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

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**FORM 10-Q**

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

For the quarterly period ended January 31, 2023

OR

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

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission file number: 1-14204



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**FUELCELL ENERGY, INC.**

(Exact name of registrant as specified in its charter)

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**Delaware**  
(State or other jurisdiction of  
incorporation or organization)

**06-0853042**  
(I.R.S. Employer  
Identification No.)

**3 Great Pasture Road**  
**Danbury, Connecticut**  
(Address of principal executive offices)

**06810**  
(Zip Code)

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

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

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

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

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

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

Large accelerated filer	<input checked="" type="checkbox"/>	Accelerated filer	<input type="checkbox"/>
Non-accelerated filer	<input type="checkbox"/>	Smaller reporting company	<input type="checkbox"/>
Emerging growth company	<input type="checkbox"/>		

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

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

Number of shares of common stock, par value \$0.0001 per share, outstanding as of March 3, 2023: 405,732,053

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**FUELCELL ENERGY, INC.**

**FORM 10-Q**  
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**PART I. FINANCIAL INFORMATION**  
**ITEM 1. FINANCIAL STATEMENTS**

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

	January 31, 2023	October 31, 2022
<b>ASSETS</b>		
Current assets:		
Cash and cash equivalents, unrestricted	\$ 315,168	\$ 458,055
Restricted cash and cash equivalents - short-term	4,456	4,423
Investments - short-term	75,652	-
Accounts receivable, net	3,213	4,885
Unbilled receivables	13,711	11,019
Inventories	101,176	90,909
Other current assets	11,545	10,989
Total current assets	524,921	580,280
Restricted cash and cash equivalents - long-term	20,155	18,566
Inventories - long-term	7,549	7,549
Project assets, net	229,914	232,886
Property, plant and equipment, net	63,338	58,137
Operating lease right-of-use assets, net	8,997	7,189
Goodwill	4,075	4,075
Intangible assets, net	17,049	17,373
Other assets	16,385	13,662
Total assets <sup>(1)</sup>	<u>\$ 892,383</u>	<u>\$ 939,717</u>
<b>LIABILITIES AND STOCKHOLDERS' EQUITY</b>		
Current liabilities:		
Current portion of long-term debt	\$ 13,249	\$ 13,198
Current portion of operating lease liabilities	557	650
Accounts payable	24,590	28,196
Accrued liabilities	20,313	27,415
Deferred revenue	7,366	16,341
Total current liabilities	66,075	85,800
Long-term deferred revenue and customer deposits	-	9,095
Long-term operating lease liabilities	9,503	7,575
Long-term debt and other liabilities	81,575	82,863
Total liabilities <sup>(1)</sup>	157,153	185,333
Redeemable Series B preferred stock (liquidation preference of \$64,020 as of January 31, 2023 and October 31, 2022)	59,857	59,857
Redeemable noncontrolling interest	-	3,030
Total equity:		
Stockholders' equity:		
Common stock (\$0.0001 par value); 500,000,000 shares authorized as of January 31, 2023 and October 31, 2022; 405,732,053 and 405,562,988 shares issued and outstanding as of January 31, 2023 and October 31, 2022, respectively	41	41
Additional paid-in capital	2,095,667	2,094,076
Accumulated deficit	(1,426,595)	(1,407,973)
Accumulated other comprehensive loss	(1,305)	(1,752)
Treasury stock, Common, at cost (163,943 and 142,837 shares as of January 31, 2023 and October 31, 2022, respectively)	(923)	(855)
Deferred compensation	923	855
Total stockholder's equity	667,808	684,392
Noncontrolling interests	7,565	7,105
Total equity	675,373	691,497
Total liabilities, redeemable Series B preferred stock, redeemable noncontrolling interest and total equity	<u>\$ 892,383</u>	<u>\$ 939,717</u>

(1) As of January 31, 2023 and October 31, 2022, the consolidated assets of the variable interest entity ("VIE") were \$122,304 and \$119,223, respectively, that can only be used to settle obligations of the VIE. These assets include cash of \$2,350, accounts receivable of \$113, unbilled accounts receivable of \$1,492, operating lease right of use assets of \$1,182, other current assets of \$17,623 and project assets of \$99,544 as of January 31, 2023, and cash of \$2,149, unbilled accounts receivable of \$1,070, other current assets of \$14,373, operating lease right of use assets of \$1,184 and project assets of \$100,448 as of October 31, 2022. The consolidated liabilities of the VIE as of January 31, 2023 include short-term operating lease liabilities of \$157, accounts payable of \$81,445 and long-term operating lease liability of \$1,478 and, as of October 31, 2022, include short-term operating lease liabilities of \$157, accounts payable of \$76,050, accrued liabilities of \$824 and long-term operating lease liability of \$1,478.

See accompanying notes to consolidated financial statements.

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

	<b>Three Months Ended January 31,</b>	
	<b>2023</b>	<b>2022</b>
Revenues:		
Product	\$ 9,095	\$ 18,000
Service	13,882	2,167
Generation	9,557	7,496
Advanced Technologies	4,539	4,132
Total revenues	37,073	31,795
Costs of revenues:		
Product	1,029	18,207
Service	10,945	2,372
Generation	16,602	10,722
Advanced Technologies	3,260	3,389
Total costs of revenues	31,836	34,690
Gross profit (loss)	5,237	(2,895)
Operating expenses:		
Administrative and selling expenses	15,009	36,965
Research and development expenses	12,683	4,984
Total costs and expenses	27,692	41,949
Loss from operations	(22,455)	(44,844)
Interest expense	(1,512)	(1,428)
Interest income	3,410	10
Other income, net	49	142
Loss before provision for income taxes	(20,508)	(46,120)
Provision for income taxes	(578)	-
Net loss	(21,086)	(46,120)
Net loss attributable to noncontrolling interests	(2,464)	(5,496)
Net loss attributable to FuelCell Energy, Inc.	(18,622)	(40,624)
Series B preferred stock dividends	(800)	(800)
Net loss attributable to common stockholders	\$ (19,422)	\$ (41,424)
Loss per share basic and diluted:		
Net loss per share attributable to common stockholders	\$ (0.05)	\$ (0.11)
Basic and diluted weighted average shares outstanding	405,803,753	366,734,739

	<b>Three Months Ended January 31,</b>	
	<b>2023</b>	<b>2022</b>
Net loss	\$ (21,086)	\$ (46,120)
Other comprehensive loss:		
Foreign currency translation adjustments	447	(91)
Total comprehensive loss	\$ (20,639)	\$ (46,211)
Comprehensive loss attributable to noncontrolling interests	(2,464)	(5,496)
Comprehensive loss attributable to FuelCell Energy, Inc.	\$ (18,175)	\$ (40,715)

See accompanying notes to consolidated financial statements.

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

	Common Stock		Additional Paid-in Capital	Accumulated Deficit	Accumulated Other Comprehensive Loss	Treasury Stock	Deferred Compensation	Total Stockholder's Equity	Noncontrolling Interests	Total Equity
	Shares	Amount								
<b>Balance, October 31, 2022</b>	405,562,988	\$ 41	\$ 2,094,076	\$ (1,407,973)	\$ (1,752)	\$ (855)	\$ 855	\$ 684,392	\$ 7,105	\$ 691,497
Common stock issued, non-employee compensation	21,106	—	68	—	—	—	—	68	—	68
Stock issued under benefit plans, net of taxes paid upon vesting of restricted stock awards	169,065	—	(314)	—	—	—	—	(314)	—	(314)
Share based compensation	—	—	2,637	—	—	—	—	2,637	—	2,637
Preferred dividends — Series B	—	—	(800)	—	—	—	—	(800)	—	(800)
Effect of foreign currency translation	—	—	—	—	447	—	—	447	—	447
Adjustment for deferred compensation	(21,106)	—	—	—	—	(68)	68	—	—	—
Reclass of redeemable non-controlling interest	—	—	—	—	—	—	—	—	3,030	3,030
Distribution to non-controlling interest	—	—	—	—	—	—	—	—	(106)	(106)
Net loss attributable to noncontrolling interests	—	—	—	2,464	—	—	—	2,464	(2,464)	—
Net Loss	—	—	—	(21,086)	—	—	—	(21,086)	—	(21,086)
<b>Balance, January 31, 2023</b>	<u>405,732,053</u>	<u>\$ 41</u>	<u>\$ 2,095,667</u>	<u>\$ (1,426,595)</u>	<u>\$ (1,305)</u>	<u>\$ (923)</u>	<u>\$ 923</u>	<u>\$ 667,808</u>	<u>\$ 7,565</u>	<u>\$ 675,373</u>

	Common Stock		Additional Paid-in Capital	Accumulated Deficit	Accumulated Other Comprehensive Loss	Treasury Stock	Deferred Compensation	Total Stockholders' Equity	Noncontrolling Interests	Total Stockholders' Equity
	Shares	Amount								
<b>Balance, October 31, 2021</b>	366,618,693	\$ 37	\$ 1,908,471	\$ (1,265,251)	\$ (819)	\$ (586)	\$ 586	\$ 642,438	\$ —	\$ 642,438
Common stock issued, non-employee compensation	20,673	—	100	—	—	—	—	100	—	100
Stock issued under benefit plan, net of taxes paid upon vesting of restricted stock awards	60,052	—	(260)	—	—	—	—	(260)	—	(260)
Share based compensation	—	—	1,470	—	—	—	—	1,470	—	1,470
Preferred dividends — Series B	—	—	(800)	—	—	—	—	(800)	—	(800)
Effect of foreign currency translation	—	—	—	—	(91)	—	—	(91)	—	(91)
Adjustment for deferred compensation	(13,232)	—	—	—	—	(64)	64	—	—	—
Net loss attributable to redeemable noncontrolling interest	—	—	—	5,496	—	—	—	5,496	(5,496)	—
Net loss attributable to FuelCell Energy, Inc.	—	—	—	(46,120)	—	—	—	(46,120)	—	(46,120)
<b>Balance, January 31, 2022</b>	<u>366,686,186</u>	<u>\$ 37</u>	<u>\$ 1,908,981</u>	<u>\$ (1,305,875)</u>	<u>\$ (910)</u>	<u>\$ (650)</u>	<u>\$ 650</u>	<u>\$ 602,233</u>	<u>\$ (5,496)</u>	<u>\$ 596,737</u>

See accompanying notes to consolidated financial statements.

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

	<b>Three Months Ended January 31,</b>	
	<b>2023</b>	<b>2022</b>
<b>Cash flows from operating activities:</b>		
Net loss	\$ (21,086)	\$ (46,120)
Adjustments to reconcile net loss to net cash used in operating activities:		
Share-based compensation	2,637	1,470
Depreciation and amortization	5,405	5,771
Non-cash interest expense on finance obligations	1,052	1,066
Non-cash interest income on investments	(675)	-
Operating lease costs	323	395
Operating lease payments	(301)	(372)
Impairment of property, plant and equipment and project assets	-	976
Unrealized foreign currency losses (gains)	5	(82)
Other, net	96	(316)
Decrease (increase) in operating assets:		
Accounts receivable	1,672	(15,972)
Unbilled receivables	(4,965)	(4,369)
Inventories	(10,267)	(2,529)
Other assets	(1,006)	(1,994)
(Decrease) increase in operating liabilities:		
Accounts payable	(1,072)	2,560
Accrued liabilities	(7,125)	10,027
Deferred revenue	(18,070)	1,735
<b>Net cash used in operating activities</b>	<b>(53,377)</b>	<b>(47,754)</b>
<b>Cash flows from investing activities:</b>		
Capital expenditures	(7,765)	(5,331)
Project asset expenditures	(2,080)	(10,435)
Purchases of held-to-maturity debt securities	(74,977)	-
<b>Net cash used in investing activities</b>	<b>(84,822)</b>	<b>(15,766)</b>
<b>Cash flows from financing activities:</b>		
Repayment of debt	(2,291)	(2,530)
Expenses related to common stock issued for stock plans	21	26
Contributions received from sale of noncontrolling interest	-	12,419
Distribution to noncontrolling interest	(106)	-
Payments for taxes related to net share settlement of equity awards	(337)	(285)
Payment of preferred dividends	(800)	(800)
<b>Net cash (used in) provided by financing activities</b>	<b>(3,513)</b>	<b>8,830</b>
Effects on cash from changes in foreign currency rates	447	(91)
<b>Net decrease in cash, cash equivalents and restricted cash</b>	<b>(141,265)</b>	<b>(54,781)</b>
Cash, cash equivalents and restricted cash-beginning of period	481,044	460,212
<b>Cash, cash equivalents and restricted cash-end of period</b>	<b>\$ 339,779</b>	<b>\$ 405,431</b>
<b>Supplemental cash flow disclosures:</b>		
Cash interest paid	\$ 343	\$ 329
<b>Noncash financing and investing activity:</b>		
Operating lease liabilities	2,005	-
Operating lease right-of-use assets	2,005	-
Noncash reclassifications from inventory to project assets	-	4,217
Accrued purchase of fixed assets, cash to be paid in subsequent period	3,055	1,077
Accrued purchase of project assets, cash to be paid in subsequent period	5,250	7,640

See accompanying notes to consolidated financial statements.

FUELCELL ENERGY, INC.  
Notes to Consolidated Financial Statements  
(Unaudited)

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

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

Headquartered in Danbury, Connecticut, FuelCell Energy, Inc. (together with its subsidiaries, the “Company,” “FuelCell Energy,” “we,” “us,” or “our”) has leveraged five decades of research and development to become a global leader in delivering environmentally responsible distributed baseload power platform solutions through our proprietary fuel cell technology. Our current commercial technology produces electricity, heat, hydrogen, and water while separating carbon for utilization and/or sequestration. We continue to invest in developing and commercializing future technologies expected to add new capabilities to our platforms’ abilities to deliver hydrogen and long duration hydrogen-based energy storage through our solid oxide technologies, as well as further enhance our existing platforms’ carbon capture solutions.

FuelCell Energy is a global leader in sustainable clean energy technologies that address some of the world’s most critical challenges around energy access, security, safety and environmental stewardship. As a leading global manufacturer of proprietary fuel cell technology platforms, FuelCell Energy is uniquely positioned to serve customers worldwide with sustainable products and solutions for industrial and commercial businesses, utilities, governments, and municipalities.

***Basis of Presentation***

The accompanying unaudited consolidated financial statements have been prepared in accordance with the rules and regulations of the Securities and Exchange Commission (“SEC”) regarding interim financial information. Accordingly, they do not contain all of the information and footnotes required by accounting principles generally accepted in the United States of America (“GAAP”) for complete financial statements. In the opinion of management, all normal and recurring adjustments necessary to fairly present the Company’s financial position and results of operations as of and for the three months ended January 31, 2023 and 2022 have been included. All intercompany accounts and transactions have been eliminated.

Certain information and footnote disclosures normally included in financial statements prepared in accordance with GAAP have been condensed or omitted. The balance sheet as of October 31, 2022 has been derived from the audited financial statements at that date, but it does not include all of the information and footnotes required by GAAP for complete financial statements. These financial statements should be read in conjunction with the Company’s financial statements and notes thereto for the fiscal year ended October 31, 2022, which are contained in the Company’s Annual Report on Form 10-K previously filed with the SEC. The results of operations for the interim periods presented are not necessarily indicative of results that may be expected for any other interim period or for the full fiscal year.

Certain reclassifications have been made to the prior year amounts to conform to the presentation for the three months ended January 31, 2023. Interest income for the three months ended January 31, 2022, which was previously included within Other income, net has been reclassified to Interest income in the Consolidated Statement of Operations and Comprehensive Loss.

***Principles of Consolidation***

The unaudited consolidated financial statements reflect our accounts and operations and those of our subsidiaries in which we have a controlling financial interest. We use a qualitative approach in assessing the consolidation requirement for each of our variable interest entities (“VIEs”), which are tax equity partnerships further described in Note 3. “Tax Equity Financings.” This approach focuses on determining whether we have the power to direct those activities of the tax equity partnerships that most significantly affect their economic performance and whether we have the obligation to absorb losses, or the right to receive benefits, that could potentially be significant to the tax equity partnerships. For all periods presented, we have determined that we are the primary beneficiary in all of our tax equity partnerships. We evaluate our tax equity partnerships on an ongoing basis to ensure that we continue to be the primary beneficiary.

***Use of Estimates***

The preparation of financial statements and related disclosures in conformity with GAAP requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure

of contingent assets and liabilities. Estimates are used in accounting for, among other things, revenue recognition, lease right-of-use assets and liabilities, contract loss accruals, excess, slow-moving and obsolete inventories, product warranty accruals, loss accruals on service agreements, share-based compensation expense, allowance for doubtful accounts, depreciation and amortization, impairment of goodwill and in-process research and development intangible assets, impairment of long-lived assets (including project assets), and contingencies. Estimates and assumptions are reviewed periodically, and the effects of revisions are reflected in the consolidated financial statements in the period they are determined to be necessary. Due to the inherent uncertainty involved in making estimates, actual results in future periods may differ from those estimates.

### ***Liquidity***

Our principal sources of cash have been proceeds from the sale of our products and projects, electricity generation revenues, research and development and service agreements with third parties, sales of our common stock through public equity offerings, and proceeds from debt, project financing and tax monetization transactions. We have utilized this cash to accelerate the commercialization of our solid oxide platforms, develop new capabilities to separate and capture carbon, develop and construct project assets, invest in capital improvements and expansion of our operations, perform research and development on Advanced Technologies, pay down existing outstanding indebtedness, and meet our other cash and liquidity needs.

As of January 31, 2023, unrestricted cash and cash equivalents totaled \$315.2 million compared to \$458.1 million as of October 31, 2022. During the three months ended January 31, 2023, the Company invested \$75.0 million in United States (U.S.) Treasury Securities which have maturity dates ranging from February 9, 2023 to May 15, 2023. The amortized cost of these U.S. Treasury Securities totaled \$75.7 million as of January 31, 2023 compared to \$0 as of October 31, 2022 and are classified as Investments - short-term on the Consolidated Balance Sheets.

On July 12, 2022, the Company entered into an Open Market Sale Agreement with Jefferies LLC, B. Riley Securities, Inc., Barclays Capital Inc., BMO Capital Markets Corp., BofA Securities, Inc., Canaccord Genuity LLC, Citigroup Global Markets Inc., J.P. Morgan Securities LLC and Loop Capital Markets LLC (the “Open Market Sale Agreement”) with respect to an at the market offering program under which the Company may, from time to time, offer and sell up to 95.0 million shares of the Company’s common stock. From the date of the Open Market Sale Agreement through January 31, 2023, the Company sold approximately 18.5 million shares under the Open Market Sale Agreement at an average sale price of \$3.63 per share, resulting in gross proceeds of approximately \$67.2 million before deducting sales commissions and fees. During the quarter ended January 31, 2023, no sales were made under the Open Market Sale Agreement. As of January 31, 2023, approximately 76.5 million shares were available for issuance under the Open Market Sale Agreement. The Company currently intends to use the net proceeds from this offering to accelerate the development and commercialization of its product platforms (including, but not limited to, its solid oxide and carbon capture platforms), for project development, market development, and internal research and development, to invest in capacity expansion for solid oxide and carbonate fuel cell manufacturing, and for project financing, working capital support, and general corporate purposes. The Company may also use the net proceeds from this offering to invest in joint ventures, acquisitions, and strategic growth investments and to acquire, license or invest in products, technologies or businesses that complement its business. See Note 11. “Stockholders’ Equity” for additional information regarding the Open Market Sale Agreement.

We believe that our unrestricted cash and cash equivalents, expected receipts from our contracted backlog, and release of short-term restricted cash less expected disbursements over the next twelve months will be sufficient to allow the Company to meet its obligations for at least one year from the date of issuance of these financial statements.

To date, we have not achieved profitable operations or sustained positive cash flow from operations. The Company’s future liquidity, for fiscal year 2023 and in the long-term, will depend on its ability to (i) timely complete current projects in process within budget, (ii) increase cash flows from its generation operating portfolio, including by meeting conditions required to timely commence operation of new projects, operating its generation operating portfolio in compliance with minimum performance guarantees and operating its generation operating portfolio in accordance with revenue expectations, (iii) obtain financing for project construction and manufacturing expansion, (iv) obtain permanent financing for its projects once constructed, (v) increase order and contract volumes, which would lead to additional product sales, service agreements and generation revenues, (vi) obtain funding for and receive payment for research and development under current and future Advanced Technologies contracts, (vii) successfully commercialize its Advanced Technologies platforms, including its solid oxide, hydrogen and carbon capture platforms, (viii) implement capacity expansion for solid oxide product manufacturing, (ix) implement the product cost reductions necessary to achieve profitable operations,



(x) manage working capital and the Company's unrestricted cash balance and (xi) access the capital markets to raise funds through the sale of debt and equity securities, convertible notes, and other equity-linked instruments.

