name:
Title:

EXHIBIT D
TO
CREDIT AGREEMENT

[Reserved]

EXHIBIT E
TO
CREDIT AGREEMENT

Form of Operating Budget

[PLEASE SEE ATTACHED]

EXHIBIT F
TO
CREDIT AGREEMENT

Form of Operational Report

[PLEASE SEE ATTACHED]

EXHIBIT G
TO
CREDIT AGREEMENT

[Reserved]

EXHIBIT H
TO
CREDIT AGREEMENT

[Reserved]

EXHIBIT I
TO
CREDIT AGREEMENT

Form of Security Agreement

[PLEASE SEE ATTACHED]

EXHIBIT J
TO
CREDIT AGREEMENT

Form of Environmental, Social and Governance Report

[PLEASE SEE ATTACHED]

EXHIBIT K
TO
CREDIT AGREEMENT

[Reserved]

EXHIBIT L-1
TO
CREDIT AGREEMENT

Form of Initial Funding Warrants

[PLEASE SEE ATTACHED]

EXHIBIT L-2
TO
CREDIT AGREEMENT

Form of Second Funding Warrants

[PLEASE SEE ATTACHED]

EXHIBIT M
TO
CREDIT AGREEMENT

Form of Observer Rights Agreement

[PLEASE SEE ATTACHED]

PLEDGE AND SECURITY AGREEMENT

This PLEDGE AND SECURITY AGREEMENT (this "Agreement") is made as of October 31, 2019, by and between FUELCELL ENERGY, INC., a Delaware corporation (the "Borrower"), each of the Subsidiaries of the Borrower from time to time party hereto (the "Guarantors", and together with the Borrower, collectively, the "Grantors" and each a "Grantor") and ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, in its capacity as collateral agent for the benefit of the Secured Parties, as hereinafter defined (in such capacity, together with its successors in such capacity, the "Collateral Agent").

WHEREAS, pursuant to that certain Credit Agreement, dated October 31, 2019 (as amended, supplemented, restated or otherwise modified from time to time, the "Credit Agreement"), by and among the Borrower, the Guarantors, certain lenders party thereto (the "Lenders"), and Orion Energy Partners Investment Agent, LLC, as the administrative agent (in such capacity, together with its successors in such capacity, the "Administrative Agent") and the Collateral Agent, the Lenders, on terms and subject to the conditions set forth in the Credit Agreement, will provide loans to the Borrower for the purposes specified therein.

WHEREAS, it is a condition precedent to the Initial Funding Date under the Credit Agreement that the Grantors shall have executed and delivered this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

Section 1. Definitions.

1.01 Certain Uniform Commercial Code Terms. As used herein, the terms "Accession", "Account", "Chattel Paper", "Commercial Tort Claims", "Commodity Account", "Deposit Account", "Document", "Electronic Chattel Paper", "Equipment", "Fixture", "General Intangible", "Goods", "Instrument", "Inventory", "Letter-of-Credit Rights", "Payment Intangible", "Proceeds", "Promissory Note", "Software" and "Tangible Chattel Paper" have the respective meanings set forth in Article 9 of the NYUCC, and the terms "Certificated Security", "Entitlement Holder", "Financial Asset", "Securities Account", "Security", "Security Entitlement", and "Supporting Obligations" have the respective meanings set forth in Article 8 or 9, as the case may be, of the NYUCC.

1.02 Defined Terms. All capitalized terms used but not otherwise defined herein (including the introductory paragraph and recitals) shall have the respective meanings given to such terms in Section 1.01 of the Credit Agreement. The rules of interpretation set forth in Section 1.02 of the Credit Agreement shall apply to this Agreement. In addition to the terms defined in the Credit Agreement, the following terms shall have the meanings specified below:

"Account Collateral" has the meaning assigned to such term in Section 3.01(j) hereof.

"Administrative Agent" has the meaning assigned to such term in the recitals hereto.

"Assigned Agreements" has the meaning assigned to such term in Section 3.01(h) hereof.

"Borrower" has the meaning assigned to such term in the introductory paragraph hereto.

"Collateral" has the meaning assigned to such term in Section 3.01 hereof.

"Collateral Agent" has the meaning assigned to such term in the introductory paragraph hereto.

"Credit Agreement" has the meaning assigned to such term in the recitals hereto.

"Discharge Date" means the date on which the Loan Parties' Obligations under the Credit Agreement (other than any contingent indemnification or reimbursement obligations not then due and payable) are paid in full in cash and the Commitments thereunder shall have been terminated.

"Excluded Assets" means:

(a) any property or other asset (including any agreement or contract, but other than any Material Agreement), or any property subject to a purchase money security interest, Lien securing a Capital Lease Obligation or similar arrangement, in each case permitted to be incurred under the Credit Agreement, (i) that by its terms validly prohibits the creation by any Grantor of a security interest therein, (ii) to the extent that any Applicable Law prohibits the creation of a security interest therein or requires a consent not obtained of any Governmental Authority, or (iii) that would be rendered invalid, abandoned, void or unenforceable by reason of its being included as part of the Collateral (in each case, other than to the extent that any such term or restriction would be rendered ineffective pursuant to Section 9-406, 9-407, 9-408 or 9-409 of the NYUCC);

(b) any permit or other approval by a Governmental Authority that by its terms or by operation of law would become void, voidable, terminable or revocable if mortgaged, pledged or assigned hereunder or if a security interest therein were granted hereunder;

(c) any United States intent-to-use trademark applications to the extent that, and solely during the period in which, the grant, attachment or enforcement of a security interest therein would, under applicable federal law, impair the registrability of such applications or the validity or enforceability of registrations issuing from such applications;

(d) any Capital Stock (i) of any Foreign Subsidiary to the extent such Capital Stock is in excess of 65% of the issued and outstanding Capital Stock of such Capital Stock entitled to vote (within the meaning of Treas. Reg. Section 1.956 2(c)(2)), or (ii) of any Excluded Project Company;

(e) those assets as to which the Collateral Agent and the Borrower shall reasonably determine, in writing, that the cost or other consequence of obtaining a Lien thereon or perfection thereof are excessive in relation to the benefit to the Secured Parties of the security to be afforded thereby; provided that (I) any such permit, approval, trademark application, Capital Stock or other property or asset described in clauses (a)

through (d) above shall constitute Excluded Assets only to the extent and for so long as the consequences specified above shall exist and shall cease to be Excluded Assets and shall become subject to the Lien of this Agreement, and constitute Collateral immediately and automatically, at such time as such consequence shall no longer exist and to the extent severable, shall attach immediately to any portion of such permit, approval, trademark application, Capital Stock or other property or asset not subject to the prohibitions specified in clauses (a) through (d) above and (II) this definition shall not apply to, and the Collateral shall include, any proceeds of any such permit, approval, trademark application or other property or asset (unless such proceeds would constitute Excluded Assets); and

(f) the Excluded Accounts.

"Excluded Swap Obligation" means, with respect to any Grantor, any Swap Obligation if, and to the extent that, all or a portion of the Guarantee of such Grantor of, or grant by such Grantor of a security interest to secure such Swap Obligation (or any Guarantee thereof) is or becomes illegal under the Commodity Exchange Act or any rule, regulation or order of the Commodity Futures Trading Commission (or the application or official interpretation of any thereof) by virtue of such Grantor's failure for any reason to constitute an "eligible contract participant" as defined in the Commodity Exchange Act and the regulations thereunder at the time the Guarantee of such Grantor or the grant of such security interest becomes effective with respect to such Swap Obligation. If a Swap Obligation arises under a master agreement governing more than one swap, such exclusion shall apply only to the portion of such Swap Obligation that is attributable to swaps for which such Guarantee or security interest is or becomes illegal.

"Foreign Subsidiary" means any Subsidiary of the Borrower that is a controlled foreign corporation within the meaning of Section 957 of the Code.

"Grantor" has the meaning assigned to such term in the introductory paragraph hereto.

"Investment Property" means the collective reference to (i) all "investment property" as such term is defined in Section 9-102(a)(49) of the NYUCC including, without limitation, all Certificated Securities and Uncertificated Securities, all Security Entitlements, all Securities Accounts and Financial Assets carried therein, (ii) all security entitlements, in the case of any United States Treasury book-entry securities, as defined in 31 C.F.R. section 357.2, or, in the case of any United States federal agency book-entry securities, as defined in the corresponding United States federal regulations governing such book-entry securities, and (iii) whether or not constituting "investment property" as so defined, all Pledged Debt and Pledged Equity Interests.

"Lenders" has the meaning assigned to such term in the recitals hereto.

"NYUCC" means the Uniform Commercial Code as in effect from time to time in the State of New York; provided, however, that if by reason of mandatory provisions of law, any or all of the perfection or priority of the Collateral Agent's and the Secured Parties' security interest in any item or portion of the Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of New York, the term "NYUCC" means the Uniform Commercial

Code as in effect from time to time in such other jurisdiction for purposes of the provisions hereof relating to such perfection or priority and for purposes of definitions relating to such provisions.

"Operating Agreement" means each operating agreement, limited liability company agreement or similar agreement of any Grantor that is a limited liability company or to which any Grantor is a party.

"Pledged Debt" means, with respect to any Grantor, all indebtedness for borrowed money owed to such Grantor (including indebtedness owed to such Grantor by any other Grantor), whether or not evidenced by any Instrument, issued by the obligors named therein, the instruments, if any, evidencing any of the foregoing, and all interest, cash, instruments and other property or proceeds from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of the foregoing.

"Pledged Equity Interests" means all Pledged LLC Interests, Pledged Stock and Pledged Partnership Interests, including, without limitation, all capital stock, limited liability company interests, limited partnership interests and other Capital Stock listed on Annex 2 hereto under the heading "Pledged Equity Interests", and any other participation or interests in any equity or profits of any business entity including, without limitation, any trust and all management rights relating to any entity whose equity interests are included as Pledged Equity Interests.

"Pledged LLC Interests" means all membership interests and other interests now owned or hereafter acquired by any Grantor in any limited liability company, and the certificates representing such limited liability company interests and any interest of such Grantor on the books and records of such limited liability company and any securities entitlements relating thereto and all dividends, distributions, cash, warrants, rights, options, instruments, securities and other property or proceeds from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such limited liability company interests and any other warrant, right or option or other agreement to acquire any of the foregoing, all management rights, all voting rights, any interest in any capital account of a member in such limited liability company, all rights as and to become a member of the limited liability company, all rights of the Grantor under any shareholder or voting trust agreement or similar agreement in respect of such limited liability company, all of the Grantor's right, title and interest as a member to any and all assets or properties of such limited liability company, and all other rights, powers, privileges, interests, claims and other property in any manner arising out of or relating to any of the foregoing.

"Pledged Partnership Interests" means all interests in any general partnership, limited partnership, limited liability partnership, limited liability limited partnership or other partnership interests owned by any Grantor, and the certificates, if any, representing such partnership interests and any interest of such Grantor on the books and records of such partnership and any securities entitlements relating thereto and all dividends, distributions, cash, warrants, rights, options, instruments, securities and other property or proceeds from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such partnership interests and any other warrant, right or option or other agreement to acquire any of the foregoing, all management rights, all voting rights, any interest in any capital account of a partner in such partnership, all rights as and to become a partner of the partnership, all rights of the Grantor under any shareholder or voting trust agreement or similar agreement in respect of such partnership, all

of the Grantor's right, title and interest as a partner to any and all assets or properties of such partnership, and all other rights, powers, privileges, interests, claims and other property in any manner arising out of or relating to any of the foregoing.

"Pledged Stock" means all shares of capital stock owned by any Grantor, and the certificates, if any, representing such shares and any interest of such Grantor in the entries on the books of the issuer of such shares or on the books of any securities intermediary pertaining to such shares, and all dividends, distributions, cash, warrants, rights, options, instruments, securities and other property or Proceeds from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such shares and any other warrant, right or option or other agreement to acquire any of the foregoing, all management rights, all voting rights, any interest in any capital account of a shareholder of such entity, all rights as and to become a shareholder in such entity, all rights of the Grantor under any shareholder or voting trust agreement or similar agreement in respect of such entity, all of the Grantor's right, title and interest as a shareholder to any and all assets or properties of such entity, and all other rights, powers, privileges, interests, claims and other property in any manner arising out of or relating to any of the foregoing.

"Receivables" has the meaning assigned to such term in Section 3.01(k) hereof.

"Related Contracts" has the meaning assigned to such term in Section 3.01(k) hereof.

"Secured Obligations" means, collectively, without duplication: (a) all of the Grantors' Indebtedness, financial liabilities and obligations, of whatsoever nature and however evidenced (including, but not limited to, principal, interest, premium (including Prepayment Premium), fees, indemnities and legal and other expenses, whether due after acceleration or otherwise) to the Secured Parties in their capacity as such under the Financing Documents; (b) any and all sums advanced by the Collateral Agent in order to preserve the Collateral or preserve the security interest in the Collateral; and (c) in the event of any proceeding for the collection or enforcement of the obligations described in clauses (a) and (b) above, after an Event of Default has occurred and is continuing and unwaived, the expenses of retaking, holding, preparing for sale or lease, selling or otherwise disposing of or realizing on the Collateral, or of any exercise by the Collateral Agent of its rights under the Security Documents. For the avoidance of doubt, no amounts constituting Excluded Swap Obligations, shall in either case constitute Secured Obligations hereunder.

"Swap Obligation" means, with respect to any Grantor, any obligation to pay or perform under any agreement, contract or transaction that constitutes a "swap" within the meaning of section 1a(47) of the Commodity Exchange Act.

"Vehicles" means all cars, trucks, trailers, construction and earth moving equipment and other Equipment of any nature covered by a certificate of title law of any jurisdiction and includes, without limitation, the vehicles listed on Annex 5, and all tires and other appurtenances to any of the foregoing.

"Waiver and Consent Agreement" means a waiver and consent agreement in substantially the form attached hereto as Exhibit A or otherwise in form and substance reasonably acceptable to the Collateral Agent.

Section 2. Representations and Warranties. Each Grantor represents and warrants to the Collateral Agent and to each Secured Party (and for the purposes of making such representations and warranties set forth in this Section 2, each Grantor may, prior to the making of any such representation and warranty, amend, modify and supplement all Annexes as applicable, but once made, such representation and warranty shall, as of such making, be deemed to have been made based on the amended, modified or supplemented Annexes in effect at such date) that:

2.01 Title. The Grantors are the sole beneficial owners of the Collateral, free and clear of all Liens or other exceptions to title other than, in the case of Collateral other than the Pledged Equity Interests, the Permitted Liens, and in the case of Pledged Equity Interests, Permitted Liens arising pursuant to Applicable Law. This Agreement is effective to create, in favor of the Collateral Agent, legally valid and enforceable first-priority Liens on the Collateral, other than Permitted Liens, in the case of Collateral other than the Pledged Equity Interests, and other than Permitted Liens arising pursuant to Applicable Law, in the case of Pledged Equity Interests. All necessary recordings and filings have been recorded or filed or arrangements have been made for such recordings and filings, such that the Liens created by this Agreement constitute or will constitute perfected Liens on the Collateral, subject only to applicable Permitted Liens, in the case of Collateral other than the Pledged Equity Interests, and Permitted Liens arising pursuant to Applicable Law, in the case of Pledged Equity Interests.

2.02 Names, Etc. The full and correct legal name, type of organization, jurisdiction of organization, organizational ID number (if applicable) and mailing address of each Grantor as of the date hereof are correctly set forth in Annex 1. Said Annex 1 correctly specifies (a) the place of business of each Grantor or, if such Grantor has more than one place of business, the location of the chief executive office of such Grantor, (b) each location where Goods (including Equipment) of any Grantor are located (other than Vehicles constituting Equipment and Goods in transit), and (c) each location where any financing statement naming any Grantor as debtor are currently on file.

2.03 Changes in Circumstances. No Grantor has (a) within the period of four months prior to the date this representation is made, changed its location (as determined pursuant to Section 9-307 of the NYUCC), (b) except as specified in Annex 1, heretofore changed its name, or (c) except as specified in Annex 3, heretofore become a "new debtor" (as defined in Section 9-102(a)(56) of the NYUCC) with respect to a currently effective security agreement previously entered into by any other Person.

2.04 Pledged Equity Interests.

(a) All of the Securities that are pledged by such Grantor hereunder constitute a "security" under Section 8-103 of the NYUCC and a Certificated Security. Each Grantor has delivered all Certificated Securities constituting Collateral held by such Grantor to the Collateral Agent, together with duly executed undated blank stock powers, or other equivalent instruments of transfer reasonably acceptable to the Collateral Agent.

(b) The Pledged Equity Interests pledged by such Grantor hereunder constitute all of the issued and outstanding shares, membership interests or other equity interests of all classes of Capital Stock of each relevant issuer owned by such Grantor.

(c) Such Grantor has the full power and authority to pledge all of the Pledged Equity Interests pledged by it pursuant to this Agreement.

(d) All the shares of the Pledged Equity Interests have been duly and validly issued and are fully paid and nonassessable. There are no outstanding warrants, options or other rights or agreements to purchase or that require the issuance or sale of, or property that is now or hereafter convertible into, any of the Pledged Equity Interests.

(e) Each Operating Agreement contains the entire agreement between the parties thereto with respect to the subject matter thereof and is in full force and effect in accordance with its terms. There exists no material violation or default by any Grantor under any Operating Agreement to which it is a party. None of the Grantors has knowingly waived or released any of its material rights under or otherwise consented to a material departure from the terms and provisions of any Operating Agreement to which it is a party.

2.05 Commercial Tort Claims. Annex 4 sets forth a complete and correct list of all known Commercial Tort Claims, the value of which is in excess of $500,000, of the Grantors.

2.06 Vehicles. Annex 5 sets forth a complete and correct list of all Vehicles owned by such Grantor with a value in excess of $75,000 individually.

Section 3. Collateral.

3.01 To secure the prompt payment in full when due (whether at stated maturity, by acceleration or otherwise) in cash and performance in full of the Secured Obligations, each Grantor does hereby collaterally assign, grant and pledge to the Collateral Agent, for the ratable benefit of the Collateral Agent and each other Secured Party, a security interest in all of such Grantor's right, title and interest in, to and under all assets of such Grantor, whether now owned or hereafter existing or acquired, including a security interest in all the right, title and interest of such Grantor in, to and under the following (all of the property described in this Section 3 being collectively referred to herein as "Collateral"):

(a) all Documents;

(b) all Equipment;

(c) all Fixtures;

(d) all Goods not covered by the other clauses of this Section 3;

(e) all Intellectual Property;

(f) all Inventory;

(g) all Commercial Tort Claims arising out of the events described in Annex 4;

(h) all agreements, contracts and documents, including each Material Agreement to which such Grantor is a party, as each such agreement may be amended, amended and restated, supplemented or otherwise modified from time to time (collectively, the "Assigned Agreements"), including (i) all rights of such Grantor to receive moneys due and to become due under or pursuant to the Assigned Agreements, (ii) all rights of such Grantor to receive proceeds of any insurance, indemnity, warranty or guaranty with respect to the Assigned Agreements, (iii) claims of such Grantor for damages arising out of or for breach of or default under the Assigned Agreements and (iv) the right of such Grantor to terminate the Assigned Agreements, to perform thereunder and to compel performance and otherwise exercise all remedies thereunder;

(i) all Pledged Equity Interests;

(j) the following (collectively, the "Account Collateral"):

(i) the Collateral Accounts and all funds and financial assets from time to time credited thereto (including all cash equivalent investments), and all certificates and instruments, if any, from time to time representing or evidencing the Collateral Accounts;

(ii) all promissory notes, certificates of deposit, checks and other instruments from time to time delivered to or otherwise possessed by the Collateral Agent for or on behalf of such Grantor in substitution for or in addition to any or all of the then existing Account Collateral; and

(iii) all interest, dividends, distributions, cash, instruments and other property from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of the then existing Account Collateral;

(k) all Accounts, Chattel Paper (including Tangible Chattel Paper and Electronic Chattel Paper), Instruments, Deposit Accounts, Letter-of-Credit Rights, General Intangibles (including Payment Intangibles) and other obligations of any kind, whether or not arising out of or in connection with the sale or lease of goods or the rendering of services and whether or not earned by performance, and all rights now or hereafter existing in and to all supporting obligations and in and to all security agreements, mortgages, Liens, leases, letters of credit and other contracts securing or otherwise relating to the foregoing property (any and all of such accounts, chattel paper, instruments, deposit accounts, letter-of-credit rights, general intangibles and other obligations being the "Receivables", and any and all such supporting obligations, security agreements, mortgages, Liens, leases, letters of credit and other contracts being the "Related Contracts");

(l) all Investment Property in which the Grantors have now, or acquire from time to time hereafter, any right, title or interest in any manner, and the certificates or instruments, if any, representing or evidencing such Investment Property, and all dividends,

distributions, return of capital, interest, cash, instruments and other property from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such investment property and all warrants, rights or options issued thereon or with respect thereto;

(m) all Vehicles;

(n) all other tangible and intangible personal property whatsoever of such Grantor; and

(o) all Proceeds of the foregoing, all Accessions to and substitutions and replacements for, any of the foregoing, and all offspring, rents, profits and products of any of the foregoing, and, to the extent related to any of the foregoing, all books, correspondence, credit files, records, invoices and other papers (including all tapes, cards, computer runs and other papers and documents in the possession or under the control of such Grantor or any computer bureau or service company from time to time acting for such Grantor).

Notwithstanding any of the other provisions set forth in this Section 3 or any other Financing Document to the contrary, this Agreement shall not, at any time, constitute a grant of a Lien on any property or other asset of the Grantors that is an Excluded Asset, and no property or other asset of the Grantors that is an Excluded Asset shall be deemed to be Collateral for any purpose hereunder or under any other Financing Document.

Section 4. Letter-of-Credit Rights.

4.01 Each Grantor by granting a security interest in its Receivables consisting of Letter-of-Credit Rights to the Collateral Agent, intends to (and hereby does) assign to the Collateral Agent its rights (including its contingent rights) to the proceeds of all Related Contracts consisting of letters of credit of which it is or hereafter becomes a beneficiary or assignee.

4.02 During the period that an Event of Default shall have occurred and is continuing, each Grantor will, promptly upon written request by the Collateral Agent (a) notify (and such Grantor hereby authorizes the Collateral Agent to notify) the issuer and each nominated person with respect to each of the Related Contracts consisting of letters of credit that the proceeds thereof have been assigned to the Collateral Agent hereunder and any payments due or to become due in respect thereof are to be made directly to the Collateral Agent or its designee and (b) arrange for the Collateral Agent to become the transferee beneficiary of such letter of credit.

Section 5. Vehicles.

5.01 No Vehicle shall be located in any state other than the state that issued its certificate of title for a period of time during which another state would require that such vehicle be titled in such other state unless the applicable Grantor shall have procured a new title in such other state with such new title evidencing the first lien of the Collateral Agent.

5.02 If any Grantor shall acquire any Vehicle after the date hereof having a value of $75,000 or more individually, such Grantor shall give prompt written notice thereof to the Collateral Agent (and in any event, within fifteen (15) Business Days of the date of such acquisition) and shall supplement Annex 5 to reflect such additional Vehicles.

5.03 Within sixty (60) days after the date hereof (as such time period may be extended by the Collateral Agent in its reasonable discretion), and, with respect to any Vehicles acquired by any Grantor subsequent to the date hereof having a value of $75,000 or more individually, within sixty (60) days (as such time period may be extended by the Collateral Agent in its reasonable discretion) after the date such Grantor obtains possession of a completed Vehicle in the condition in which it will be used, each Grantor shall cause all applications for certificates of title or ownership indicating the Collateral Agent's first priority security interest in the Vehicle covered by such certificate, and any other necessary documentation, to be filed in each office in each jurisdiction necessary, or which the Agent shall deem advisable, to perfect its security interests in the Vehicles.

Section 6. Collateral Access Agreement. On or following the Second Funding Date, the Grantors shall use commercially reasonable efforts to obtain a Waiver and Consent Agreement or, if requested by the Collateral Agent, a subordination, non-disturbance, and attornment agreement in form and substance reasonably acceptable to the Collateral Agent, in favor of the Collateral Agent from the lessor of each leased property (located within the United States), mortgagee of owned property or bailee or consignee with respect to any warehouse where Collateral with an aggregate value in excess of $500,000 is stored or located.

Section 7. Further Assurances; Voting Rights; Remedies. In furtherance of the grant of the security interest pursuant to Section 3, the Grantors hereby agree with the Collateral Agent as follows:

7.01 Delivery and Other Perfection. Each Grantor shall promptly from time to time give, execute, deliver, file, record, authorize or obtain all such financing statements, continuation statements, notices, instruments, documents, agreements or consents or other papers as may be necessary or appropriate in the reasonable judgment of the Collateral Agent to create, preserve, perfect, maintain the perfection of or validate the security interest granted pursuant hereto or to enable the Collateral Agent to exercise and enforce its rights hereunder with respect to such security interest, and without limiting the foregoing, shall:

(a) if any of the Investment Property or Financial Assets constituting part of the Collateral is or shall become evidenced or represented by any certificates or instruments, forthwith (x) deliver to the Collateral Agent the certificates or instruments representing or evidencing the same, duly endorsed in blank or accompanied by such instruments of assignment and transfer in such form and substance as the Collateral Agent may reasonably request, all of which thereafter shall be held by the Collateral Agent, pursuant to the terms of this Agreement, as part of the Collateral and (y) take such other action as the Collateral Agent may reasonably deem necessary or appropriate to duly record or otherwise perfect the security interest created hereunder in such Collateral;

(b) promptly from time to time, deliver to the Collateral Agent any and all Instruments having a face amount in excess of $500,000 constituting part of the Collateral, endorsed and/or accompanied by such instruments of assignment and transfer in such form and substance as the Collateral Agent may reasonably request; provided, that unless an Event of Default shall have occurred and be continuing, each Grantor may retain for collection in the ordinary course any Instruments received by such Grantor in the ordinary course of business and the Collateral Agent shall, promptly upon written request of such Grantor, make appropriate arrangements for making any Instrument delivered to Collateral Agent available to such Grantor for purposes of presentation, collection or renewal (any such arrangement to be effected, to the extent requested by the Collateral Agent, against trust receipt or like document);

(c) other than with respect to the Pledged Equity Interests, from and after the Account Establishment Date, promptly from time to time, enter into such control agreements, each in form and substance reasonably acceptable to the Collateral Agent, as may be required to perfect the security interest created hereby in any and all Deposit Accounts, Securities Accounts, Investment Property, Electronic Chattel Paper and Letter-of-Credit Rights, and will promptly furnish to the Collateral Agent true copies thereof;

(d) upon the request of the Collateral Agent, execute and deliver such short-form security agreements as the Collateral Agent may reasonably deem necessary or appropriate to protect the interests of the Collateral Agent in respect of that portion of the Collateral consisting of Intellectual Property;

(e) with respect to any Commercial Tort Claim, the value of which is in excess of $500,000, that any Grantor may hereafter hold, such Grantor shall promptly grant to Collateral Agent for the benefit of the Secured Parties a security interest (subject to Permitted Liens) therein and the proceeds thereof (and such Grantor shall provide the Collateral Agent with a supplement to Annex 4 to reflect such additional commercial tort claims);

(f) at all times cause the Pledged Equity Interests owned by each Grantor to be Certificated Securities;

(g) upon obtaining any additional Pledged Equity Interests, including, without limitation, any additional equity interest in any Grantor issued in respect of any new equity investment or other consideration of any kind from any Grantor, or any additional or substitute certificates or any other equity interests, whether as an addition to, in substitution for or exchange for any Pledged Equity Interests, hold such Pledged Equity Interests in trust for the Collateral Agent, segregate such Pledged Equity Interests from other property or funds of such Grantor, and promptly (and in any event, within fifteen (15) days) deliver to the Collateral Agent the certificates or instruments evidencing such additional Pledged Equity Interests, which shall be in suitable form for transfer by delivery, or shall be accompanied by duly executed instruments of transfer or assignment, where applicable, in blank, all in form and substance reasonably satisfactory to the Collateral Agent;

(h) keep full and accurate books and records relating to the Collateral as required by the Financing Documents, and stamp or otherwise mark such books and records in such manner as the Collateral Agent may reasonably require in writing in order to reflect the security interests granted by this Agreement; and

(i) permit representatives of the Collateral Agent, as may be directed by the Secured Parties, to inspect its books and records pertaining to the Collateral, in accordance with Section 5.08 of the Credit Agreement.

7.02 Other Financing Statements or Control. Without the prior written consent of the Collateral Agent, the Grantors shall not (a) file or suffer to be on file, or authorize or permit to be filed or to be on file, in any jurisdiction, any financing statement or like instrument with respect to any of the Collateral in which the Collateral Agent is not named as the sole secured party except in connection with Permitted Liens and precautionary filings that do not perfect a security interest or (b) cause or permit any Person other than the Collateral Agent to have "Control" (as defined in Section 9-104, 9-105, 9-106 or 9-107 of the NYUCC) of any Deposit Account, Electronic Chattel Paper, Investment Property or Letter-of-Credit Right constituting part of the Collateral (except to the extent of Permitted Liens).

7.03 Preservation of Rights. The Collateral Agent shall not be required to take steps necessary to preserve any rights against prior parties to any of the Collateral.

7.04 Chattel Paper. Each Grantor will (i) deliver to the Collateral Agent each original of each item of Chattel Paper having a face amount in excess of $500,000 at any time constituting part of the Collateral, and (ii) cause each such original and each copy thereof to bear a conspicuous legend, in form and substance reasonably satisfactory to the Collateral Agent, indicating that such Chattel Paper is subject to the security interest granted hereby and that purchase of such Chattel Paper by a Person other than the Collateral Agent without the consent of the Collateral Agent would violate the rights of the Collateral Agent.

7.05 Adverse Claims. Each Grantor shall use commercially reasonable efforts to defend, at its own cost and expense, such Grantor's title and the existence, perfection and priority of the Collateral Agent's (for the benefit of the Secured Parties) security interests in the Collateral against all adverse claims (other than any Permitted Liens).

7.06 Distributions, Voting Rights, Etc.

(a) Distributions and Voting Rights Prior to Event of Default. Unless an Event of Default shall have occurred and be continuing and the Collateral Agent shall have provided notice as provided in Section 7.06(b), each Grantor shall be entitled to (i) receive and retain, and to utilize free and clear of the Lien of this Agreement, any and all cash and other distributions paid in respect of its Pledged Equity Interests; provided, that such distributions are permitted by, and are made in accordance with, the terms of the Financing Documents, and (ii) exercise any and all voting and other consensual rights pertaining to its Pledged Equity Interests or any part thereof for any purpose not inconsistent with the terms of this Agreement.

(b) Distributions and Voting Rights After Event of Default. During the period that an Event of Default shall have occurred and is continuing, the Collateral Agent may provide any Grantor with written notice prohibiting such Grantor from exercising the rights and powers of a holder of the Pledged Equity Interests, at which time (and until such time that such Event of Default has been cured or waived) all such rights and powers of such Grantor shall cease immediately, and the Collateral Agent shall thereupon have the right to exercise any and all rights and powers, including voting rights, and enforce any and all remedies available to the Collateral Agent, on behalf of the Secured Parties related to the Pledged Equity Interests, including foreclosure thereof, pursuant to this Agreement, all without liability except to account for property actually received by it or any loss resulting from its fraud, gross negligence or willful misconduct.

In order to permit the Collateral Agent to exercise the voting and other consensual rights which it may be entitled to exercise pursuant hereto and to receive all distributions which it may be entitled to receive hereunder, (A) each Grantor shall promptly execute and deliver (or cause to be executed and delivered) to the Collateral Agent all such proxies and other instruments the Collateral Agent may from time to time reasonably request in writing (in each case, the rights granted under which shall only be effective during the period that an Event of Default has occurred and is continuing and shall terminate only at such time as such Event of Default is cured or waived), and (B) without limiting the effect of clause (A) above, each Grantor grants to the Collateral Agent an irrevocable proxy to vote its Pledged Equity Interests and to exercise all other rights, powers, privileges and remedies to which a holder of such Pledged Equity Interests would be entitled (including giving or withholding written consents of members or other holders of equity interests, calling special meetings of members or other holders of equity interests and voting at such meetings), which proxy shall be effective, automatically and without the necessity of any action (including any transfer of any such Pledged Equity Interests on the record books of the applicable Loan Party) by any other Person (including the Loan Parties or any officer or agent thereof), during the period that an Event of Default has occurred and is continuing and which proxy shall terminate only at such time as such Event of Default is cured or waived.

7.07 Remedies.

(a) Rights and Remedies Generally upon Event of Default. If an Event of Default shall have occurred and is continuing, the Collateral Agent for the benefit of the Secured Parties shall have all of the rights and remedies with respect to the Collateral of a secured party under the NYUCC and such additional rights and remedies to which a secured party is entitled under the laws in effect in any jurisdiction where any rights and remedies hereunder may be asserted, including the right, to the fullest extent permitted by law, to exercise all voting, consensual and other powers of ownership pertaining to the Collateral as if the Collateral Agent were the sole and absolute owner thereof (and the Grantors agree to take all such action as may be appropriate to give effect to such right); and without limiting the foregoing:

(i) the Collateral Agent in its discretion may, in its name or in the name of any Grantor or otherwise, demand, sue for, collect or receive any

money or other property at any time payable or receivable on account of or in exchange for any of the Collateral, but shall be under no obligation to do so;

(ii) the Collateral Agent may make any reasonable compromise or settlement deemed desirable with respect to any of the Collateral and may extend the time of payment, arrange for payment in installments, or otherwise modify the terms of, any of the Collateral;

(iii) the Collateral Agent may require any Grantor to notify (and each Grantor hereby authorizes the Collateral Agent so to notify) each account debtor in respect of any Account, Chattel Paper or General Intangible, and each obligor on any Instrument, constituting part of the Collateral that such Collateral has been assigned to the Collateral Agent hereunder, and to instruct that any payments due or to become due in respect of such Collateral shall be made directly to the Collateral Agent or as it may direct (and if any such payments, or any other Proceeds of Collateral, are received by any Grantor they shall be held in trust by such Grantor for the benefit of the Collateral Agent and as promptly as possible remitted or delivered to the Collateral Agent for application as provided herein);

(iv) subject to the requirements of the Material Agreements, the Collateral Agent may require the Grantors to assemble the Collateral (not otherwise in the possession of the Collateral Agent) at such place or places, reasonably convenient to the Collateral Agent and the Grantors, as the Collateral Agent may direct;

(v) the Collateral Agent may apply the Collateral Accounts and any money or other property therein to payment of the Secured Obligations; and

(vi) the Collateral Agent may sell, lease, assign or otherwise dispose of all or any part of the Collateral, at such place or places as the Collateral Agent deems best, and for cash or for credit or for future delivery (without thereby assuming any credit risk), at public or private sale, without demand of performance or notice of intention to effect any such disposition or of the time or place thereof (except such notice as is required by applicable statute and cannot be waived), and the Collateral Agent or anyone else may be the purchaser, lessee, assignee or recipient of any or all of the Collateral so disposed of at any public sale (or, to the extent permitted by law, at any private sale) and thereafter hold the same absolutely, free from any claim or right of whatsoever kind, including any right or equity of redemption (statutory or otherwise), of the Grantors, any such demand, notice and right or equity being hereby expressly waived and released. The Collateral Agent may, without notice or

publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for the sale, and such sale may be made at any time or place to which the sale may be so adjourned; and

(vii) the Collateral Agent in its discretion may, in its name or in the name of any Grantor or otherwise, cure any default or event of default under any Assigned Agreement, but shall be under no obligation to do so.

The Proceeds of each collection, sale or other disposition under this Section 7.07 shall be applied in accordance with Section 7.11.

(b) Certain Securities Act Limitations. The Grantors recognize that, by reason of certain prohibitions contained in the Securities Act of 1933, and applicable state securities laws, the Collateral Agent may be compelled, with respect to any sale of all or any part of the Collateral, to limit purchasers to those who will agree, among other things, to acquire the Collateral for their own account, for investment and not with a view to the distribution or resale thereof. The Grantors acknowledge that any such private sales may be at prices and on terms less favorable to the Collateral Agent than those obtainable through a public sale without such restrictions, and agrees that such private sales shall not solely by reason thereof be deemed not to have been made in a commercially reasonable manner and that the Collateral Agent shall have no obligation to engage in public sales and no obligation to delay the sale of any Collateral for the period of time necessary to permit the issuer thereof to register it for public sale.

(c) Notice. The Grantors agree that to the extent the Collateral Agent is required by Applicable Law to give reasonable prior notice of any sale or other disposition of any Collateral, ten (10) Business Days' notice shall be deemed to constitute reasonable prior notice.

7.08 Deficiency. If the proceeds of sale, collection or other realization of or upon the Collateral pursuant to Section 7.07 are insufficient to cover the costs and expenses of such realization and the payment in full of the Secured Obligations, the Grantors shall remain liable for any deficiency.

7.09 Locations; Names, Etc. Without at least thirty (30) days' prior written notice to the Collateral Agent (and in the case of clause (iii) below, delivery to the Collateral Agent of a supplement to Annex 1 showing any additional location at which Goods (including Equipment) are kept), no Grantor shall (i) change its location (as determined pursuant to Section 9-307 of the NYUCC), (ii) change its name from the name shown as its current legal name on Annex 1, (iii) permit any of the Goods (including Equipment) of such Grantor with a value in excess of $500,000 to be kept at a location other than those listed on Annex 1 or (iv) agree to or authorize any modification of the terms of any item of Collateral if the effect thereof would be to result in a loss of perfection of, or diminution of priority for, the security interests created hereunder in such item of Collateral, or the loss of control (within the meaning of Section 9-104, 9-105, 9-106 or 9-107 of the NYUCC) over such item of Collateral. Annex 1 sets forth the location of Goods

(including Equipment) as of the date of this Agreement. At the end of each fiscal quarter, each Grantor will provide a supplement to Annex 1 to reflect any changes that have occurred in the location of any such Goods (including Equipment).

7.10 Private Sale.

(a) The Collateral Agent shall incur no liability as a result of the sale of the Collateral, or any part thereof, at any private sale pursuant to Section 7.07 conducted in a commercially reasonable manner. The Grantors hereby waive, to the maximum extent permitted under Applicable Law, any claims against the Collateral Agent arising by reason of the fact that the price at which the Collateral may have been sold at such a private sale, if conducted in a commercially reasonable manner, was less than the price that might have been obtained at a public sale or was less than the aggregate amount of the Secured Obligations, even if the Collateral Agent accepts the first offer received and does not offer the Collateral to more than one offeree.

(b) Each Grantor recognizes that, by reason of certain prohibitions contained in the Securities Act of 1933, and applicable state securities laws, the Collateral Agent may be compelled, with respect to any sale of all or any part of the Pledged Equity Interests, to limit purchasers to those who will agree, among other things, to acquire the Pledged Equity Interests for their own account, for investment and not with a view to the distribution or resale thereof. Each Grantor acknowledges that any such private sales may be at prices and on terms less favorable to the Collateral Agent than those obtainable through a public sale without such restrictions, and, and agrees that such private sales shall not solely by reason thereof be deemed not to have been made in a commercially reasonable manner and that the Collateral Agent shall have no obligation to engage in public sales and no obligation to delay the sale of any Pledged Equity Interests for the period of time necessary to permit the issuer thereof to register it for public sale.

7.11 Application of Proceeds. Except as otherwise herein expressly provided, the Proceeds of any collection, sale or other realization of all or any part of the Collateral pursuant hereto, and any cash at the time held by the Collateral Agent under Section 3 or this Section 7, shall be applied by the Collateral Agent in accordance with Section 7.02 of the Credit Agreement.

7.12 Attorney-in-Fact. During the period that an Event of Default shall have occurred and is continuing, the Collateral Agent is hereby appointed the attorney-in-fact of the Grantors for the purpose of carrying out the provisions of this Section 7 and taking any action and executing any instruments that the Secured Parties may deem necessary or advisable to accomplish the purposes hereof, which appointment as attorney-in-fact is irrevocable and coupled with an interest. Without limiting the generality of the foregoing, so long as the Collateral Agent shall be entitled under this Section 7 to make collections in respect of the Collateral, the Collateral Agent shall have the right and power to receive, endorse and collect all checks made payable to the order of the Grantors representing any dividend, payment or other distribution in respect of the Collateral or any part thereof and to give full discharge for the same.

7.13 Perfection and Recordation. Each Grantor authorizes the Collateral Agent to file Uniform Commercial Code financing statements describing the Collateral as “all assets” or “all

personal property and fixtures" of such Grantor (provided that no such description shall be deemed to modify the description of Collateral set forth in Section 3).

7.14 Termination.

(a) On the Discharge Date, this Agreement shall terminate, and the Collateral Agent shall forthwith cause to be assigned, transferred and delivered, against receipt but without any recourse, warranty or representation whatsoever, any remaining Collateral and money received in respect thereof, to or on the order of the Grantors. The Collateral Agent shall also, at the expense of the Grantors, execute and deliver to the Grantors upon such termination, such Uniform Commercial Code termination statements and such other documentation as shall be reasonably requested by the Grantors to effect the termination and release of the Liens on the Collateral as required by this Section 7.14.

(b) The Collateral Agent shall release any Lien covering any asset that has been disposed of in accordance with the provisions of the Credit Agreement (including (i) any asset that has been transferred by any Grantor to any Excluded Project Company or (ii) transferred by any Grantor to any third party (that is not a Grantor) in the ordinary course of business, in each case of clause (i) and (ii), that are permitted by the Credit Agreement) including the execution and delivery of such documents and other instruments as reasonably requested by the Grantors to effect such release.

(c) Notwithstanding the foregoing, upon the occurrence of the Second Funding Date, the security interest created hereby in the Intellectual Property of each Grantor other than the Covered Project Companies shall be automatically released and all security interests of the Collateral Agent and the Secured Parties with respect thereto shall terminate and the Collateral Agent shall execute and deliver to such Grantors such release documentation as shall be reasonably requested by such Grantors to effect the termination and release of such Liens.

(d) Further, upon (i) any Restricted Project Company or Covered Project Company becoming an Excluded Project Company in accordance with the terms of the Credit Agreement or (ii) the occurrence of any transaction or event permitted under the Credit Agreement that results in any Restricted Project Company or Covered Project Company ceasing to be a Subsidiary of the Borrower, each of (i) the security interest created hereby in the assets of such former Restricted Project Company or former Covered Project Company, and (y) the security interest created hereby in any Capital Stock issued by such former Restricted Project Company or former Covered Project Company, shall, in each case, be automatically released and all security interests of the Collateral Agent and the Secured Parties with respect thereto shall terminate and the Collateral Agent shall execute and deliver to such Grantors such release documentation as shall be reasonably requested by such Grantors to effect the termination and release of the Liens granted hereunder in the assets of, and Capital Stock issued by, such former Restricted Project Company or former Covered Project Company.

7.15 Further Assurances. The Grantors agree that, from time to time upon the written request of the Collateral Agent, the Grantors will execute and deliver such further documents and

do such other acts and things as the Collateral Agent may reasonably request in order to fully effect the purposes of this Agreement.

Section 8. Miscellaneous.

8.01 Notices. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing, and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered by hand or, in the case of notice given by certified or registered mail, private courier or overnight delivery service, when received, addressed as follows, or to such other address as may be hereafter notified in accordance with this Section 8.01 by the respective parties hereto:

if to the Borrower or any other Grantor:

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

if to the Collateral Agent:

Orion Energy Partners Investment Agent, LLC
350 5th Ave #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

Notwithstanding anything to the contrary contained herein, each such notice, instruction, direction, request or other communication so given shall be effective only upon actual receipt.

8.02 No Waiver. No failure or delay on the part of Collateral Agent in exercising any right, power or privilege hereunder or under any other Financing Document and no course of dealing between any Grantor, on the one hand, and Collateral Agent 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 any Grantor in any case shall entitle such Grantor to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of Collateral Agent to any other or further action in any circumstances without notice or demand.

8.03 Expenses. The Grantors agree to pay or to reimburse the Collateral Agent for all reasonable documented out-of-pocket costs and expenses (including reasonable attorney's fees and expenses) that may be incurred by the Collateral Agent in accordance with this Agreement in any effort to enforce any of the obligations of the Grantors in respect of the Collateral or in connection with (a) the preservation of the Liens on, or the rights of the Collateral Agent to the Collateral pursuant to this Agreement, (b) performance by the Collateral Agent of any obligations of the Grantors in respect of the Collateral that the Grantors have failed or refused to perform, or (c) any actual or attempted sale, lease, disposition, exchange, collection, compromise, settlement or other realization in respect of, or care of, the Collateral, including all such reasonable out-of-pocket costs and expenses (and reasonable attorney's fees and expenses) incurred in any bankruptcy, reorganization, workout or other similar proceeding, and, until paid all such costs, shall be Secured Obligations entitled to the benefit of the collateral security provided by this Agreement.

8.04 Amendments, Etc. Any term, covenant, agreement or condition of this Agreement may be amended or waived only by an instrument in writing signed by the Grantors and the Collateral Agent; provided, however, that:

(a) only the Collateral Agent may waive any of its rights under any provision of this Agreement, and no consent to any departure by the Grantors therefrom shall be effective unless in writing signed by the Collateral Agent, and each such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given;

(b) in addition to the Grantors, any amendment or waiver which amends or waives this Section 8.04 must be in writing and signed by the Collateral Agent; and

(c) solely for the purposes of making the representations and warranties set forth in Section 2, each Grantor may, prior to the making of any such representation and warranty, amend, modify or supplement the Annexes hereto as provided in Section 2 upon providing written notice and a description of such amendment, modification or supplement to the Collateral Agent (without the consent of any Secured Party).

8.05 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the respective successors and permitted assigns of any of the Grantors and the Collateral Agent; provided that no Grantor shall assign or transfer their respective rights or obligations hereunder without the prior written consent of the Collateral Agent.

8.06 Counterparts. 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.

8.07 Governing Law; Submission to Jurisdiction; Etc.

(a) Governing Law. This Agreement shall be governed by and construed in accordance with the law of the State of New York.