We are continually assessing different means by which to accelerate the Company's growth, enter new markets, commercialize new products, and enable capacity expansion. Therefore, from time to time, the Company may consider and enter into agreements for one or more of the following: negotiated financial transactions, minority investments, collaborative ventures, technology sharing, transfer or other technology license arrangements, joint ventures, partnerships, acquisitions or other business transactions for the purpose(s) of geographic or manufacturing expansion and/or new product or technology development and commercialization, including hydrogen production through our carbonate and solid oxide platforms and storage and carbon capture, sequestration and utilization technologies.

Our business model requires substantial outside financing arrangements and satisfaction of the conditions of such arrangements to construct and deploy our projects to facilitate the growth of our business. The Company has invested capital raised from sales of its common stock to build out its project portfolio. The Company has also utilized and expects to continue to utilize a combination of long-term debt and tax equity financing (e.g., sale-leaseback transactions, partnership flip transactions and the monetization and/or transfer of eligible investment and production tax credits) to finance its project asset portfolio as these projects commence commercial operations, particularly in light of the passage of the Inflation Reduction Act in August 2022. The Company may also seek to undertake private placements of debt securities of a portfolio of assets to finance its project asset portfolio. The proceeds of any such financing, if obtained, may allow the Company to reinvest capital back into the business and to fund other projects. We may also seek to obtain additional financing in both the debt and equity markets in the future. If financing is not available to us on acceptable terms if and when needed, or on terms acceptable to us or our lenders, if we do not satisfy the conditions of our financing arrangements, if we spend more than the financing approved for projects, if project costs exceed an amount that the Company can finance, or if we do not generate sufficient revenues or obtain capital sufficient for our corporate needs, we may be required to reduce or slow planned spending, reduce staffing, sell assets, seek alternative financing and take other measures, any of which could have a material adverse effect on our financial condition and operations.

## **Note 2. Recent Accounting Pronouncements**

### *Recently Adopted Accounting Guidance*

There is no recently adopted accounting guidance.

### *Recent Accounting Guidance Not Yet Effective*

There is no recent accounting guidance that is not yet effective.

## **Note 3. Tax Equity Financings**

### *Groton Tax Equity Financing Transaction*

The Company closed on a tax equity financing transaction in August 2021 with East West Bancorp, Inc. ("East West Bank") for the 7.4 MW fuel cell project (the "Groton Project") located on the U.S. Navy Submarine Base in Groton, CT. East West Bank's tax equity commitment totals \$15 million.

This transaction was structured as a "partnership flip", which is a structure commonly used by tax equity investors in the financing of renewable energy projects. Under this partnership flip structure, a partnership, in this case Groton Station Fuel Cell Holdco, LLC (the "Groton Partnership"), was organized to acquire from FuelCell Energy Finance II, LLC, a wholly-owned subsidiary of the Company, all outstanding equity interests in Groton Station Fuel Cell, LLC (the "Groton Project Company") which in turn owns the Groton Project and is the party to the power purchase agreement and all project agreements. At the closing of the transaction, the Groton Partnership is owned by East West Bank, holding Class A Units, and Fuel Cell Energy Finance Holdco, LLC, a subsidiary of FuelCell Energy Finance, LLC, holding Class B Units. The acquisition of the Groton Project Company by the Groton Partnership was funded in part by an initial draw from East West Bank and funds contributed downstream to the Groton Partnership by the Company. The initial closing occurred on August 4, 2021, upon the satisfaction of certain conditions precedent (including the receipt of an appraisal and confirmation that the Groton Project would be eligible for the investment tax credit under Section 48 of the Internal Revenue Code of 1986, as amended). In connection with the initial closing, the Company drew down \$3.0 million, of which approximately \$0.8 million was used to pay closing costs including appraisal fees, title insurance expenses and legal and consulting fees.

Under the original terms of the Company's agreement with East West Bank, the Company would have been eligible to draw the remaining amount of the commitment, approximately \$12 million, once the Groton Project achieves commercial operation. In addition, under the original terms of the Company's agreement with East West Bank, the Groton Project had a required commercial operations deadline of October 18, 2021. The significance of the commercial operations deadline is that, if commercial operations were not achieved by such deadline, East West Bank would have the option to require an amount equal to 101% of its investment to be returned. East West Bank granted several extensions of the commercial operations deadline, which collectively extended the deadline to May 15, 2022, in exchange for the Company's agreement to pay fees of \$0.4 million in the aggregate.

On July 7, 2022, the Company and East West Bank amended their tax equity financing agreement and extended the commercial operations deadline to September 30, 2022. In addition, in the July 7, 2022 amendment to the tax equity financing agreement, the terms of East West Bank's remaining investment commitment of \$12.0 million were modified such that East West Bank will contribute \$4.0 million on each of the first, second and third anniversaries of the Groton Project achieving commercial operations, rather than contributing the full \$12.0 million when the Groton Project achieves commercial operations. Such contributions are subject to certain customer conditions precedent, including a third-party certification by an independent engineer that the plant is operating in conformance with the amended and restated power purchase agreement. When such contributions are made by East West Bank, the funds will be distributed upstream to the Company, as a reimbursement of prior construction costs incurred by the Company. In conjunction with this amendment, the Company agreed to pay aggregate fees of \$0.5 million (which are inclusive of the fees from the previous extensions described above), which were payable by the Company upon commencement of commercial operations of the plant.

On October 4, 2022, the Company and East West Bank further amended their tax equity financing agreement to extend the deadline by which commercial operations were to be achieved at the Groton Project from September 30, 2022 to November 30, 2022. In addition, modifications to the Groton Project documents between Connecticut Municipal Electric Energy Cooperative ("CMEEC") and the Company as a result of the agreement between those parties to commence operations at less than 7.4 MW required the approval of East West Bank as part of East West Bank's rights under the agreement between East West Bank and the Company. On December 16, 2022, the Company and CMEEC agreed that, for all purposes, the commercial operations date had occurred, and, accordingly, East West Bank no longer had a right to have its investment returned as a result of the Company's failure to achieve commercial operations in a timely fashion, and this investment became a non-redeemable noncontrolling interest as of December 16, 2022. In addition, on December 16, 2022, the Company paid the aggregate fees of \$0.5 million described above to East West Bank.

On December 16, 2022, the Company declared and, per the terms of the Amended and Restated Power Purchase Agreement between the Company and CMEEC entered into on that date (the "Amended and Restated PPA"), CMEEC agreed that the Groton Project is commercially operational at 6 MW. As of December 16, 2022, the Groton Project is reported as a part of the Company's generation operating portfolio. The Amended and Restated PPA allows the Company to operate the plants at a reduced output of approximately 6 MW while a Technical Improvement Plan ("TIP") is implemented over the next year with the goal of bringing the platform to its rated capacity of 7.4 MW by December 31, 2023. In conjunction with entering into the Amended and Restated PPA, the Navy also provided its authorization to proceed with commercial operations at 6 MW. The Company paid CMEEC an amendment fee of \$1.2 million and is incurring and will continue to incur performance guarantee fees under the Amended and Restated PPA as a result of operating at an output below 7.4 MW during implementation of the TIP. Although the Company believes it will successfully implement the TIP and bring the plants up to their nominal output of 7.4 MW by December 31, 2023, no assurance can be provided that such work will be successful. In the event that the plants do not reach an output of 7.4 MW by December 31, 2023, the Amended and Restated PPA will continue in effect, and the Company will be subject to ongoing performance guarantee fees as set forth in the Amended and Restated PPA.

With the declaration of commercial operations, East West Bank's investment in the project was reclassified, as of December 16, 2022, from a redeemable noncontrolling interest to non-redeemable noncontrolling interests within the Total equity section of the Consolidated Balance Sheet.

Under most partnership flip structures, tax equity investors agree to receive a minimum target rate of return, typically on an after-tax basis. Prior to receiving a contractual rate of return or a date specified in the contractual arrangements, East West Bank will receive substantially all of the non-cash value attributable to the Groton Project, which includes accelerated depreciation and Section 48(a) investment tax credits; however, the Company will receive a majority of the cash distributions (based on the operating income of the Groton Project), which are paid quarterly. After East West Bank receives its contractual rate of return, the Company will receive approximately 95% of the cash and tax allocations. The

Company (through a separate wholly owned entity) may enter into a back leverage debt financing transaction and use the cash distributions from the Groton Partnership to service the debt.

We have determined we are the primary beneficiary in the Groton Partnership for accounting purposes as a Variable Interest Entity ("VIE") under GAAP. We have considered the provisions within the financing-related agreements (including the limited liability company agreement for the Groton Partnership) which grant us power to manage and make decisions affecting the operations of the Groton Partnership. We consider the rights granted to East West Bank under the agreements to be more protective in nature than participatory. Therefore, we have determined under the power and benefits criterion of Accounting Standards Codification ("ASC") 810, *Consolidations* that we are the primary beneficiary of the Groton Partnership. As the primary beneficiary, we consolidate the financial position, results of operations and cash flows of the Groton Partnership in our consolidated financial statements, and all intercompany balances and transactions between us and the Groton Partnership are eliminated. We recognized East West Bank's share of the net assets of the Groton Partnership as redeemable noncontrolling interests in our Consolidated Balance Sheets. East West Bank's share of the net assets is considered as a redeemable noncontrolling interest due to the conditional withdrawal right under which, if events outside the control of the Company occur, East West Bank has the ability to force the Company to redeem its interest in the Groton Partnership. The income or loss allocations reflected in our Consolidated Statements of Operations and Comprehensive Loss may create volatility in our reported results of operations, including potentially changing net loss attributable to stockholders to net income attributable to stockholders, or vice versa, from quarter to quarter. Since the Groton Project became operational during the three months ended January 31, 2023, we have begun to allocate profits and losses to noncontrolling interests under the hypothetical liquidation at book value ("HLBV") method. HLBV is a balance sheet-oriented approach for applying the equity method of accounting when there is a complex structure, such as the partnership flip structure. For the three months ended January 31, 2023, the net loss attributable to noncontrolling interests totaled \$2.9 million. There were no amounts allocated to noncontrolling interest for the three months ended January 31, 2022 for the Groton Partnership.

#### *Yaphank Tax Equity Financing Transaction*

The Company closed on a tax equity financing transaction in November 2021 with Renewable Energy Investors, LLC ("REI"), a subsidiary of Franklin Park Infrastructure, LLC, for the 7.4 MW fuel cell project (the "LIPA Yaphank Project") located in Yaphank Long Island. REI's tax equity commitment totaled \$12.4 million.

This transaction was structured as a "partnership flip," which is a structure commonly used by tax equity investors in the financing of renewable energy projects. Under this partnership flip structure, a partnership, in this case YTBFC Holdco, LLC (the "Yaphank Partnership"), was organized to acquire from FuelCell Energy Finance II, LLC, a wholly-owned subsidiary of the Company, all outstanding equity interests in Yaphank Fuel Cell Park, LLC which in turn owns the LIPA Yaphank Project and is the party to the power purchase agreement and all project agreements. REI holds Class A Units in the Yaphank Partnership and a subsidiary of the Company holds the Class B Units. The initial funding occurred on December 13, 2021. In connection with the initial closing, the Company was able to draw down approximately \$3.2 million, of which approximately \$0.4 million was used to pay closing costs, including title insurance expenses and legal and consulting fees. The Company drew down the remaining amount of the commitment, approximately \$9.2 million, in December 2021 and January 2022, after the LIPA Yaphank Project achieved commercial operation. These proceeds were partially offset by legal and advisory fees of approximately \$0.4 million.

The Company determined during the second quarter of fiscal year 2022 that there was an overpayment by REI of the Class A Member Capital Contribution of \$0.5 million and as such the Company refunded this amount back to REI, reducing the REI tax equity commitment to \$11.9 million. During the three months ended January 31, 2023, the Company made priority return distributions to REI of \$0.1 million which were calculated at a 2.73% annual interest rate on invested tax equity capital. There were no priority return distributions to REI during the three months ended January 31, 2022.

Under a partnership flip structure, tax equity investors agree to receive a minimum target rate of return, typically on an after-tax basis. Prior to receiving a contractual rate of return or a date specified in the contractual arrangements, REI will receive substantially all of the non-cash value attributable to the LIPA Yaphank Project, which includes accelerated depreciation and Section 48(a) investment tax credits; however, the Company will receive a majority of the cash distributions (based on the operating income of the LIPA Yaphank Project), which are paid quarterly. After REI receives its contractual rate of return, the Company will receive approximately 95% of the cash and tax allocations. The Company may enter into a back leverage debt financing transaction and use the cash distributions from the Yaphank Partnership to service the debt.

Under this partnership flip structure, after the fifth anniversary following achievement of commercial operations, we have an option to acquire all of the equity interests that REI holds in the Yaphank Partnership starting after REI receives its contractual rate of return (the anticipated “flip” date) after the LIPA Yaphank Project is operational. If we exercise this option, we will be required to pay the greater of the following: (i) the fair market value of REI's equity interest at the time the option is exercised or (ii) an amount equal to 10.3% of REI's capital contributions. This option payment is to be grossed up for federal taxes if it exceeds the tax basis of the Yaphank Partnership Class A Units.

We are the primary beneficiary in the Yaphank Partnership for accounting purposes as a VIE under GAAP. We have considered the provisions within the financing-related agreements (including the limited liability company agreement for the Yaphank Partnership) which grant us power to manage and make decisions affecting the operations of the Yaphank Partnership. We consider the rights granted to REI under the agreements to be more protective in nature rather than participatory. Therefore, we have determined under the power and benefits criterion of ASC 810, *Consolidations* that we are the primary beneficiary of the Yaphank Partnership. As the primary beneficiary, we consolidate the financial position, results of operations and cash flows of the Yaphank Partnership in our consolidated financial statements, and all intercompany balances and transactions between us and the Yaphank Partnership are eliminated. We recognized REI's share of the net assets of the Yaphank Partnership as noncontrolling interests in our Consolidated Balance Sheets. The income or loss allocations reflected in our Consolidated Statements of Operations and Comprehensive Loss may create volatility in our reported results of operations, including potentially changing net loss attributable to stockholders to net income attributable to stockholders, or vice versa, from quarter to quarter. We allocate profits and losses to REI's noncontrolling interest under the HLBV method. HLBV is a balance sheet-oriented approach for applying the equity method of accounting when there is a complex structure, such as the partnership flip structure. For the three months ended January 31, 2023 and 2022, net income (loss) attributable to noncontrolling interest for the Yaphank Partnership totaled \$0.4 million and \$(5.5) million, respectively.

#### **Note 4. Revenue Recognition**

##### *Contract Balances*

Contract assets as of January 31, 2023 and October 31, 2022 were \$25.7 million (\$12.0 million long-term) and \$20.7 million (\$9.7 million long-term), respectively. The contract assets relate to the Company's rights to consideration for work completed but not yet billed. These amounts are included on a separate line item as Unbilled receivables, and balances expected to be billed later than one year from the balance sheet date are included within Other assets on the accompanying Consolidated Balance Sheets. We bill customers for power platform and power platform component sales based on certain contractual milestones being reached. We bill service agreements based on the contract price and billing terms of the contracts. Generally, our Advanced Technologies contracts are billed based on actual revenues recorded, typically in the subsequent month. Some Advanced Technologies contracts are billed based on contractual milestones or costs incurred. The net change in contract assets represents amounts recognized as revenue offset by customer billings.

Contract liabilities as of January 31, 2023 and October 31, 2022 were \$7.4 million and \$25.4 million, respectively. The contract liabilities relate to the advance billings to customers for services that will be recognized over time.

The net change in contract liabilities represents customer billings offset by revenue recognized.

##### *Contract modification*

As previously disclosed, the Company entered into a Settlement Agreement (the “Settlement Agreement”) with POSCO Energy Co., Ltd. (“POSCO Energy”) and its subsidiary, Korea Fuel Cell Co., Ltd. (“KFC”) in fiscal year 2022. The Settlement Agreement included an option to purchase an additional 14 modules (in addition to the 20 modules which were purchased by KFC during fiscal year 2022). The option was not exercised as of the expiration date of December 31, 2022 and as a result, the Company recognized \$9.1 million of product revenue during the three months ended January 31, 2023 which represents the consideration allocated to the material right had the option been exercised.

##### *Advanced Technologies Revenue - EMTEC Joint Development Agreement*

On December 19, 2022, the Company and ExxonMobil Technology and Engineering Company (formerly known as ExxonMobil Research and Engineering Company) (“EMTEC”) entered into Amendment No. 3 to the Joint Development

Agreement between the Company and EMTEC, effective as of December 1, 2022 (such amendment, “Amendment No. 3” and such agreement, as amended, the “EMTEC Joint Development Agreement”). In Amendment No. 3, the Company and EMTEC agreed to further extend the term of the EMTEC Joint Development Agreement such that it will end on August 31, 2023 (unless terminated earlier) and to further increase the maximum amount of contract consideration to be reimbursed by EMTEC from \$50.0 million to \$60.0 million. Amendment No. 3 is intended to (i) allow for continuation of research that would enable the parties to finalize data collection in support of the project gate decision to use the developed technology in a Company fuel cell module demonstration for capturing carbon at ExxonMobil’s Rotterdam facility, (ii) allow for the continuation of the development, engineering and mechanical derisking of the Generation 2 Technology fuel cell module prototype, and (iii) allow for studying the manufacturing scale-up and cost reduction of a commercial Generation 2 Technology fuel cell carbon capture facility.

#### *Remaining Performance Obligations*

Remaining performance obligations are the aggregate amount of total contract transaction price that is unsatisfied or partially unsatisfied. As of January 31, 2023, the Company’s total remaining performance obligations were: \$99.9 million for service agreements and \$26.8 million for Advanced Technologies contracts in the aggregate. Service revenue in periods in which there are no module exchanges is expected to be relatively consistent from period to period, whereas module exchanges will result in an increase in revenue when exchanges occur.

#### **Note 5. Investments – Short-Term**

On November 14, 2022, the Company invested \$75.0 million to purchase U.S. Treasury Securities. The U.S. Treasury Securities have maturity dates ranging from February 9, 2023 to May 15, 2023. We have classified the U.S. Treasury Securities as held-to-maturity and recorded them at amortized cost. The following table summarizes the amortized cost basis and fair value (based on quoted market prices) at January 31, 2023.

	Amortized cost	Gross unrealized gains	Gross unrealized losses	Fair value
U.S. Treasury Securities				
As of January 31, 2023	\$ 75,652	\$ —	\$ (24)	\$ 75,628

The contractual maturities of investments are within one year and the weighted average yield to maturity is 4.36%.

#### **Note 6. Inventories**

Inventories (current and long-term) as of January 31, 2023 and October 31, 2022 consisted of the following (in thousands):

	January 31, 2023	October 31, 2022
Raw materials	\$ 39,395	\$ 30,624
Work-in-process <sup>(1)</sup>	69,330	67,834
Inventories	108,725	98,458
Inventories – current	(101,176)	(90,909)
Inventories – long-term <sup>(2)</sup>	\$ 7,549	\$ 7,549

- (1) Work-in-process includes the standard components of inventory used to build the typical modules or module components that are intended to be used in future project asset construction or power plant orders or for use under the Company’s service agreements. Included in work-in-process as of January 31, 2023 and October 31, 2022 was \$58.8 million and \$54.0 million, respectively, of completed standard components and modules.
- (2) Long-term inventory includes modules that are contractually required to be segregated for use as exchange modules for specific project assets.

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

**Note 7. Project Assets**

Project assets as of January 31, 2023 and October 31, 2022 consisted of the following (in thousands):

	January 31, 2023	October 31, 2022	Estimated Useful Life
Project Assets – Operating	\$ 211,384	\$ 154,736	4-20 years
Accumulated depreciation	(33,403)	(29,546)	
Project Assets – Operating, net	177,981	125,190	
Project Assets – Construction in progress	51,933	107,696	7-20 years
Project Assets, net	<u>\$ 229,914</u>	<u>\$ 232,886</u>	

The estimated useful lives of these project assets are 20 years for balance of plant (“BOP”) and site construction, and four to seven years for modules. Project assets as of January 31, 2023 and October 31, 2022 included nine and eight, respectively, completed, commissioned installations generating power with respect to which the Company has a power purchase agreement (“PPA”) with the end-user of power and site host with a net aggregate value of \$178.0 million and \$125.2 million as of January 31, 2023 and October 31, 2022, respectively. Certain of these assets are the subject of sale-leaseback arrangements with PNC Energy Capital, LLC (“PNC”) and Crestmark Equipment Finance (“Crestmark”). The increase in operating project assets at January 31, 2023 is a result of the inclusion of the Groton Project which became operational during the three months ended January 31, 2023.

Project assets as of January 31, 2023 and October 31, 2022 also include installations with carrying values of \$51.9 million and \$107.7 million, respectively, which are being developed and constructed by the Company in connection with projects for which we have entered into PPAs or projects for which we expect to secure PPAs or otherwise recover the asset value and which have not yet been placed in service.