(b) Incorporation by Reference. Section 10.09(b) *(Submission to Jurisdiction)*, Section 10.09(c) *(Waiver of Venue)*, Section 10.09(d) *(Rights of the Secured Parties)*, Section 10.09(e) *(Waiver of Jury Trial)*, Section 10.09(f) *(Service of Process)* and Section 10.09(g) *(Waiver of Immunity)* of the Credit Agreement and related definitions are hereby incorporated by reference *mutatis mutandis*.

8.08 Joinders. The Grantors shall cause each of their respective Subsidiaries (other than any Foreign Subsidiary or Excluded Project Company) to be a party to this Agreement as a Grantor hereunder. Accordingly, the Grantors shall cause each of their respective Subsidiaries (other than any Foreign Subsidiary or Excluded Project Company) that are not then a party to this Agreement as a Grantor hereunder, including any and all Subsidiaries of the Grantors that are organized, formed, created or acquired after the date hereof (other than any Foreign Subsidiary or Excluded Project Company), to become a party hereto as a Grantor hereunder by executing a supplement or joinder hereto, in substantially the form of Exhibit B hereto (a "Joinder Supplement"), and the execution and delivery thereof shall not require the consent of any Grantor hereunder. The rights and obligations of each Grantor hereunder shall remain in full force and effect notwithstanding the addition of any new Grantor as a party to this Agreement or the execution or delivery of any Joinder Supplement.

8.09 Agents and Attorneys-in-Fact. The Collateral Agent may employ agents and attorneys-in-fact in connection herewith.

8.10 Headings. The headings of Sections and Annexes have been included herein for convenience of reference only, are not part of this Agreement, and shall not be taken into consideration in interpreting this Agreement.

8.11 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.

8.12 Entire Agreement. This Agreement and the other Financing Documents to which any Grantor 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.

[*Signature Page Follows*]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

FUELCELL ENERGY, INC.,
as Grantor
By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

FUELCELL ENERGY FINANCE II, LLC,
as Grantor

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

BAKERSFIELD FUEL CELL, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few

Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CENTRAL CA FUEL CELL 2, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

YAPHANK FUEL CELL PARK, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

LONG BEACH TRIGEN, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

SAN BERNARDINO FUEL CELL, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

MONTVILLE FUEL CELL PARK, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

EASTERN CONNECTICUT FUEL CELL PROPERTIES, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CR FUEL CELL, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

BRT FUEL CELL, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few

Title: President, Chief Executive Officer and Chief Commercial Officer

DERBY FUEL CELL, LLC,
as Grantor

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

	ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, as Collateral Agent By: /s/ Gerritt Nicholas Name: Gerritt Nicholas Title: Managing Partner

EXHIBIT A – WAIVER AND CONSENT AGREEMENT

[See attached]

RECORDING REQUESTED BY:
Greenberg Traurig, LLP

AND WHEN RECORDED MAIL TO:

Greenberg Traurig, LLP
200 Park Avenue
New York, New York 10166

Space above this line for recorder's use only

LANDLORD WAIVER AND CONSENT AGREEMENT

This **LANDLORD WAIVER AND CONSENT AGREEMENT** (this "**Agreement**") is dated as of _____ ___, 20___ and entered into by [**LANDLORD**] ("**Landlord**"), to and for the benefit of ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, as Collateral Agent for the Secured Parties (in such capacity "**Collateral Agent**").

RECITALS:

WHEREAS, [**TENANT**], [**type of person**] ("**Tenant**"), has possession of and occupies all or a portion of the property described on Exhibit A annexed hereto (the "**Premises**");

WHEREAS, Tenant's interest in the Premises arises under the lease agreement (the "**Lease**") more particularly described on Exhibit B annexed hereto, pursuant to which Landlord has rights, upon the terms and conditions set forth therein, to take possession of, and otherwise assert control over, the Premises;

WHEREAS, reference is made to that certain Credit Agreement, dated as of October 31, 2019 (as amended, amended and restated, supplemented or otherwise modified from time to time, the "**Credit Agreement**"), pursuant to which Tenant is required to execute a pledge and security agreement and other collateral documents in relation to the Credit Agreement;

WHEREAS, Tenant's repayment of the extensions of credit made under the Credit Agreement will be secured, in part, by all inventory of Tenant (including all inventory of Tenant now or hereafter located on the Premises (the "**Subject Inventory**") and all equipment used in Tenant's business (including all equipment of Tenant now or hereafter located on the Premises (the "**Subject Equipment**"; and, together with the Subject Inventory, the "**Collateral**")); and

WHEREAS, Collateral Agent has requested that Landlord execute this Agreement as a condition to the extension of credit to Tenant under the Credit Agreement.

NOW, **THEREFORE**, in consideration of ten dollars ($10.00) and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord hereby represents and warrants to, and covenants and agrees with, Collateral Agent as follows:

1. Landlord hereby (a) waives and releases unto Collateral Agent and its successors and assigns any and all rights granted by or under any present or future laws to levy or distraint for rent or any other charges which may be due to Landlord against the Collateral, and any and all other claims, liens and demands of every kind which it now has or may hereafter have against the Collateral, and (b) agrees that any rights it may have in or to the Collateral, no matter how arising (to the extent not effectively waived pursuant to clause (a) of this paragraph 1), shall be second and subordinate to the rights of Collateral Agent in respect thereof Landlord acknowledges that the Collateral is and will remain personal property and not fixtures even though it may be affixed to or placed on the Premises.

2. Landlord certifies that (a) Landlord is the landlord under the Lease, (b) the Lease is in full force and effect and has not been amended, restated, replaced, modified, or supplemented except as set forth on Exhibit B annexed hereto, (c) to the knowledge of Landlord, there is no defense, offset, claim or counterclaim by or in favor of Landlord against Tenant under the Lease or against the obligations of Landlord under the Lease, (d) no notice of default has been given under or in connection with the Lease which has not been cured, and Landlord has no knowledge of the occurrence of any other default under or in connection with the Lease, and (e) except as disclosed to Collateral Agent, no portion of the Premises is encumbered in any way by any deed of trust or mortgage lien or ground or superior lease.

3. Landlord consents to the installation or placement of the Collateral on the Premises, and Landlord grants to Collateral Agent a license to enter upon and into the Premises to do any or all of the following with respect to the Collateral: assemble, have appraised, display, remove, maintain, prepare for sale or lease, repair, transfer, or sell (at public or private sale). In entering upon or into the Premises, Collateral Agent hereby agrees to indemnify, defend and hold Landlord harmless from and against any and all claims, judgments, liabilities, costs and expenses incurred by Landlord caused solely by Collateral Agent's entering upon or into the Premises and taking any of the foregoing actions with respect to the Collateral. Such costs shall include any damage to the Premises made by Collateral Agent in severing and/or removing the Collateral therefrom.

4. Landlord agrees that it will not prevent Collateral Agent or its designee from entering upon the Premises at all reasonable times to inspect or remove the Collateral. In the event that Landlord has the right to, and desires to, obtain possession of the Premises (either through expiration of the Lease or termination thereof due to the default of Tenant thereunder), Landlord will deliver notice (the "**Landlord's Notice**") to Collateral Agent to that effect. Within the 45 day period after Collateral Agent receives the Landlord's Notice, Collateral Agent shall have the right, but not the obligation, to cause the Collateral to be removed from the Premises. During such 45 day period, Landlord will not remove the Collateral from the Premises nor interfere with Collateral Agent's actions in removing the Collateral from the Premises or Administrative Agent's actions in otherwise enforcing its security interest in the Collateral. Notwithstanding anything to the contrary in this paragraph, Collateral Agent shall at no time have any obligation to remove the Collateral from the Premises.

5. Landlord shall send to Collateral Agent a copy of any notice of default under the Lease sent by Landlord to Tenant. In addition, Landlord shall send to Collateral Agent a copy of any notice received by Landlord of a breach or default under any other lease, mortgage, deed of trust, security agreement or other instrument to which Landlord is a party which may affect Landlord's rights in, or possession of, the Premises.

6. All notices to Collateral Agent under this Agreement shall be in writing and sent to Collateral Agent at its address set forth on the signature page hereof by facsimile, by United States mail, or by overnight delivery service.

7. The provisions of this Agreement shall continue in effect until Landlord shall have received Collateral Agent's written certification that all amounts advanced under the Credit Agreement have been paid in full.

8. This Agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the internal laws of the State of New York, without regard to conflicts of laws principles.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be duly executed and delivered as of the day and year first set forth above.

[**LANDLORD**]

By: _____
Name:
Title:

_____
_____
_____
Attention:
Facsimile:

By its acceptance hereof, as of the day and year first set forth above, Collateral Agent agrees to be bound by the provisions hereof.

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC

By: _____
Name:
Title:

_____
_____
_____
Attention:
Facsimile:

Legal Description of Premises:

Description of Lease:

EXHIBIT B – JOINDER SUPPLEMENT

[See attached]

FORM OF JOINDER SUPPLEMENT

JOINDER SUPPLEMENT, dated as of _____ __, 20__, made by_____ (the "Additional Grantor"), in favor of ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, in its capacity as collateral agent for the benefit of the Secured Parties (in such capacity, together with its successors in such capacity, the "Collateral Agent") in connection with the Credit Agreement referred to below. All capitalized terms not defined herein shall have the meaning ascribed to them in such Security Agreement referred to below.

W I T N E S S E T H :

WHEREAS, there exists that Credit Agreement, dated October 31, 2019 (as amended, supplemented, restated or otherwise modified from time to time, the "Credit Agreement"), by and among FuelCell Energy, Inc., a Delaware corporation (the "Borrower"), each of the Subsidiaries of the Borrower from time to time party hereto (the "Guarantors"), certain lenders party thereto (the "Lenders"), and Orion Energy Partners Investment Agent, LLC, as the administrative agent and the Collateral Agent;

WHEREAS, in connection with the Credit Agreement, the Borrower, the Guarantors (other than the Additional Grantor) and the Collateral Agent have entered into the Pledge and Security Agreement, dated as of October 31, 2019 (as amended, restated, supplemented, waived and/or otherwise modified from time to time, the "Security Agreement") in favor of the Collateral Agent for the benefit of the Secured Parties;

WHEREAS, the Credit Agreement and the Security Agreement requires the Additional Grantor to become a party to the Security Agreement; and

WHEREAS, the Additional Grantor has agreed to execute and deliver this Joinder Supplement in order to become a party to the Security Agreement.

NOW, THEREFORE, IT IS AGREED:

1. Security Agreement. By executing and delivering this Joinder Supplement, the Additional Grantor, as provided in Section 8.08 of the Security Agreement, hereby becomes a party to the Security Agreement as a Grantor thereunder with the same force and effect as if originally named therein as a Grantor and, without limiting the generality of the foregoing, hereby expressly assumes all obligations and liabilities of a Grantor thereunder. The Additional Grantor hereby represents and warrants, to the extent applicable, that each of the representations and warranties contained in Section 2 of the Security Agreement and Article III of the Credit Agreement is true and correct in all material respects on and as of the date hereof (after giving effect to this Joinder Supplement) as if made on and as of such date except to the extent that any representation and warranty relates to an earlier date, in which case such representation and warranty shall be true and correct in all material respects as of such earlier date (provided that any representation and warranty that is qualified by "materiality" or "Material Adverse Effect" or similar language shall be true and correct in all respects).

Without limiting the foregoing:

(a) to secure the prompt payment in full when due (whether at stated maturity, by acceleration or otherwise) in cash and performance in full of the Secured Obligations, the Additional Grantor does hereby collaterally assign, grant and pledge to the Collateral Agent, for the ratable benefit of the Collateral Agent and each other Secured Party, a security interest in all of such Additional Grantor's right, title and interest in, to and under all assets of such Additional Grantor, whether now owned or hereafter existing or acquired, including a security interest in all the right, title and interest of such Additional Grantor in, to and under all of the Collateral of such Additional Grantor set forth in Section 3 of the Security Agreement; and

(b) The information set forth in Annex A hereto is hereby added to the information set forth in Annexes 1 through 5 to the Security Agreement.

2. GOVERNING LAW. THIS JOINDER SUPPLEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK.

IN WITNESS WHEREOF, the undersigned has caused this Joinder Supplement to be duly executed and delivered as of the date first above written.

[ADDITIONAL GRANTOR]

By: _____
Name:
Title:

ANNEX 1

FILING DETAILS

Name:

Type:

Jurisdiction:

Organizational ID:

Mailing Address:

Chief Executive Office:

Location of Goods:

Location of Financing Statements:

Name:

Type:

Jurisdiction:

Organizational ID:

Mailing Address:

Chief Executive Office:

Location of Goods:

Location of Financing Statements:

ANNEX 2

PLEDGED EQUITY INTERESTS

Issuer	Holder	Type of Interest	Percentage Held	Certificate Number

ANNEX 3

NEW DEBTOR EVENTS

ANNEX 4

LIST OF COMMERCIAL TORT CLAIMS

ANNEX 5

VEHICLES

Annex 5-1

PRIVILEGED AND CONFIDENTIAL

October 31, 2019

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Jason Few
Email: jfew@fce.com

Loan Discount Letter

Ladies and Gentlemen:

This letter (this "**Loan Discount Letter**") sets forth the loan discount amount accepted by FuelCell Energy, Inc., a Delaware corporation (the "**Borrower**" or "**you**"), in connection with the Credit Agreement dated as of the date hereof (as amended, modified or supplemented from time to time, the "**Credit Agreement**") by and among the Borrower, the Subsidiaries of the Borrower from time to time parties thereto as Guarantors, the Lenders party thereto from time to time, and Orion Energy Partners Investment Agent, LLC, as administrative agent and collateral agent (and in such capacities as both the administrative agent and the collateral agent, the "**Agent**"). Capitalized terms used herein and not defined shall have the meanings set forth in the Credit Agreement.

Loan Discount.

Each Lender shall 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**").

Such Loan Discount shall be in all respects fully earned on the Initial Funding Date and non-refundable and non-creditable thereafter.

General Provisions.

The Loan Discount shall be in addition to the reimbursement of any other expenses or amounts reimbursable or payable to any Lender, Agent or Person in connection with the Credit Agreement.

Borrower acknowledges that this Loan Discount Letter is neither an express nor an implied commitment by any Lender, Agent or Person to act in any capacity with respect to the Credit Agreement or the Commitments thereunder or to purchase or place any Loans in connection therewith. This Loan Discount Letter may not be amended or any provision hereof waived or modified except by an instrument in writing signed by the parties hereto. Except as specified in the Credit Agreement, you agree that this Loan Discount Letter shall not constitute or give rise to any obligation on the part of us or any of our Affiliates to provide or arrange any financing.

This Loan Discount Letter shall be construed in accordance with and governed by the law of the State of New York.

The provisions of Sections 10.07 (*Severability*) and 10.09(b) – (g) (*Governing Law; Jurisdiction; Etc.*) of the Credit Agreement shall apply, *mutatis mutandis*, to this Loan Discount Letter. This Loan Discount Letter may be executed in any number of counterparts, each of which when executed will be an original, and all of which, when taken together, will constitute one agreement. Delivery of an executed counterpart of a signature page of this Loan Discount Letter by facsimile or other electronic transmission will be effective as delivery of a manually executed counterpart hereof.

In addition, please note that neither Lender nor Agent, nor any of their respective Affiliates, provide accounting, tax or legal advice.

Please confirm that the foregoing is in accordance with your understanding by signing and returning to us the enclosed copy of this Loan Discount Letter.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the undersigned have executed this Loan Discount Letter as of the date first written above.

Very truly yours,

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, as Agent

By: /s/ Gerritt Nicholas
Name: Gerritt Nicholas
Title: Managing Partner

ACKNOWLEDGED AND AGREED:

FUELCELL ENERGY, INC.

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and
Chief Commercial Officer

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC
as Agent
350 5th Ave #6740
New York, NY 10118

October 31, 2019

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Jason Few
Email: jfew@fce.com

Agent Reimbursement Letter

Ladies and Gentlemen:

This Agent Reimbursement Letter (this "**Agent Reimbursement Letter**") is delivered to you in connection with the Credit Agreement dated as of the date hereof (as amended, modified or supplemented from time to time, the "**Credit Agreement**") by and among FuelCell Energy, Inc., a Delaware corporation (the "**Borrower**" or "**you**"), the Subsidiaries of the Borrower from time to time parties thereto as Guarantors, the Lenders party thereto from time to time, and Orion Energy Partners Investment Agent, LLC, as administrative agent and collateral agent (and in such capacities as both the administrative agent and the collateral agent, the "**Agent**"). Capitalized terms used herein and not defined shall have the meanings set forth in the Credit Agreement.

Agent Reimbursement. In connection with the Credit Agreement, subject to the occurrence of the Closing Date thereunder, you agree to pay, or cause to be paid, to the Agent, for its own account, a nonrefundable reimbursement to the Agent (the "**Agent Reimbursement**") in an amount of US$100,000.00 per annum. The Agent Reimbursement shall be due and payable quarterly in advance in quarterly installments of $25,000 each. For the first fiscal year, the first quarterly payment of $25,000 shall be due on the Initial Funding Date and the next three quarterly payments of $25,000 shall due on the twenty –first (21st) Business Day after the last Business day of April, 2020, July, 2020 and October, 2020, respectively. For each fiscal year thereafter, each quarterly payment of $25,000 shall be due on each Quarterly Payment Date.

The foregoing quarterly payments shall be made until the earlier of (i) the resignation or replacement of the Agent in accordance with the Credit Agreement, or (ii) the date on which the Obligations have been indefeasibly paid in full or are otherwise terminated in accordance with the Credit Agreement (and pro-rated for any partial quarter).

This Agent Reimbursement Letter and any claim, controversy or dispute arising under or related to this Agent Reimbursement Letter shall be governed by, and construed in accordance with the laws of the State of New York without regard to principles of conflicts of law to the extent that the application of the laws of another jurisdiction will be required thereby. Any right to trial by jury with respect to any claim, action, suit or proceeding arising out

of or contemplated by this Agent Reimbursement Letter is hereby waived. Each of the parties hereto hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the federal and New York State courts located in the City of New York, Borough of Manhattan (and appellate courts thereof) in connection with any dispute related to this Agent Reimbursement Letter or any matters contemplated hereby or thereby, and agrees that any service of process, summons, notice or document by registered mail addressed to such party shall be effective service of process for any suit, action or proceeding relating to any such dispute. Each of the parties hereto irrevocably and unconditionally waives any objection to the laying of venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding has been brought in an inconvenient forum. Nothing herein will affect the right of the Agent to serve legal process in any other manner permitted by law or affect the Agent's right to bring any suit, action or proceeding against you or your property in the courts of other jurisdictions. A final judgment in any such suit, action or proceeding may be enforced in any jurisdiction by suit on the judgment or in any other manner provided by law.

All Agent Reimbursement payments shall be payable in U.S. dollars in immediately available funds, free and clear of and without deduction for any and all present or future applicable taxes, levies, imports, deductions, charges or withholdings, and all liabilities with respect thereto. Except as expressly provided herein, once paid, each such Agent Reimbursement payment shall be fully earned and no Agent Reimbursement payment shall be refundable under any circumstances. At the sole discretion of Agent, all or any portion of any Agent Reimbursement payment may be paid to any of its Affiliates. You agree that this Agent Reimbursement Letter shall not constitute or give rise to any obligation on the part of us or any of our Affiliates to provide or arrange any financing, including any financing or any part thereof under the Credit Agreement.

Delivery of an executed counterpart of a signature page to this Agent Reimbursement Letter by facsimile or electronic .pdf shall be effective as delivery of a manually executed counterpart of this Agent Reimbursement Letter. This Agent Reimbursement Letter may be executed in any number of counterparts, and by the different parties hereto on separate counterparts, each of which counterpart shall be an original, but all of which shall together constitute one and the same instrument. This Agent Reimbursement Letter may not be amended or any provision hereof waived or modified except by an instrument in writing signed by the parties hereto. This Agent Reimbursement Letter shall not be assignable by you without our prior written consent and any purported assignment without such consent shall be null and void.

[*Remainder of page intentionally left blank*]

We are pleased to have given the opportunity to assist you in connection with the financing for this transaction.

Very truly yours,

ORION ENERGY PARTNERS INVESTMENT AGENT, LLC, as Agent

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

ACKNOWLEDGED AND AGREED:

FUELCELL ENERGY, INC.

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and
Chief Commercial Officer

FUELCELL ENERGY, INC.
COMMON STOCK WARRANT

THIS WARRANT AND THE SHARES OF COMMON STOCK ISSUABLE UPON EXERCISE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), OR ANY APPLICABLE STATE SECURITIES LAWS, AND MAY NOT BE SOLD, OFFERED FOR SALE, PLEDGED OR HYPOTHECATED IN THE ABSENCE OF A REGISTRATION STATEMENT IN EFFECT UNDER THE SECURITIES ACT AND APPLICABLE LAWS OR AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND APPLICABLE LAWS OR AN OPINION OF COUNSEL SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED. THIS WARRANT MAY NOT BE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE RESTRICTIONS ON TRANSFER SET FORTH IN SECTION 8.

Warrant Issue Date: [_____]

Warrant to Purchase up to [_____] Shares of Common Stock

This certifies that, for value received, [_____], or its registered and permitted assigns (the "Holder") is entitled, subject to the terms set forth herein, to purchase from FuelCell Energy, Inc., a Delaware corporation (the "Company"), up to [_____] shares of the Common Stock ("Common Stock") of the Company, as constituted on the Warrant Issue Date specified above (the "Warrant Issue Date"), at the Exercise Price per share of Common Stock. The Exercise Price and the number of shares of Common Stock issuable on exercise of this Warrant are subject to adjustment as provided below. This Warrant is being issued to the Holder on the Warrant Issue Date as a requirement under the Credit Agreement by and among the Company, the Subsidiaries of the Company from time to time party thereto as Guarantors, the lenders from time to time party thereto and Orion Energy Partners Investment Agent, LLC, as administrative agent and collateral agent, dated as of October 31, 2019 (as amended and restated from time to time, the "Credit Agreement"). Terms not otherwise defined herein shall have the meaning set forth in the Credit Agreement (it being understood that if the Credit Agreement is not in effect at any time during the term of this Warrant, references herein to the Credit Agreement shall be to the Credit Agreement as if the Credit Agreement was in effect at such time).

1. Term of Warrant. Subject to the terms and conditions set forth herein, this Warrant shall be exercisable, in whole or in part, at any time or from time to time, during the period (the "Term") commencing on the Warrant Issue Date and ending at 5:00 p.m., Eastern Time, on the date that is the eighth anniversary of the Warrant Issue Date.

2. Shares Subject to Purchase. The number of shares of Common Stock which this Warrant entitles the Holder to purchase shall be [_____] shares, subject to adjustment as provided in Section 11 hereof.

3. Exercise Price. The Exercise Price shall be $[_____] per share of Common Stock, as adjusted from time to time pursuant to Section 11 hereof.