Included in “Construction in progress” is the 2.3 MW Toyota project. It was determined in the fourth quarter of fiscal year 2021 that a potential source of renewable natural gas (“RNG”) at favorable pricing was no longer sufficiently probable and that market pricing for RNG had significantly increased, resulting in the determination that the carrying value of the project asset was no longer recoverable. Refer to Note 17. “Commitments and Contingencies” for more information regarding fuel risk exposure. As this project is being constructed, only inventory components that can be redeployed for alternative use are being capitalized. The balance of costs incurred are being expensed as generation cost of revenues.

Project construction costs incurred for long-term project assets are reported as investing activities in the Consolidated Statements of Cash Flows. The proceeds received from the sale and subsequent leaseback of project assets are classified as “Cash flows from financing activities” within the Consolidated Statements of Cash Flows and are classified as a finance obligation within “Current portion of long-term debt” and “Long-term debt and other liabilities” on the Consolidated Balance Sheets (refer to Note 15. “Debt” for more information).

**Note 8. Goodwill and Intangible Assets**

As of January 31, 2023 and October 31, 2022, the Company had goodwill of \$4.1 million and intangible assets of \$17.0 million and \$17.4 million, respectively, that were recorded in connection with the Company’s 2012 acquisition of Versa Power Systems, Inc. (“Versa”) and the 2019 Bridgeport Fuel Cell Project acquisition.

The Versa acquisition intangible asset represents an indefinite-lived in-process research and development intangible asset (“IPR&D”) for cumulative research and development efforts associated with the development of solid oxide fuel cell stationary power generation. Amortization expense for the Bridgeport Fuel Cell Project-related intangible asset for each of the three months ended January 31, 2023 and 2022 was \$0.3 million.



The following tables summarize the carrying value of the Company's intangible assets as of January 31, 2023 and October 31, 2022 (in thousands):

As of January 31, 2023	Gross Amount	Accumulated Amortization	Net Amount
In-Process Research and Development	\$ 9,592	\$ —	\$ 9,592
Bridgeport PPA	12,320	(4,863)	7,457
<b>Total</b>	<b>\$ 21,912</b>	<b>\$ (4,863)</b>	<b>\$ 17,049</b>

As of October 31, 2022	Gross Amount	Accumulated Amortization	Net Amount
In-Process Research and Development	\$ 9,592	\$ —	\$ 9,592
Bridgeport PPA	12,320	(4,539)	7,781
<b>Total</b>	<b>\$ 21,912</b>	<b>\$ (4,539)</b>	<b>\$ 17,373</b>

#### Note 9. Accrued Liabilities

Accrued liabilities as of January 31, 2023 and October 31, 2022 consisted of the following (in thousands):

	January 31, 2023	October 31, 2022
Accrued payroll and employee benefits <sup>(1)</sup>	\$ 4,784	\$ 8,534
Accrued product warranty cost <sup>(2)</sup>	426	537
Accrued service agreement and PPA costs <sup>(3)</sup>	12,087	11,340
Accrued legal, taxes, professional and other	3,016	7,004
<b>Accrued liabilities</b>	<b>\$ 20,313</b>	<b>\$ 27,415</b>

- (1) The balance in this account represents accrued payroll, payroll taxes and accrued bonus for both periods. The decrease in the account relates to a decrease in accrued bonus as of January 31, 2023 due to the payout in January 2023 of bonuses earned under the 2022 Management Incentive Plan.
- (2) The decrease in accrued product warranty cost reflects an adjustment for the removal of 3 months of warranty costs associated with the KFC module purchases. Product warranty expense for the three months ended January 31, 2023 and 2022 was \$0 and \$0.2 million, respectively.
- (3) Accrued service agreement costs include loss accruals on service agreements of \$7.1 million and \$7.3 million as of January 31, 2023 and October 31, 2022, respectively. The accruals for performance guarantees on service agreements and PPAs were \$4.9 million and \$4.1 million as of January 31, 2023 and October 31, 2022.

#### Note 10. Leases

The Company enters into operating and finance lease agreements for the use of real estate, vehicles, information technology equipment, and certain other equipment. We determine if an arrangement contains a lease at inception, which is the date on which the terms of the contract are agreed to and the agreement creates enforceable rights and obligations. Operating leases are included in Operating lease right-of-use assets, net, Operating lease liabilities, and Long-term operating lease liabilities in the Company's Consolidated Balance Sheets. Finance leases are not considered significant to the Company's Consolidated Balance Sheets or Consolidated Statements of Operations and Comprehensive Loss. Finance lease right-of-use ("ROU") assets of \$0.1 million at January 31, 2023 and October 31, 2022 are included in Property, plant and equipment, net in the Company's Consolidated Balance Sheets. Finance lease liabilities of \$0.1 million at January 2023 and October 31, 2022 are included in Current portion of long-term debt and Long-term debt and other liabilities in the Company's Consolidated Balance Sheets.

On January 5, 2023, the Company's wholly-owned subsidiary, Versa Power Systems Ltd. ("Versa Ltd."), entered in to a lease expansion, extension and amending agreement to an existing building lease that was originally entered into on May 20, 2005. The lease expansion, extension and amending agreement extended the term of the lease through September 30, 2028 and expanded the space to be leased by Versa Ltd. in Calgary, Alberta, Canada to include approximately 48,000 square feet of additional space. A ROU asset and operating lease liability was recorded for this lease as of January 31, 2023 for CAD \$2.7 million (\$2.0 million USD).

Operating lease expense for each of the three months ended January 31, 2023 and 2022 was \$0.3 million and \$0.4 million, respectively. As of January 31, 2023, the weighted average remaining lease term (in years) was approximately 17 years and the weighted average discount rate was 6.9%. Lease payments made during the three months ended January 31, 2023 and 2022 were \$0.3 million and \$0.4 million, respectively.

Undiscounted maturities of operating lease and finance lease liabilities as of January 31, 2023 were as follows:

	Operating Leases	Finance Leases
Due Year 1	\$ 1,126	\$ 49
Due Year 2	1,278	4
Due Year 3	1,268	—
Due Year 4	1,295	—
Due Year 5	1,316	—
Thereafter	13,261	—
Total undiscounted lease payments	19,544	53
Less imputed interest	(9,484)	(7)
Total discounted lease payments	\$ 10,060	\$ 46

#### Note 11. Stockholders' Equity

##### *2022 Open Market Sale Agreement*

On July 12, 2022, the Company entered into an Open Market Sale Agreement with Jefferies LLC, B. Riley Securities, Inc., Barclays Capital Inc., BMO Capital Markets Corp., BofA Securities, Inc., Canaccord Genuity LLC, Citigroup Global Markets Inc., J.P. Morgan Securities LLC and Loop Capital Markets LLC (the "Open Market Sale Agreement") with respect to an at the market offering program under which the Company may, from time to time, offer and sell up to 95.0 million shares of the Company's common stock. Pursuant to the Open Market Sale Agreement, the Company pays each agent a commission equal to 2.0% of the gross proceeds from each sale of shares made by such agent under the Open Market Sale Agreement. From the date of the Open Market Sale Agreement through January 31, 2023, the Company sold approximately 18.5 million shares under the Open Market Sale Agreement at an average sale price of \$3.63 per share, resulting in gross proceeds of approximately \$67.2 million, before deducting sales commissions and fees, and net proceeds to the Company of approximately \$65.4 million after deducting commissions and fees totaling approximately \$1.8 million. No sales were made under the Open Market Sale Agreement during the quarter ended January 31, 2023.

As of January 31, 2023, approximately 76.5 million shares were available for issuance under the Open Market Sale Agreement.

#### Note 12. Redeemable Preferred Stock

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

##### *Series B Preferred Stock*

As of January 31, 2023, the Company had 105,875 shares of Series B Preferred Stock, with a liquidation preference of \$1,000.00 per share, authorized for issuance. As of January 31, 2023 and October 31, 2022, there were 64,020 shares of Series B Preferred Stock issued and outstanding, with a carrying value of \$59.9 million. Dividends of \$0.8 million were paid in cash during each of the three month periods ended January 31, 2023 and 2022.



### Note 13. Loss Per Share

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

	Three months ended January 31,	
	2023	2022
<b>Numerator</b>		
Net loss attributable to FuelCell Energy, Inc.	\$ (18,622)	\$ (40,624)
Series B preferred stock dividends	(800)	(800)
Net loss attributable to common stockholders	<u>\$ (19,422)</u>	<u>\$ (41,424)</u>
<b>Denominator</b>		
Weighted average common shares outstanding – basic	405,803,753	366,734,739
Effect of dilutive securities <sup>(1)</sup>	—	—
Weighted average common shares outstanding – diluted	<u>405,803,753</u>	<u>366,734,739</u>
Net loss to common stockholders per share – basic	<u>\$ (0.05)</u>	<u>\$ (0.11)</u>
Net loss to common stockholders per share – diluted <sup>(1)</sup>	<u>\$ (0.05)</u>	<u>\$ (0.11)</u>

- (1) Due to the net loss to common stockholders in each of the periods presented above, diluted loss per share was computed without consideration to potentially dilutive instruments as their inclusion would have been anti-dilutive. As of January 31, 2023 and 2022, potentially dilutive securities excluded from the diluted loss per share calculation are as follows:

	January 31, 2023	January 31, 2022
May 2017 Offering – Series C Warrants	-	950,102
Outstanding options to purchase common stock	20,231	22,432
Unvested Restricted Stock Units	7,102,089	3,276,776
5% Series B Cumulative Convertible Perpetual Preferred Stock	37,837	37,837
Total potentially dilutive securities	<u>7,160,157</u>	<u>4,287,147</u>

### Note 14. Restricted Cash

As of January 31, 2023 and October 31, 2022, there was \$24.6 million and \$23.0 million, respectively, of restricted cash and cash equivalents pledged as performance security, reserved for future debt service requirements, and reserved for letters of credit for certain banking requirements and contracts. The allocation of restricted cash is as follows (in thousands):

	January 31, 2023	October 31, 2022
Cash Restricted for Outstanding Letters of Credit <sup>(1)</sup>	\$ 4,993	\$ 4,993
Cash Restricted for PNC Sale-Leaseback Transactions <sup>(2)</sup>	5,424	5,010
Cash Restricted for Crestmark Sale-Leaseback Transactions <sup>(3)</sup>	2,896	2,894
Bridgeport Fuel Cell Park Project Debt Service and Performance Reserves <sup>(4)</sup>	9,441	8,746
Other	1,857	1,346
Total Restricted Cash	24,611	22,989
Restricted Cash and Cash Equivalents – Short-Term <sup>(5)</sup>	(4,456)	(4,423)
Restricted Cash and Cash Equivalents – Long-Term	<u>\$ 20,155</u>	<u>\$ 18,566</u>

- (1) Letters of credit outstanding as of January 31, 2023 expire on various dates through August 2028.
- (2) Long and short-term reserve that is to be used primarily to fund future module exchanges for operating projects falling under the PNC sale leaseback obligations.
- (3) Long and short-term reserve that is to be used primarily to fund future module exchanges and other performance obligations.
- (4) Long and short-term reserves for the Bridgeport Fuel Cell Park Project to fund future module exchanges and other performance requirements.
- (5) Short-term restricted cash and cash equivalents are amounts expected to be released and classified as unrestricted cash within twelve months of the balance sheet date.

## Note 15. Debt

Debt as of January 31, 2023 and October 31, 2022 consisted of the following (in thousands):

	January 31, 2023	October 31, 2022
Connecticut Green Bank Loan	\$ 4,800	\$ 4,800
Connecticut Green Bank Loan (Bridgeport Fuel Cell Project)	3,294	3,507
Liberty Bank Term Loan Agreement (Bridgeport Fuel Cell Project)	4,861	5,382
Fifth Third Bank Term Loan Agreement (Bridgeport Fuel Cell Project)	4,861	5,382
Finance obligation for sale-leaseback transactions	56,777	56,625
State of Connecticut Loan	7,559	7,774
Finance lease obligations	46	57
Deferred finance costs	(1,063)	(1,152)
Total debt and finance obligations	81,135	82,375
Current portion of long-term debt and finance obligations	(13,249)	(13,198)
Long-term debt and finance obligations	\$ 67,886	\$ 69,177

## Note 16. Benefit Plans

We have stockholder approved equity incentive plans, a stockholder approved Employee Stock Purchase Plan and an employee tax-deferred savings plan which are described in more detail below.

### 2018 Omnibus Incentive Plan

The Company's 2018 Omnibus Incentive Plan (as amended and restated from time to time, the "2018 Incentive Plan") authorizes grants of stock options, stock appreciation rights ("SARs"), restricted stock awards ("RSAs"), restricted stock units ("RSUs"), performance shares, performance units and incentive awards to employees, directors, consultants and advisors. Stock options, RSAs, RSUs and SARs have restrictions as to transferability. Stock option exercise prices are fixed by the Company's Board of Directors but shall not be less than the fair market value of our common stock on the date of the grant. SARs may be granted in conjunction with stock options. Of the 12,333,333 shares of the Company's common stock currently authorized to be issued under the 2018 Incentive Plan, 3,556,070 remained available for grant as of January 31, 2023. Of the shares remaining available for grant, the Company has reserved, for potential future grant, up to 2,036,257 performance stock units if maximum performance is achieved.

### Long-Term Incentive Plans

The Company's Board of Directors periodically approves Long Term Incentive Plans which include performance-based awards tied to the Company's common stock price as well as time-vesting awards. None of the awards granted as part of Long-Term Incentive Plans include any dividend equivalent or other stockholder rights. To the extent the awards are earned, they may be settled in shares or cash of an equivalent value at the Company's option.

#### Fiscal Year 2023 Long Term Incentive Plan:

On December 5, 2022, the Company's Board of Directors approved a Long-Term Incentive Plan for fiscal year 2023 (the "FY 2023 LTI Plan") as a sub-plan consisting of awards made under the 2018 Incentive Plan. The participants in the FY 2023 LTI Plan are members of senior management. The FY 2023 LTI Plan consists of two award components:

- 1) Relative Total Shareholder Return ("TSR") Performance Share Units ("PSU") awards. The PSUs granted during the three months ended January 31, 2023 will be earned over the performance period ending on October 31, 2025, but will remain subject to a continued service-based vesting requirement until the third anniversary of the date of grant. The performance measure for the relative TSR PSUs is the TSR of the Company relative to the TSR of the Russell 2000 from November 1, 2022 through October 31, 2025. The Compensation Committee established the performance assessment criteria for the relative TSR PSUs as the TSR of the Company relative to the TSR of the Russell 2000, with the award calibration being 100% plus or minus 0.5x the difference between the Company's TSR and the Russell 2000 Index composite TSR. The award is capped at 200% of the target number of PSUs, and the award is further capped at 100% of the target number of PSUs if the Company's absolute TSR over the performance period is negative. The Company's TSR is calculated by subtracting the Company's beginning

stock price (defined as the average closing price of the Company's common stock over the 60 consecutive trading days ending on October 31, 2022) from the ending stock price (defined as the average closing price of the Company's common stock over the 60 consecutive trading days ending on October 31, 2025), adding any dividends during the period, and then dividing the result by the Company's beginning stock price. Given that the performance period is still open, the Company has reserved shares equal to 200% of the target number of PSUs, subject to performance during the remaining performance period as well as vesting based on continued service until December 5, 2025 (the third anniversary of the grant date).

- 2) Time-vesting RSUs. The time-vesting RSUs granted during the three months ended January 31, 2023 will vest at a rate of one-third of the total number of RSUs on each of the first three anniversaries of the date of grant.

### ***Other Equity Incentive Plans***

The Company's 2006 and 2010 Equity Incentive Plans remain in effect only to the extent of awards outstanding under the plans as of January 31, 2023.

### ***Share-Based Compensation***

Share-based compensation was reflected in the Consolidated Statements of Operations and Comprehensive Loss as follows (in thousands):

	<b>Three Months Ended January 31,</b>	
	<b>2023</b>	<b>2022</b>
Cost of revenues	\$ 331	\$ 153
Administrative and selling expense	1,942	1,178
Research and development expense	291	78
	<u>\$ 2,564</u>	<u>\$ 1,409</u>

### ***Restricted Stock Units Including Performance Share Units***

The following table summarizes our RSU activity for the three months ended January 31, 2023:

<b>Restricted Stock Units</b>	<b>Shares</b>	<b>Weighted-Average Fair Value</b>
Outstanding as of October 31, 2022	2,520,881	\$ 7.93
Granted - PSUs	1,124,953	5.50
Granted - time-vesting RSUs	3,781,370	3.41
Vested	(261,059)	7.03
Forfeited	(64,056)	7.55
Outstanding as of January 31, 2023	<u>7,102,089</u>	<u>\$ 5.18</u>

On December 5, 2022, 2,249,890 RSUs were awarded to senior management under the FY 2023 LTI Plan, which included 1,124,953 PSUs and 1,124,937 time-based vesting RSUs. The PSUs were valued based on a Monte-Carlo Simulation, and the estimated fair value of the relative TSR PSUs was \$5.50 per share. The PSUs and time-based vesting RSUs are expensed over the three-year performance period.

In addition to the awards granted to senior management, during the first quarter of fiscal year 2023, the Board of Directors also granted a total of 2,656,433 time-based vesting RSUs to certain salaried employees to promote ownership of the Company's equity and retention. The time-based vesting RSUs granted during the first quarter of fiscal year 2023 vest at a rate of one-third of the total number of RSUs granted on each of the first three anniversaries of the date of grant.

PSUs are issued assuming participants achieve 100% target performance. The Company also reserves additional shares assuming the maximum performance targets are met.

## **Note 17. Commitments and Contingencies**

### ***Service Agreements***

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

### ***Power Purchase Agreements***

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

### ***Project Fuel Exposure***

Certain of our PPAs for project assets in our generation operating portfolio and project assets under construction expose us to fluctuating fuel price risks as well as the risk of being unable to procure the required amounts of fuel and the lack of alternative available fuel sources. We seek to mitigate our fuel risk using strategies including: (i) fuel cost reimbursement mechanisms in our PPAs to allow for pass through of fuel costs (full or partial) where possible, which we have done with our 14.9 MW operating project in Bridgeport, CT; (ii) procuring fuel under fixed price physical contracts with investment grade counterparties, which we have done for twenty years for our Tulare BioMAT project and the initial seven years of the eighteen year PPA for our LIPA Yaphank Project; and (iii) potentially entering into future financial hedges with investment grade counterparties to offset potential negative market fluctuations. The Company does not take a fundamental view on natural gas or other commodity pricing and seeks commercially available means to reduce commodity exposure.

There are currently three projects in development with fuel sourcing risk, which are the Toyota project, which requires procurement of RNG, and our Derby, CT 14.0 MW and 2.8 MW projects, both of which require natural gas for which there is no pass-through mechanism. Fuel sourcing and risk mitigation strategies for all three projects are being assessed and will be implemented as project operational dates become firm. Such strategies may require cash collateral or reserves to secure fuel or related contracts for these three projects. If the Company is unable to secure fuel on favorable economic terms, it may result in impairment charges to the Derby project assets and further charges for the Toyota project asset.

While the Company is pursuing alternative sources of RNG for the Toyota project, charges are being recorded to cost of generation revenues for any project expenditures currently expected to be unrecoverable. To date, \$32.0 million in charges have been recorded, which includes \$7.1 million and \$2.8 million in charges for the three months ended January 31, 2023 and 2022, respectively. As of January 31, 2023, the carrying value of the Toyota project on the Consolidated Balance Sheet totaled \$22.0 million which represents the carrying value of inventory components that could be redeployed for alternative use.

Since the war in Ukraine began in February of 2022, there has been significant volatility in the global natural gas markets. As a result, in fiscal year 2022, the Company performed a recoverability analysis with respect to the Derby 14.0 MW and 2.8 MW projects and concluded that the assets are recoverable and therefore an impairment had not occurred. Should natural gas prices continue to rise, there could be an impairment in future periods. No triggering events occurred during the first quarter of fiscal year 2023. The Company has risk mitigation strategies that it may implement in an effort to mitigate potential impacts including the ability to extend commercial operations dates. As of January 31, 2023, the carrying value of the 14.0 MW project in Derby, CT totaled \$29.4 million and the carrying value of the 2.8 MW project in Derby, CT totaled \$0.4 million.

***Other***

As of January 31, 2023, the Company had unconditional purchase commitments aggregating \$77.1 million for materials, supplies and services in the normal course of business.

***Legal Proceedings***

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

**Note 18. Subsequent Events**

On February 20, 2023, Versa Ltd. entered into a Lease Expansion and Amending Agreement – Short Term (the “Lease Expansion and Amendment”) to the existing lease for the Calgary manufacturing facility, which was originally entered into on May 20, 2005 and was amended and extended several times, including on January 5, 2023 (refer to Note 10. “Leases” for more information regarding the January 5, 2023 amendment). Under the Lease Expansion and Amendment, the space leased by Versa Ltd. is to be further expanded to include, on a short-term basis, an additional space located at the same address as the original Calgary manufacturing facility (4800 – 52<sup>nd</sup> Street SE, Calgary, Alberta, Canada) and consisting of approximately 18,627 square feet (the “Temporary Premises”). Subject to certain conditions, the term of the lease with respect to the Temporary Premises will commence on April 1, 2023 and expire on July 31, 2024. The Temporary Premises is expected to be used for short term expansion of solid oxide fuel cell and stack production and commissioning of newly purchased production equipment.

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

### **FORWARD-LOOKING STATEMENTS**

This Quarterly Report on Form 10-Q contains both historical statements and forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995 that involve risks, uncertainties and assumptions. The statements contained in this report that are not purely historical are forward-looking statements that are subject to the safe harbors created under the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended, including statements regarding our expectations, beliefs, intentions and strategies for the future. When used in this report, the words “expects,” “anticipates,” “estimates,” “goals,” “projects,” “intends,” “plans,” “believes,” “predicts,” “should,” “seeks,” “will,” “could,” “would,” “may,” “forecast,” and similar expressions and variations of such words are intended to identify forward-looking statements. Such statements relate to, among other things, the following: (i) the development and commercialization by FuelCell Energy, Inc. and its subsidiaries of fuel cell technology and products and the market for such products; (ii) expected operating results such as revenue growth and earnings; (iii) the expected timing of completion of our ongoing projects; (iv) our business plans and strategies; (v) the markets in which we expect to operate; (vi) our belief that we have sufficient liquidity to fund our business operations for the next 12 months; (vii) future funding under Advanced Technologies contracts; (viii) future financing for projects, including equity and debt investments by investors and commercial bank financing, as well as overall financial market conditions; (ix) the expected cost competitiveness of our technology; and (x) our ability to achieve our sales plans, market access and market expansion goals, and cost reduction targets.

The forward-looking statements contained in this report are subject to risks and uncertainties, known and unknown, that could cause actual results and future events to differ materially from those set forth in or contemplated by the forward-looking statements, including, without limitation, the risks described in our Annual Report on Form 10-K for the fiscal year ended October 31, 2022 and in the section below entitled “Item 1A. Risk Factors,” and the following risks and uncertainties: general risks associated with product development and manufacturing; general economic conditions; changes in interest rates, which may impact project financing; supply chain disruptions; changes in the utility regulatory environment; changes in the utility industry and the markets for distributed generation, distributed hydrogen, and fuel cell power plants configured for carbon capture or carbon separation; potential volatility of commodity prices that may adversely affect our projects; availability of government subsidies and economic incentives for alternative energy technologies; our ability to remain in compliance with U.S. federal and state and foreign government laws and regulations and the listing rules of The Nasdaq Stock Market (“Nasdaq”); rapid technological change; competition; the risk that our bid awards will not convert to contracts or that our contracts will not convert to revenue; market acceptance of our products; changes in accounting policies or practices adopted voluntarily or as required by accounting principles generally accepted in the United States; factors affecting our liquidity position and financial condition; government appropriations; the ability of the government and third parties to terminate their development contracts at any time; the ability of the government to exercise “march-in” rights with respect to certain of our patents; our ability to successfully market and sell our products internationally; our ability to develop new products to achieve our long-term revenue targets; our ability to implement our strategy; our ability to reduce our levelized cost of energy and deliver on our cost reduction strategy generally; our ability to protect our intellectual property; litigation and other proceedings; the risk that commercialization of our new products will not occur when anticipated or, if it does, that we will not have adequate capacity to satisfy demand; our need for and the availability of additional financing; our ability to generate positive cash flow from operations; our ability to service our long-term debt; our ability to increase the output and longevity of our platforms and to meet the performance requirements of our contracts; our ability to expand our customer base and maintain relationships with our largest customers and strategic business allies; and concerns with, threats of, or the consequences of, pandemics, contagious diseases or health epidemics, including the novel coronavirus (“COVID-19”), and resulting supply chain disruptions, shifts in clean energy demand, impacts to our customers’ capital budgets and investment plans, impacts to our project schedules, impacts to our ability to service existing projects, and impacts on the demand for our products.

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

Investors are cautioned that forward-looking statements are not guarantees of future performance and involve risks and uncertainties, many of which are beyond our ability to control, and that actual results may differ materially from those projected in the forward-looking statements as a result of various factors discussed herein. Any forward-looking statement made by us in this report is based only on information currently available to us and speaks only as of the date on which it is made. We undertake no obligation to publicly update any forward-looking statement, whether written or oral, that may be made from time to time, whether as a result of new information, future developments or otherwise.

Management's Discussion and Analysis of Financial Condition and Results of Operations is provided as a supplement to the accompanying financial statements and footnotes to help provide an understanding of our financial condition, changes in our financial condition and results of operations. The preparation of financial statements and related disclosures requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities, as well as management's assessment of the Company's ability to meet its obligations as they come due over the next twelve months. Actual results could differ from those estimates. Estimates are used in accounting for, among other things, revenue recognition, excess, slow-moving and obsolete inventories, product warranty accruals, loss accruals on service agreements, share-based compensation expense, allowance for doubtful accounts, depreciation and amortization, impairment of goodwill and in-process research and development intangible assets, impairment of long-lived assets (including project assets), lease liabilities and right-of-use ("ROU") assets, and contingencies, and in management's assessment of the Company's ability to meet its obligations as they come due over the next twelve months. Estimates and assumptions are reviewed periodically, and the effects of revisions are reflected in the consolidated financial statements in the period they are determined to be necessary. Due to the inherent uncertainty involved in making estimates, actual results in future periods may differ from those estimates. The following discussion should be read in conjunction with information included in our Annual Report on Form 10-K for the fiscal year ended October 31, 2022 filed with the Securities and Exchange Commission ("SEC"). Unless otherwise indicated, the terms "Company", "FuelCell Energy", "we", "us", and "our" refer to FuelCell Energy, Inc. and its subsidiaries. All tabular dollar amounts are in thousands.

## OVERVIEW

Headquartered in Danbury, Connecticut, FuelCell Energy has leveraged five decades of research and development to become a global leader in delivering environmentally responsible distributed baseload energy platform solutions through our proprietary fuel cell technology. Our current commercial technology produces electricity, heat, hydrogen, and water while separating carbon for utilization and/or sequestration. We continue to invest in developing and commercializing future technologies expected to add new capabilities to our platforms' abilities to deliver hydrogen and long duration hydrogen-based energy storage through our solid oxide technologies, as well as further enhance our existing platforms' carbon capture solutions.

FuelCell Energy is a global leader in sustainable clean energy technologies that address some of the world's most critical challenges around energy access, security, safety and environmental stewardship. As a leading global manufacturer of proprietary fuel cell technology platforms, FuelCell Energy is uniquely positioned to serve customers worldwide with sustainable products and solutions for industrial and commercial businesses, utilities, governments, and municipalities.

FuelCell Energy, based in Connecticut, was founded in 1969 as a New York corporation to provide applied research and development services on a contract basis. We completed our initial public offering in 1992 and reincorporated in Delaware in 1999. We began selling stationary fuel cell power plants commercially in 2003.

## **RECENT DEVELOPMENTS**

On February 20, 2023, Versa Power Systems Ltd. (“Versa Ltd.”), a wholly owned subsidiary of FuelCell Energy, entered into a Lease Expansion and Amending Agreement – Short Term (the “Lease Expansion and Amendment”) to the existing lease for the Calgary manufacturing facility, which was originally entered into on May 20, 2005 and was amended and extended several times, including on January 5, 2023 (refer to Note 10. “Leases” for more information regarding the January 5, 2023 amendment). Under the Lease Expansion and Amendment, the space leased by Versa Ltd. is to be further expanded to include, on a short-term basis, an additional space located at the same address as the original Calgary manufacturing facility (4800 – 52<sup>nd</sup> Street SE, Calgary, Alberta, Canada) and consisting of approximately 18,627 square feet (the “Temporary Premises”). Subject to the landlord’s ability to obtain vacant possession of the Temporary Premises on March 31, 2023, the term of the lease with respect to the Temporary Premises will commence on April 1, 2023 and expire on July 31, 2024. The Temporary Premises is expected to be used for short term expansion of solid oxide fuel cell and stack production and commissioning of newly purchased production equipment.



## RESULTS OF OPERATIONS

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

### Comparison of Three Months Ended January 31, 2023 and 2022

#### Revenues and Costs of revenues

Our revenues and cost of revenues for the three months ended January 31, 2023 and 2022 were as follows:

(dollars in thousands)	Three Months Ended January 31,		Change	
	2023	2022	\$	%
Total revenues	\$ 37,073	\$ 31,795	\$ 5,278	17%
Total costs of revenues	31,836	34,690	(2,854)	(8)%
Gross profit (loss)	<u>\$ 5,237</u>	<u>\$ (2,895)</u>	<u>\$ 8,132</u>	281%
Gross margin	14.1%	(9.1)%		

Total revenues for the three months ended January 31, 2023 of \$37.1 million reflects an increase of \$5.3 million from \$31.8 million for the same period in the prior year. Cost of revenues for the three months ended January 31, 2023 of \$31.8 million reflects a decrease of \$2.9 million from \$34.7 million for the same period in the prior year. A discussion of the changes in product revenues, service agreements revenues, generation revenues and Advanced Technologies contract revenues follows.

#### Product revenues

Our product revenues and related costs for the three months ended January 31, 2023 and 2022 were as follows:

(dollars in thousands)	Three Months Ended January 31,		Change	
	2023	2022	\$	%
Product revenues	\$ 9,095	\$ 18,000	\$ (8,905)	(49)%
Cost of product revenues	1,029	18,207	(17,178)	(94)%
Gross profit (loss) from product revenues	<u>\$ 8,066</u>	<u>\$ (207)</u>	<u>\$ 8,273</u>	3997%
Product revenues gross margin	88.7%	(1.2)%		

Product revenues for the three months ended January 31, 2023 were \$9.1 million compared to \$18.0 million for the three months ended January 31, 2022. Our December 2021 Settlement Agreement (the “Settlement Agreement”) with POSCO Energy Co., Ltd. (“POSCO Energy”) and its subsidiary, Korea Fuel Cell Co., Ltd. (“KFC”), included an option to purchase an additional 14 modules (in addition to the 20 modules that were purchased by KFC during fiscal year 2022). This option included a material right related to an extended warranty obligation for the modules. The option was not exercised by KFC as of the expiration date of December 31, 2022 and, as a result, the Company recognized \$9.1 million of product revenues, which represents the consideration allocated to the material right if the option had been exercised. Product revenues for the three months ended January 31, 2022 were a result of module sales to KFC under the Settlement Agreement for which the Company recognized \$18.0 million on the Ex Works delivery of six modules from the Company’s facility in Torrington, CT in January 2022.

Cost of product revenues decreased \$17.2 million for the three months ended January 31, 2023 to \$1.0 million, compared to \$18.2 million in the same period in the prior year. The decrease is primarily due to the lack of module sales during the three months ended January 31, 2023. Manufacturing variances, primarily related to production volumes and unabsorbed overhead costs, totaled approximately \$1.1 million for the three months ended January 31, 2023 compared to approximately \$2.2 million for the three months ended January 31, 2022. The reduction in manufacturing variances for the three months ended January 31, 2023 included an increase in capitalized costs as a result of an increase in product standard costs. Cost of product revenues for the three months ended January 31, 2022 included an impairment charge of

approximately \$1.0 million related to the cessation of use of conditioning equipment in Danbury, CT, which has been replaced by new equipment at our production facility in Torrington, CT.

Product revenues for the three months ended January 31, 2023 generated a gross profit of \$8.1 million compared to a gross loss of \$0.2 million for the three months ended January 31, 2022. The gross profit is a direct result of the product revenues recognized in the three months ended January 31, 2023 related to the expiration of KFC's module purchase option, particularly as there were no corresponding costs associated with the recognition of these revenues.

For the three months ended January 31, 2023, we operated at an annualized production rate of approximately 38.2 megawatts ("MW"), which is comparable to the annualized production rate of 38.3 MW for the three months ended January 31, 2022.

### ***Service agreements revenues***

Service agreements revenues and related costs for the three months ended January 31, 2023 and 2022 were as follows:

(dollars in thousands)	<b>Three Months Ended January 31,</b>		<b>Change</b>	
	<b>2023</b>	<b>2022</b>	<b>\$</b>	<b>%</b>
Service agreements revenues	\$ 13,882	\$ 2,167	\$ 11,715	541%
Cost of service agreements revenues	10,945	2,372	8,573	361%
Gross profit (loss) from service agreements revenues	\$ 2,937	\$ (205)	\$ 3,142	1533%
Service agreements revenues gross margin	21.2%	(9.5)%		

Service agreements revenues for the three months ended January 31, 2023 increased \$11.7 million to \$13.9 million from \$2.2 million for the three months ended January 31, 2022. Service agreements revenues recognized during the three months ended January 31, 2023 were primarily driven by new module exchanges at the plant in Woodbridge, CT, which originally achieved commercial operations in fiscal year 2017, and at the plants owned by Korea Southern Power Company in Korea, which achieved commercial operations in fiscal year 2018. The increase in revenues for the three months ended January 31, 2023 is primarily due to the fact that new module exchanges occurred during the quarter, while there were no new module exchanges during the three months ended January 31, 2022.

Cost of service agreements revenues increased \$8.6 million to \$10.9 million for the three months ended January 31, 2023 from \$2.4 million for the three months ended January 31, 2022. Cost of service agreements revenues includes maintenance and operating costs and costs of module exchanges and the increase is primarily due to the fact that new module exchanges occurred during the three months ended January 31, 2023, while there were no new module exchanges during the three months ended January 31, 2022.

Overall gross profit from service agreements revenues was \$2.9 million for the three months ended January 31, 2023 which increased from a gross loss of \$0.2 million for the three months ended January 31, 2022. The overall gross margin was 21.2% for the three months ended January 31, 2023 compared to a gross margin loss of 9.5% in the comparable prior year period. Gross margin was higher during the three months ended January 31, 2023 primarily due to the fact that new module exchanges were completed during the three months ended January 31, 2023 (compared to no new module exchanges during the three months ended January 31, 2022) and that such module exchanges were performed pursuant to service agreements with higher margins.

### ***Generation revenues***

Generation revenues and related costs for the three months ended January 31, 2023 and 2022 were as follows:

(dollars in thousands)	<b>Three Months Ended January 31,</b>		<b>Change</b>	
	<b>2023</b>	<b>2022</b>	<b>\$</b>	<b>%</b>
Generation revenues	\$ 9,557	\$ 7,496	\$ 2,061	27%
Cost of generation revenues	16,602	10,722	5,880	55%
Gross loss from generation revenues	\$ (7,045)	\$ (3,226)	\$ (3,819)	(118)%
Generation revenues gross margin	(73.7)%	(43.0)%		

Revenues from generation for the three months ended January 31, 2023 totaled \$9.6 million, which represents an increase of \$2.1 million from revenue recognized of \$7.5 million for the three months ended January 31, 2022. Generation revenues

for the three months ended January 31, 2023 and 2022 reflect revenue from electricity generated under our power purchase agreements (“PPAs”) and renewable energy credits. The increase in generation revenues in the three months ended January 31, 2023 is primarily due to the fact that we recorded a full quarter of generation revenues associated with the Long Island Power Authority (“LIPA”) project in Yaphank, New York (which achieved commercial operations in December 2021) and that fact that the project at the U.S. Navy Submarine Base in Groton, Connecticut (the “Groton Project”) achieved commercial operations and began generating revenues in the first quarter of fiscal year 2023.

Cost of generation revenues totaled \$16.6 million in the three months ended January 31, 2023. The increase from the comparable prior year period was primarily due to expensed construction costs of approximately \$7.1 million related to the Toyota project (while construction costs for the comparable prior year period were \$2.8 million) and costs of approximately \$0.8 million related to the increased size of the installed fleet with the Groton Project achieving commercial operations, offset by lower operating costs for existing plants due to efficiencies resulting from plant maintenance activities and module exchanges.

As further background on the costs related to the Toyota project, it was determined in the fourth quarter of fiscal year 2021 that a potential source of renewable natural gas (“RNG”) at favorable pricing was no longer sufficiently probable for the Toyota project, resulting in impairment of the asset. Thus, as the Toyota project is being constructed, only amounts associated with inventory components that can be redeployed for alternative use are being capitalized. The balance of costs incurred are being expensed as cost of generation revenues.

We currently have three projects in development with fuel sourcing risk, which are the Toyota project, which requires procurement of RNG, and our Derby, CT 14.0 MW and 2.8 MW projects, which require natural gas. Fuel sourcing and risk mitigation strategies for all three projects are being assessed and will be implemented as project operational dates become firm. Such strategies may require cash collateral or reserves to secure fuel or related contracts for these three projects. If the Company is unable to secure fuel on favorable economic terms, it may result in impairment charges to the Derby project assets and further charges for the Toyota project asset.

Cost of generation revenues included depreciation and amortization of approximately \$4.2 million and \$3.6 million for the three months ended January 31, 2023 and 2022, respectively.

The decrease in generation revenues gross margin is primarily related to the \$7.1 million of costs being expensed related to the Toyota project, partially offset by higher margins from the operating fleet (due in part to the higher operating output of the generation fleet portfolio) compared to the three months ended January 31, 2022.

We had 43.7 MW of operating power plants in our generation operating portfolio as of January 31, 2023, which increased from 41.4 MW as of January 31, 2022 and which includes 7.4 MW attributed to the design rated output of the Groton Project although the Groton Project is, and was as of January 31, 2023 and at the commencement of commercial operations in December 2022, operating at approximately 6.0 MW. The increase relates to the Groton Project, which commenced commercial operations below its rated capacity at an output of approximately 6.0 MW during the three months ended January 31, 2023 (and continues to operate at an output of approximately 6.0 MW), offset by the removal of the 3.7 MW Triangle Street Project which is no longer in operation and the 1.4 MW UCI Medical Center Project which has been decommissioned.

#### ***Advanced Technologies contract revenues***

Advanced Technologies contract revenues and related costs for the three months ended January 31, 2023 and 2022 were as follows:

(dollars in thousands)	<b>Three Months Ended January 31,</b>		<b>Change</b>	
	<b>2023</b>	<b>2022</b>	<b>\$</b>	<b>%</b>
Advanced Technologies contract revenues	\$ 4,539	\$ 4,132	\$ 407	10%
Cost of Advanced Technologies contract revenues	3,260	3,389	(129)	(4)%
Gross profit from Advanced Technologies contracts	<u>\$ 1,279</u>	<u>\$ 743</u>	<u>\$ 536</u>	<u>72%</u>
Advanced Technologies contract gross margin	28.2%	18.0%		

Advanced Technologies contract revenues increased to \$4.5 million for the three months ended January 31, 2023 from \$4.1 million for the three months ended January 31, 2022. Compared to the three months ended January 31, 2022, Advanced Technologies contract revenues recognized under the Joint Development Agreement entered into with

ExxonMobil Technology and Engineering Company f/k/a ExxonMobil Research and Engineering Company (“EMTEC”), on November 5, 2019 (as amended effective as of October 31, 2021, April 30, 2022 and December 1, 2022 (the “EMTEC Joint Development Agreement”)) were approximately \$0.1 million higher during the three months ended January 31, 2023 and revenue recognized under government contracts and other contracts were approximately \$0.3 million higher for the three months ended January 31, 2023.

Cost of Advanced Technologies contract revenues were \$3.3 million for the three months ended January 31, 2023, compared to \$3.4 million for the same period in the prior year.

Advanced Technologies contracts for the three months ended January 31, 2023 generated a gross profit of \$1.3 million compared to a gross profit of \$0.7 million for the three months ended January 31, 2022. The higher gross profit was due to higher gross profit recognized under the EMTEC Joint Development Agreement during the three months ended January 31, 2023 as a result of lower costs incurred under the EMTEC Joint Development Agreement compared to the three months ended January 31 2022.

#### **Administrative and selling expenses**

Administrative and selling expenses were \$15.0 million and \$37.0 million for the three months ended January 31, 2023 and 2022, respectively. The three months ended January 31, 2022 included non-recurring legal expenses of \$24.0 million associated with the settlement of the Company’s disputes with POSCO Energy and KFC. Excluding the \$24.0 million in legal fees, administrative and selling expenses were higher during the three months ended January 31, 2023 than during the three months ended January 31, 2022 primarily due to an increase in compensation expense resulting from an increase in headcount.

#### **Research and development expenses**

Research and development expenses increased to \$12.7 million for the three months ended January 31, 2023 compared to \$5.0 million for the three months ended January 31, 2022. The increase is primarily due to an increase in spending on the Company’s ongoing commercial development efforts related to our solid oxide platform and carbon capture solutions compared to the comparable prior year period.