4. Exercise of Warrant.

(a) *Surrender and Payment*. The purchase rights represented by this Warrant are exercisable by the Holder in whole or in part, at any time, or from time to time, during the Term hereof as described in Section 1 above by delivery of a Notice of Exercise annexed hereto duly completed and executed on behalf of the Holder and, in the event that such exercise is an exercise in full of this Warrant, surrender of this Warrant, at the office of the Company (or such other office or agency of the Company as it may designate by notice in writing to the Holder at the address of the Holder appearing on the books of the Company). On the date of the delivery of any Notice of Exercise, the Holder shall deliver payment to the Company of an amount equal to the Exercise Price multiplied by the number of shares of Common Stock as to which this Warrant is so exercised either (x) in cash or by certified check, wire transfer or other payment means acceptable to the Company or (y) in the event that the Holder has elected to make such exercise via Cashless Exercise as set forth in the Notice of Exercise, in the manner specified in Section 4(b) below. Execution and delivery of a Notice of Exercise with respect to an exercise to purchase less than the maximum number of shares of Common Stock issuable hereunder shall have the same effect as cancellation of the original of this Warrant and issuance of a new Warrant evidencing the right to purchase shares hereunder with respect to the remaining portion of this Warrant.

(b) *Cashless Exercise*. Notwithstanding anything contained herein to the contrary (other than Section 4(d) below), if at any time of exercise hereof a Registration Statement filed with the SEC by the Company is not effective (or the prospectus contained therein is not available for use) for the resale by the Holder of all of the shares of Common Stock then issuable hereunder, then the Holder may, in its sole discretion, exercise this Warrant in whole or in part and, in lieu of making the cash payment otherwise contemplated to be made to the Company upon such exercise in payment of the Exercise Price, elect instead to receive upon such exercise the "Net Number" of shares of Common Stock determined according to the following formula (a "Cashless Exercise"):

$$\text{Net Number} = \frac{(A \times B) - (A \times C)}{B}$$

For purposes of the foregoing formula:

A = the total number of shares of Common Stock with respect to which this Warrant is then being exercised.

B = the quotient of (x) the sum of the VWAP of the Common Stock on each of the five (5) Trading Days ending at the close of business on the Principal Market immediately prior to the time of exercise as set forth in the applicable Exercise Notice, divided by (y) five (5).

C = the Exercise Price then in effect for the applicable shares of Common Stock at the time of such exercise.

If the shares of Common Stock are issued in a Cashless Exercise, the parties hereto acknowledge and agree that in accordance with Section 3(a)(9) of the Securities Act, such shares of Common Stock take on the characteristics of the Warrants being exercised. For purposes of Rule 144(d) promulgated under the Securities Act, as in effect on the Warrant Issue Date, it is intended that shares of Common Stock issued in a Cashless Exercise shall be deemed to have been acquired by the Holder, and the holding period for such shares of Common Stock shall be deemed to have commenced, on the Warrant Issue Date.

(c) *Effectiveness of Exercise*. This Warrant shall be deemed to have been exercised immediately prior to the close of business on the date of the Holder's delivery of a Notice of Exercise and payment of the applicable Exercise Price (other than in the case of a Cashless Exercise pursuant to Section 4(b)) as provided herein, and the person entitled to receive the shares of Common Stock issuable upon such exercise shall be treated for all purposes as the holder of record of such shares as of the close of business on such date. As promptly as practicable on or after such date and in any event within three (3) Trading Days thereafter (or such earlier date as required pursuant to the Exchange Act or other applicable law, rule or regulation for the settlement of a trade of shares issuable upon such exercise), the Company, at its expense, shall issue and deliver to the person or persons entitled to receive the same a certificate or certificates for the number of shares issuable upon such exercise and shall deliver all instructions necessary to the Company's transfer agent to permit the immediate transfer of such shares of Common Stock (the failure of the Company to deliver such certificates or instructions within such three Trading Day (or shorter) period is referred to herein as an "Exercise Failure"). The Company shall pay any and all transfer, stamp and similar taxes and fees which may be payable with respect to the issuance and delivery of shares of Common Stock upon exercise of this Warrant. In the event that this Warrant is exercised only in part, and the Holder tenders this Warrant for reissuance, the Company at its expense will execute and deliver a new Warrant of like tenor exercisable for the number of shares for which this Warrant may then be exercised. If an Exercise Failure occurs and on or after the expiration of the three Trading Day period referred to above (or such earlier date as required pursuant to the Exchange Act or other applicable law, rule or regulation for the settlement of a trade of shares issuable upon such exercise), the Holder is required by its broker to purchase (in an open market transaction or otherwise) or the Holder's brokerage firm otherwise purchases, shares of Common Stock corresponding to all or any portion of the number of shares of Common Stock issuable upon such exercise that the Holder is entitled to receive from the Company and has not received from the Company in connection with such Exercise Failure (a "Buy-In"), then, in addition to all other remedies available to the Holder, the Company shall, within three (3) Business Days after receipt of the Holder's request and in the Holder's discretion, either: (I) pay cash to the Holder in an amount equal to the Holder's total purchase price (including brokerage commissions and other out-of-pocket expenses, if any) for the shares of Common Stock so purchased (including, without limitation, by any other Person in respect, or on behalf, of the Holder) (the "Buy-In Price"), at which point the Company's obligation to cause the issuance and delivery of such certificate (and to issue such shares of Common Stock) shall terminate, or (II) promptly honor its obligation to issue and deliver to the Holder a certificate or certificates representing such shares of Common Stock to

which the Holder is entitled upon the Holder's exercise hereunder and pay cash to the Holder in an amount equal to the excess (if any) of the Buy-In Price over the product of (x) such number of shares of Common Stock so purchased multiplied by (y) the price at which the sell order giving rise to such purchase obligation was executed. Nothing shall limit the Holder's right to pursue any other remedies available to it hereunder, at law or in equity, including, without limitation, a decree of specific performance and/or injunctive relief with respect to the Company's failure to timely deliver certificates representing shares of Common Stock upon the exercise of this Warrant as required pursuant to the terms hereof.

(d) *Limitation on Exercises*. The Company shall not effect the exercise of any portion of this Warrant, and the Holder shall not have the right to exercise any portion of this Warrant, pursuant to the terms and conditions of this Warrant and any such exercise shall be null and void and treated as if never made, to the extent that after giving effect to such exercise, the Holder together with the other Attribution Parties collectively would beneficially own in excess of 4.99% (the "Maximum Percentage") of the shares of Common Stock outstanding immediately after giving effect to such exercise. For purposes of the foregoing sentence, the aggregate number of shares of Common Stock beneficially owned by the Holder and the other Attribution Parties shall include the number of shares of Common Stock held by the Holder and all other Attribution Parties plus the number of shares of Common Stock issuable upon the exercise of this Warrant with respect to which the determination of such sentence is being made, but shall exclude shares of Common Stock which would be issuable upon (A) exercise of the remaining, unexercised portion of this Warrant beneficially owned by the Holder or any of the other Attribution Parties and (B) exercise or conversion of the unexercised or unconverted portion of any other securities of the Company (including, without limitation, any convertible notes or convertible preferred stock or warrants) beneficially owned by the Holder or any other Attribution Party subject to a limitation on conversion or exercise analogous to the limitation contained in this Section 4(d). For purposes of this Section 4(d) beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act. For purposes of determining the number of outstanding shares of Common Stock the Holder may acquire upon the exercise of this Warrant without exceeding the Maximum Percentage, the Holder may rely on the number of outstanding shares of Common Stock as reflected in (x) the Company's most recent Annual Report on Form 10-K, Quarterly Report on Form 10-Q, Current Report on Form 8-K or other public filing with the SEC, as the case may be, (y) a more recent public announcement by the Company or (z) any other written notice by the Company or its transfer agent, if any, setting forth the number of shares of Common Stock outstanding (the "Reported Outstanding Share Number"). If the Company receives an Exercise Notice from the Holder at a time when the actual number of outstanding shares of Common Stock is less than the Reported Outstanding Share Number, the Company shall notify the Holder in writing of the number of shares of Common Stock then outstanding and, to the extent that such Exercise Notice would otherwise cause the Holder's beneficial ownership, as determined pursuant to this Section 4(d), to exceed the Maximum Percentage, the Holder must notify the Company of a reduced number of shares of Common Stock to be purchased pursuant to such Exercise Notice. For any reason at any time, upon the written or oral request of the Holder, the Company shall within one (1) Business Day confirm orally and in writing or by electronic mail to the Holder the number

of shares of Common Stock then outstanding. In any case, the number of outstanding shares of Common Stock shall be determined after giving effect to the exercise or conversion of securities of the Company, including this Warrant, by the Holder and any other Attribution Party since the date as of which the Reported Outstanding Share Number was reported. In the event that the issuance of shares of Common Stock to the Holder upon exercise of this Warrant results in the Holder and the other Attribution Parties being deemed to beneficially own, in the aggregate, more than the Maximum Percentage of the number of outstanding shares of Common Stock (as determined under Section 13(d) of the Exchange Act), the number of shares so issued by which the Holder's and the other Attribution Parties' aggregate beneficial ownership exceeds the Maximum Percentage (the "Excess Shares") shall be deemed null and void and shall be cancelled ab initio, and the Holder shall not have the power to vote or to transfer the Excess Shares. Upon delivery of a written notice to the Company, the Holder may from time to time increase (with such increase not effective until the sixty-first (61st) day after delivery of such notice) or decrease the Maximum Percentage to any other percentage as specified in such notice; provided that (i) any such increase in the Maximum Percentage will not be effective until the sixty-first (61st) day after such notice is delivered to the Company and (ii) any such increase or decrease will apply only to the Holder and the other Attribution Parties and not to any other holder of Warrants that is not an Attribution Party of the Holder. For purposes of clarity, the shares of Common Stock issuable pursuant to the terms of this Warrant in excess of the Maximum Percentage shall not be deemed to be beneficially owned by the Holder for any purpose including for purposes of Section 13(d) or Rule 16a-1(a)(1) of the Exchange Act. No prior inability to exercise this Warrant pursuant to this paragraph shall have any effect on the applicability of the provisions of this paragraph with respect to any subsequent determination of exercisability. The provisions of this paragraph shall be construed and implemented in a manner otherwise than in strict conformity with the terms of this Section 4(d) to the extent necessary to correct this paragraph (or any portion of this paragraph) which may be defective or inconsistent with the intended beneficial ownership limitation contained in this Section 4(d) or to make changes or supplements necessary or desirable to properly give effect to such limitation. The limitation contained in this paragraph may not be waived and shall apply to a successor holder of this Warrant.

5. No Fractional Shares or Scrip. No fractional shares or scrip representing fractional shares shall be issued upon the exercise of this Warrant. In lieu of any fractional share to which the Holder would otherwise be entitled, the Company shall make a cash payment equal to the fair market value of one share of Common Stock multiplied by such fraction.

6. Replacement of Warrant. On receipt of evidence reasonably satisfactory to the Company of the loss, theft, destruction or mutilation of this Warrant and, in the case of loss, theft or destruction, on delivery of an indemnity agreement reasonably satisfactory in form and substance to the Company or, in the case of mutilation, on surrender and cancellation of this Warrant, the Company at its expense shall execute and deliver, in lieu of this Warrant, a new warrant of like tenor and amount.

7. Rights of Stockholders. Subject to Section 4(c), the Holder shall not be entitled to vote or receive dividends or be deemed the holder of Common Stock or any other securities of

the Company that may at any time be issuable on the exercise hereof for any purpose, nor shall anything contained herein be construed to confer upon the Holder, as such, any of the rights of a stockholder of the Company or any right to vote for the election of directors or upon any matter submitted to stockholders at any meeting thereof, or to give or withhold consent to any corporate action (whether upon any recapitalization, issuance of stock, reclassification of stock, change of par value, or change of stock to no par value, consolidation, merger, conveyance, or otherwise) or to receive notice of meetings, or to receive dividends or subscription rights or otherwise until the Warrant shall have been exercised as provided herein.

8. Transfer of Warrant.

(a) *Warrant Register*. The Company will maintain a register (the "Warrant Register") containing the names and addresses of the Holder or Holders. Any Holder of this Warrant or any portion thereof may change such Holder's address as shown on the Warrant Register by written notice to the Company requesting such change. Any notice or written communication required or permitted to be given to the Holder may be delivered or given by mail to such Holder as shown on the Warrant Register and at the address shown on the Warrant Register. Until this Warrant is transferred on the Warrant Register of the Company, the Company may treat the Holder as shown on the Warrant Register as the absolute owner of this Warrant for all purposes, notwithstanding any notice to the contrary.

(b) *Warrant Agent*. The Company may, by written notice to the Holder, appoint an agent for the purpose of maintaining the Warrant Register referred to in Section 8(a) above, issuing the Common Stock or other securities then issuable upon the exercise of this Warrant, exchanging this Warrant, replacing this Warrant, or any or all of the foregoing. Thereafter, any such registration, issuance, exchange, or replacement, as the case may be, shall be made at the office of such agent.

(c) *Limitations on Transfer*. In no event may this Warrant be transferred or assigned without compliance with, or pursuant to an available exemption from, the Securities Act and state securities laws by the transferor and the transferee (including the delivery of investment representation letters and legal opinions reasonably satisfactory to the Company, if such are requested by the Company; provided that no such representation letters or legal opinions shall be required in connection with any transfer of this Warrant (i) pursuant to an effective Registration Statement, (ii) to the Company, (iii) pursuant to Rule 144 (as promulgated under the Securities Act) (provided that the Holder provides the Company with reasonable assurances (in the form of a seller representation letter) that the Warrant may be sold pursuant to such rule) or Rule 144A (as promulgated under the Securities Act), or (iv) in connection transfer or assignment to an Affiliate of this Holder). Subject to the foregoing provisions, this Warrant may be transferred by the Holder executing an assignment in the form annexed hereto and delivery in the same manner as a negotiable instrument transferable by endorsement and delivery.

(d) *Exchange of Warrant Upon a Transfer*. On surrender of this Warrant for exchange, properly endorsed on the Assignment Form appended hereto and subject to the provisions of this Warrant with respect to compliance with the Act and with the limitations

on assignments and transfers contained in this Section 8, the Company at its expense shall issue to or on the order of the Holder a new warrant or warrants of like tenor, in the name of the Holder or as the Holder (on payment by the Holder of any applicable transfer taxes) may direct, for the number of shares issuable upon exercise hereof.

9. Reservation of Stock. The Company covenants that during the Term in which this Warrant is exercisable, the Company will reserve from its authorized and unissued Common Stock a sufficient number of shares to provide for the issuance of Common Stock upon the exercise of this Warrant (without regard to any limitation otherwise contained herein with respect to the number of shares of Common Stock that may be acquirable upon exercise of this Warrant) and, from time to time, will take all steps necessary to provide sufficient reserves of shares of Common Stock issuable upon exercise of this Warrant. If, notwithstanding the foregoing, and not in limitation thereof, at any time while this Warrant remains outstanding the Company does not have a sufficient number of authorized and unreserved shares of Common Stock to satisfy its obligation to reserve for issuance upon exercise of this Warrant at least a number of shares of Common Stock (the "Required Reserve Amount") equal to the number of shares of Common Stock as shall from time to time be necessary to effect the exercise of this Warrant, in full (an "Authorized Share Failure"), then the Company shall promptly take all action necessary to increase the Company's authorized shares of Common Stock to an amount sufficient to allow Company to reserve the Required Reserve Amount under this Warrant. Without limiting the generality of the foregoing sentence, as soon as practicable after the date of the occurrence of an Authorized Share Failure, but in no event later than one hundred twenty (120) days after the occurrence of such Authorized Share Failure, the Company shall take all actions necessary under applicable law and stock exchange regulations (including obtaining all necessary consents and approvals of stockholders) to effect such increase in the number of authorized shares of Common Stock. If, upon any exercise of this Warrant under Section 4, the Company does not have sufficient authorized shares to deliver in satisfaction of such exercise, then unless the Holder elects to rescind such attempted exercise, the Holder may, in its discretion, require the Company, in lieu of delivering Common Stock in connection with such exercise and in full satisfaction of the Company's obligations with respect to such exercise, to pay to the Holder within three (3) Business Days of the applicable attempted exercise, cash in an amount equal to the product of (i) the number of shares of Common Stock that the Company is unable to deliver pursuant to Section 4, *multiplied by* (ii) the highest Closing Sale Price of the Common Stock on any Trading Day during the period beginning on the date on which the Company has received the applicable Exercise Notice and ending on the date on which the Company makes the applicable cash payment. The Company further covenants that all shares that may be issued upon the exercise of rights represented by this Warrant, all as set forth herein, will be duly authorized, validly issued, fully paid and nonassessable and shall be free from all preemptive rights, taxes, liens and charges in respect of the issue thereof (other than taxes in respect of any transfer occurring contemporaneously or otherwise specified herein). The Company agrees that its issuance of this Warrant shall constitute full authority to its officers who are charged with the duty of executing stock certificates to execute and issue the necessary certificates for shares of Common Stock upon the exercise of this Warrant.

10. Notices.

(a) Whenever the Exercise Price or number of shares purchasable hereunder shall be adjusted pursuant to Section 11 hereof, the Company shall issue a certificate setting forth, in reasonable detail, the event requiring the adjustment, the amount of the adjustment, the method by which such adjustment was calculated, and the Exercise Price and number of shares purchasable hereunder after giving effect to such adjustment, and shall cause a copy of such certificate to be mailed (by first-class mail, postage prepaid) to the Holder of this Warrant.

(b) In case:

(i) the Company shall take a record of the holders of its Common Stock (or other stock or securities at the time receivable upon the exercise of this Warrant) for the purpose of entitling them to receive any dividend or other distribution, or any right to subscribe for or purchase any shares of stock of any class or any other securities, or to receive any other right, or

(ii) of any capital reorganization of the Company, any reclassification of the capital stock of the Company, any consolidation or merger of the Company with or into another corporation, or any conveyance of all or substantially all of the assets of the Company to another corporation, or

(iii) of any voluntary dissolution, liquidation or winding-up of the Company,

then, and in each such case, the Company will mail or cause to be mailed to the Holder or Holders a notice specifying, as the case may be, (A) the date on which a record is to be taken for the purpose of such dividend, distribution or right, and stating the amount and character of such dividend, distribution or right, or (B) the date on which such reorganization, reclassification, consolidation, merger, conveyance, dissolution, liquidation or winding-up is to take place, and the time, if any is to be fixed, as of which the holders of record of Common Stock (or such stock or securities at the time receivable upon the exercise of this Warrant) shall be entitled to exchange their shares of Common Stock (or such other stock or securities) for securities or other property deliverable upon such reorganization, reclassification, consolidation, merger, conveyance, dissolution, liquidation or winding-up. Such notice shall be mailed at least 15 days prior to the date therein specified.

(c) All such notices, advices and communications shall be deemed to have been received (i) in the case of personal delivery, on the date of such delivery and (ii) in the case of mailing, on the fifth business day following the date of such mailing.

11. Adjustments. The Exercise Price and the number of shares purchasable hereunder are subject to adjustment from time to time as follows:

11.1 Merger, Sale of Assets, etc. (other than a Change of Control). If at any time while this Warrant, or any portion hereof, is outstanding and unexpired there shall be (i) a reorganization (other than a combination, reclassification, exchange or subdivision of shares otherwise provided for herein), (ii) a merger or consolidation of the Company with or into another corporation in which the Company is not the surviving entity, or a reverse triangular merger in which the Company is the surviving entity but the shares of the Company's capital stock outstanding immediately prior to the merger are converted by virtue of the merger into other property, whether in the form of securities, cash, or otherwise, or (iii) a sale or transfer of the Company's properties and assets as, or substantially as, an entirety to any other person (any such event, in (i), (ii) and (iii), a "Fundamental Transaction"), then, except in the case of a Change of Control, as a part of such Fundamental Transaction, the successor corporation or entity shall assume in writing all of the obligations of the Company under this Warrant pursuant to written instrument substantially similar in form and substance to this Warrant such that the holder of this Warrant shall thereafter be entitled to receive upon exercise of this Warrant, during the period specified herein, the number of shares of stock or other securities or property of the successor corporation or entity resulting from such reorganization, merger, consolidation, sale or transfer that a holder of the shares deliverable upon exercise of this Warrant would have been entitled to receive in such reorganization, consolidation, merger, sale or transfer if this Warrant had been exercised immediately before such reorganization, merger, consolidation, sale or transfer, all subject to further adjustment as provided in this Section 11. Notwithstanding the foregoing, at the request of the Holder delivered at any time commencing on the earliest to occur of (A) the public disclosure of any Fundamental Transaction in which the successor corporation or entity is not a publicly traded entity whose common equity or ordinary shares, as the case may be, is quoted on or listed for trading on an Eligible Board or Market, (B) the consummation of any such Fundamental Transaction and (C) the Holder first becoming aware of any such Fundamental Transaction through the date that is ninety (90) days after the public disclosure of the consummation of such Fundamental Transaction by the Company pursuant to a Current Report on Form 8-K filed with the SEC, the Company or the successor corporation or entity (as the case may be shall purchase this Warrant from the Holder by paying to the Holder, within five (5) Business Days after such request (or, if later, on the effective date of the Change of Control), an amount equal to (x) in the event that such payment date is on or prior to the second anniversary of the Warrant Issue Date, the Black Scholes Value of the remaining unexercised portion of this Warrant on the effective date of such Fundamental Transaction, payable in cash, or (y) in the event that such payment date is after the second anniversary of the Warrant Issue Date, an amount equal to (i) the product of the remaining number of shares of Common Stock issuable upon exercise of this Warrant times the consideration per share of Common Stock paid or payable to each holder of Common Stock in such Fundamental Transaction, minus (ii) the aggregate Exercise Price, payable in case. The foregoing provisions of this Section 11.1 shall similarly apply to successive reorganizations, consolidations, mergers, sales and transfers and to the stock or securities of any other corporation that are at the time receivable upon the exercise of this Warrant.

If the per share consideration payable to the holder hereof for shares in connection with any such transaction is in a form other than cash or marketable securities, then the value of such consideration shall be determined in good faith by the Company's Board of Directors. In all events, appropriate adjustment (as determined in good faith by the Company's Board of Directors) shall be made in the application of the provisions of this Warrant with respect to the rights and interests of the Holder after the transaction, to the end that the provisions of this Warrant shall be applicable after that event, as near as reasonably may be, in relation to any shares or other property deliverable after that event upon exercise of this Warrant. Notwithstanding the foregoing, in the event of a Change of Control, at the request of the Holder delivered at any time commencing on the earliest to occur of (A) the public disclosure of any Change of Control, (B) the consummation of any Change of Control and (C) the Holder first becoming aware of any Change of Control through the date that is ninety (90) days after the public disclosure of the consummation of such Change of Control by the Company pursuant to a Current Report on Form 8-K filed with the SEC, the Company or the successor corporation or entity (as the case may be) purchase this Warrant from the Holder by paying to the Holder, within five (5) Business Days after such request (or, if later, on the effective date of the Change of Control), an amount equal to (x) in the event that such payment date is on or prior to the second anniversary of the Warrant Issue Date, the Black Scholes Value of the remaining unexercised portion of this Warrant on the effective date of such Change of Control, payable in cash or (y) in the event that such payment date is after the second anniversary of the Warrant Issue Date, an amount equal to (i) the product of the remaining number of shares of Common Stock issuable upon exercise of this Warrant times the consideration per share of Common Stock paid or payable to each holder of Common Stock in such Change of Control, minus (ii) the aggregate Exercise Price, payable in case.