#### **Loss from operations**

Loss from operations for the three months ended January 31, 2023 was \$22.5 million compared to \$44.8 million for the three months ended January 31, 2022. This decrease was driven by a \$14.3 million decrease in operating expenses for the three months ended January 31, 2023 as a result of (a) decreased administrative and selling expenses compared to the three months ended January 31, 2022 and (b) higher research and development expenses, which were higher due to an increase in spending on the Company’s ongoing commercial development efforts related to our solid oxide platform and carbon capture solutions compared to the three months ended January 31, 2022. The decrease in loss from operations was also due, in part, to a gross profit of \$5.2 million in the three months ended January 31, 2023, compared to gross loss of \$2.9 million in the three months ended January 31, 2022. The transition from gross loss to gross profit was driven by lower manufacturing variances and higher Advanced Technologies contract margin, partially offset by \$7.1 million of non-capitalizable costs related to construction of the Toyota project, increased gross profit from service agreements and reduced generation gross loss (excluding the impact of non-capitalizable costs related to construction of the Toyota project).

#### **Interest expense**

Interest expense for the three months ended January 31, 2023 and 2022 was \$1.5 million and \$1.4 million, respectively. Interest expense for both periods includes interest associated with finance obligations for failed sale-leaseback transactions and interest on the outstanding loans associated with the Bridgeport Fuel Cell Project.

### **Interest income**

Interest income was \$3.4 million and \$10.0 thousand for the three months ended January 31, 2023 and 2022, respectively. Interest income for the three months ended January 31, 2023 represents \$2.7 million of interest earned on money market investments and \$0.7 million of unrealized interest income on U.S. Treasury Securities purchased in November 2022.

### **Other income, net**

Other income, net was \$49.0 thousand and \$0.1 million for the three months ended January 31, 2023 and 2022, respectively, and primarily represents foreign currency exchange gains for each of the three month periods ended January 31, 2023 and 2022.

### **Provision for income taxes**

We have not paid federal or state income taxes in several years due to our history of net operating losses, although we have paid foreign income and withholding taxes in Korea. Provision for income tax recorded for the three months ended January 31, 2023 and 2022 was \$0.6 million and \$0.0 million, respectively. The provision for income tax recorded for the three months ended January 31, 2023 reflects the realization of withholding taxes on customer deposits.

### **Series B preferred stock dividends**

Dividends recorded on our 5% Series B Cumulative Convertible Perpetual Preferred Stock ("Series B Preferred Stock") were \$0.8 million for each of the three month periods ended January 31, 2023 and 2022.

### **Net loss attributable to noncontrolling interests**

Net loss attributable to noncontrolling interests is the result of allocating profits and losses to noncontrolling interests under the hypothetical liquidation at book value ("HLBV") method. HLBV is a balance sheet-oriented approach for applying the equity method of accounting when there is a complex structure, such as the flip structure of our tax equity financings with East West Bancorp, Inc. ("East West Bank") and Renewable Energy Investors, LLC ("REI").

For the three months ended January 31, 2023, net income attributable to noncontrolling interest totaled \$0.4 million for the LIPA Yaphank project tax equity financing transaction with REI. For the three months ended January 31, 2022, net loss allocated to noncontrolling interest totaled \$5.5 million for the LIPA Yaphank tax equity financing transaction with REI. The net loss for the three months ended January 31, 2022 was primarily driven by the Investment Tax Credit ("ITC") attributable to the noncontrolling interest for the 2021 tax year. The ITC reduces the noncontrolling interests' claim on hypothetical liquidation proceeds in the HLBV waterfall. This reduction in liquidation proceeds drove the loss in the three months ended January 31, 2022.

For the three months ended January 31, 2023, net loss attributable to noncontrolling interests totaled \$2.9 million for the Groton Project tax equity financing transaction with East West Bank. There was no comparable net loss for the three months ended January 31, 2022, as the Groton Project tax equity transaction closed and the Groton Project began operations in the first quarter of fiscal year 2023. The net loss for the three months ended January 31, 2023 is primarily driven by the ITC attributable to the noncontrolling interest for the 2022 tax year. The ITC reduces the noncontrolling interests' claim on hypothetical liquidation proceeds in the HLBV waterfall. This reduction in liquidation proceeds drove the loss in the three months ended January 31, 2023.

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

Net loss attributable to common stockholders represents the net loss for the period less the preferred stock dividends on the Series B Preferred Stock. For the three month periods ended January 31, 2023 and 2022, net loss attributable to common stockholders was \$19.4 million and \$41.4 million, respectively, and loss per common share was \$0.05 and \$0.11, respectively. The decrease in the net loss attributable to common stockholders for the three months ended January 31, 2023 is primarily due to the gross profit for the three months ended January 31, 2023 compared to gross loss for the three months ended January 31, 2022, as well as lower operating expenses during the three months ended January 31, 2023. The lower net loss per common share for the three months ended January 31, 2023 as compared to the three months ended January 31, 2022 is primarily due to the lower net loss attributable to common stockholders and the higher number of weighted average shares outstanding due to share issuances since January 31, 2022.

## LIQUIDITY AND CAPITAL RESOURCES

### Overview, Cash Position, Sources and Uses

Our principal sources of cash have been proceeds from the sale of our products and projects, electricity generation revenues, research and development and service agreements with third parties, sales of our common stock through public equity offerings, and proceeds from debt, project financing and tax monetization transactions. We have utilized this cash to accelerate the commercialization of our solid oxide platforms, develop new capabilities to separate and capture carbon, develop and construct project assets, invest in capital improvements and expansion of our operations, perform research and development on Advanced Technologies, pay down existing outstanding indebtedness, and meet our other cash and liquidity needs.

As of January 31, 2023, unrestricted cash and cash equivalents totaled \$315.2 million compared to \$458.1 million as of October 31, 2022. During the three months ended January 31, 2023, the Company invested \$75.0 million in United States (U.S.) Treasury Securities which have maturity dates ranging from February 9, 2023 to May 15, 2023. The amortized cost of these U.S. Treasury Securities totaled \$75.7 million as of January 31, 2023 compared to \$0 as of October 31, 2022 and are classified as Investments - short term on the Consolidated Balance Sheets.

On July 12, 2022, the Company entered into an Open Market Sale Agreement with Jefferies LLC, B. Riley Securities, Inc., Barclays Capital Inc., BMO Capital Markets Corp., BofA Securities, Inc., Canaccord Genuity LLC, Citigroup Global Markets Inc., J.P. Morgan Securities LLC and Loop Capital Markets LLC (the "Open Market Sale Agreement") with respect to an at the market offering program under which the Company may, from time to time, offer and sell up to 95.0 million shares of the Company's common stock. From the date of the Open Market Sale Agreement through January 31, 2023, the Company sold approximately 18.5 million shares under the Open Market Sale Agreement at an average sale price of \$3.63 per share, resulting in gross proceeds of approximately \$67.2 million before deducting sales commissions and fees, and net proceeds to the Company of approximately \$65.4 million after deducting commissions and fees totaling approximately \$1.8 million. During the quarter ended January 31, 2023, no sales were made under the Open Market Sale Agreement. As of January 31, 2023, approximately 76.5 million shares were available for issuance under the Open Market Sale Agreement. The Company currently intends to use the net proceeds from this offering to accelerate the development and commercialization of its product platforms (including, but not limited to, its solid oxide and carbon capture platforms), for project development, market development, and internal research and development, to invest in capacity expansion for solid oxide and carbonate fuel cell manufacturing, and for project financing, working capital support, and general corporate purposes. The Company may also use the net proceeds from this offering to invest in joint ventures, acquisitions, and strategic growth investments and to acquire, license or invest in products, technologies or businesses that complement its business.

We believe that our unrestricted cash and cash equivalents, expected receipts from our contracted backlog, and release of short-term restricted cash less expected disbursements over the next twelve months will be sufficient to allow the Company to meet its obligations for at least one year from the date of issuance of the financial statements included in this Quarterly Report on Form 10-Q.

To date, we have not achieved profitable operations or sustained positive cash flow from operations. The Company's future liquidity, for fiscal year 2023 and in the long-term, will depend on its ability to (i) timely complete current projects in process within budget, (ii) increase cash flows from its generation operating portfolio, including by meeting conditions required to timely commence operation of new projects, operating its generation operating portfolio in compliance with minimum performance guarantees and operating its generation operating portfolio in accordance with revenue expectations, (iii) obtain financing for project construction and manufacturing expansion, (iv) obtain permanent financing for its projects once constructed, (v) increase order and contract volumes, which would lead to additional product sales, service agreements and generation revenues, (vi) obtain funding for and receive payment for research and development under current and future Advanced Technologies contracts, (vii) successfully commercialize its Advanced Technologies platforms, including its solid oxide, hydrogen and carbon capture platforms, (viii) implement capacity expansion for solid oxide product manufacturing, (ix) implement the product cost reductions necessary to achieve profitable operations, (x) manage working capital and the Company's unrestricted cash balance and (xi) access the capital markets to raise funds through the sale of debt and equity securities, convertible notes, and other equity-linked instruments.

We are continually assessing different means by which to accelerate the Company's growth, enter new markets, commercialize new products, and enable capacity expansion. Therefore, from time to time, the Company may consider



and enter into agreements for one or more of the following: negotiated financial transactions, minority investments, collaborative ventures, technology sharing, transfer or other technology license arrangements, joint ventures, partnerships, acquisitions or other business transactions for the purpose(s) of geographic or manufacturing expansion and/or new product or technology development and commercialization, including hydrogen production through our carbonate and solid oxide platforms and storage and carbon capture, sequestration and utilization technologies.

Our business model requires substantial outside financing arrangements and satisfaction of the conditions of such arrangements to construct and deploy our projects to facilitate the growth of our business. The Company has invested capital raised from sales of its common stock to build out its project portfolio. The Company has also utilized and expects to continue to utilize a combination of long-term debt and tax equity financing (e.g., sale-leaseback transactions, partnership flip transactions and the monetization and/or transfer of eligible investment and production tax credits) to finance its project asset portfolio as these projects commence commercial operations, particularly in light of the passage of the Inflation Reduction Act in August 2022. The Company may also seek to undertake private placements of debt securities of a portfolio of assets to finance its project asset portfolio. The proceeds of any such financing, if obtained, may allow the Company to reinvest capital back into the business and to fund other projects. We may also seek to obtain additional financing in both the debt and equity markets in the future. If financing is not available to us on acceptable terms if and when needed, or on terms acceptable to us or our lenders, if we do not satisfy the conditions of our financing arrangements, if we spend more than the financing approved for projects, if project costs exceed an amount that the Company can finance, or if we do not generate sufficient revenues or obtain capital sufficient for our corporate needs, we may be required to reduce or slow planned spending, reduce staffing, sell assets, seek alternative financing and take other measures, any of which could have a material adverse effect on our financial condition and operations.

### **Generation Operating Portfolio, Project Assets, and Backlog**

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

Our generation operating portfolio (43.7 MW as of January 31, 2023, which includes 7.4 MW attributed to the design rated output of the Groton Project although the Groton Project is, and was as of January 31, 2023 and at the commencement of commercial operations in December 2022, operating at approximately 6.0 MW) contributes higher long-term cash flows to the Company than if these projects had been sold. We expect generation revenue to continue to grow as additional projects achieve commercial operation, but this revenue amount may also fluctuate from year to year depending on platform output, operational performance and management and site conditions. The Company plans to continue to grow this portfolio while also selling projects to investors. As of January 31, 2023, the Company had projects representing an additional 19.4 MW in various stages of development and construction, which projects are expected to generate operating cash flows in future periods, if completed. Retaining long-term cash flow positive projects, combined with our service fleet, is expected to result in reduced reliance on new project sales to achieve cash flow positive operations, however, operations and performance issues could impact results. We have worked with and are continuing to work with lenders and financial institutions to secure construction financing, long-term debt, tax equity and sale-leasebacks for our project asset portfolio, but there can be no assurance that such financing can be attained, or that, if attained, it will be retained and sufficient.

As of January 31, 2023, net debt outstanding related to project assets was \$68.7 million. Future required payments totaled \$30.9 million as of January 31, 2023. The outstanding finance obligations under our sale-leaseback transactions, which totaled \$56.8 million as of January 31, 2023, include an embedded gain of \$37.8 million representing the current carrying value of finance obligations less future required payments, which will be recognized at the end of the applicable lease terms.

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

The following table summarizes our generation operating portfolio as of January 31, 2023:

Project Name	Location	Power Off-Taker	Rated Capacity (MW) <sup>(1)</sup>	Actual Commercial Operation Date (FuelCell Energy Fiscal Quarter)	PPA Term (Years)
Central CT State University (“CCSU”)	New Britain, CT	CCSU (CT University)	1.4	Q2 '12	15
Riverside Regional Water Quality Control Plant	Riverside, CA	City of Riverside (CA Municipality)	1.4	Q4 '16	20
Pfizer, Inc.	Groton, CT	Pfizer, Inc.	5.6	Q4 '16	20
Santa Rita Jail	Dublin, CA	Alameda County, California	1.4	Q1 '17	20
Bridgeport Fuel Cell Project	Bridgeport, CT	Connecticut Light and Power Company (CT Utility)	14.9	Q1 '13	15
Tulare BioMAT	Tulare, CA	Southern California Edison (CA Utility)	2.8	Q1 '20	20
San Bernardino	San Bernardino, CA	City of San Bernardino Municipal Water Department	1.4	Q3'21	20
LIPA Yaphank Project	Long Island, NY	PSEG / LIPA, LI NY (Utility)	7.4	Q1'22	18
Groton Project	Groton, CT	CMEEC (CT Electric Co-op)	7.4 <sup>(2)</sup>	Q1'23	20
<b>Total MW Operating:</b>			<b>43.7</b>		

(1) Rated capacity is the platform’s design rated output as of the date of initiation of commercial operations, except with respect to the Groton Project. The Groton Project commenced commercial operations in December 2022 operating at, and is and was as of January 31, 2023 operating at, only approximately 6.0 MW as discussed in additional detail in footnote (2) below. The initial operating output of the Groton Project is and will be approximately 6.0 MW until the Technical Improvement Plan described below in footnote (2) is fully implemented. Full implementation of the Technical Improvement Plan is expected to bring this platform to its design rated output of 7.4 MW. Accordingly, rated capacity with respect to the Groton Project is the platform’s expected design rated output at the time of the full implementation of the Technical Improvement Plan.

(2) As previously disclosed, the Groton Project achieved commercial operations on December 16, 2022. On December 16, 2022, the Company entered into an amended and restated power purchase agreement (“Amended and Restated PPA”) which modified and replaced the existing power purchase agreement with Connecticut Municipal Electric Energy Cooperative (“CMEEC”) to allow the Groton Project to operate at a reduced output of approximately 6 MW while a Technical Improvement Plan (“TIP”) is implemented with the goal of bringing the platform to its rated capacity of 7.4 MW by December 31, 2023. In conjunction with entering into the Amended and Restated PPA, on December 16, 2022, the Company and CMEEC declared that the plants are commercially operational at 6 MW and CMEEC and the Company agreed that, for all purposes, the commercial operations date had been achieved. The Navy also provided its authorization to proceed with commercial operations at 6 MW. The Company is incurring and will continue to incur performance guarantee fees under the Amended and Restated PPA as a result of operating at an output below 7.4 MW during implementation of the TIP. Although the Company believes it will successfully implement the TIP and bring the plant up to its design rated output of 7.4 MW by December 31, 2023, no assurance can be provided that such work will be successful. In the event that the plants do not reach an output of 7.4 MW by December 31, 2023, the Amended and Restated PPA will continue in effect, and the Company will be subject to ongoing performance guarantee fees.



The following table summarizes projects in process, all of which are in backlog, as of January 31, 2023:

Project Name	Location	Power Off-Taker	Rated Capacity (MW) <sup>(1)</sup>	PPA Term (Years)
Toyota	Los Angeles, CA	Southern California Edison; Toyota	2.3	20
CT RFP-2	Derby, CT	Eversource/United Illuminating (CT Utilities)	14.0	20
SCEF - Derby	Derby, CT	Eversource/United Illuminating (CT Utilities)	2.8	20
Trinity College	Hartford, CT	Trinity College	0.3	15
<b>Total MW in Process:</b>			<b>19.4</b>	

(1) Rated capacity is the platform's design rated output as of the date of initiation of commercial operations.

The projects listed in the above table are in various stages of development or on-site construction and installation. Current project updates are as follows:

- Toyota - Port of Long Beach, CA – The Toyota Project.** This 2.8 MW Tri-generation platform will produce electricity (at an expected net output of 2.3 MW), hydrogen and water. We have completed the construction work on our Tri-generation project at the Port of Long Beach for Toyota (the “Toyota project”) and the fuel cell platform has advanced to the commissioning phase of project deployment. We anticipate that the remaining commissioning activity will be completed in the third fiscal quarter of 2023. The current contractually required commercial operations date is July 8, 2023. In the event that we do not achieve commercial operations on or before the deadline of July 8, 2023, Toyota will have the right to terminate its hydrogen power purchase agreement.
- Derby, CT.** On-site civil construction of this 14 MW project continues to advance and the Company has largely completed the foundational construction, with the majority of the balance of plant components delivered and installed on site. This utility scale fuel cell platform will contain five SureSource 3000 fuel cell systems that will be installed on engineered platforms alongside the Housatonic River. To date, the Company has invested approximately \$29.3 million into the project, with the fuel cell modules currently in production and slated to be completed in our Torrington manufacturing facility over the next two fiscal quarters. The Company continues to work with the utility customer, United Illuminating, on the interconnection process, the timing of which will drive the continued development of the site, including the delivery of the ten fuel cell modules required to complete the project. Our current expectation is that this project will commence commercial operations in the fourth calendar quarter of 2023.

Backlog by revenue category is as follows:

- Service agreements backlog totaled \$99.9 million as of January 31, 2023, compared to \$123.7 million as of January 31, 2022. Service agreements backlog includes future contracted revenue from maintenance and scheduled module exchanges for power plants under service agreements.
- Generation backlog totaled \$0.9 billion as of January 31, 2023 compared to \$1.1 billion as of January 31, 2022. Generation backlog represents future contracted energy sales under contracted PPAs or approved utility tariffs.
- There was no product sales backlog as of January 31, 2023. Product sales backlog totaled \$60.2 million as of January 31, 2022.
- Advanced Technologies contract backlog totaled \$26.8 million as of January 31, 2023 compared to \$31.7 million as of January 31, 2022. Advanced Technologies contract backlog primarily represents remaining revenue under the EMTEC Joint Development Agreement and government projects.

Backlog decreased by approximately 19% to \$1.06 billion as of January 31, 2023, compared to \$1.30 billion as of January 31, 2022, primarily as a result of a reduction in generation backlog due to the decision to not move forward with certain generation projects during the fourth quarter of fiscal year 2022. The reduction was also due, in part, to revenue recognition since January 31, 2022.

Backlog represents definitive agreements executed by the Company and our customers. Projects for which we have an executed PPA are included in generation backlog, which represents future revenue under long-term PPAs. The Company's ability to recognize revenue in the future under a PPA is subject to the Company's completion of construction of the project covered by such PPA. Should the Company not complete the construction of the project covered by a PPA, it will forgo future revenues with respect to the project and may incur penalties and/or impairment charges related to the project. Projects sold to customers (and not retained by the Company) are included in product sales and service agreements backlog, and the related generation backlog is removed upon sale. Together, the service and generation portion of backlog had a weighted average term of approximately 17 years, with weighting based on the dollar amount of backlog and utility service contracts of up to 20 years in duration at inception.

### **Factors that may impact our liquidity**

Factors that may impact our liquidity in fiscal year 2023 and beyond include:

- The Company's cash on hand and access to additional liquidity. As of January 31, 2023, unrestricted cash and cash equivalents totaled \$315.2 million and short-term investments in U.S. Treasury Securities totaled \$75.7 million. Such securities have maturity dates ranging from February 9, 2023 to May 15, 2023.
- We bid on large projects in diverse markets that can have long decision cycles and uncertain outcomes.
- We manage production rate based on expected demand and project schedules. Changes to production rate take time to implement. During the three months ended January 31, 2023, we operated at an annualized production rate of approximately 38.2 MW, which is in-line with the annualized production rate achieved for the three months ended January 31, 2022. For fiscal year 2023, we are planning to operate at a 45 MW annualized production rate in support of project backlog and service requirements.
- As project sizes and the number of projects evolve, project cycle times may increase. We may need to make significant up-front investments of resources in advance of the receipt of any cash from the financing or sale of our projects. These amounts include development costs, interconnection costs, costs associated with posting of letters of credit, bonding or other forms of security, and engineering, permitting, legal, and other expenses.
- The amount of accounts receivable and unbilled receivables as of January 31, 2023 and October 31, 2022 was \$28.9 million (\$12.0 million of which is classified as "Other assets") and \$25.6 million (\$9.7 million of which is classified as "Other assets"), respectively. Unbilled accounts receivable represent revenue that has been recognized in advance of billing the customer under the terms of the underlying contracts. Such costs have been funded with working capital and the unbilled amounts are expected to be billed and collected from customers once we meet the billing criteria under the contracts. Our accounts receivable balances may fluctuate as of any balance sheet date depending on the timing of individual contract milestones and progress on completion of our projects.
- The amount of total inventory as of January 31, 2023 and October 31, 2022 was \$108.7 million (\$7.5 million is classified as long-term inventory) and \$98.5 million (\$7.5 million is classified as long-term inventory), respectively, which includes work in process inventory totaling \$69.3 million and \$67.8 million, respectively. Work in process inventory can generally be deployed rapidly while the balance of our inventory requires further manufacturing prior to deployment. To execute on our business plan, we must produce fuel cell modules and procure balance of plant ("BOP") components in required volumes to support our planned construction schedules and potential customer contractual requirements. As a result, we may manufacture modules or acquire BOP components in advance of receiving payment for such activities. This may result in fluctuations in inventory and in use of cash as of any given balance sheet date.
- The amount of total project assets as of January 31, 2023 and October 31, 2022 was \$229.9 million and \$232.9 million, respectively. Project assets consist of capitalized costs for fuel cell projects that are operating and producing revenue or are under construction. Project assets as of January 31, 2023 consisted of \$178.0 million of completed, operating installations and \$51.9 million of projects in development. As of January 31, 2023, we had 43.7 MW of

operating project assets (which includes 7.4 MW attributed to the design rated output of the Groton Project although the Groton Project is, and was as of January 31, 2023 and at the commencement of commercial operations in December 2022, operating at approximately 6.0 MW) that generated \$9.6 million of revenue in the three months ended January 31, 2023.

- As of January 31, 2023, the Company had 19.4 MW of projects under development and construction. To build out this portfolio, as of January 31, 2023, we estimate the remaining investment in project assets to be made during fiscal year 2023 to be in the range of approximately \$45.0 million to \$65.0 million. To fund such expenditures, the Company expects to use unrestricted cash on hand and to seek sources of construction financing. In addition, once the projects under development become operational, the Company will seek to obtain permanent financing (tax equity and debt) which would be expected to return cash to the business. For the three months ended January 31, 2023, capitalized project asset expenditures were \$2.1 million. In addition, the Company expensed costs related to the Toyota project which totaled \$7.1 million for the three months ended January 31, 2023.
- Certain of our PPAs for project assets in our generation operating portfolio and project assets under construction expose us to fluctuating fuel price risks as well as the risk of being unable to procure the required amounts of fuel and the lack of alternative available fuel sources. We seek to mitigate our fuel risk using strategies including: (i) fuel cost reimbursement mechanisms in our PPAs to allow for pass through of fuel costs (full or partial) where possible, which we have done with our 14.9 MW operating project in Bridgeport, CT; (ii) procuring fuel under fixed price physical contracts with investment grade counterparties, which we have done for twenty years for our Tulare BioMAT project and the initial seven years of the eighteen year PPA for our LIPA Yaphank, NY project; and (iii) potentially entering into future financial hedges with investment grade counterparties to offset potential negative market fluctuations.

We currently have three projects in development with fuel sourcing risk, which are the Toyota project, which requires procurement of renewable natural gas ("RNG"), and our Derby, CT 14.0 MW and 2.8 MW projects, both of which require natural gas for which there is no pass through mechanism in the related PPAs. Fuel sourcing and risk mitigation strategies for all three projects are being assessed and will be implemented as project operational dates become firm. Such strategies may require cash collateral or reserves to secure fuel or related contracts for these three projects.

- Capital expenditures are expected to range between \$60.0 million to \$90.0 million for fiscal year 2023, which includes expected investments in our manufacturing facilities for molten carbonate and solid oxide production capacity expansion, the addition of test facilities for new products and components, the expansion of our laboratories and upgrades to and expansion of our business systems. Included in projected expenditures associated with the capacity expansion for molten carbonate is equipment to launch the carbon capture platform manufacturing required for the assembly of the jointly developed technology with EMTEC. The solid oxide production capacity expansion is underway in our Calgary Canada facility and is expected to increase the capacity of the facility from 1 MW to 10 MW per year of SOFC production or from 4 MW to 40 MW per year of SOEC production by the middle of fiscal year 2024.

We have made progress in advancing our carbonate and solid oxide platform capacity expansion plans.

**Carbonate Platform:** At this time, the maximum annualized capacity (module manufacturing, final assembly, testing and conditioning) is 100 MW per year under the Torrington facility's current configuration when fully utilized. The Torrington facility is sized to accommodate the eventual annualized production capacity of up to 200 MW per year with additional capital investment in machinery, equipment, tooling, labor and inventory.

The Company continues to invest in capability with the goal of reducing production bottlenecks and driving productivity, including investments in automation, laser welding, and the construction of additional integrated conditioning capacity. The Company also constructed a SureSource 1500 in Torrington during fiscal year 2022, which operates as a testing facility for qualifying new supplier components and performance testing and validation of continued platform innovations. During fiscal year 2023, the Company expects to invest in adding the engineered carbon separation capability to the onsite SureSource 1500, which will allow potential customers to observe the operating plant and, given the targeted market of food and beverage companies, will allow for the sampling and testing of separated CO<sub>2</sub> to verify quantity, quality or purity requirements.

**Solid Oxide Platform:** During the three months ended January 31, 2023, Versa Ltd., a subsidiary of FuelCell Energy, entered into a lease expansion, extension and amending agreement which expanded the space to be leased by Versa Ltd. in Calgary, Alberta, Canada to include an additional approximately 48,000 square feet, for a total of approximately 80,000 square feet of space. Additionally, long-lead process equipment has been ordered to facilitate the expansion of manufacturing capacity for the solid oxide platforms in Calgary. Upon the completion of the Calgary capacity expansion, the Company expects that it will be able to increase annual production capacity and that it will be capable of delivering up to 40 MWs of annualized electrolysis production per year.

During calendar year 2023, our Calgary manufacturing operation is expected to build and deliver four units: two units that will run internally for advanced testing and two first article production units for delivery externally. Of these commercial units for external delivery, one will be our electrolysis platform for delivery to Idaho National Laboratory, and the other will be our distributed power platform for delivery to Trinity College in Hartford, Connecticut for use under a long-term power purchase agreement.

The expansion of the Calgary manufacturing facility is phase 1 of the Company's planned operational expansion of production capability. While this expansion is expected to increase our production capacity from 4 MWs per year to 40 MWs per year of solid oxide electrolyzers, the Company has plans to add an additional 400 MW of solid oxide manufacturing capacity in the United States. While the location of the facility has not yet been determined, early facility design and engineering requirements have been developed. We anticipate announcing more details regarding our plans for solid oxide production expansion into the United States later this fiscal year.

- Company-funded research and development expenses are expected to be in the range between \$50.0 million and \$70.0 million for fiscal year 2023. During the three months ended January 31, 2023, we incurred a total of \$12.7 million of Company-funded research and development expenses as we continued to accelerate commercialization of our Advanced Technologies solutions including distributed hydrogen, hydrogen based long duration energy storage and hydrogen power generation. The Company continues to advance its solid oxide platform research, including increasing production of solid oxide fuel cell modules and expanding manufacturing capacity. The Company continues to work with Idaho National Laboratories on a demonstration high-efficiency electrolysis platform. This project, done in conjunction with the U.S. Department of Energy, is intended to demonstrate that the Company's platform can operate at higher electrical efficiency than currently available electrolysis technologies through the inclusion of an external heat source. To further accelerate the commercialization activity for the solid oxide platform, the Company recently commenced the design and construction of two advanced prototypes targeted for fiscal year 2023 completion: (i) a 250 kW power generation platform, and (ii) a 1 MW high-efficiency electrolysis platform.
- Under the terms of certain contracts, the Company will provide performance security for future contractual obligations. As of January 31, 2023, we had pledged approximately \$24.6 million of our cash and cash equivalents as collateral for performance security and for letters of credit for certain banking requirements and contracts. This balance may increase with a growing backlog and installed fleet.
- On August 16, 2022, the U.S. Inflation Reduction Act ("IRA" or the "Act") was signed into law. The provisions of the IRA are intended to, among other things, incentivize domestic clean energy investment, manufacturing and production. The IRA includes provisions that provide incentives for clean energy through enhancement of the Investment Tax Credit ("ITC") program, Production Tax Credits for clean energy component sourcing and production in the United States, enhancements to Section 45Q of the Internal Revenue Code which provides credits for carbon oxide sequestration intended to incentivize investment in carbon capture and sequestration, and certain incentives for clean energy projects that use environmental brownfield sites and/or are located in economically challenged areas. In addition, the Act would provide a 10-year Production Tax Credit ("PTC") for the production of clean hydrogen at a qualified facility that begins construction prior to January 1, 2023, with the option to elect the ITC in lieu of the PTC. The Company views the enactment of the IRA as favorable for the overall business climate for fuel cell manufacturers, however, the Company is continuing to evaluate the overall impact and applicability of the IRA to the Company's current and planned products and the markets in which the Company seeks to sell its products.
- As global policies evolve, there may be incentives available to the Company and potential customers that may help to accelerate the growth of projects utilizing FuelCell Energy's platform. We continue to see broad support for the energy transition through legislation and economic incentives globally. For example, the European Union recently proposed an approximately \$270 billion program that would offer tax breaks for businesses investing in net-zero

technology, and in Korea, the Korean Hydrogen Economy Roadmap aims to produce 6.2 million fuel cell electric vehicles and deploy at least 1,200 hydrogen refueling stations by 2040. Additionally, Japan's Sixth Strategy Energy Plan would target decarbonizing power sources through increased hydrogen production as well as the broad deployment of carbon capture utilization and sequestration technology.

### Depreciation and Amortization

As the Company builds project assets and makes capital expenditures, depreciation and amortization expenses are expected to increase. For the three months ended January 31, 2023 and 2022, depreciation and amortization totaled \$5.4 million and \$5.8 million, respectively (of these totals, approximately \$4.2 million and \$3.6 million for the three months ended January 31, 2023 and 2022, respectively, relate to depreciation and amortization of project assets in our generation operating portfolio).

### Cash Flows

Cash and cash equivalents and restricted cash and cash equivalents totaled \$339.8 million as of January 31, 2023 compared to \$481.0 million as of October 31, 2022. As of January 31, 2023, unrestricted cash and cash equivalents was \$315.2 million compared to \$458.1 million of unrestricted cash and cash equivalents as of October 31, 2022. As of January 31, 2023, restricted cash and cash equivalents was \$24.6 million, of which \$4.5 million was classified as current and \$20.2 million was classified as non-current, compared to \$23.0 million of restricted cash and cash equivalents as of October 31, 2022, of which \$4.4 million was classified as current and \$18.6 million was classified as non-current.

The following table summarizes our consolidated cash flows:

(dollars in thousands)	Three Months Ended January 31,	
	2023	2022
<b>Consolidated Cash Flow Data:</b>		
Net cash used in operating activities	\$ (53,377)	\$ (47,754)
Net cash used in investing activities	(84,822)	(15,766)
Net cash (used in) provided by financing activities	(3,513)	8,830
Effects on cash from changes in foreign currency rates	447	(91)
Net decrease in cash, cash equivalents and restricted cash	<u>\$ (141,265)</u>	<u>\$ (54,781)</u>

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

**Operating Activities** – Net cash used in operating activities was \$53.4 million during the three months ended January 31, 2023, compared to \$47.8 million of net cash used in operating activities during the three months ended January 31, 2022.

Net cash used in operating activities for the three months ended January 31, 2023 was primarily a result of the net loss of \$21.1 million, increases in inventories of \$10.3 million, unbilled receivables of \$5.0 million and other assets of \$1.0 million and decreases in deferred revenue of \$18.1 million, accrued liabilities of \$7.1 million and accounts payable of \$1.1 million partially offset by decreases in accounts receivable of \$1.7 million and non-cash adjustments of \$8.8 million.

Net cash used in operating activities for the three months ended January 31, 2022 was primarily a result of the net loss of \$46.1 million, increases in inventories of \$2.5 million, unbilled receivables of \$4.4 million, accounts receivable of \$16.0 million, and other assets of \$2.0 million, offset by increases in deferred revenue of \$1.7 million, accrued liabilities of \$10.0 million, and accounts payable of \$2.6 million and non-cash adjustments of \$9.3 million.

**Investing Activities** – Net cash used in investing activities was \$84.8 million for the three months ended January 31, 2023, compared to net cash used in investing activities of \$15.8 million during the three months ended January 31, 2022.

Net cash used in investing activities for the three months ended January 31, 2023 included \$75.0 million for the purchase of U.S. Treasury Securities, \$7.8 million of capital expenditures and \$2.1 million of project asset expenditures.

Net cash used in investing activities for the three months ended January 31, 2022 included \$10.4 million of project asset expenditures and \$5.3 million of capital expenditures.

**Financing Activities** – Net cash used in financing activities was \$3.5 million during the three months ended January 31, 2023, compared to net cash provided by financing activities of \$8.8 million during the three months ended January 31, 2022.

Net cash used in financing activities during the three months ended January 31, 2023 resulted from debt repayments of \$2.3 million, payments for taxes related to net share settlement of equity awards of \$0.3 million, payment of \$0.8 million in preferred dividends and distribution to noncontrolling interest of \$0.1 million.

Net cash provided by financing activities during the three months ended January 31, 2022 resulted from \$12.4 million of contributions received from a noncontrolling interest in our tax equity partnership for the LIPA Yaphank Project, offset by debt repayments of \$2.5 million, payment for taxes related to net share settlement of equity awards of \$0.3 million, and payment of \$0.8 million in preferred dividends.

### Sources and Uses of Cash and Investments

In order to consistently produce positive cash flow from operations, we need to increase order flow to support higher production levels, leading to lower costs on a per unit basis. We also continue to invest in new product and market development and, as a result, we are not generating positive cash flow from our operations. Our operations are funded primarily through cash generated from product sales, service contracts, generation assets and Advanced Technologies contracts, as well as sales of equity and equity linked securities, issuances of corporate and project level debt, and monetization of technology through licenses.

### Commitments and Significant Contractual Obligations

A summary of our significant commitments and contractual obligations as of January 31, 2023 and the related payments by fiscal year are as follows:

(dollars in thousands)	Payments Due by Period				
	Total	Less than 1 Year	1 – 3 Years	3 – 5 Years	More than 5 Years
Purchase commitments <sup>(1)</sup>	\$ 77,107	\$ 76,283	\$ 710	\$ 114	\$ —
Term loans (principal and interest)	27,270	7,880	12,099	4,166	3,125
Capital and operating lease commitments <sup>(2)</sup>	19,599	1,176	2,550	2,612	13,261
Sale-leaseback finance obligations <sup>(3)</sup>	17,236	3,259	6,487	3,742	3,748
Natural gas supply contract <sup>(4)</sup>	11,158	1,969	3,938	3,938	1,313
Series B Preferred dividends payable <sup>(5)</sup>	—	—	—	—	—
<b>Totals</b>	<b>\$ 152,370</b>	<b>\$ 90,567</b>	<b>\$ 25,784</b>	<b>\$ 14,572</b>	<b>\$ 21,447</b>

- (1) Purchase commitments with suppliers for materials, supplies and services incurred in the normal course of business.
- (2) Future minimum lease payments on finance and operating leases.
- (3) Represents payments due under sale-leaseback transactions and related financing agreements between certain of our wholly-owned subsidiaries and PNC Energy Capital, LLC (“PNC”) and/or Crestmark Equipment Finance (“Crestmark”) (as applicable). Lease payments for each lease under these financing agreements are generally payable in fixed quarterly installments over a 10-year period.
- (4) During fiscal year 2020, the Company entered into a 7-year natural gas contract with an estimated annual cost per year of \$2.0 million which was set to begin on November 1, 2021. Actual service began under the contract on December 7, 2021 to coincide with our commissioning schedule. This gas contract is for the Company’s Yaphank project and the costs are expected to be offset by generation revenues on the project.
- (5) We pay \$3.2 million in annual dividends on our Series B Preferred Stock, if and when declared. The \$3.2 million annual dividend payment, if dividends are declared, has not been included in this table as we cannot reasonably determine when or if we will be able to convert the Series B Preferred Stock into shares of our common stock. We may, at our option, convert these shares into the number of shares of our common stock that are issuable at the then prevailing conversion rate if the closing price of our common stock exceeds 150% of the then prevailing conversion price (\$1,692 per share at January 31, 2023) for 20 trading days during any consecutive 30 trading day period.



## *Outstanding Loans*

### **Connecticut Green Bank Loans**

As of October 31, 2019, the Company had a long-term loan agreement with the Connecticut Green Bank, providing the Company with a loan of \$1.8 million (the “Green Bank Loan Agreement”). On and effective as of December 19, 2019, the Company and Connecticut Green Bank entered into an amendment to the Green Bank Loan Agreement (the “Green Bank Amendment”). Upon the execution of the Green Bank Amendment on December 19, 2019, Connecticut Green Bank made an additional loan to the Company in the aggregate principal amount of \$3.0 million (the “December 2019 Loan”), which was to be used (i) first, to pay closing fees related to the May 9, 2019 acquisition of the Bridgeport Fuel Cell Project and the Subordinated Credit Agreement (as defined below), other fees and interest, and (ii) thereafter, for general corporate purposes.

The Green Bank Amendment provides that, until such time as the loan (which includes both the outstanding principal balance of the original loan under the Green Bank Loan Agreement and the outstanding principal amount of the December 2019 Loan) has been repaid in its entirety, interest on the outstanding balance of the loan shall accrue at a rate of 8% per annum, payable by the Company on a monthly basis in arrears. Interest payments made by the Company after the date of the Green Bank Amendment are to be applied first to interest that has accrued on the outstanding principal balance of the original loan under the Green Bank Loan Agreement and then to interest that has accrued on the December 2019 Loan.

The Green Bank Amendment also modifies the repayment and mandatory prepayment terms and extends the maturity date set forth in the original Green Bank Loan Agreement. Under the Green Bank Amendment, to the extent that excess cash flow reserve funds under the BFC Credit Agreement (as defined below) are eligible for disbursement to Bridgeport Fuel Cell, LLC pursuant to Section 6.23(c) of the BFC Credit Agreement, such funds are to be paid to Connecticut Green Bank until the loans are repaid in full. The Green Bank Amendment further provides that any unpaid balance of the loan and all other obligations due under the Green Bank Loan Agreement will be due and payable on May 9, 2026. Finally, with respect to mandatory prepayments, the Green Bank Amendment provides that, when the Company has closed on the subordinated project term loan pursuant to the Commitment Letter, dated February 6, 2019, issued by Connecticut Green Bank to Groton Station Fuel Cell, LLC (“Groton Fuel Cell”) to provide a subordinated project term loan to Groton Fuel Cell in the amount of \$5.0 million, the Company will be required to prepay to Connecticut Green Bank the lesser of any then outstanding amount of the December 2019 Loan and the amount of the subordinated project term loan actually advanced by Connecticut Green Bank. The balance under the original Green Bank Loan Agreement and the December 2019 Loan as of January 31, 2023 was \$4.8 million.

### **Bridgeport Fuel Cell Project Loans**

On May 9, 2019, in connection with the closing of the purchase of the membership interests of Bridgeport Fuel Cell, LLC (“BFC”) (and the 14.9 MW Bridgeport Fuel Cell Project), BFC (a subsidiary of the Company following the closing) entered into a subordinated credit agreement with the Connecticut Green Bank whereby Connecticut Green Bank provided financing in the amount of \$6.0 million (the “Subordinated Credit Agreement”). This \$6.0 million consisted of \$1.8 million in incremental funding that was received by BFC and \$4.2 million of funding previously received by FuelCell Energy, Inc. with respect to which BFC became the primary obligor. As security for the Subordinated Credit Agreement, Connecticut Green Bank received a perfected lien, subordinated and second in priority to the liens securing the \$25.0 million loaned under the BFC Credit Agreement (as defined below), in all of the same collateral securing the BFC Credit Agreement. The interest rate under the Subordinated Credit Agreement is 8% per annum. Principal and interest are due monthly in amounts sufficient to fully amortize the loan over an 84-month period ending in May 2026. The Subordinated Credit Agreement contains a debt coverage ratio which is required to be maintained and may not be less than 1.10 as of the end of each fiscal quarter, beginning with the quarter ended July 31, 2020. The balance under the Subordinated Credit Agreement as of January 31, 2023 was \$3.3 million.