11.2 Reclassification, etc. If the Company, at any time while this Warrant, or any portion hereof, remains outstanding and unexpired, by reclassification of securities or otherwise, shall change any of the securities as to which purchase rights under this Warrant exist into the same or a different number of securities of any other class or classes, this Warrant shall thereafter represent the right to acquire such number and kind of securities as would have been issuable as the result of such change with respect to the securities that were subject to the purchase rights under this Warrant immediately prior to such reclassification or other change and the Exercise Price therefor shall be appropriately adjusted, all subject to further adjustment as provided in this Section 11.

11.3 Split, Subdivision or Combination of Shares. If the Company, at any time while this Warrant, or any portion hereof, remains outstanding and unexpired, shall split, subdivide or combine the securities as to which purchase rights under this Warrant exist, into a different number of securities of the same class, the Exercise Price for such securities shall be proportionately decreased in the case of a split or subdivision or proportionately increased in the case of a combination.

11.4 Adjustments for Dividends in Stock or Other Securities or Property. If while this Warrant, or any portion hereof, remains outstanding and unexpired, the holders of the securities as to which purchase rights under this Warrant exist at the time shall have

received, or, on or after the record date fixed for the determination of eligible stockholders, shall have become entitled to receive, without payment therefor, other or additional stock or other securities or property (other than cash) of the Company by way of dividend, then and in each case, this Warrant shall represent the right to acquire, in addition to the number of shares of the security receivable upon exercise of this Warrant, and without payment of any additional consideration therefor, the amount of such other or additional stock or other securities or property (other than cash) of the Company that such holder would hold on the date of such exercise had it been the holder of record of the security receivable upon exercise of this Warrant on the date hereof and had thereafter, during the period from the date hereof to and including the date of such exercise, retained such shares and/or all other additional stock available by it as aforesaid during such period, giving effect to all adjustments called for during such period by the provisions of this Section 11.

11.5 Rights, Options and Warrants. If while this Warrant, or any portion hereof, remains outstanding and unexpired, the Company distributes to substantially all of the holders of the securities as to which purchase rights under this Warrant exist at the time rights, options or warrants entitling such holders to subscribe for or purchase securities as to which purchase rights under this Warrant exist at the time at a price per share that is less than the average of the Closing Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is publicly announced, then the Exercise Price will be decreased based on the following formula:

$$EP_1 = EP_0 * \frac{OS + Y}{OS + X}$$

EP0 = the Exercise Price in effect immediately before the open of business on the ex-dividend date for such distribution

EP1 = the Exercise Price in effect immediately after the open of business on such ex-dividend date

OS = the number of shares of Common Stock (or other securities as to which purchase rights under this Warrant exist at the time) outstanding immediately before the open of business on such ex-dividend date

X = the total number of shares of Common Stock (or other securities as to which purchase rights under this Warrant exist at the time) issuable pursuant to such rights, options or warrants

Y	=	a number of shares of Common Stock (or other securities as to which purchase rights under this Warrant exist at the time) obtained by dividing (x) the aggregate price amount to exercise all such rights, options or warrants distributed by the Company by (y) the average of the Closing Sale Prices per share of Common Stock (or other securities as to which purchase rights under this Warrant exist at the time) for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced

For the avoidance of doubt, any adjustment to the Exercise Price made pursuant to this Section 11.5 will be made successively whenever any such rights, options or warrants are issued and, pursuant to the definition of EP1 above, will become effective immediately after the open of business on the ex-dividend date for the applicable distribution. To the extent that shares of Common Stock are not delivered after the expiration of such rights, options or warrants (including as a result of such rights, options or warrants not being exercised), the Exercise Price, if previously adjusted, will be readjusted effective as of such expiration date to the Exercise Price that would then be in effect had the decrease to the Exercise Price for such distribution been made on the basis of delivery of only the number of shares of Common Stock actually delivered upon exercise of such rights, option or warrants. To the extent such rights, options or warrants are not so distributed, the Exercise Price will be readjusted effective as of the date the Board of Directors of the Company determines not to distribute such rights, options or warrants, to the Exercise Price that would then be in effect had the ex-dividend date for the distribution of such rights, options or warrants not occurred. For purposes of this Section 11.5, in determining whether any rights, options or warrants entitle holders of Common Stock to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Closing Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date of the distribution of such rights, options or warrants is announced, and in determining the aggregate price payable to exercise such rights, options or warrants, there will be taken into account any consideration the Company receives for such rights, options or warrants and any amount payable on exercise thereof, with the value of such consideration, if not cash, to be determined by the Board of Directors of the Company. For the avoidance of doubt, in no event shall any adjustment to the Exercise Price be made pursuant to this Section 11.5 unless and until the distribution by the Company of the applicable rights, options or warrants.

11.6 Number of Shares. Simultaneously with any adjustment to the Exercise Price pursuant to Section 11.3 or 11.5 above, the number of shares of Common Stock that may be purchased upon exercise of this Warrant shall be increased or decreased proportionately, so that after such adjustment the aggregate Exercise Price payable hereunder for the adjusted number of shares of Common Stock shall be the same as the aggregate Exercise Price in effect immediately prior to such adjustment (without regard to any limitations on exercise contained herein).

11.7 Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment pursuant to this Section 11, the Company at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish

to each Holder of this Warrant a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Company shall, upon the written request, at any time, of any such Holder, furnish or cause to be furnished to such Holder a like certificate setting forth: (i) such adjustments and readjustments; (ii) the Exercise Price at the time in effect; and (iii) the number of shares and the amount, if any, of other property that at the time would be received upon the exercise of the Warrant.

11.6 No Impairment. The Company will not, by any voluntary action, by amendment of its respective certificate or articles of incorporation, bylaws or other governing document or through any reorganization, transfer of assets, consolidation, merger, scheme of arrangement, dissolution, issue or sale of securities, or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Company, but will at all times in good faith assist in the carrying out of all the provisions of this Warrant and in the taking of all such action as may be necessary or appropriate in order to protect the rights of the Holder of this Warrant against impairment. Without limiting the generality of the foregoing or any other provision of this Warrant, the Company shall not increase, or take any action the result of which is to increase, the par value of any shares of Common Stock receivable upon exercise of this Warrant above the Exercise Price then in effect.

12. Registration.

(a) The Company shall use its commercially reasonable efforts to effect the registration, as soon as practicable after the Warrant Issue Date, but, in no event later than March 16, 2020, pursuant to Rule 415 of resales by the Holder of all shares of Common Stock issuable upon exercise of this Warrant on a delayed or continuous basis at then-prevailing market prices (and not fixed prices) and shall maintain such registration at all times following the effective date of such Registration Statement until the earlier of (i) the date as of which the Holder may sell all of the shares of Common Stock issuable upon exercise of this Warrant without restriction pursuant to Rule 144 as promulgated under the Securities Act (including, without limitation, volume restrictions) and without the need for current public information required by Rule 144(c)(1) (or Rule 144(i)(2), if applicable) as promulgated under the Securities Act or (ii) the date on which the Holder shall have sold all of the shares of Common Stock issuable upon exercise of this Warrant (the "Registration Period"). The Holder consents to the disclosure of its name and its ownership of Warrants and Common Stock in such Registration Statement.

(b) The Company shall prepare and file with the SEC such amendments (including, without limitation, post-effective amendments) and supplements to each Registration Statement and the prospectus used in connection with each such Registration Statement, which prospectus is to be filed pursuant to Rule 424 promulgated under the Securities Act, as may be necessary to keep each such Registration Statement effective at all times during the Registration Period for such Registration Statement, and, during such period, comply with the provisions of the Securities Act with respect to the disposition of all Registrable Securities of the Company required to be covered by such Registration

Statement until such time as all of Common Stock issuable upon exercise of this Warrant shall have been disposed of in accordance with the intended methods of disposition by the Holder as set forth in such Registration Statement or the completion of the applicable Registration Period. In the case of amendments and supplements to any Registration Statement by reason of the Company filing a report on Form 10-Q or Form 10-K or any analogous report under the Exchange Act, the Company shall, if permitted under the applicable rules and regulations of the SEC, have incorporated such report by reference into such Registration Statement, if applicable, or shall file such amendments or supplements with the SEC on or prior to the third (3rd) Trading Day following the date on which the Exchange Act report is filed with the SEC which created the requirement for the Company to amend or supplement such Registration Statement. Notwithstanding anything herein to the contrary, upon a good faith determination by a majority of the members of the board of directors of the Company that it is in the best interests of the Company to suspend the use of a Registration Statement, following the effectiveness of such Registration Statement (and the filings with any federal or state securities commissions), the Company, by written notice to the applicable Holders, may direct the applicable Holders to suspend sales of shares of Common Stock issuable upon exercise of this Warrant pursuant to a Registration Statement for such times as the Company reasonably may determine is necessary and advisable (but in no event for more than an aggregate of 90 days in any rolling 12 month period commencing on the Warrant Issue Date or more than 60 days in any rolling 90 day period).

(c) The Company shall use its commercially reasonable efforts, as it determines necessary, to promptly prepare a supplement or post-effective amendment to a Registration Statement or the related prospectus included therein or any document incorporated therein by reference or file any other required document so that such Registration Statement and the related prospectus will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading.

(d) If, for any reason (including, without limitation, by reason of the last sentence of Section 12 (b)), (i) a Registration Statement covering the resale of all of the shares of Common Stock issuable upon exercise of this Warrant on a delayed or continuous basis at then-prevailing market prices (and not fixed prices) is not declared effective by the SEC on or before March 16, 2020 (an "Effectiveness Failure") (it being understood that if on or prior to the fifth Business Day immediately following the effective date for such Registration Statement the Company shall not have filed a "final" prospectus for such Registration Statement with the SEC under Rule 424(b) (to the extent such a prospectus is either technically required by such rule or is otherwise required under applicable securities laws in order to permit the resale by the Holder of all of the shares of Common Stock issuable upon exercise of this Warrant), the Company shall be deemed to not have satisfied this clause (i) and such event shall be deemed to be an Effectiveness Failure), (ii) on any day after the effective date of a Registration Statement during the Registration Period sales of all of the shares of Common Stock cannot be made pursuant to such Registration Statement (including, without limitation, because of a failure to keep such Registration Statement effective, a failure to disclose such information as is necessary for sales to be made pursuant to such Registration Statement, a suspension or delisting of the shares of

Common Stock on the applicable Trading Market, or a failure to register a sufficient number of shares of Common Stock or by reason of a stop order) or the prospectus contained therein is not available for use for any reason (a "Maintenance Failure"), or (iii) if a Registration Statement is not effective for any reason or the prospectus contained therein is not available for use for any reason, and either (x) the Company fails for any reason to satisfy the requirements of Rule 144(c)(1), including, without limitation, the failure to satisfy the current public information requirement under Rule 144(c) or (y) the Company has ever been an issuer described in Rule 144(i)(1)(i) or becomes such an issuer in the future, and the Company shall fail to satisfy any condition set forth in Rule 144(i)(2) (a "Current Public Information Failure") as a result of which any of the Holder is unable to sell all of the shares of Common Stock issuable upon exercise of this Warrant without restriction under Rule 144 (including, without limitation, volume restrictions), then, as partial relief (other than equity remedies) for the damages to any holder by reason of any such delay in, or reduction of, its ability to sell all of the shares of Common Stock issuable upon exercise of this Warrant (which remedy shall not be exclusive of any other remedies available in equity), the Company shall pay to the Holder an amount in cash equal to $25,000 on (1) the date of such Effectiveness Failure, Maintenance Failure or Current Public Information Failure, as applicable, and (2) on every thirty (30) day anniversary of (I) an Effectiveness Failure until such Effectiveness Failure is cured; (II) a Maintenance Failure until such Maintenance Failure is cured; and (III) a Current Public Information Failure until the earlier of (i) the date such Current Public Information Failure is cured and (ii) such time that such public information is no longer required pursuant to Rule 144 (in each case, pro-rated for periods totaling less than thirty (30) days). The payments to which a holder of Registrable Securities shall be entitled pursuant to this clause (d) are referred to herein as "Registration Delay Payments." In the event the Company fails to make Registration Delay Payments in a timely manner in accordance with the foregoing, such Registration Delay Payments shall bear interest at the rate of 1.0% per month (prorated for partial months) until paid in full.

13. Representations and Warranties of the Holder. The Holder represents and warrants to the Company as of the Warrant Issue Date that:

(a) *Understandings or Arrangements*. The Holder is acquiring this Warrant and the shares of Common Stock issuable upon exercise of this Warrant as principal for its own account and has no direct or indirect arrangement or understanding with any other person to distribute, or regarding the distribution of, such securities (this representation and warranty not limiting the Holder's right to sell the securities in compliance with applicable federal and state securities laws and the terms of this Warrant).

(b) *Accredited Investor Status*. At the time the Holder was offered this Warrant, it was, and as of the Warrant Issue Date it is, and on each date on which it exercises this Warrant, it will be an "accredited investor" as defined in Rule 501(a)(1), (a)(2), (a)(3), (a)(7) or (a)(8) under the Securities Act.

(c) *Experience*. The Holder, either alone or together with its representatives, has such knowledge, sophistication and experience in business and financial matters so as

to be capable of evaluating the merits and risks of the prospective investment in this Warrant and the shares of Common Stock issuable upon exercise of this Warrant, and has so evaluated the merits and risks of such investment. The Holder is able to bear the economic risk of an investment in this Warrant and the shares of Common Stock issuable upon exercise of this Warrant and, at the present time, is able to afford a complete loss of such investment.

(d) *Access to Information*. The Holder acknowledges that it has had the opportunity to review the Transaction Documents (including all exhibits and schedules thereto) and the SEC Reports and has been afforded (i) the opportunity to ask such questions as it has deemed necessary of, and to receive answers from, representatives of the Company concerning the merits and risks of investing in this Warrant and the shares of Common Stock issuable upon exercise of this Warrant; (ii) access to information about the Company and its financial condition, results of operations, business, properties, management and prospects sufficient to enable it to evaluate its investment; and (iii) the opportunity to obtain such additional information that the Company possesses or can acquire without unreasonable effort or expense that is necessary to make an informed investment decision with respect to the investment.

14. Definitions. As used herein, the following terms shall have the following meanings:

(a) "Attribution Parties" means, collectively, the following Persons and entities: (i) any investment vehicle, including, any funds, feeder funds or managed accounts, currently, or from time to time after the Warrant Issue Date, directly or indirectly managed or advised by the Holder's investment manager or any of its Affiliates or principals, (ii) any direct or indirect Affiliates of the Holder or any of the foregoing, (iii) any Person acting or who could be deemed to be acting as a "group" (as that term is used in Section 13(d) of the Exchange Act and as defined in Rule 13d-5 thereunder) together with the Holder or any of the foregoing and (iv) any other Persons whose beneficial ownership of Common Stock would or could be aggregated with the Holder's and the other Attribution Parties for purposes of Section 13(d) of the Exchange Act. For clarity, the purpose of the foregoing is to subject collectively the Holder and all other Attribution Parties to the Maximum Percentage.

(b) "Black Scholes Value" means the value of this Warrant based on the Black-Scholes Option Pricing Model obtained from the "OV" function on Bloomberg Financial Markets determined as of the day immediately following the first public announcement of the applicable Change of Control, or, if the Change of Control is not publicly announced, the date the Change of Control is consummated, for pricing purposes and reflecting (i) a risk-free interest rate corresponding to the U.S. Treasury rate for a period equal to the remaining term of this Warrant as of such date of request, (ii) an expected volatility equal to 100%, (iii) the underlying price per share used in such calculation shall be the greater of (A) the sum of the price per share being offered in cash, if any, plus the per share value of any non-cash consideration, if any, being offered in such Change of Control and (B) the greater of (x) the last VWAP immediately prior to the public announcement of such Change

of Control and (y) (B) the highest Closing Sale Price of the Common Stock during the period beginning on the Trading Day immediately preceding the announcement of the applicable Change of Control (or the consummation of the applicable Change of Control, if earlier) and ending on the Trading Day of the Holder's request pursuant to Section 11.1, (iv) a zero cost of borrow and (v) a 360 day annualization factor.

(c) "Closing Sale Price" means, for any security as of any date, the last closing trade price for such security on the Principal Market, as reported by Bloomberg Financial Markets, or, if the Principal Market begins to operate on an extended hours basis and does not designate the closing trade price then the last trade price, respectively, of such security prior to 4:00:00 p.m., New York time, as reported by Bloomberg Financial Markets, or, if the Principal Market is not the principal securities exchange or trading market for such security, the last trade price of such security on the principal securities exchange or trading market where such security is listed or traded as reported by Bloomberg Financial Markets, or if the foregoing do not apply, the last trade price of such security in the over-the-counter market on the electronic bulletin board for such security as reported by Bloomberg Financial Markets, or, if no last trade price is reported for such security by Bloomberg Financial Markets, the average of the ask prices of any market makers for such security as reported in the "pink sheets" by OTC Markets Group Inc. (formerly Pink Sheets LLC). If the Closing Sale Price cannot be calculated for a security on a particular date on any of the foregoing bases, the Closing Sale Price of such security on such date shall be the fair market value as mutually determined by the Company and the Holder. All such determinations shall be appropriately adjusted for any stock splits, stock dividends, stock combinations, recapitalizations or other similar transactions during such period.

(d) "Eligible Board or Market" means the New York Stock Exchange, the NYSE MKT, the NASDAQ Global Select Market, the NASDAQ Global Market, the NASDAQ Capital Market or the OTCBB.

(e) "Principal Market" means the Eligible Board or Market on which the Common Stock is then traded.

(f) "Registration Statement" means a registration statement or registration statements of the Company filed under the Securities Act covering all shares of Common Stock issuable upon exercise of this Warrant (without regard to any limitation otherwise contained herein with respect to the number of shares of Common Stock that may be acquirable upon exercise of this Warrant), including, in each case, the prospectus, amendments and supplements to such registration statement or prospectus, including pre- and post-effective amendments, all exhibits thereto and all material incorporated by reference or deemed to be incorporated by reference, if any, in such registration statement.

(g) "Trading Day" means (i) a day on which the Common Stock is traded on a Eligible Board or Market (other than the OTCBB), or (ii) if the Common Stock is not listed or quoted on a Eligible Board or Market (other than the OTCBB), a day on which the Common Stock is traded in the over-the-counter market, as reported by the OTCBB, or (iii) if the Common Stock is not listed or quoted on any Eligible Board or Market, a day on

which the Common Stock is quoted in the over-the-counter market as reported by the OTC Markets Group Inc. (or any similar organization or agency succeeding to its functions of reporting prices); provided, that in the event that the Common Stock is not listed or quoted as set forth in (i), (ii) and (iii) hereof, then Trading Day shall mean a Business Day.

(h) "VWAP" means, for any security as of any date, the dollar volume-weighted average price for such security on the Principal Market (or, if the Principal Market is not the principal trading market for such security, then on the principal securities exchange or securities market on which such security is then traded) during the period beginning at 9:30:01 a.m., New York time, and ending at 4:00:00 p.m., New York time, as reported by Bloomberg Financial Markets or, if the foregoing does not apply, the dollar volume-weighted average price of such security in the over-the-counter market on the electronic bulletin board for such security during the period beginning at 9:30:01 a.m., New York time, and ending at 4:00:00 p.m., New York time, as reported by Bloomberg Financial Markets, or, if no dollar volume-weighted average price is reported for such security by Bloomberg Financial Markets for such hours, the average of the highest closing bid price and the lowest closing ask price of any of the market makers for such security as reported in the "pink sheets" by OTC Markets Group Inc. (formerly Pink Sheets LLC). If the VWAP cannot be calculated for such security on such date on any of the foregoing bases, the VWAP of such security on such date shall be the fair market value as mutually determined by the Company and the Holder. All such determinations shall be appropriately adjusted for any stock dividend, stock split, stock combination, recapitalization or other similar transaction during such period.

15. Governing Law. This Warrant shall be governed by and construed in accordance with the laws of the State of New York, without regard to principles of conflicts of laws.

[remainder of page intentionally left blank; signature page follows]

IN WITNESS WHEREOF, FUELCELL ENERGY, INC. has caused this Warrant to be executed by its officer thereunto duly authorized.

Dated as of: _____, 2019

FUELCELL ENERGY, INC.

By: _____
Name:
Title:

Dated as of:_____, 2019

Solely for purpose of making the representations and warranties set forth in Section 13 of this Warrant, [WARRANT HOLDER] has caused this Warrant to be executed by its officer thereunto duly authorized:

[WARRANT HOLDER]

By: _____
Name:
Title:

NOTICE OF EXERCISE

To: FUELCELL ENERGY, INC.

(1) The undersigned hereby elects to purchase _____ shares of Common Stock of FuelCell Energy, Inc., pursuant to the provisions of the attached Warrant.

(2) The Holder intends that payment of the aggregate Exercise Price for such shares of Common Stock shall be made as follows:

□ a Cash Exercise with respect to _____ shares of Common Stock;
and/or

□ a Cashless Exercise with respect to _____ shares of Common Stock.

(3) Please issue a certificate or certificates representing said shares of Common Stock in the name of the undersigned or in such other name as is specified below:

_____
(Name)

(3) Please issue a new Warrant for the unexercised portion of the attached Warrant in the name of the undersigned or in such other name as is specified below.

_____
(Name)

_____
(Date) (Signature)

ASSIGNMENT FORM

FOR VALUE RECEIVED, the undersigned registered owner of this Warrant hereby sells, assigns and transfers unto the Assignee named below all of the rights of the undersigned under the Warrant with respect to the number of shares of Common Stock set forth below:

Name of Assignee	**Address**	**No. of Shares**

and does hereby irrevocably constitute and appoint _____ Attorney to make such transfer on the books of FuelCell Energy, Inc., maintained for the purpose, with full power of substitution in the premises.