On May 9, 2019, in connection with the closing of the purchase of the Bridgeport Fuel Cell Project, BFC entered into a Credit Agreement with Liberty Bank, as administrative agent and co-lead arranger, and Fifth Third Bank as co-lead arranger and interest rate swap hedger (the “BFC Credit Agreement”), whereby (i) Fifth Third Bank provided financing in the amount of \$12.5 million towards the purchase price for the BFC acquisition; and (ii) Liberty Bank provided financing in the amount of \$12.5 million towards the purchase price for the BFC acquisition. As security for the BFC Credit Agreement, Liberty Bank and Fifth Third Bank were granted a first priority lien in (i) all assets of BFC, including BFC’s cash accounts, fuel cells, and all other personal property, as well as third party contracts including the Energy Purchase

Agreement between BFC and Connecticut Light and Power Company dated July 10, 2009, as amended; (ii) certain fuel cell modules that are intended to be used to replace the Bridgeport Fuel Cell Project's fuel cell modules as part of routine operation and maintenance; and (iii) FuelCell Energy Finance, LLC's (a wholly-owned subsidiary of the Company and the direct parent of BFC) ownership interest in BFC. The maturity date under the BFC Credit Agreement is May 9, 2025. Monthly principal and interest are to be paid in arrears in an amount sufficient to fully amortize the term loan over a 72-month period. BFC has the right to make additional principal payments or pay the balance due under the BFC Credit Agreement in full, provided that it pays any associated breakage fees with regard to the interest rate swap agreements fixing the interest rate. The interest rate under the BFC Credit Agreement fluctuates monthly at the 30-day LIBOR rate plus 275 basis points.

An interest rate swap agreement was required to be entered into with Fifth Third Bank in connection with the BFC Credit Agreement to protect against movements in the floating LIBOR index. Accordingly, on May 16, 2019, an interest rate swap agreement (the "Swap Agreement") was entered into with Fifth Third Bank in connection with the BFC Credit Agreement for the term of the loan. The net interest rate across the BFC Credit Agreement and the swap transaction results in a fixed rate of 5.09%. The interest rate swap is adjusted to fair value on a quarterly basis. The estimated fair value is based on Level 2 inputs including primarily the forward LIBOR curve available to swap dealers. The valuation methodology involves comparison of (i) the sum of the present value of all monthly variable rate payments based on a reset rate using the forward LIBOR curve and (ii) the sum of the present value of all monthly fixed rate payments on the notional amount, which is equivalent to the outstanding principal amount of the loan. The fair value adjustments for the three months ended January 31, 2023 and 2022 resulted in a \$0.1 million loss and a \$0.2 million gain, respectively. The fair value of the interest rate swap asset as of January 31, 2023 and October 31, 2022 was \$0.2 million and \$0.3 million, respectively. On August 1, 2022, the Company entered into an amendment to its interest rate swap agreement that replaced LIBOR with Term Secured Overnight Financing Rate ("SOFR") effective as of June 2023.

The BFC Credit Agreement requires BFC to maintain a debt service reserve. Each of Liberty Bank and Fifth Third Bank also has an operation and module replacement reserve ("O&M Reserve") under the BFC Credit Agreement. BFC is required to deposit \$0.1 million per month into each O&M Reserve for the first five years of the BFC Credit Agreement, with such funds to be released at the sole discretion of Liberty Bank and Fifth Third Bank, as applicable. BFC is also required to maintain excess cash flow reserve accounts at each of Liberty Bank and Fifth Third Bank. Excess cash flow consists of cash generated by BFC from the Bridgeport Fuel Cell Project after payment of all expenses (including after payment of intercompany service fees to the Company), debt service to Liberty Bank and Fifth Third Bank, the funding of all required reserves, and payments to Connecticut Green Bank for the subordinated facility. BFC is also required to maintain a debt service coverage ratio of not less than 1.20, measured for the trailing year based on fiscal quarters beginning with the quarter ended July 31, 2020. The Company was in compliance with the debt service coverage ratio as of January 31, 2023. The Company has certain quarterly and annual financial reporting requirements under the BFC Credit Agreement. The annual financial statements to be provided pursuant to such requirements are to be audited and accompanied by a report of an independent certified public accountant, which report shall not include a "going concern" matter of emphasis or any qualification as to the scope of such audit.

#### **State of Connecticut Loan**

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

In January 2019, the Company and the State of Connecticut entered into a Second Amendment to the Assistance Agreement (the "Second Amendment"). The Second Amendment extended the Target Date to October 31, 2022 and amended the Employment Obligation to require the Company to continuously maintain a minimum of 538 full-time positions for 24 consecutive months. If the Company met the Employment Obligation, as modified by the Second Amendment, and created an additional 91 full-time positions, the Company would have received a credit in the amount of



\$2.0 million to be applied against the outstanding balance of the loan. However, based on the Company's headcount as of October 31, 2022, it did not meet this requirement and will not receive this credit. Because the Company did not meet the Employment Obligation, an accelerated payment penalty will be assessed at a rate of \$18,587.36 multiplied by the number of employees below the number of employees required by the Employment Obligation. Such penalty will be applied first to accelerate the payment of any outstanding fees or interest due and then to accelerate the payment of outstanding principal. The Company estimates that it had an average of 359 employees over the 24 consecutive month period. As a result, \$3.3 million of the loan has been reclassified to current, which represents the accelerated payment penalty amount. The Company has not been formally assessed a penalty but since there are no fees or interest due, any penalty assessed would be applied to the outstanding principal and not result in any charges to the Statement of Operations. The Company is currently in dialogue with the State of Connecticut regarding an extension to the Employment Obligation, but there can be no assurance that an extension will be granted.

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

#### *Restricted Cash*

We have pledged approximately \$24.6 million of our cash and cash equivalents as performance security and for letters of credit for certain banking requirements and contracts. As of January 31, 2023, outstanding letters of credit totaled \$5.0 million. These expire on various dates through August 2028. Under the terms of certain contracts, we will provide performance security for future contractual obligations. The restricted cash balance as of January 31, 2023 also included \$5.4 million and \$2.9 million primarily to support obligations under the power purchase and service agreements related to the PNC sale-leaseback transactions and the Crestmark sale-leaseback transactions, respectively, and \$9.4 million relating to future obligations associated with the Bridgeport Fuel Cell Project. Refer to Note 16. "Restricted Cash" to our Consolidated Financial Statements for the three months ended January 31, 2023 included in this Quarterly Report on Form 10-Q for a more detailed discussion of the Company's restricted cash balance.

#### *Power purchase agreements*

Under the terms of our PPAs, customers agree to purchase power or other value streams delivered such as hydrogen, steam, water, and/or carbon from the Company's fuel cell power platforms at negotiated rates. Electricity rates are generally a function of the customers' current and estimated future electricity pricing available from the grid. We are responsible for all operating costs necessary to maintain, monitor and repair our fuel cell power platforms. Under certain agreements, we are also responsible for procuring fuel, generally natural gas or biogas, to run our fuel cell power platforms. In addition, under certain agreements, we are required to produce minimum amounts of power under our PPAs and we have the right to terminate PPAs by giving written notice to the customer, subject to certain exit costs. As of January 31, 2023, our generation operating portfolio was 43.7 MW (which includes 7.4 MW attributed to the design rated output of the Groton Project although the Groton Project is, and was as of January 31, 2023 and at the commencement of commercial operations in December 2022, operating at approximately 6.0 MW).

#### *Service and warranty agreements*

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

#### *Advanced Technologies contracts*

We have contracted with various government agencies and certain companies from private industry to conduct research and development as either a prime contractor or sub-contractor under multi-year, cost-reimbursement and/or cost-share type contracts or cooperative agreements. Cost-share terms require that participating contractors share the total cost of the project based on an agreed upon ratio. In many cases, we are reimbursed only a portion of the costs incurred or to be incurred on the contract. While government research and development contracts may extend for many years, funding is

often provided incrementally on a year-by-year basis if contract terms are met and Congress authorizes the funds. As of January 31, 2023, Advanced Technologies contract backlog totaled \$26.8 million, of which \$14.2 million is non-U.S. Government-funded, \$11.4 million is U.S. Government-funded and \$1.2 million is U.S. Government-unfunded.

#### *Off-Balance Sheet Arrangements*

We have no off-balance sheet debt or similar obligations, which are not classified as debt. We do not guarantee any third-party debt. See Note 17. “Commitments and Contingencies” to our Consolidated Financial Statements for the three months ended January 31, 2023 included in this Quarterly Report on Form 10-Q for further information.

### **CRITICAL ACCOUNTING POLICIES AND ESTIMATES**

The preparation of financial statements and related disclosures in conformity with U.S. GAAP requires management to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities. Estimates are used in accounting for, among other things, revenue recognition, loss accruals on service agreements, excess, slow-moving and obsolete inventories, product warranty accruals, loss accruals on service agreements, share-based compensation expense, allowance for doubtful accounts, depreciation and amortization, impairment of goodwill and in-process research and development intangible assets, impairment of long-lived assets (including project assets), lease liabilities and right-of-use (“ROU”) assets, and contingencies. Estimates and assumptions are reviewed periodically, and the effects of revisions are reflected in the consolidated financial statements in the period they are determined to be necessary. Due to the inherent uncertainty involved in making estimates, actual results in future periods may differ from those estimates.

Our critical accounting policies are those that are both most important to our financial condition and results of operations and require the most difficult, subjective or complex judgments on the part of management in their application, often as a result of the need to make estimates about the effect of matters that are inherently uncertain. For a complete description of our critical accounting policies that affect our more significant judgments and estimates used in the preparation of our condensed consolidated financial statements, refer to our Annual Report on Form 10-K for the year ended October 31, 2022 filed with the SEC.

### **ACCOUNTING GUIDANCE UPDATE**

See Note 2. “Recent Accounting Pronouncements,” to our Consolidated Financial Statements included in this Quarterly Report on Form 10-Q for a summary of recently adopted accounting guidance.

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

#### **Interest Rate Exposure Risk**

We have invested in U.S. Treasury Securities with maturities ranging from more than three months to less than one year. We expect to hold these investments until maturity and accordingly, these investments are carried at cost and not subject to mark-to-market accounting. At January 31, 2023, our U.S. Treasury Securities had a carrying value of \$75.7 million, which approximated fair value. These investments have maturity dates ranging from February 2023 to May 2023 and a weighted average yield to maturity of 4.36%. Cash is invested overnight with high credit quality financial institutions and therefore we are not exposed to market risk on our cash holdings from changing interest rates. Based on our overall interest rate exposure as of January 31, 2023, including all interest rate sensitive instruments, a change in interest rates of 1% would not have a material impact on our results of operations.

#### **Foreign Currency Exchange Risk**

As of January 31, 2023, approximately 0.5% of our total cash and cash equivalents were in currencies other than U.S. dollars (primarily the Euro, Canadian dollars and Korean Won) and we have no plans of repatriation. We make purchases from certain vendors and receive payment from certain customers in currencies other than U.S. dollars. Although we have not experienced significant foreign exchange rate losses to date, we may in the future, especially to the extent that we do not engage in currency hedging activities. The economic impact of currency exchange rate movements on our operating results is complex because such changes are often linked to variability in real growth, inflation, interest rates, governmental actions and other factors. These changes, if material, may cause us to adjust our financing and operating strategies.

## **Derivative Fair Value Exposure Risk**

### *Interest Rate Swap*

On May 16, 2019, an interest rate swap agreement (the “Swap Agreement”) was entered into with Fifth Third Bank in connection with the BFC Credit Agreement for the term of the loan. The net interest rate across the BFC Credit Agreement and the swap transaction results in a fixed rate of 5.09%. The interest rate swap is adjusted to fair value on a quarterly basis. The estimated fair value is based on Level 2 inputs including primarily the forward LIBOR curve available to swap dealers. The valuation methodology involves comparison of (i) the sum of the present value of all monthly variable rate payments based on a reset rate using the forward LIBOR curve and (ii) the sum of the present value of all monthly fixed rate payments on the notional amount, which is equivalent to the outstanding principal amount of the loan. On August 1, 2022, the Company entered into an amendment to its interest rate swap agreement that replaced LIBOR with Term Secured Overnight Financing Rate (“SOFR”) effective as of June 2023. The fair value adjustments for the three months ended January 31, 2023 and 2022 resulted in a loss of \$0.1 million and a gain of \$0.2 million, respectively.

## **Project Fuel Price Exposure Risk**

Certain of our PPAs for project assets in our generation operating portfolio and project assets under construction expose us to fluctuating fuel price risks as well as the risk of being unable to procure the required amounts of fuel and the lack of alternative available fuel sources. We seek to mitigate our fuel risk using strategies including: (i) fuel cost reimbursement mechanisms in our PPAs to allow for pass through of fuel costs (full or partial) where possible, which we have done with our 14.9 MW operating project in Bridgeport, CT; (ii) procuring fuel under fixed price physical contracts with investment grade counterparties, which we have done for twenty years for our Tulare BioMAT project and the initial seven years of the 18 year PPA for our LIPA Yaphank, NY project; and (iii) potentially entering into future financial hedges with investment grade counterparties to offset potential negative market fluctuations.

We currently have three projects in development with fuel sourcing risk, namely, the Toyota project, which requires procurement of renewable natural gas (“RNG”), and our Derby, CT 14.0 MW and 2.8 MW projects, both of which require natural gas for which there is no pass through mechanism in the related PPAs. Fuel sourcing and risk mitigation strategies for all three projects are being assessed and will be implemented as project operational dates become firm.

Historically, this risk has not been material to our financial statements as our operating projects prior to January 31, 2023 either did not have fuel price risk exposure, had fuel cost reimbursement mechanisms in our related PPAs to allow for pass through of fuel costs (full or partial), or had established long term fixed price fuel physical contracts. To provide a meaningful assessment of the fuel price risk arising from price movements of natural gas, the Company performed a sensitivity analysis to determine the impact a change in natural gas commodity pricing would have on our Consolidated Statements of Operations and Comprehensive Loss (assuming that all projects with fuel price risk were operating). A \$1/Metric Million British Thermal Unit (“MMBTu”) increase in market pricing compared to our underlying project models would result in a cost impact of approximately \$1.1 million to our Consolidated Statements of Operations and Comprehensive Loss on an annual basis. We have also conducted a sensitivity analysis on the impact of RNG pricing and a \$10/MMBTu increase in market pricing compared to our underlying project models would result in an impact of approximately \$2.0 million to our Consolidated Statements of Operations and Comprehensive Loss on an annual basis.

## **Item 4. CONTROLS AND PROCEDURES**

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

We carried out an evaluation, under the supervision and with the participation of our principal executive officer and principal financial officer, of the effectiveness of the design and operation of our disclosure controls and procedures as of the end of the period covered by this report. Based on that evaluation, the Company’s principal executive officer and principal financial officer have concluded that the Company’s disclosure controls and procedures were effective as of the end of the period covered by this report to provide reasonable assurance that information required to be disclosed in the Company’s periodic SEC reports is recorded, processed, summarized, and reported within the time periods specified in

the SEC's rules and forms, and that such information is accumulated and communicated to its principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure.

There has been no change in our internal controls over financial reporting that occurred during the last fiscal quarter that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

## PART II. OTHER INFORMATION

### Item 1. LEGAL PROCEEDINGS

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

### Item 1A. RISK FACTORS

Part I, Item 1A, “Risk Factors” of our most recently filed Annual Report on Form 10-K for the fiscal year ended October 31, 2022, filed with the Securities and Exchange Commission on December 20, 2022 (the “2022 Annual Report”), sets forth information relating to important risks and uncertainties that could materially adversely affect our business, financial condition and operating results. Those risk factors continue to be relevant to an understanding of our business, financial condition and operating results and, accordingly, you should review and consider such risk factors in making any investment decision with respect to our securities. There have been no material changes to the risk factors previously disclosed in the 2022 Annual Report.

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

- (a) None.
- (b) Not applicable.
- (c) Stock Repurchases

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

Period	Total Number of Shares Purchased (1)	Average Price Paid per Share	Total Number of Shares Purchased as Part of Publicly Announced Programs	Maximum Number of Shares that May Yet be Purchased Under the Plans or Programs
November 1, 2022 - November 30, 2022	32,582	\$ 3.48	—	—
December 1, 2022 - December 31, 2022	68,381	3.47	—	—
January 1, 2023 - January 31, 2023	—	—	—	—
<b>Total</b>	<u>100,963</u>	<u>\$ 3.47</u>	<u>—</u>	<u>—</u>

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

### Item 3. DEFAULT UPON SENIOR SECURITIES

None.

### Item 4. MINE SAFETY DISCLOSURES

None.

**Item 5. OTHER INFORMATION**

None.

**Item 6. EXHIBITS**

<b>Exhibit No.</b>	<b>Description</b>
3.1	<a href="#">Certificate of Incorporation of the Company, as amended, July 12, 1999 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated September 21, 1999).</a>
3.2	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated November 21, 2000 (incorporated by reference to Exhibit 3.3 to the Company's Annual Report on Form 10-K dated January 12, 2017).</a>
3.3	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated October 31, 2003 (incorporated by reference to Exhibit 3.11 to the Company's Current Report on Form 8-K dated November 3, 2003).</a>
3.4	<a href="#">Certificate of Designation for the Company's 5% Series B Cumulative Convertible Perpetual Preferred Stock (incorporated by reference to Exhibit 3.1 to the Company's Current Report Form 8-K, dated November 22, 2004).</a>
3.5	<a href="#">Amended Certificate of Designation of 5% Series B Cumulative Convertible Perpetual Preferred Stock, dated March 14, 2005 (incorporated by reference to Exhibit 3.4 to the Company's Annual Report on Form 10-K dated January 12, 2017).</a>
3.6	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 8, 2011 (incorporated by reference to Exhibit 3.5 to the Company's Annual Report on Form 10-K dated January 12, 2017).</a>
3.7	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 5, 2012 (incorporated by reference to Exhibit 3.6 to the Company's Annual Report on Form 10-K dated January 12, 2017).</a>
3.8	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated December 3, 2015 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated December 3, 2015).</a>
3.9	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 18, 2016 (incorporated by reference to Exhibit 3.9 to the Company's Quarterly Report on Form 10-Q for the period ending April 30, 2016).</a>
3.10	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated April 7, 2017 (incorporated by reference to Exhibit 3.10 to the Company's Quarterly Report on Form 10-Q for the period ending April 30, 2017).</a>
3.11	<a href="#">Certificate of Designations for the Company's Series C Convertible Preferred Stock (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K, dated September 5, 2017).</a>
3.12	<a href="#">Certificate of Amendment of the Certificate of Incorporation of the Company, dated December 14, 2017 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated December 14, 2017).</a>
3.13	<a href="#">Certificate of Designations, Preferences and Rights for the Company's Series D Convertible Preferred Stock (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated August 27, 2018).</a>
3.14	<a href="#">Certificate of Amendment of the Certificate of Incorporation of FuelCell Energy, Inc., dated May 8, 2019 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on May 8, 2019).</a>
3.15	<a href="#">Certificate of Amendment of the Certificate of Incorporation of FuelCell Energy, Inc., dated May 11, 2020 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on May 12, 2020).</a>
3.16	<a href="#">Certificate of Amendment of the Certificate of Incorporation of FuelCell Energy, Inc. dated April 8, 2021 (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K/A filed on April 14, 2021).</a>
3.17	<a href="#">Amended and Restated By-Laws of the Company, dated December 15, 2016 (incorporated by reference to Exhibit 3.2 to the Company's Current Report on Form 8-K dated December 15, 2016).</a>
4.1	<a href="#">Specimen of Common Share Certificate (incorporated by reference to Exhibit 4 to the Company's Annual Report on Form 10-K for fiscal year ended October 31, 1999).</a>
10.1	<a href="#">Amendment No. 3 to Joint Development Agreement between FuelCell Energy, Inc. and ExxonMobil Technology and Engineering Company, fully executed on December 19, 2022 and effective as of December 1, 2022 (incorporated by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed on December 19, 2022).</a>
10.2	<a href="#">Lease, dated May 20, 2005, between Westpen Properties Ltd. and Versa Power Systems Ltd.</a>



<b>Exhibit No.</b>	<b>Description</b>
10.3	<a href="#">Lease Amending Agreement, dated April 20, 2006, between Westpen Properties Ltd. and Versa Power Systems Ltd.</a>
10.4	<a href="#">Lease Renewal Agreement, dated November 11, 2010, between 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., and Versa Power Systems Ltd.</a>
10.5	<a href="#">Lease Extension and Amending Agreement, dated October 29, 2013, between 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., and Versa Power Systems Ltd.</a>
10.6	<a href="#">Lease Extension Agreement, dated November 9, 2016, between 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., and Versa Power Systems Ltd.</a>
10.7	<a href="#">Lease Extension Agreement, dated January 10, 2020, between 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., and Versa Power Systems Ltd.</a>
10.8	<a href="#">Lease Expansion, Extension and Amending Agreement, dated January 5, 2023, between 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., and Versa Power Systems Ltd.</a>
10.9	<a href="#">Lease Expansion and Amending Agreement – Short Term, dated February 20, 2023, between 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., and Versa Power Systems Ltd.</a>
31.1	<a href="#">Certification of Chief Executive Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002</a>
31.2	<a href="#">Certification of Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002</a>
32.1	<a href="#">Certification of Chief Executive Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002</a>
32.2	<a href="#">Certification of Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002</a>
101.INS	Inline XBRL Instance Document – the instance document does not appear in the Interactive Data File because its XBRL tags are embedded within the Inline XBRL document.
101.SCH	Inline XBRL Schema Document
101.CAL	Inline XBRL Calculation Linkbase Document
101.LAB	Inline XBRL Labels Linkbase Document
101.PRE	Inline XBRL Presentation Linkbase Document
104	Cover Page Interactive Data File (formatted as Inline XBRL and contained in Exhibit 101).