Dated: _____

_____
Signature of Holder

Exhibit 10.7

October 31, 2019

Orion Energy Credit Opportunities Fund II, L.P.
Orion Energy Credit Opportunities Fund II PV, L.P.
Orion Energy Credit Opportunities Fund II GPFA, L.P.
350 5th Ave #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

Re: Observer Right Agreement

Ladies and Gentlemen:

FuelCell Energy, Inc., a Delaware corporation (the "Borrower"), the Subsidiaries of the Borrower from time to time party hereto (each a "Guarantor", and, collectively, together with the Borrower, the "Loan Parties"), Orion Energy Credit Opportunities Fund II, L.P., a Delaware limited partnership ("Main Fund"), Orion Energy Credit Opportunities Fund II PV, L.P., a Delaware limited partnership ("ECI Parallel Fund") and Orion Energy Credit Opportunities Fund II GPFA, L.P., a Delaware limited partnership ("Family & Associates Fund," and, together with Main Fund, ECI Parallel Fund, and their respective Affiliates, collectively, "Orion") are entering into this letter agreement (this "Agreement"), in connection with (i) the Credit Agreement dated of even date herewith (the "Credit Agreement"), among the Borrower, the Guarantors, the lenders party thereto from time to time (collectively, the "Lenders") and Orion Energy Partners Investment Agent, LLC, as administrative agent ("Agent") and collateral agent, (ii) those certain Initial Funding Warrants dated as of even date herewith issued by the Borrower to each of the Orion Energy Warrant Holders, and (iii) to the extent issued on the Second Funding Date in accordance with the Credit Agreement, those certain Second Funding Warrants to be dated as of the Second Funding Date and to be issued by the Borrower to each of the Orion Energy Warrant Holders. The purpose of this Agreement is to permit Main Fund, ECI Parallel Fund and Family & Associates Fund to qualify the investment in the Loan Parties as a "venture capital investment" for purposes of the United States Department of Labor Regulation published at 29 C.F.R. Section 2510.3-101(c) under the Employee Retirement Income Security Act of 1974, as amended (the "Plan Asset Regulation"). Capitalized terms used in this Agreement and not otherwise defined shall have the respective meanings set forth in the Credit Agreement (it being understood that if the Credit Agreement is not in effect at any time during the term of this Agreement, references herein to the Credit Agreement shall be to the Credit Agreement as if the Credit Agreement was in effect at such time). In connection therewith, the parties hereby agree as follows:

1. Observer Right.

(a) The Borrower hereby grants to each of Main Fund and Family & Associates Fund the right to have a representative (who shall initially be Gerrit Nicholas in the case of Main Fund and Rui Viana in the case of Family & Associates Fund) (each, a "Representative" and, together, the "Representatives"), which Representatives must, in all cases, meet the criteria for nomination as a director pursuant to the Borrower's Nominating and Corporate Governance Committee Charter attached hereto as Annex A (other than paragraph 5 thereof to the extent related to the Representative's representation of the Lenders) (the "Board Criteria") to attend all formal meetings of the board of directors or similar governing body of the Borrower (the "Board") and the audit committee thereof, in a nonvoting observer capacity and, in this respect, the Borrower shall give such Representatives copies of all notices, minutes, consents, and other materials that it provides to members of the Board or the audit committee thereof at the same time and in the same manner as provided to such members; provided, however, that such Representatives shall agree to hold in confidence and trust all information so provided; provided, further, that the Borrower reserves the right to reasonably withhold any information and to reasonably exclude such Representatives from any meeting or portion thereof if access to such information or attendance at such meeting could, in the reasonable belief of the Borrower, (i) cause the Borrower to lose the protection of attorney-client privilege, (ii) result in a conflict of interest (including, in the case of any threatened, pending or completed action, suit or proceeding involving Orion or the Lenders or the Orion Energy Warrant Holders under the Financing Documents or the Warrants or any proposed or pending transaction involving the Borrower, on the one hand, and Orion or the Lenders or the Orion Energy Warrant Holders, on the other hand), or (iii) result in the disclosure of trade secrets of the Borrower to such Representative (information described in clauses (i) through (iii), "Protected Information"). Moreover, Orion and the Representatives agree that any information provided to the Representatives in their capacity as such is delivered "AS IS" and neither the Borrower nor the Loan Parties make, and they each expressly disclaim, any representation or warranty as to the accuracy or completeness thereof. Without limiting the foregoing, the Borrower shall have no liability to Orion, the Representatives or their respective Affiliates resulting from any use or reliance upon any information provided to the Representatives in their capacity as such.

(b) The Representatives may participate in discussions of matters brought before a quarterly meeting of the Board, but in no event shall either Representative (i) be deemed a member of the Board or the audit committee thereof or (ii) vote on or have the right to propose or offer any motions or resolutions to the Board. For the avoidance of doubt, the presence of one or both of the Representatives shall not be required for establishing a quorum at a meeting of the Board.

(c) The Borrower shall not remove or replace the Representative of Main Fund or the Representative of Family & Associates Fund as a nonvoting observer at any time without the prior written consent of Main Fund or Family & Associates Fund, respectively; provided, however, that the Borrower may remove any Representative who ceases to meet the Board Criteria. Each Representative shall have the right to resign at any time by giving prior written notice thereof to the Borrower. Upon any such notice of resignation or any such removal, (i) Main Fund shall have the right to appoint a successor representative of Main Fund, and (ii) Family & Associates Fund shall have the right to appoint a successor representative of Family & Associates Fund; provided that such successor representative executes a counterpart to this Agreement and agrees to be bound by the terms hereof. Any such successor representative shall thereupon succeed to

and become vested with all the rights, powers, privileges and duties of the retiring or removed representative and the retiring or removed representative shall promptly take such actions, as may be necessary or appropriate in connection with the assignment to such successor representative of the rights hereunder, whereupon such retiring or removed representative shall be discharged from his or her duties and obligations hereunder. After any retiring or removed representative's resignation or removal hereunder, the provisions of Section 6 of this Agreement shall inure to such representative's benefit as to any actions taken or omitted to be taken by such representative while he or she was a representative hereunder.

(d) In the event that the Borrower may at any time in the future be governed, directly or indirectly, by a board of directors, board of managers or similar governing body of a person (other than or in addition to the Board), the rights set forth in clauses (a) and (b) above shall apply *mutatis mutandis* to such other board of directors, board of managers or similar governing body and similar committees thereof.

(e) Except as set forth in Section 6 hereof, the parties hereto acknowledge and agree that the Representatives shall not be entitled to reimbursement or compensation from the Borrower in connection with the activities performed by the Representatives under this Agreement.

(f) Orion agrees that it will, and will cause each Representative and each other person designated as a Representative upon the exercise of the rights granted to Main Fund, ECI Parallel Fund and Family & Associates Fund pursuant to Section 4 of this Agreement to comply with all written policies, procedures, processes, codes, rules, standards and guidelines applicable to Board members, including but not limited to the Borrower's corporate governance guidelines, code of business conduct, and insider trading policy.

2. Books and Records; Financial Information. Each of the Loan Parties hereby agrees, subject to the right of the Loan Parties to withhold Protected Information, that they shall provide each of the Representatives, with:

(a) the right to (i) visit and inspect the properties of the Loan Parties with five (5) business days' prior notice and subject to the Loan Parties' regular site access and security requirements; (ii) examine the books of account and records of the Loan Parties; and (iii) discuss the affairs, finances, and accounts of the Loan Parties with their respective executive officers, during normal business hours of the Loan Parties, in each case, as may be reasonably requested by Main Fund, ECI Parallel Fund or Family & Associates Fund; and

(b) as soon as practicable, but in any event within ninety (90) days after the end of each fiscal year of the Loan Parties, (i) a balance sheet as of the end of such year, (ii) statements of income and of cash flows for such year, and (iii) a statement of stockholders' equity as of the end of such year, all such financial statements audited and certified by independent public accountants of recognized standing selected by the Borrower; provided that the Loan Parties shall be deemed to have complied with this requirement by filing same on the Electronic Data Gathering and Retrieval System (EDGAR) of the U.S. Securities and Exchange Commission; provided, however, that the Loan Parties shall not be in violation of this Agreement until Orion has notified the Loan Parties in writing describing the events which constitute such violation and then only if the Loan Parties shall have failed to cure such violation within sixty (60) days after the receipt of such written notice.

3. Consultation with Management. The Loan Parties hereby agree that they shall make their appropriate executive officers available periodically, but at least quarterly, and at such other times as reasonably requested (in any event, with at least five (5) business days' written notice unless waived by all relevant parties) by any of Main Fund, ECI Parallel Fund or Family & Associates Fund, for reasonable consultation with the Representatives, with respect to matters relating to the business and affairs of the Loan Parties; provided, however, that the Loan Parties shall not be in violation of this Agreement until Orion has notified the Loan Parties in writing describing the events which constitute such violation and then only if the Loan Parties shall have failed to cure such violation within sixty (60) days after the receipt of such written notice. The parties acknowledge and agree that such consultations need not be in person and may be carried out by telephone or videoconference. At the request of any or all of Main Fund, ECI Parallel Fund and Family & Associates Fund, the Loan Parties will provide such additional rights of consultation as Main Fund, ECI Parallel Fund or Family & Associates Fund may reasonably request in the event changes in applicable law require such changes in order for the investment in the Loan Parties to qualify as a "venture capital investment" for purposes of the Plan Asset Regulation.

4. VCOC Transferees.

(a) In the event that Main Fund, ECI Parallel Fund or Family & Associates Fund transfers all or any portion of its investment in the Loan Parties to any other entity that is intended to qualify as a "venture capital operating company" under the Plan Asset Regulation (a "VCOC Transferee"), such VCOC Transferee shall be afforded the same rights as are afforded to Main Fund, ECI Parallel Fund and Family & Associates Fund, respectively, hereunder and shall be treated, for such purposes, as a third party beneficiary hereunder. Notwithstanding the foregoing, at no time shall the aggregate number of observers or Representatives under this Agreement exceed two (2) unless a higher number of observers or Representatives is consented to by the Borrower (which consent shall not be unreasonably withheld).

(b) It is the intention of Orion and the Loan Parties that all rights herein constitute direct contractual rights between Main Fund, ECI Parallel Fund and Family & Associates Fund, on the one hand, and each of the Loan Parties, on the other hand, and that such rights shall be independently enforceable by each of Main Fund, ECI Parallel Fund and Family & Associates Fund, consistent with each fund's status as a "venture capital operating company" as defined in the Plan Asset Regulation. The Loan Parties hereby acknowledge and agree that each of Main Fund, ECI Parallel Fund and Family & Associates Fund shall have the right, in its sole discretion, to designate one or more individuals or other persons to exercise the rights granted to Main Fund, ECI Parallel Fund and Family & Associates Fund hereunder, subject to the requirement that any Representative must meet the Board Criteria and that, subject to clause (a) above, there may be no more than two (2) Representatives under this Agreement.

5. Term. The observer right set forth in Section 1 of this Agreement, the right to review books and records set forth in Section 2 of this Agreement, the right to consult with management set forth in Section 3 above and this Agreement as a whole shall automatically terminate on the later of the Discharge Date or the date that neither Orion nor any of its Affiliates own any interest in any of the Loan Parties (including any Warrant or any equity interest acquired upon the exercise of the Warrants); provided that Sections 6 and 7 of this Agreement shall survive such termination.

6. Indemnity. To the extent the provisions of Section 1 of this Agreement apply, each Loan Party hereby agrees to provide indemnification and advancement of expenses to the Representatives in accordance with the terms of the form of Indemnification Agreement attached hereto as Exhibit A. For purposes of clarity, the parties agree and acknowledge that (i) each of the Representatives shall have no fiduciary duties or obligations to the Loan Parties and, under no circumstances, shall any indemnity and/or advancement contemplated by this Agreement be negated or otherwise impacted by any claim which alleges a breach of any such duties, (ii) subject to the obligations of non-use and confidentiality set forth in Sections 1(a) and 7 of this Agreement, nothing contained herein will restrict the ability of Orion or any of its Affiliates from time to time to engage in any business or investment activity or to acquire, develop or otherwise pursue business or investment opportunities for its own account, independently and without notice to, or regard for the interests of, the Loan Parties, including, without limitation, business or investment activities or opportunities that compete with or are otherwise contrary to the interests of the Loan Parties or their Affiliates or that the Loan Parties or their Affiliates might find advantageous or desirable to engage in, acquire, develop or otherwise pursue, and (iii) the foregoing rights to indemnification and advancement constitute third-party rights extended by the Loan Parties to the Representatives and do not constitute rights to indemnification or advancement of expenses as a result of a Representative serving as a director, officer, employee or agent of any Loan Party.

7. Confidentiality. Orion agrees that it will, and will cause each Representative and each individual or other person exercising the rights granted to Main Fund, ECI Parallel Fund and Family & Associates Fund pursuant to Section 4 of this Agreement to, keep confidential any information obtained from the Loan Parties pursuant to the terms of this Agreement in accordance with the provisions of Section 10.11 of the Credit Agreement, which provisions are hereby incorporated by reference, *mutatis mutandis*, as if fully set forth herein. Orion agrees that it shall be jointly and severally liable for any breach by a Representative or any individual or other person exercising the rights granted to Main Fund, ECI Parallel Fund and Family & Associates Fund pursuant to Section 4 of this Agreement of any of the terms (both stated herein and incorporated from the Credit Agreement) of this Section 7.

8. Miscellaneous.

(a) This Agreement shall be governed in accordance with the laws of the State of New York.

(b) This Agreement and the other Financing Documents to which any Loan Party is party constitutes 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.

(c) 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.

(d) This Agreement may only be waived, altered or amended by an instrument in writing duly executed by each of the parties hereto.

(e) 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 THIS AGREEMENT OR IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THIS AGREEMENT, 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) Any legal action or proceeding with respect to this Agreement shall, except as provided in clause (g) 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 irrevocably consents to the service of process in the manner provided for notices in Section 10.01 of the Credit Agreement, which provisions are hereby incorporated by reference, mutatis mutandis, as if fully set forth herein. 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.

(g) 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 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.

(h) The parties hereto agree that a breach of any of the covenants contained in this Agreement may cause irreparable injury to the other parties hereto, that such other parties may not have an adequate remedy at law in respect of such breach and, as a consequence, that each and every covenant contained in this Agreement shall be specifically enforceable against the breaching party, and the parties hereto hereby waive and agree not to assert any defenses against an action for specific performance of such covenants.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first written above.

FUELCELL ENERGY, INC.

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

FUELCELL ENERGY FINANCE II, LLC

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

BAKERSFIELD FUEL CELL 1, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CENTRAL CA FUEL CELL 2, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

YAPHANK FUEL CELL PARK, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

LONG BEACH TRIGEN, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

SAN BERNARDINO FUEL CELL, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

MONTVILLE FUEL CELL PARK, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

EASTERN CONNECTICUT FUEL CELL PROPERTIES, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

CR FUEL CELL, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

BRT FUEL CELL, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

DERBY FUEL CELL, LLC

By: FUELCELL ENERGY FINANCE II, LLC
Its: Sole Member

By: FuelCell Energy, Inc.
Its: Sole Member

By: /s/ Jason B. Few
Name: Jason B. Few
Title: President, Chief Executive Officer and Chief Commercial Officer

ACCEPTED AND AGREED TO:

ORION ENERGY CREDIT OPPORTUNITIES
FUND II, L.P., a Delaware limited partnership

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES
FUND II PV, L.P., a Delaware limited partnership

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

ORION ENERGY CREDIT OPPORTUNITIES FUND II GPFA,
L.P., a Delaware limited
partnership

By: /s/ Gerrit Nicholas
Name: Gerrit Nicholas
Title: Managing Partner

EXHIBIT A

INDEMNIFICATION AGREEMENT

THIS INDEMNIFICATION AGREEMENT (the "Agreement") is made and entered into as of [_____] between FuelCell Energy, Inc., a Delaware corporation ("FuelCell"), the Subsidiaries of FuelCell from time to time party hereto (collectively, together with FuelCell, each a "Company" and collectively, the "Companies"), Orion Energy Credit Opportunities Fund II, L.P., a Delaware limited partnership ("Main Fund"), Orion Energy Credit Opportunities Fund II PV, L.P., a Delaware limited partnership ("ECI Parallel Fund"), Orion Energy Credit Opportunities Fund II GPFA, L.P., a Delaware limited partnership ("Family & Associates Fund" and, together with Main Fund and ECI Parallel Fund, "Orion"), Orion Energy Credit Opportunities Fund II GP, L.P., a Delaware limited partnership ("GP"), Orion Energy Partners, L.P., a Delaware limited partnership ("Main Fund Management"), Gerrit Nicholas, an individual, in his capacity as a representative of Main Fund as a nonvoting observer to FuelCell's Board of Directors or similar governing body (the "Board"), and Rui Viana, an individual, in his capacity as a representative of Family & Associates Fund as a nonvoting observer to the Board (together, in such capacity, the "Representatives," and collectively with Main Fund, ECI Parallel Fund, Family & Associates Fund, GP, Main Fund Management, any replacement Representatives and their respective Affiliates, the "Indemnitees").

WITNESSETH:

WHEREAS, highly competent persons have become more reluctant to serve companies as directors, managers, officers or in other capacities unless they are provided with adequate protection through insurance or adequate indemnification against risks of claims and actions against them arising out of their service to and activities on behalf of the corporation;

WHEREAS, the Board has determined that, in order to attract and retain qualified individuals, each Company will attempt to maintain on an ongoing basis, at its sole expense, liability insurance to protect persons serving such Company from certain liabilities. Although the furnishing of such insurance has been a customary and widespread practice among United States-based companies and other business enterprises, each Company believes that, given current market conditions and trends, such insurance may be available to it in the future only at higher premiums and with more exclusions. At the same time, directors, managers, officers, and other persons in service to companies and other business enterprises are being increasingly subjected to expensive and time-consuming litigation relating to, among other things, matters that traditionally would have been brought only against a Company or business enterprise itself.

WHEREAS, the uncertainties relating to such insurance and to indemnification have increased the difficulty of attracting and retaining such persons;

WHEREAS, the Board acknowledges the increased difficulty in attracting and retaining such persons and has determined that each Company should act to assure such persons that there will be increased certainty of such protection in the future;

WHEREAS, it is reasonable, prudent and necessary for each Company contractually to obligate itself to indemnify, and to advance expenses on behalf of, such persons to the fullest extent permitted by applicable law so that they will serve or continue to serve a Company free from undue concern that they will not be so indemnified;

WHEREAS, this Agreement is a supplement to and is in furtherance of the certificate of incorporation, certificate of formation, bylaws, limited liability company agreement or other organization document of each Company (as the same may be amended from time to time in accordance with their terms, the "Charter Documents"), and shall not be deemed a substitute therefor, nor shall anything in this Agreement diminish or abrogate any rights of any Indemnitee thereunder; and

WHEREAS, the Indemnitees do not regard the protection available under the Charter Documents and insurance as adequate in the present circumstances, and may not be willing to enter into the transactions contemplated by (i) the Credit Agreement dated as of October 31, 2019 (the "Credit Agreement"), among the Companies, the lenders party thereto from time to time (collectively, the "Lenders") and Orion Energy Partners Investment Agent, LLC, as administrative agent and collateral agent, (ii) those certain Initial Funding Warrants dated as of October 31, 2019 issued by the Borrower to each of the Orion Energy Warrant Holders, and (iii) to the extent issued on the Second Funding Date in accordance with the Credit Agreement, those certain Second Funding Warrants to be dated as of the Second Funding Date and to be issued by the Borrower to each of the Orion Energy Warrant Holders (collectively, the "Transactions"), or to permit the Representatives to serve in such capacity, in each case without adequate protection, and each Company desires the Indemnitees to enter into the Transactions and to cause the Representatives to serve in such capacity. The Representatives are willing to serve in such capacity on the condition that they be so indemnified.

NOW, THEREFORE, in consideration of the Indemnitees' agreement to enter into the Transactions and the Representatives' agreement to serve in such capacity, the parties hereto agree as follows:

1. Indemnity of Indemnitees. Subject to the terms and conditions hereof, each Company hereby agrees to hold harmless and indemnify each Indemnitee to the fullest extent permitted by law, as such may be amended from time to time. In furtherance of the foregoing indemnification, and without limiting the generality thereof:

(a) Generally. Each Indemnitee shall be indemnified to the maximum extent permitted by law, as such may be amended from time to time, against all Expenses (as hereinafter defined) actually and reasonably incurred by it or on its behalf if, by reason of a Representative's status as such or service in such capacity, such Indemnitee is, or is threatened to be made, a party to or otherwise involved in any Proceeding (as hereinafter defined), REGARDLESS OF WHETHER ARISING FROM ANY ACT OR OMISSION WHICH CONSTITUTED THE SOLE, PARTIAL OR CONCURRENT NEGLIGENCE (WHETHER ACTIVE OR PASSIVE) OF SUCH INDEMNITEE; provided that the conduct of such Indemnitee in respect of the matters at issue did not constitute gross negligence, willful misconduct, bad faith, or a violation of law, and in the case of any criminal proceeding, such Indemnitee did not have reasonable cause to believe that the act or omission was unlawful.

(b) Certain Presumptions. The termination of any Proceeding by judgment, order or settlement does not create a presumption that the Indemnitee did not meet the requisite standard of conduct set forth in this Section 1. The termination of any Proceeding by conviction or upon a plea of *nolo contendere* or its equivalent, or an entry of an order of probation prior to judgment, creates a rebuttable presumption that an Indemnitee acted in a manner contrary to that specified in this Section 1.

(c) Third-Party Indemnification Rights. For the avoidance of doubt, the rights to indemnification and advancement of expenses provided hereunder shall constitute third-party indemnification rights.

(d) Limitations. Notwithstanding anything herein to the contrary, no Indemnitee hereunder shall be entitled to indemnification or advancement of expenses provided hereunder (i) by reason of being a director or officer of any Company pursuant to the terms of this Agreement or (ii) as a result of, in connection with or following a material breach of the Observer Right Agreement between the Company and Orion dated [of even date herewith].

2. Additional Indemnity. In addition to, and without regard to any limitations on, the indemnification provided for in Section 1 of this Agreement, each Company shall and hereby does indemnify and hold harmless each Indemnitee against all Expenses, judgments, penalties, fines and amounts paid in settlement actually and reasonably incurred by it or on its behalf if, by reason of a Representative's status as such or service in such capacity, it is, or is threatened to be made, a party to or participant in any Proceeding, including, without limitation, all liability arising out of the negligence or active or passive wrongdoing of such Indemnitee. The only limitation that shall exist upon a Company's obligations pursuant to this Agreement shall be that such Company shall not be obligated to make any payment to an Indemnitee that is finally determined (under the procedures, and subject to the presumptions, set forth in Sections 6 and 7 hereof of this Agreement) to be unlawful.

3. Contribution.

(a) Whether or not the indemnification provided in Sections 1 and 2 of this Agreement is available, in respect of any threatened, pending or completed action, suit or proceeding in which a Company is jointly liable with an Indemnitee (or would be if joined in such action, suit or proceeding), such Company shall pay, in the first instance, the entire amount of any judgment or settlement of such action, suit or proceeding without requiring such Indemnitee to contribute to such payment and such Company hereby waives and relinquishes any right of contribution it may have against such Indemnitee. A Company shall not enter into any settlement of any action, suit or proceeding in which such Company is jointly liable with any Indemnitee (or would be if joined in such action, suit or proceeding) without the prior written consent of such Indemnitee unless such settlement provides for a full and final release of all claims asserted against such Indemnitee.

(b) Without diminishing or impairing the obligations of each Company set forth in the preceding subparagraph, if, for any reason, an Indemnitee shall elect or be required to pay all or any portion of any judgment or settlement in any threatened, pending or completed action, suit or proceeding in which a Company is jointly liable with such Indemnitee (or would be if joined in such action, suit or proceeding), such Company shall, to the extent permitted by applicable law, contribute to the amount of Expenses, judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by such Indemnitee in proportion to the relative benefits received by such Company and all officers, directors, managers or employees of such Company who are jointly liable with such Indemnitee (or would be if joined in such action, suit or proceeding), on the one hand, and such Indemnitee, on the other hand, from the transaction from which such action, suit or proceeding arose; provided, however, that the proportion determined on the basis of relative benefit may, to the extent necessary to conform to law, be further adjusted by reference to the relative fault of such Company and all officers, directors, managers or employees of such Company who are jointly liable with such Indemnitee (or would be if joined in such action, suit or proceeding), on the one hand, and such Indemnitee, on the other hand, in connection with the events that resulted in such expenses, judgments, fines or settlement amounts, as well as any other equitable considerations which the law may require to be considered. The relative fault of each Company and all officers, directors, managers or employees of each Company who are jointly liable with such Indemnitee (or would be if joined in such action, suit or proceeding), on the one hand, and such Indemnitee, on the other hand, shall be determined by reference to, among other things, the degree to which their actions were motivated by intent to gain personal profit or advantage, the degree to which their liability is primary or secondary and the degree to which their conduct is active or passive.

(c) Each Company hereby agrees to fully indemnify and hold each Indemnitee harmless from any claims of contribution which may be brought by officers, directors, managers or employees of each Company who may be jointly liable with such Indemnitee.

(d) To the fullest extent permissible under applicable law, if the indemnification provided for in this Agreement is unavailable to an Indemnitee for any reason whatsoever, each Company, in lieu of indemnifying such Indemnitee, shall contribute to the amount incurred by such Indemnitee, whether for judgments, fines, penalties, excise taxes, amounts paid or to be paid in settlement and/or for Expenses, in connection with any claim relating to an indemnifiable event under this Agreement, in such proportion as is deemed fair and reasonable in light of all of the circumstances of such Proceeding in order to reflect (i) the relative benefits received by each Company and such Indemnitee as a result of the event(s) and/or transaction(s) giving cause to such Proceeding; and/or (ii) the relative fault of each Company (and its directors, officers, managers, employees and agents) and such Indemnitee in connection with such event(s) and/or transaction(s).

4. Indemnification for Expenses of a Witness. Notwithstanding any other provision of this Agreement, to the extent that any Indemnitee is, by reason of a Representative's status as such or service in such capacity, a witness, or is made (or asked to) respond to discovery requests, in any Proceeding to which such Indemnitee is not a party, such Indemnitee shall be indemnified against all Expenses actually and reasonably incurred by it or on its behalf in connection therewith.

5. Advancement of Expenses. Notwithstanding any other provision of this Agreement, each Company shall advance all Expenses incurred by or on behalf of any Indemnitee in connection with any Proceeding by reason of a Representatives' status as such or service within such capacity within thirty (30) days after the receipt by a Company of a statement or statements from such Indemnitee requesting such advance or advances from time to time, whether prior to or after final disposition of such Proceeding. Such statement or statements shall reasonably evidence the Expenses incurred by such Indemnitee and shall include or be preceded or accompanied by a written undertaking by or on behalf of such Indemnitee to repay any Expenses advanced if it shall ultimately be determined that such Indemnitee is not entitled to be indemnified against such Expenses. Any advances and undertakings to repay pursuant to this Section 5 shall be unsecured and interest free.

6. Procedures and Presumptions of Entitlement to Indemnification. It is the intent of this Agreement to secure for each Indemnitee rights of indemnity that are as favorable as may be permitted under applicable law. Accordingly, the parties agree that the following procedures and presumptions shall apply in the event of any question as to whether an Indemnitee is entitled to indemnification under this Agreement:

(a) To obtain indemnification under this Agreement, an Indemnitee shall submit to a Company a written request, including therein or therewith such documentation and information as is reasonably available to such Indemnitee and is reasonably necessary to determine whether and to what extent such Indemnitee is entitled to indemnification. The Secretary of such Company shall, promptly upon receipt of such a request for indemnification, advise the Board in writing that such Indemnitee has requested indemnification. Notwithstanding the foregoing, any delay or failure by an Indemnitee to provide such a request to a Company hereunder will not relieve such Company of any liability which it may have to such Indemnitee hereunder unless, and to the extent that, such delay or failure actually and materially prejudices the interests of such Company.

(b) Upon written request by an Indemnitee for indemnification pursuant to the first sentence of Section 6(a) hereof, a determination with respect to such Indemnitee's entitlement thereto shall be made in the specific case by one of the following three methods, which shall be at the election of the Board (1) by a majority vote of the disinterested directors, even though less than a quorum, (2) by a committee of disinterested directors designated by a majority vote of the disinterested directors, even though less than a quorum, or (3) if there are no disinterested directors or if the disinterested directors so direct, by independent legal counsel in a written opinion to the Board, a copy of which shall be delivered to the Indemnitee. For purposes hereof, disinterested directors are those members of the Board who are not parties to the action, suit or proceeding in respect of which indemnification is sought by such Indemnitee.

(c) If the determination of entitlement to indemnification is to be made by Independent Counsel pursuant to Section 6(b) hereof, the Independent Counsel shall be selected as provided in this Section 6(c). The Independent Counsel shall be selected by the Board. The applicable Indemnitee may, within ten (10) days after such written notice of selection shall have been given, deliver to the Company a written objection to such selection; provided, however, that such objection may be asserted only on the ground that the Independent Counsel so selected does not meet the requirements of "Independent Counsel" as defined in Section 13 of this Agreement, and the objection shall set forth with particularity the factual basis of such assertion. Absent a

proper and timely objection, the person so selected shall act as Independent Counsel. If a written objection is made and substantiated, the Independent Counsel selected may not serve as Independent Counsel unless and until such objection is withdrawn or a court has determined that such objection is without merit. If, within twenty (20) days after submission by the applicable Indemnitee of a written request for indemnification pursuant to Section 6(a) hereof, no Independent Counsel shall have been selected and not objected to, either the applicable Company or Indemnitee may petition the Court of Chancery of the State of Delaware or other court of competent jurisdiction for resolution of any objection which shall have been made by such Indemnitee to such Company's selection of Independent Counsel and/or for the appointment as Independent Counsel of a person selected by the court or by such other person as the court shall designate, and the person with respect to whom all objections are so resolved or the person so appointed shall act as Independent Counsel under Section 6(b) hereof. The applicable Company shall pay any and all reasonable fees and expenses of Independent Counsel incurred by such Independent Counsel in connection with acting pursuant to Section 6(b) hereof, and such Company shall pay all reasonable fees and expenses incident to the procedures of this Section 6(c), regardless of the manner in which such Independent Counsel was selected or appointed.

(d) In making a determination with respect to entitlement to indemnification hereunder, the person or persons or entity making such determination shall presume that Indemnitee is entitled to indemnification under this Agreement. Anyone seeking to overcome this presumption shall have the burden of proof and the burden of persuasion by clear and convincing evidence. Neither the failure of a Company (including by its directors or independent legal counsel) to have made a determination prior to the commencement of any action pursuant to this Agreement that indemnification is proper in the circumstances because Indemnitee has met the applicable standard of conduct, nor an actual determination by a Company (including by its directors or independent legal counsel) that Indemnitee has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that Indemnitee has not met the applicable standard of conduct.

(e) Indemnitee shall be deemed to have acted in good faith if Indemnitee's action is based on the records or books of account of the applicable Company, including financial statements, or on information supplied to a Representative in its capacity as such by the officers or directors of such Company in the course of their duties. In addition, the knowledge and/or actions, or failure to act, of any director, officer, agent or employee of a Company shall not be imputed to an Indemnitee for purposes of determining the right to indemnification under this Agreement.

(f) If the person, persons or entity empowered or selected under this Section 6 to determine whether an Indemnitee is entitled to indemnification shall not have made a determination within sixty (60) days after receipt by the applicable Company of the request therefor, the requisite determination of entitlement to indemnification shall be deemed to have been made and such Indemnitee shall be entitled to such indemnification absent (i) a misstatement by such Indemnitee of a material fact, or an omission of a material fact necessary to make such Indemnitee's statement not materially misleading, in connection with the request for indemnification, or (ii) a prohibition of such indemnification under applicable law; provided, however, that such sixty (60) day period may be extended for a reasonable time, not to exceed an additional thirty (30) days, if the person, persons or entity making such determination with respect to entitlement to indemnification in good faith requires such additional time to obtain or evaluate documentation and/or information relating thereto.

(g) Each Indemnitee shall cooperate with the person, persons or entity making such determination with respect to such Indemnitee's entitlement to indemnification, including providing to such person, persons or entity upon reasonable advance request any documentation or information which is not privileged or otherwise protected from disclosure and which is reasonably available to such Indemnitee and reasonably necessary to such determination. Any Independent Counsel or member of the Board, as the case may be, shall act reasonably and in good faith in making a determination regarding such Indemnitee's entitlement to indemnification under this Agreement. Any costs or expenses (including attorneys' fees and disbursements) incurred by such Indemnitee in so cooperating with the person, persons or entity making such determination shall be borne by the applicable Company and such Company hereby indemnifies and agrees to hold Indemnitee harmless therefrom.

(h) Notwithstanding any provision in this Agreement, a Company shall not be obligated under this Agreement to make any indemnity in connection with any claim made against an Indemnitee for which payment has actually been made to or on behalf of such Indemnitee under any insurance policy or other indemnity provision, except with respect to any excess beyond the amount paid under any insurance policy or other indemnity provision; provided that the foregoing shall not affect the rights of such Indemnitee or the Fund Indemnitors set forth in Section 8(d).

7. Remedies of Indemnitee.

(a) In the event that (i) a determination is made pursuant to Section 6 of this Agreement that an Indemnitee is not entitled to indemnification under this Agreement, (ii) advancement of Expenses is not timely made pursuant to Section 5 of this Agreement, (iii) no determination of entitlement to indemnification is made pursuant to Section 6(b) of this Agreement within ninety (90) days after receipt by a Company of the request for indemnification, (iv) payment of indemnification is not made pursuant to this Agreement within ten (10) days after receipt by a Company of a written request therefor or (v) payment of indemnification is not made within ten (10) days after a determination has been made that such Indemnitee is entitled to indemnification or such determination is deemed to have been made pursuant to Section 6 of this Agreement, such Indemnitee shall be entitled to an adjudication in any court of competent jurisdiction, of such Indemnitee's entitlement to such indemnification. Indemnitee shall commence such proceeding seeking an adjudication within one hundred eighty (180) days following the date on which Indemnitee first has the right to commence such proceeding pursuant to this Section 7(a). Each Company shall not oppose any Indemnitee's right to seek any adjudication thereof.

(b) In the event that a determination shall have been made pursuant to Section 6(b) of this Agreement that an Indemnitee is not entitled to indemnification, any judicial proceeding commenced pursuant to this Section 7 shall be conducted in all respects as a *de novo* trial on the merits, and such Indemnitee shall not be prejudiced by reason of the adverse determination under Section 6(b).

(c) If a determination shall have been made pursuant to Section 6(b) of this Agreement that an Indemnitee is entitled to indemnification, each Company shall be bound by such determination in any judicial proceeding commenced pursuant to this Section 7 absent (i) a misstatement by such Indemnitee of a material fact, or an omission of a material fact necessary to make such Indemnitee's misstatement not materially misleading in connection with the application for indemnification, or (ii) a prohibition of such indemnification under applicable law.

(d) In the event that an Indemnitee, pursuant to this Section 7, seeks a judicial adjudication of its rights under, or to recover damages for breach of, this Agreement, or to recover under any directors' and officers' liability insurance policies maintained by the applicable Company, such Company shall pay on such Indemnitee's behalf, in advance, any and all expenses (of the types described in the definition of Expenses in Section 12 of this Agreement) actually and reasonably incurred by such Indemnitee in such judicial adjudication, regardless of whether such Indemnitee ultimately is determined to be entitled to such indemnification, advancement of expenses or insurance recovery.

(e) Each Company shall be precluded from asserting in any judicial proceeding commenced pursuant to this Section 7 that the procedures and presumptions of this Agreement are not valid, binding and enforceable and shall stipulate in any such court that each Company is bound by all the provisions of this Agreement. The applicable Company shall indemnify each applicable Indemnitee against any and all Expenses and, if requested by any applicable Indemnitee, shall (within ten (10) days after receipt by a Company of a written request therefor) advance, to the extent not prohibited by law, such expenses to the applicable Indemnitee, which are incurred by such Indemnitee in connection with any action brought by such Indemnitee for indemnification or advance of Expenses from such Company under this Agreement or under any directors' and officers' liability insurance policies maintained by such Company, regardless of whether such Indemnitee ultimately is determined to be entitled to such indemnification, advancement of Expenses or insurance recovery, as the case may be.

(f) Notwithstanding anything in this Agreement to the contrary, no determination as to entitlement to indemnification under this Agreement shall be required to be made prior to the final disposition of the Proceeding.

8. Non-Exclusivity; Survival of Rights; Insurance; Primacy of Indemnification; Subrogation.

(a) The rights of indemnification as provided by this Agreement shall not be deemed exclusive of any other rights to which any Indemnitee may at any time be entitled, without duplication, under applicable law, Charter Documents, any other agreement, a vote of equityholders, a resolution of managers or otherwise, of any Company. No amendment, alteration or repeal of this Agreement or of any provision hereof shall limit or restrict any right of any Indemnitee under this Agreement in respect of any action taken or omitted by such Indemnitee prior to such amendment, alteration or repeal. To the extent that a change in law, whether by statute or judicial decision, permits greater indemnification than would be afforded currently under the Charter Documents and this Agreement, it is the intent of the parties hereto that each Indemnitee shall enjoy by this Agreement the greater benefits, without duplication, so afforded by such change. No right or remedy herein conferred is intended to be exclusive of any other right or remedy, and every other right and remedy shall be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise, but without duplication of payment or reimbursement. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other right or remedy.

(b) To the extent that a Company maintains an insurance policy or policies providing liability insurance for directors, officers, managers, employees, or agents or fiduciaries of a Company or of any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise that such person serves at the request of a Company, each Indemnitee shall be covered by such policy or policies in accordance with its or their terms to the maximum extent of the coverage available for any director, officer, manager, employee, agent or fiduciary under such policy or policies; provided, however, that such coverage shall not be construed as evidence that the Indemnitee is a director, officer, manager, employee, agent or fiduciary of any Company or entitled to indemnification or advancement of expenses by reason of such Indemnitee's status as any of the foregoing. If, at the time of the receipt of a notice of a claim pursuant to the terms hereof, a Company has director and officer liability insurance in effect, such Company shall give prompt notice of the commencement of such proceeding to the insurers in accordance with the procedures set forth in the respective policies. Each Company shall thereafter take all necessary or desirable action to cause such insurers to pay, on behalf of the Indemnitee, all amounts payable as a result of such proceeding in accordance with the terms of such policies.

(c) In the event of any payment under this Agreement, the applicable Company shall be subrogated to the extent of such payment to all of the rights of recovery of the Indemnitee, who shall execute all papers required and take all action necessary to secure such rights, including execution of such documents as are necessary to enable such Company to bring suit to enforce such rights. Notwithstanding the foregoing, in no event shall any Company be subrogated to any right of recovery an Indemnitee may have from any Orion Energy Partners entity or any insurer thereof.

(d) Each Company hereby acknowledges that the Indemnitees may have certain rights to indemnification, advancement of expenses and/or insurance provided by or on behalf of one or more Orion Energy Partners entities, including Main Fund, ECI Parallel Fund, Family & Associates Fund, Main Fund Management, or their respective affiliates (collectively, the "Fund Indemnitors"). Notwithstanding anything to the contrary herein or otherwise, each Company hereby agrees, with respect to a claim for indemnification made against such Company hereunder and which is payable by such Company hereunder:

(i) that such Company is the indemnitor of first resort (*i.e.*, that such Company's obligations to the Indemnitees are primary and that any obligation of the Fund Indemnitors to advance expenses or to provide indemnification for the same expenses or liabilities incurred by the Indemnitees are secondary),

(ii) that such Company will be required to advance the full amount of any reasonable expenses incurred by the Indemnitees and will be liable for the full amount of all liabilities, expenses, judgments, penalties, fines and amounts paid in settlement to the extent legally permitted and as required by the terms of this Agreement or any other agreement between such Company and such Indemnitees, without regard to any rights such Indemnitees may have against the Fund Indemnitors, and

(iii) that such Company irrevocably waives, relinquishes and releases the Fund Indemnitors from any and all claims for contribution, subrogation or any other recovery of any kind in respect thereof.

(e) Notwithstanding anything to the contrary herein or otherwise, each Company further agrees that no advancement or payment by the Fund Indemnitors on behalf of any Indemnitee with respect to any claim for which an Indemnitee has sought indemnification from a Company will affect the foregoing and the Fund Indemnitors will have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery of each Indemnitee against a Company. Each Company and each Indemnitee agree that the Fund Indemnitors are express third party beneficiaries of the terms of this Agreement.

9. Duration of Agreement. All agreements and obligations of each Company contained herein shall continue for so long as there is any Representative or any replacement thereof serving in such capacity, and shall continue thereafter so long as any Indemnitee shall be subject to any Proceeding by reason of Representative's status as such or service in such capacity , whether or not any Representative is acting or serving in any such capacity at the time any liability or expense is incurred for which indemnification can be provided under this Agreement. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective successors (including any direct or indirect successor by purchase, merger, consolidation or otherwise to all or substantially all of the business or assets of a Company, and including any transferee of an interest of any Orion Energy Partners entity), assigns, spouses, heirs, executors and personal and legal representatives.

10. Security. To the extent requested by an Indemnitee and approved by a Company, each Company may at any time and from time to time provide security to an Indemnitee for such Company's obligations hereunder through an irrevocable bank line of credit, funded trust or other collateral. Any such security, once provided to an Indemnitee, may not be revoked or released without the prior written consent of the Indemnitee.

11. Enforcement.

(a) Each Company expressly confirms and agrees that it has entered into this Agreement and assumes the obligations imposed on it hereby in order to induce the Indemnitees to enter into the Transactions and to induce the Representatives to serve in such capacity in connection with the Transactions, and each Company acknowledges that each Indemnitee is relying upon this Agreement in entering into the Transactions and permitting the Representatives to serve as such.

(b) This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral, written and implied, between the parties hereto with respect to the subject matter hereof.

12. Definitions. For purposes of this Agreement:

(a) "Expenses" shall include all losses, claims, damages, liabilities, joint or several, reasonable and documented attorneys' fees and legal expenses, retainers, court costs, transcript costs, fees of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees and all other disbursements or expenses of the types customarily incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigating, participating, or being or preparing to be a witness in a

Proceeding, or responding to, or objecting to, a request to provide discovery in any Proceeding. Expenses also shall include Expenses incurred in connection with any appeal resulting from any Proceeding and all federal, state, local or foreign taxes imposed on any Indemnitee as a result of the actual or deemed receipt of any payments under this Agreement, including without limitation the premium, security for, and other costs relating to any cost bond, supersede as bond, or other appeal bond or its equivalent. Expenses, however, shall not include amounts paid in settlement by an Indemnitee or the amount of judgments or fines against an Indemnitee.

(b) "Independent Counsel" means a law firm, or a member of a law firm, that is experienced in matters of corporation law and neither presently is, nor in the past five years has been, retained to represent (i) a Company or Indemnitee in any matter material to either such party (other than with respect to matters concerning Indemnitee under this Agreement, or of other indemnitees under similar indemnification agreements), or (ii) any other party to the Proceeding giving rise to a claim for indemnification hereunder. Notwithstanding the foregoing, the term "Independent Counsel" shall not include any person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either a Company or Indemnitee in an action to determine Indemnitee's rights under this Agreement. The applicable Company agrees to pay the reasonable fees of the Independent Counsel referred to above and to fully indemnify such counsel against any and all Expenses, claims, liabilities and damages arising out of or relating to this Agreement or its engagement pursuant hereto.

(c) "Proceeding" includes any threatened, pending or completed action, suit, arbitration, alternate dispute resolution mechanism, investigation, inquiry, administrative hearing or any other actual, threatened or completed proceeding, whether brought by or in the right of a Company or otherwise and whether civil, criminal, administrative or investigative, in which an Indemnitee was, is or will be involved as a party or otherwise, by reason of a Representative's status as such or service in such capacity, but excluding (i) one initiated by an Indemnitee pursuant to Section 7 of this Agreement to enforce its rights under this Agreement, (ii) one brought by a Company against an Indemnitee in connection with the Transactions, the Observer Right Agreement (as defined below) or any other agreement, document, instrument, transaction or other action related thereto.

13. Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision. Without limiting the generality of the foregoing, this Agreement is intended to confer upon each Indemnitee indemnification rights to the fullest extent permitted by applicable laws. In the event any provision hereof conflicts with any applicable law, such provision shall be deemed modified, consistent with the aforementioned intent, to the extent necessary to resolve such conflict.

14. Modification and Waiver. No supplement, modification, termination or amendment of this Agreement shall be binding unless executed in writing by each Company and GP. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions hereof (whether or not similar) nor shall such waiver constitute a continuing waiver.

15. Notice By Indemnitee. Indemnitee agrees promptly to notify the applicable Company in writing upon being served with or otherwise receiving any summons, citation, subpoena, complaint, indictment, information or other document relating to any Proceeding or matter which may be subject to indemnification covered hereunder. The failure to so notify the applicable Company shall not relieve such Company of any obligation which it may have to Indemnitee under this Agreement or otherwise unless and only to the extent that such failure or delay materially prejudices the Company.

16. Notices. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed electronic mail if sent during normal business hours of the recipient, and if not so confirmed, then on the next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All communications shall be sent:

(a) To any Indemnitee at the following address:

Orion Energy Credit Opportunities Fund II, L.P.
Orion Energy Credit Opportunities Fund II PV, L.P.
Orion Energy Credit Opportunities Fund II GPFA, L.P.
350 5th Ave #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

with a copy to:

Greenberg Traurig, LLP
200 Park Avenue
New York, NY 10166
Attention: Todd Bowen
Phone: 212-801-2299
Email: bowent@gtlaw.com

(b) To a Company at:

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Jason Few
Email: jfew@fce.com

with a copy to:

FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, CT 06810
Attention: Jennifer Arasimowicz, General Counsel
Email: jarasimowicz@fce.com

or to such other address as may have been furnished to Indemnitee by a Company or to a Company by Indemnitee, as the case may be.

17. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. This Agreement may also be executed and delivered by electronic signature and in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

18. Headings. The headings of the paragraphs of this Agreement are inserted for convenience only and shall not be deemed to constitute part of this Agreement or to affect the construction thereof.

19. Governing Law and Consent to Jurisdiction. This Agreement and the legal relations among the parties shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, without regard to its conflict of laws rules. Each Company and Indemnitee hereby irrevocably and unconditionally (i) agree that any action or proceeding arising out of or in connection with this Agreement shall be brought only in the Chancery Court of the State of Delaware (the "Delaware Court"), and not in any other state or federal court in the United States of America or any court in any other country, (ii) consent to submit to the exclusive jurisdiction of the Delaware Court for purposes of any action or proceeding arising out of or in connection with this Agreement, (iii) appoint, to the extent such party is not otherwise subject to service of process in the State of Delaware, irrevocably [*name*] [*address*] as its agent in the State of Delaware as such party's agent for acceptance of legal process in connection with any such action or proceeding against such party with the same legal force and validity as if served upon such party personally within the State of Delaware, (iv) waive any objection to the laying of venue of any such action or proceeding in the Delaware Court, and (v) waive, and agree not to plead or to make, any claim that any such action or proceeding brought in the Delaware Court has been brought in an improper or inconvenient forum.

20. Observer Rights Agreement. The provisions of Section 8 of that certain Observer Right Agreement dated as of October 31, 2019 among the Companies and certain of the Indemnitees party hereto (the "Observer Right Agreement") are hereby incorporated by reference, *mutatis mutandis*, as if fully set forth herein.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on and as of the day and year first above written.

COMPANIES:

FUELCELL ENERGY, INC.

By: _____
Name:
Title:

[OTHER LOAN PARTIES]

By: _____
Name:
Title:

INDEMNITEES:

_____
Gerrit Nicholas

_____
Rui Viana

ORION ENERGY CREDIT OPPORTUNITIES
FUND II, L.P., a Delaware limited partnership

By: _____
Name:
Title:

ORION ENERGY CREDIT OPPORTUNITIES
FUND II PV, L.P., a Delaware limited partnership

By: _____
Name:
Title:

ORION ENERGY CREDIT OPPORTUNITIES
FUND II GPFA, L.P., a Delaware limited partnership

By: _____
Name:
Title:

ORION ENERGY CREDIT OPPORTUNITIES
FUND II GP, L.P., a Delaware limited partnership

By: _____
Name:
Title:

ORION ENERGY PARTNERS, L.P., a Delaware
limited partnership

By: _____
Name:
Title:

Exhibit 10.8

NRG Energy, Inc.
804 Carnegie Center
Princeton, NJ 08540

October 31, 2019

FuelCell Energy Finance, LLC
3 Great Pasture Road
Danbury, CT 06810
Attn: Michael Bishop
Phone: (203) 825-6049
Email: mbishop@fce.com

PAYOFF LETTER

Dear Sir or Madam:

Reference is made to that certain Loan Agreement (as amended, restated, supplemented, or otherwise modified, the "Loan Agreement"), dated as of July 30, 2014, by and between NRG Energy, Inc., as Lender, and FuelCell Energy Finance, LLC, as Parent. Capitalized terms used and not defined herein shall have the meanings given to them in the Loan Agreement.

Pursuant to Section 2.4 of the Loan Agreement, on the date hereof (the "Payoff Date"), the Parent is repaying the outstanding principal, accrued but unpaid interest, fees, costs and other expenses due and owing to the Lender under the Note and its related Loan Documents through the Maturity Date in an aggregate amount equal to $4,116,534 (collectively, the "Payoff Amount").

Subject to Parent's acceptance of this letter by execution of a counterpart of this letter in the space provided below, Parent and Lender hereby confirm and agree as follows:

1. Termination of Loan Agreement. Pursuant to Section 13.11 of the Loan Agreement, effective as of Parent's payment to Lender of the Payoff Amount, the Obligations are deemed repaid and satisfied in full, and the Loan Agreement is automatically, and without the need for further action, terminated and of no further force and effect.

2. Release. Pursuant to Section 2.6 of the Loan Agreement, in connection with the termination of the Loan Agreement, the Lender agrees that, simultaneously with Parent's payment to Lender of the Payoff Amount, Lender releases all of the Collateral from the liens of the Security Documents. Upon Parent's payment to Lender of the Payoff Amount, Lender also authorizes Parent to file such termination statements of any existing UCC filings that have been made with respect to the Obligations. The Lender hereby confirms that it has received all reasonable and documented out-of-pocket escrow, closing and recording costs, the reasonable and documented out-of-pocket costs of preparing and delivering such release and any sums then due and payable under the Loan Documents. The Sponsor, Parent and each Co-Borrower are unconditionally released from their respective Obligations under the Loan Documents without further action or documentation.

NRG Energy, Inc.
804 Carnegie Center
Princeton, NJ 08540

3. Miscellaneous. This letter will be governed by, and shall be construed and interpreted in accordance with, the laws of the state of New York. This letter may be executed by Lender and Parent in separate counterparts and the executed counterparts may be delivered by electronic means, all of which will be enforceable as an original.

Very truly yours,

NRG Energy, Inc.
As Lender

By: /s/ Bruce Chung
Name: Bruce Chung
Title: SVP

Accepted and agreed to as of the date first written above:

FuelCell Energy Finance, LLC

As Parent

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: Executive Vice President, Chief Financial Officer
FuelCell Energy, Inc., Sole Member

Cc:

FuelCell Energy Finance, LLC
3 Great Pasture Road
Danbury, CT 06810
Attn: Jennifer D. Arasimowicz
Phone: (203) 825-6049
Email: jrasimowicz@fce.com

Exhibit 10.9

GENERATE LENDING, LLC
555 DE HARO STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94107

October 30th, 2019

Fuel Cell Energy Finance II, LLC
c/o FuelCell Energy, Inc.
3 Great Pasture Road
Danbury, Connecticut 06810

Ladies and Gentlemen:

Reference is made to (i) the Construction Loan Agreement, dated December 21, 2018 (as amended, restated, supplemented or otherwise modified through the date hereof, collectively, the "Loan Agreement"; capitalized terms used herein and not otherwise defined have the same meanings herein as in the Loan Agreement), by and among FuelCell Energy Finance II, LLC (the "Borrower"), certain of its subsidiaries, as the "Project Company Guarantors" (collectively, the "Subsidiaries", and each, a "Subsidiary") and Generate Lending, LLC ("Lender"), (ii) the Pledge and Security Agreement, dated as of December 21, 2018, by and among Borrower, the Subsidiaries, and Lender, (iii) the Pledge Agreement between FuelCell Energy Finance, LLC ("Holdco") and Lender, dated as of December 21, 2018, (iv) the Guaranty Agreement between FuelCell Energy, Inc. (the "Parent") and Lender, dated as of December 21, 2018, and (v) all other associated documents executed or entered into in connection with the Loan Agreement and any of the foregoing, including but not limited to each of the other Loan Documents, in each case, as amended, restated, supplemented or otherwise modified through the date hereof.

We understand that on the Payoff Date (as defined below) Borrower intends (i) to repay in full all of the Obligations of Borrower to Lender under or in respect of the Loan Agreement and the other Loan Documents, and (ii) to terminate any commitment of Lender, if any, to make additional advances to Borrower.

1. This letter will confirm that, if remitted on or prior to on or before 2:00 p.m. (San Francisco, California time) on October 31, 2019 (the "Payoff Date"), the amount necessary to pay in full the Obligations is $7,061,948.92 (the "Payoff Amount"). Please transfer the Payoff Amount to Lender's account at Wells Fargo Bank (ABA No. XXXXXXXXX), Account No. XXXXXXXXX, referencing FuelCell Energy Finance II, LLC by wire transfer of immediately available funds, for receipt no later than 2:00 p.m., San Francisco, California time, on the Payoff Date.

2. Upon Lender's receipt of the Payoff Amount, by wire transfer of immediately available funds and a fully-executed counterpart of this letter signed by Borrower, (i) all of the Obligations shall be terminated and satisfied in full; provided, however, that any indemnification obligations of Borrower, Parent, Holdco or any Subsidiary that by their terms survive the repayment of the Obligations shall remain in full force and effect; (ii) all commitments and other obligations of Lender to Borrower or any Subsidiary under any of the Loan Documents, including

the commitment, if any, of Lender to make any Loan, shall automatically terminate, and Lender shall have no further obligation to make any loans, issue letters of credit, or make financial accommodations or other extensions of credit to the Borrower or any Subsidiary under any of the Loan Documents or otherwise; (iii) each of the Loan Documents shall automatically terminate and be of no further force and effect (except for any provisions under any of the Loan Documents that by their terms survive the repayment of the Obligations, which provisions shall remain in full force and effect); (iv) all security interests, guarantees and liens created as security for the Obligations (including, but not limited to, the Collateral), in each case, granted to Lender pursuant to the Security Agreement or any other Loan Document will be automatically released; (v) Lender authorizes Borrower or its agents (including Borrower's counsel), to file UCC termination statements for all UCC financing statements filed by Lender against the Borrower or any Subsidiary as Debtor and encumbering the Collateral; and (vi) Lender will execute and deliver to Borrower, at its request and expense, such additional discharges of security interests, pledges, guarantees, documents, instruments or other releases (all of which shall be prepared by Borrower, without recourse or warranty to Lender and otherwise in form and substance reasonably satisfactory to Lender) as Borrower may reasonably request to further evidence the termination of all such security interests or pledges. For the avoidance of doubt, except as set forth herein, this letter does not include any payoff or release information pertaining to any other indebtedness, obligation or liability that may be due or owing to Generate Lending, LLC or to any of its affiliates or subsidiaries.

3. Borrower acknowledges that the amounts referred to in Paragraph 1 above are enforceable obligations of Borrower owed to Lender pursuant to the provisions of the Loan Documents and confirms its agreement to the terms and provisions of this letter by returning to Lender a signed counterpart of this letter. This letter may be executed by each party on a separate counterpart, each of which when so executed and delivered shall be an original, but all of which together shall constitute one agreement.

4. BORROWER, BY EXECUTION BELOW, RELEASES, DISCHARGES AND ACQUITS LENDER AND ITS OFFICERS, DIRECTORS, AGENTS, ATTORNEYS AND EMPLOYEES AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, FROM ALL OBLIGATIONS TO BORROWER (AND ITS SUCCESSORS AND ASSIGNS) AND FROM ANY AND ALL CLAIMS, DEMANDS, DEBTS, ACCOUNTS, CONTRACTS, LIABILITIES, ACTIONS AND CAUSES OF ACTIONS, WHETHER IN LAW OR IN EQUITY, ARISING OUT OF THIS LETTER, THE LOAN AGREEMENT OR ANY OTHER LOAN DOCUMENTS THAT BORROWER AT ANY TIME HAD OR HAS, OR THAT ITS SUCCESSORS AND ASSIGNS HEREAFTER CAN OR MAY HAVE AGAINST LENDER OR ITS OFFICERS, DIRECTORS, AGENTS, ATTORNEYS OR EMPLOYEES AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS.

[*Remainder of page intentionally blank; signature page follows.*]

Very truly yours,

GENERATE LENDING, LLC
a Delaware limited liability company

By: /s/ Matan Friedman
Name: Matan Friedman
Title: Manager

AGREED AND ACCEPTED BY:
FuelCell Energy Finance II, LLC

By: /s/ Michael S. Bishop
Name: Michael S. Bishop
Title: Executive Vice President, Chief Financial Officer and Treasurer

FOR IMMEDIATE RELEASE

FuelCell Energy Announces End of Engagement with Huron Based on Progress

DANBURY, CT -- November 5, 2019- - FuelCell Energy, Inc. (Nasdaq: FCEL), a global leader in delivering clean, innovative and affordable fuel cell solutions for the supply, recovery and storage of energy, today announced that based on the progress made by the Company, the Board ended the engagement with Huron and the restructuring services being provided effective October 31, 2019. Beginning on June 2, 2019, Huron provided various services related to the Company's restructuring and contingency planning initiatives. The Board's decision was based on the outcome of many actions undertaken by Huron at the direction of the Board that led to the Company's successful restructuring, including the right sizing of the business, implementation of cost control measures, and pay off of substantial corporate debt.

"Huron did an exceptional job on behalf of FuelCell throughout the restructuring and their efforts toward our stronger future is appreciated," said Jason Few, President and Chief Executive Officer, FuelCell Energy, Inc. "Huron engaged at a difficult time in the Company's history and has completed its role successfully positioning FuelCell Energy in a much stronger position just four months after the initial engagement."

The Company will continue delivering world class differentiated clean continuous power, the work of revitalizing FuelCell Energy, its overall operational effectiveness, enhanced commercial activity, geographic expansion and improving financial results.

Cautionary Language

This news release contains forward-looking statements within the meaning of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995, including, without limitation, statements with respect to the Company's anticipated financial results and statements regarding the Company's plans and expectations regarding the continuing development, commercialization and financing of its fuel cell technology and business plans. All forward-looking statements are subject to risks and uncertainties that could cause actual results to differ materially from those projected. Factors that could cause such a difference include, without limitation, changes to projected deliveries and order flow, changes to production rate and product costs, general risks associated with product development, manufacturing, changes in the regulatory environment, customer strategies, unanticipated manufacturing issues that impact power plant performance, changes in critical accounting policies, potential volatility of energy prices, rapid technological change, competition, and the Company's ability to achieve its sales plans and cost reduction targets, as well as other risks set forth in the Company's filings with the Securities and Exchange Commission. The forward-looking statements contained herein speak only as of the date of this press release. The Company expressly disclaims any obligation or undertaking to release publicly any updates or revisions to any such statement to reflect any change in the Company's expectations or any change in events, conditions or circumstances on which any such statement is based.

About FuelCell Energy

FuelCell Energy, Inc. (NASDAQ: FCEL) delivers efficient, affordable and clean solutions for the supply, recovery and storage of energy. We design, manufacture, undertake project development of, install, operate and maintain megawatt-scale fuel cell systems, serving utilities and industrial and large municipal power users with solutions that include both utility-scale and on-site power generation, carbon capture, local hydrogen production for transportation and industry, and long duration energy storage. With SureSource™ installations on three continents and millions of megawatt hours of ultra-clean power produced, FuelCell Energy is a global leader in designing, manufacturing, installing, operating and maintaining environmentally responsible fuel cell power solutions. Visit us online at www.fuelcellenergy.com and follow us on Twitter @FuelCell_Energy.

SureSource, SureSource 1500, SureSource 3000, SureSource 4000, SureSource Recovery, SureSource Capture, SureSource Hydrogen, SureSource Storage, SureSource Service, SureSource Capital, FuelCell Energy, and FuelCell Energy logo are all trademarks of FuelCell Energy, Inc.

Contact:

Contact:
FuelCell Energy
203.205.2491
ir@fce.com

Source: FuelCell Energy

# # # #

Exhibit 99.2

CONTACT: ExxonMobil Media Relations, 972-940-6007
FuelCell Energy Investor Relations, 203-830-7494

FOR IMMEDIATE RELEASE
NOVEMBER 6, 2019

ExxonMobil, FuelCell Energy Expand Agreement for Carbon Capture Technology

- Agreement to optimize carbonate fuel cell technology for large-scale carbon capture
- ExxonMobil exploring opportunities to deploy technology within its operations

IRVING, Texas and DANBURY, Connecticut – ExxonMobil and FuelCell Energy, Inc. said today they have signed a new, two-year expanded joint-development agreement to further enhance carbonate fuel cell technology for the purpose of capturing carbon dioxide from industrial facilities.

The agreement, worth up to $60 million, will focus efforts on optimizing the core technology, overall process integration and large-scale deployment of carbon capture solutions. ExxonMobil is exploring options to conduct a pilot test of next-generation fuel cell carbon capture solution at one of its operating sites.

“ExxonMobil is working to advance carbon capture technologies while reducing costs and enhancing scalability,” said Vijay Swarup, vice president of research and development for ExxonMobil Research and Engineering Company. “This expanded agreement with FuelCell Energy will enable further progress on this unique carbon capture solution that has the potential to achieve meaningful reductions of carbon dioxide emissions from industrial operations.”

FuelCell Energy’s proprietary technology uses carbonate fuel cells to efficiently capture and concentrate carbon dioxide streams from large industrial sources. Combustion exhaust is directed to the fuel cell, which produces power while capturing and concentrating carbon dioxide for permanent storage.

The modular design enables the technology to be deployed at a wide range of locations, which could lead to a more cost-efficient path for large-scale deployment of carbon capture and sequestration.

“Today’s announcement underscores our leadership position in fuel cell technology,” said Jason Few, president and chief executive officer of FuelCell Energy. “We are excited to continue to work with ExxonMobil to tackle one of the biggest challenges that exists today. We have a great opportunity to scale and commercialize our unique carbon capture solution, one that captures about 90 percent of carbon dioxide from various exhaust streams, while generating additional power, unlike traditional carbon capture technologies which consume significant power.”

“FuelCell Energy has always been proud of our technology and our role in reshaping the environmental impact of industry and electrical generation. This is another giant step forward towards the large-scale deployment of this much needed technology.”

ExxonMobil and FuelCell Energy began working together in 2016 with a focus on better understanding the fundamental science behind carbonate fuel cells and how to increase efficiency in separating and concentrating carbon dioxide from the exhaust of natural gas-fueled power generation. The new and expanded agreement will prioritize the optimization of the core carbon capture technology for integration into large-scale industrial facilities such as refineries and chemical plants.

ExxonMobil engineers and scientists have researched, developed and applied technologies that could play a role in the widespread deployment of carbon capture and storage for more than 30 years. The company has a working interest in approximately one-fifth of the world's total carbon capture capacity, and has captured about 7 million tonnes per year of carbon dioxide. ExxonMobil has captured more carbon dioxide than any other company.

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About ExxonMobil
ExxonMobil, the largest publicly traded international oil and gas company, uses technology and innovation to help meet the world's growing energy needs. ExxonMobil holds an industry-leading inventory of resources, is one of the largest refiners and marketers of petroleum products, and its chemical company is one of the largest in the world. For more information, visit www.exxonmobil.com or follow us on Twitter at www.twitter.com/exxonmobil.

About FuelCell Energy, Inc.
FuelCell Energy, Inc. (NASDAQ: FCEL) delivers efficient, affordable and clean solutions for the supply, recovery and storage of energy. We design, manufacture, undertake project development of, install, operate and maintain megawatt-scale fuel cell systems, serving utilities and industrial and large municipal power users with solutions that include both utility-scale and on-site power generation, carbon capture, local hydrogen production for transportation and industry, and long duration energy storage. With SureSource™ installations on three continents and millions of megawatt hours of ultra-clean power produced, FuelCell Energy is a global leader in designing, manufacturing, installing, operating and maintaining environmentally responsible fuel cell power solutions. Visit us online at www.fuelcellenergy.com and follow us on Twitter @FuelCell_Energy.

Cautionary Statement: Statements of future events or conditions in this release are forward-looking statements. Actual future results, including project plans and timing and the impact and results of new technologies, including efficiency gains and emission reductions, could vary depending on the outcome of further research and testing; the development and competitiveness of alternative technologies; the ability to scale pilot projects on a cost-effective basis; political and regulatory developments; and other factors discussed in this release and under the heading "Factors Affecting Future Results" on the Investors page of ExxonMobil's website at exxonmobil.com.

FOR IMMEDIATE RELEASE

FuelCell Energy Inc. Announces New $200 Million Strategic Corporate Loan Facility with Orion Energy Partners

- *Supports execution of current inflight projects and provides capital for future growth*
- *Refinances existing debt and enables payment of dividend obligations*
- *Provides continued financial flexibility to support FuelCell Energy's long-term strategy*

DANBURY, CT – November 6, 2019- - Today, FuelCell Energy, Inc. (Nasdaq: FCEL), a leading clean energy company, announced a new, 8-year $200 million strategic corporate loan facility with Orion Energy Partners. The Company is planning to leverage the initial October/November 2019 draws totaling $80 million to primarily support execution of certain projects within the Company's $2 billion project backlog. The balance of the Facility, or $120 million, will be available over the first 18 months to invest in strategic growth, providing working capital as needed.

Specifically, $80 million of the Facility will be deployed toward:

- Current construction and engineering costs associated with inflight projects, specifically Tulare BioMAT, Bolthouse Farms and the CMEEC U.S. Navy Base fuel cell plant
- Future growth, including commencing the construction of the first of three FuelCell projects with LIPA
- Increasing FuelCell Energy's unrestricted cash balance through the monetization of the Company's project portfolio and repayment of all short-term outstanding construction loan facilities
- Funding outstanding dividends for Series B Preferred shareholders

"We are pleased to close the new Facility with Orion Energy Partners. This successful transaction underscores the confidence Orion Energy Partners has in FuelCell based on its deep understanding of our business and our strategy, as well as the importance of the role our proprietary fuel cell technology plays in delivering a clean energy future," noted Jason Few, President and Chief Executive Officer of FuelCell Energy. "With this partnership, we have strengthened our balance sheet and have the funding we need to complete construction of several projects in process, continue to execute on our $2 billion backlog and project awards while driving new sales growth, all of which will generate strong cash flow."

"We are pleased to announce this new partnership with FuelCell Energy, and look forward to supporting their continued growth as a world leader for reliable, low carbon, base-load distributed power generation," said Gerrit Nicholas, Co-Founder and Managing Partner of Orion Energy Partners. "This investment is a perfect example of Orion Energy's focus on providing our partners with flexible, creative capital solutions, while meeting our commitments to environmentally sustainable energy businesses and practices."

The second tranche and remaining $120 million in financing is subject to the conditions contained in the agreement.

In connection with the Facility, the Company has granted Orion Energy Partners warrants to purchase up to 20 million shares of the Company's common stock. 8 million shares of these shares are valued at the October 30th, 2019 closing price, while the balance, or 12 million shares are valued at a premium to the October 30th closing price.

Cautionary Language

This news release contains forward-looking statements within the meaning of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995, including, without limitation, statements with respect to the Company's anticipated financial results, statements regarding the Company's plans and expectations regarding the continuing development, commercialization and financing of its fuel cell technology, and statements regarding the Company's strategic focuses and business plans. All forward-looking statements are subject to risks and uncertainties that could cause actual results to differ materially from those projected. Factors that could cause such a difference include, without limitation, changes to projected deliveries and order flow, changes to production rate and product costs, general risks associated with product development, manufacturing, changes in the regulatory environment, customer strategies, unanticipated manufacturing issues that impact power plant performance, changes in critical accounting policies, potential volatility of energy prices, rapid technological change, competition, and the Company's ability to achieve its sales plans, business and strategic plans, refinancing and restructuring plans, and cost reduction targets, as well as other risks set forth in the Company's filings with the Securities and Exchange Commission. The forward-looking statements contained herein speak only as of the date of this press release. The Company expressly disclaims any obligation or undertaking to release publicly any updates or revisions to any such statement to reflect any change in the Company's expectations or any change in events, conditions or circumstances on which any such statement is based.

About FuelCell Energy

FuelCell Energy, Inc. (NASDAQ: FCEL) delivers efficient, affordable and clean solutions for the supply, recovery and storage of energy. We design, manufacture, undertake project development of, install, operate and maintain megawatt-scale fuel cell systems, serving utilities and industrial and large municipal power users with solutions that include both utility-scale and on-site power generation, carbon capture, local hydrogen production for transportation and industry, and long duration energy storage. With SureSource™ installations on three continents and millions of megawatt hours of ultra-clean power produced, FuelCell Energy is a global leader in designing, manufacturing, installing, operating and maintaining environmentally responsible fuel cell power solutions. Visit us online at www.fuelcellenergy.com and follow us on Twitter @FuelCell_Energy.

About Orion Energy Partners

Orion Energy Partners is a credit-oriented private equity firm with over $1 billion of investable capital. Orion Energy is focused on providing creative capital solutions to middle-market energy infrastructure businesses across North America and select international markets with a focus on downstream, midstream, conventional electric power, renewable energy and storage, asset-heavy energy services and other energy subsectors. Its management has substantial experience leading successful energy companies and energy infrastructure investments. The firm was founded in 2015 and has offices in New York and Houston. For more information on Orion Energy Partners, please visit www.OrionEnergyPartners.com.

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