**SIGNATURE**

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

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

March 9, 2023

**Date**

/s/ Michael S. Bishop

**Michael S. Bishop**

Executive Vice President and Chief Financial Officer

(Principal Financial Officer and Principal Accounting Officer)

## INDUSTRIAL LEASE

## BASIC TERMS

1. LANDLORD: Westpen Properties Ltd.
  2. LANDLORD'S ADDRESS: Suite 301, 240 - 4<sup>th</sup> Avenue SW  
Calgary, Alberta  
T2P 4H4
  3. TENANT: **VERSA POWER SYSTEMS LTD.**
  4. TENANT'S ADDRESS: 4852 - 52 Street SE  
Calgary, AB
  5. LEASED PREMISES: 4852 - 52 Street SE, Calgary, Alberta  
  
Leasable Area: 32,220 square feet subject to adjustment in accordance with the provisions of section 3.4A As shown cross-hatched on Schedule A attached.
  6. TERM: **Five (5) years** beginning on **February 1, 2006** (the "Commencement Date") and ending on **January 31, 2011**.
  - 6A. FIXTURING PERIOD: ~~• days, commencing pursuant to Section 2.2.~~
  7. BASE RENT: **The Base rent shall be paid monthly in advance by the Tenant on the Commencement Date and thereafter on the first day of each month and computed at the rate of:**  
  
(a) During the Term, **Two Hundred Nine Thousand Four Hundred Thirty Dollars (\$209,430.00)** annually payable in advance in equal consecutive monthly instalments of **Seventeen Thousand Four Hundred Fifty Two Dollars and Fifty Cents (\$17,452.50)** on the first day of each and every calendar month during such period.  
  
Base Rent has been calculated on the basis that the rental rate for the Leased Premises is **Six Dollars and Fifty Cents (\$6.50)** per annum per square foot of Leaseable Area during the Term. Rent shall be adjusted
-

from time to time, if necessary, to conform with the actual Leaseable Area of the Premises.

8. DEPOSIT: **\$90,000.00** including G.S.T. **subject to Article 3.6 of this Lease.**
9. USE: **The Leased Premises shall be used for light manufacturing, general office and warehouse distribution. The storage and use of chemicals is permitted provided it is lawful to store them and they are stored and handled in properly designated areas in accordance and compliance with Federal, Provincial or Municipal laws, rules, codes, ordinances and guidelines.**
10. SIGN FEE: N/A
11. INDEMNIFIER (if applicable): N/A
12. ADDITIONAL RENT **Additional Rent is estimated at \$2.50 per square foot per annum.**
13. SPECIAL PROVISIONS
  - a. OPTION TO RENEW:

**The Tenant, when not in default herein, shall have the option to renew the Term of this Lease for one (1) additional five (5) year term. The Base Rent for a renewal term shall be negotiated seven (7) months prior to the end of the original term, or a renewal term as the case may be, at the then prevailing market rent for like premises as at the first day of a renewal term. If the parties are unable to agree as to the then prevailing market rent for like premises to be used as Base Rent for a renewal term then the same shall be determined by arbitration. In the case of any dispute between the Landlord and the Tenant as to the then prevailing market rent for like premises to be used as Base rent for a renewal term, the matter shall be referred to a single arbitrator appointed by the parties for determination. If the parties cannot agree on a single arbitrator, each party shall appoint an arbitrator within fifteen (15) days after notice of failure to agree served by one party on the other. Each party shall advise the other party in writing of its arbitrator so appointed. In the event a party shall fail to appoint an arbitrator, and notify the other party in writing of his identity within the said 15 days limit, the arbitrator appointed by the other party shall act as a sole arbitrator. Upon the appointment of an arbitrator by each of the parties, the two arbitrators shall then appoint a third arbitrator (and failing their agreement on a third, the same shall be appointed by a Justice of the Court of Queen's Bench of Alberta on application by either party hereto) and the three arbitrators shall then proceed to determine**

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the matters in dispute. The dispute shall be determined by majority decision of the arbitrators (or the sole arbitrator, if one is agreed upon or applicable) and such determination shall be final. Each arbitrator shall be a disinterested person of recognized competence in the real estate business in the City of Calgary. The expenses of such arbitration shall be shared equally by the Landlord and the Tenant, unless otherwise determined by the arbitrator(s). Except as otherwise herein provided, the arbitration shall be conducted in accordance with the provisions of the Arbitration Act of Alberta and any amendments thereto or successors to such statute, which provisions shall apply mutatis mutandis. The Tenant shall provide a written notice to the Landlord of its intention to exercise its option to renew at least seven (7) months prior to the end of the original term or renewal term as the case may be. The same terms and conditions will prevail during a renewal term, excluding therefrom any further option to renew beyond the renewal term, any tenant inducements, cash payments, moving allowances, rights to expand, rights of first offer, free rent periods and further fixturing periods. Notwithstanding the foregoing, the Base Rent for the renewal term shall not be less than the Base Rent for the original term.

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THIS LEASE is dated the 20<sup>th</sup> day of **May, 2005**, and is made between

WESTPEN PROPERTIES LTD.

-and-

VERSA POWER SYSTEMS LTD.

(the "Tenant")

## **ARTICLE 1 GRANT**

### **1.1 The Leased Premises**

The Landlord leases to the Tenant, and the Tenant leases from the Landlord, the Leased Premises, to have and to hold for the Term, unless sooner terminated by the Landlord pursuant to this Lease.

### **1.2 Use of Common Elements**

The Tenant has the non-exclusive right to use the Common Elements for the purposes for which they are intended, subject to this Lease.

### **1.3 Quiet Enjoyment**

If the Tenant performs its obligations under this Lease, it may hold and use the Leased Premises without interference by the Landlord or any other Person claiming through the Landlord, subject to this Lease.

### **1.4 Basic Terms**

The Basic Terms shall form an integral part of this Lease as though they were set forth herein in full.

## **ARTICLE 2 CONSTRUCTION AND FIXTURING**

### **2.1 Construction of the Leased Premises**

The Tenant will examine the Leased Premises before taking possession and unless the Tenant serves the Landlord with written notice specifying any deficiencies or defects within ten (10) days after taking possession, the Tenant will be deemed to have examined the Leased Premises and to have agreed that they are in good order and that the Landlord's Work has been satisfactorily completed.

### **2.2 Fixturing Period**

Intentionally Deleted.

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### **2.3 Construction Delays and Early Occupancy Penalty**

Intentionally Deleted.

## **ARTICLE 3 TENANT'S COVENANTS**

### **3.1 Base Rent**

The Tenant will pay to the Landlord, without demand, the Base Rent, calculated in accordance with Paragraph 7 of the Basic Terms, payable in advance in equal monthly installments, beginning on the Commencement Date and thereafter on the first day of every month of the Term.

### **3.2 Taxes**

- a. The Tenant will pay its share of Realty Taxes in one of the following manners: (i) if the Leased Premises are separately assessed by the lawful taxing authority on a basis that includes an equitable allocation of the Common Elements reasonably attributable thereto, the Tenant will pay the amount of the separate assessment directly to the taxing authority; or (ii) if the Leased Premises are not separately assessed or, if the Landlord elects, acting equitably, that Realty Taxes be allocated on a proportionate share basis, the Tenant will pay its Proportionate Share of Realty Taxes, directly to the Landlord.
- b. The Tenant will promptly pay all Business Taxes for the Leased Premises: (i) to the taxing authorities or (ii) if imposed on the Landlord, to the Landlord or as the Landlord directs. If a separate bill is not issued by the relevant authority for Business Taxes for the Leased Premises, the Tenant will pay its Proportionate Share of Business Taxes for the Building.
- c. The Tenant will, on the Landlord's request, promptly deliver to the Landlord receipts for payment of all its Business Taxes and Realty Taxes and any assessments or other information related to Realty Taxes and Business Taxes.

### **3.3 Operating Costs and Utilities**

- a. The Tenant will pay to the Landlord its Proportionate Share of Operating Costs.
- b. The Tenant will pay directly to the suppliers, before delinquency, any Utilities separately metered to the Leased Premises which are billed directly to the Tenant by the supplier.
- c. The Tenant will pay to the Landlord a Utilities Charge for the supply to and use of ~~(i) any excess Utilities in the Leased Premises and (ii) any Utilities if separate meters are not installed, or the Landlord elects to supply any Utility~~ used or consumed in the Leased Premises. The Landlord will determine the Utilities Charge on an equitable basis. The Tenant will pay the Utilities Charge to the Landlord within ten (10) days after the delivery of a statement by the Landlord.

### **3.4 Payment of Additional Rent**

- a. All amounts payable under this Lease other than Base Rent are "Additional Rent".
  - b. The Landlord may estimate the Tenant's Proportionate Share of any amount at the commencement of each fiscal year for the Building (or calendar year), or fraction of a fiscal
-

year within the Term. The Tenant will pay to the Landlord its Proportionate Share of the estimated amounts in equal monthly installments in advance throughout the period for which the estimate is made. However, if the Landlord is obligated by the taxing authorities to pay the full amount of Realty Taxes over a portion of the calendar year, the amount of the Tenant's contribution so estimated shall, at the Landlord's option, be adjusted and be payable by the Tenant to the Landlord in equal monthly installments in advance over the portion of the calendar year in which the entire amount of such Realty Taxes becomes due and payable by the Landlord. The Landlord may periodically revise its estimates and notify the Tenant of the revised estimates, and the Tenant's monthly payments will be adjusted accordingly.

- c. Within a reasonable time after the end of the fiscal year (or in the case of Realty Taxes, after receipt of the final bills) the Landlord will provide to the Tenant a statement of the actual amounts payable by the Tenant, showing in reasonable detail the determination of the costs and the calculation of the Tenant's payment. Any amounts owing by the Tenant to the Landlord will be paid within ten (10) days after the date of delivery of the statement by the Landlord. Any amounts owing by the Landlord to the Tenant will be credited to the Tenant's account, without interest.

### 3.4A Area Determination

- a. The Landlord may from time to time, as it deems necessary, cause the Leasable Area of the Leased Premises, the Building or any part thereof to be recalculated or remeasured and the cost thereof shall be included in Operating Costs (except as otherwise provided in this Section 3.4A). If any calculation or determination by the Landlord of the Leasable Area of any premises (including the Leased Premises) is disputed or called in question, it shall be calculated or determined by the Landlord's architect or surveyor from time to time appointed for that purpose, whose certificate shall be conclusive and binding upon the parties hereto. The cost of such calculation or determination shall be included in Operating Costs; provided that if the Tenant disputes the Landlord's calculation or determination and the calculation or determination by the Landlord's architect or surveyor agrees with the Landlord's calculation or determination within a two percent variance, the Tenant shall pay the full cost of **the Landlord's and its architect's or surveyor's** such calculation or determination forthwith upon demand.
- b. If any error shall be found in the calculation of the Leasable Area of the Leased Premises or in the calculation of the Tenant's Proportionate Share, Rent (including without limitation Base Rent) shall be adjusted for the fiscal year in which that error is discovered and for the fiscal year preceding the fiscal year in which the error was discovered, if any, and thereafter but not for any prior period.

### 3.5 Post-dated Cheques and Overdue Rent

The Tenant will deliver to the Landlord, at the beginning of each twelve (12) month period (or less if the Term remaining is less than twelve (12) months), a series of monthly post-dated cheques for the total of the monthly payments of Base Rent and any Additional Rent that is payable monthly under this Lease. **Alternatively the Tenant may elect to pay by pre-authorized bank debit procedures or automated computer issued cheques.** ~~Upon written notice to the Tenant, the Tenant shall pay Base Rent and Additional Rent to the landlord by electronic funds transfer (EFT) in which case the Tenant will provide to the Landlord the necessary authorization and account information to permit the Landlord to debit the Rent by EFT. If the~~

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Tenant defaults in paying Rent, the unpaid Rent bears interest at the Stipulated Rate from the due date to the date of payment.

### **3.6 Deposit**

The Tenant shall deliver to the Landlord, on or before the Commencement Date, the Deposit to be held by the Landlord as a security deposit (the "Security Deposit") for the faithful performance by the Tenant of the terms, covenants and conditions on the part of the Tenant to be performed hereunder. There shall be no interest payable on such Security Deposit.

The Tenant shall not have the right to direct that the Landlord apply the Security Deposit to Rent. If the Tenant defaults under this Lease, the Landlord may use all or part of any remaining Deposit towards the cost of remedying the default, without prior notice to the Tenant. Upon the Landlord's written demand following any such appropriation, the Tenant shall pay to the Landlord an amount sufficient to restore the Deposit. If the Tenant complies with the provisions of this Lease, the remaining Deposit shall be applied to the last month's Rent, **plus GST**, payable at the end of the Term.

### **3.7 Use**

The Tenant will, ~~continuously throughout the term~~, use the Leased Premises only for the use set out in Paragraph 9 of the Basic Terms and for no other purpose. The Tenant shall satisfy itself that such use is permissible pursuant to all applicable zoning and other municipal laws and regulations. The Tenant shall also be solely responsible for obtaining its own occupancy permit.

### **3.8 Conduct of Business**

In the conduct of the Tenant's business, the Tenant will:

- a. not allow or cause any act to occur in or about the Building and the Lands which, in the Landlord's opinion, hinders or interrupts the flow of vehicular and pedestrian traffic to, in and from the Building and the Lands or in any way obstructs the free movement of Persons doing business in the Building or on the Lands;
- b. not allow or cause business to be solicited in any part of the Building or the Lands (other than the Leased Premises), nor carry on any business or do or suffer any act or thing which may constitute or result in a nuisance to the Landlord or to other tenants of the Building, nor display any merchandise elsewhere outside the Leased Premises at any time.

### **3.9 Observance of Law**

The Tenant will, at its expense, promptly comply with all governmental requirements from time to time in effect relating to its ability to enter into and comply with this Lease or which pertain to the Leased Premises, the Tenant's use of the Leased Premises, the conduct of business in the Leased Premises, or the doing of work in the Leased Premises. The Tenant is not required, however, to remedy work done by the Landlord in contravention of any law.

### **3.10 Tenant's Insurance**

- a. The Tenant will maintain at its cost (i) "all risks" property insurance on a ~~full~~-replacement cost basis, insuring all property owned by the Tenant or for which the Tenant is legally liable which is installed, located or situated within the Leased Premises or elsewhere in

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the Building (which will contain the standard mortgage clause required by each Mortgagee) and (ii) public liability and property damage insurance with respect to the Leased Premises and the Tenant's use ~~and occupancy~~ of the Building (which will be written on a comprehensive basis with inclusive limits of at least three million dollars (\$3,000,000.00) for each occurrence for bodily injury for any one or more Persons or property damage ~~or such other amount as the Landlord may from time to time reasonably require upon not less than thirty (30) days' notice at any time during the Term~~ and contain a severability of interests clause and cross liability clauses) and (iii) **Tenant warrants that comprehensive pressure vessel and machinery insurance is not required at this time however in the event the Tenant brings onto the Leased Premises a pressure vessel, Tenant shall secure comprehensive pressure vessel and machinery insurance**, including repair or replacement endorsement in an amount **satisfactory to the Landlord** ~~not less than full replacement costs of all Leasehold Improvements and of all boilers, pressure vessels, heating, ventilating and air conditioning equipment and miscellaneous electric apparatus owned or operated by the Tenant or by others (other than the Landlord) on behalf of the Tenant in the Premises, or relating to or serving the Premises and providing coverage with respect to all objects introduced into the Leased Premises by or on behalf of the Tenant or otherwise constituting Leasehold Improvements and (iv) plate glass insurance on all internal and external glass within or fronting the Leased Premises and (v) business interruption insurance on the profit form providing all risks coverage with a period of indemnity of not less than 12 months and subject to stated amount co-insurance clause and (vi) any other form of insurance with whatever limits the Tenant, the Landlord, acting reasonably, or a Mortgagee requires from time to time, in form, in amounts and for risks against which a prudent tenant under similar circumstances would insure.~~

- b. Each policy of insurance will name, as insureds, the Tenant and the Released Persons, each as their respective interests may appear. The policies (other than the Tenant's liability policy) will contain a waiver of any subrogation rights which the Tenant's insurers may have against the Released Persons and those for whom any of them is in law responsible, whether or not any loss or damage is caused or contributed to by the negligence of any of them. All policies will (i) be non-contributing and apply only as primary and not excess to any other insurance available to any of the Released Persons; (ii) not be invalidated (in relation to the interests of any of the Released Persons) by reason of any breach of warranties, representations, declaration or conditions contained in the policies; and (iii) contain an undertaking by the insurers to notify the Landlord and each Mortgagee in writing not less than thirty (30) days before any material change, cancellation or termination.
  - c. Prior to taking possession of the Leased Premises and on every renewal date, the Tenant will deliver certificates of insurance executed by the Tenant's insurers. No review or approval of any insurance policy or certificate by the Landlord will in any way alter the Landlord's rights under this Lease.
  - d. The Tenant will not allow anything to occur that results in (i) an increase in premiums for any insurance carried by the Landlord or (ii) the cancellation or threatened cancellation or a reduction of coverage under any of the Landlord's insurance policies on any part of the Building. **Landlord warrants that the Tenant's use, in the event the Tenant uses the Leased Premises as contemplated under this Lease, will not increase the Landlord's insurance premiums or cancel the Landlord's insurance policy.**
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### 3.11 Release

Except to the extent of its gross negligence or willful misconduct, none of the Released Persons is liable for any death or injury from any occurrence in, or relating to any part of the Building or damage to or loss of (or loss of use of) property of the Tenant or of others wherever located, however caused, including any failure in the supply of any services or Utilities, the existence of any Hazardous Substances or the exercise by the Landlord of any of its rights under this Lease.

### 3.12 Indemnity

Unless arising from the gross negligence or willful misconduct of a Released Person, the Tenant will indemnify the Released Persons from all losses or claims in connection with loss of life, personal injury, damage to property or anything else arising from a default of any of the Tenant's obligations under this Lease, or from any occurrence in or relating to the Leased Premises, or from the occupancy or use by the Tenant of all or any part of the Leased Premises, or occasioned wholly or in part by an act or omission of the Tenant or those for whom the Tenant is legally responsible or by anyone permitted to be on the Leased Premises by the Tenant.

### 3.13 Maintenance and Alterations

- a. Subject to Article 5, the Tenant will keep the Leased Premises and all improvements, fixtures and equipment in the Leased Premises, including windows, which are not part of the Common Elements in a good condition and state of repair, subject to reasonable wear and tear. The Landlord shall have the right at all reasonable times to examine the condition of the Leased Premises and the Tenant shall not be entitled to compensation for any inconvenience, nuisance or discomfort caused thereby. Landlord will notify the Tenant of deficiencies and the Tenant shall make good any deficiencies for which it is responsible within fifteen (15) days from the date of such notice.
  - b. **The Landlord shall keep the HVAC System in and for the exclusive use of the Leased Premises, in good repair and operating order (the cost of same shall be included in the Tenant's Additional Rent). The Tenant acknowledges that any special HVAC equipment installed in the Leased Premises required specifically for the Tenant's operations shall be maintained and repaired by the Tenant at their sole cost and expense. The Tenant will maintain the temperature in the Leased Premises at a reasonable standard of comfort for normal occupancy at all times. At the option of the Landlord, either the Landlord or the Tenant shall maintain, repair and, if necessary, replace the HVAC System in or which exclusively serves the Premises, including any variable air volume, valve or thermostat in the Premises and items (including, but not limited to, booster units and make-up air units) installed by or on behalf of the Tenant that are located outside the Premises, (collectively, the "Premises HVAC System"), in each case at the sole cost and expense of the Tenant. In the event that the Landlord elects to require the Tenant to maintain, repair and replace the Premises HVAC System, the Tenant shall enter into a maintenance contract for such purpose with a contractor and on terms and conditions satisfactory to the Landlord, acting reasonably. In the event that the Landlord elects to maintain, repair and replace the Premises HVAC System, then the Tenant shall pay as Additional Rent, monthly in advance, the Landlord's estimated costs and expenses of all such maintenance, repairs and replacement. Such costs and expenses shall include, without limitation, depreciation or amortization on such Premises HVAC System including interest on the undepreciated or unamortized portion of the costs of such Premises HVAC System and an administration fee of fifteen percent (15%) of all**
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~~of the foregoing costs and expenses. If the Premises are served by an HVAC System which serves more than one premises in the Building, then the Tenant shall be obligated to pay a share only of the foregoing costs and expenses as equitably determined by the Landlord upon the advice of a qualified engineer and such costs or expenses shall be allocated amongst the tenants served by such HVAC System. The foregoing costs and expenses shall exclude the cost of fuel and electricity consumed in the use of such HVAC System to the extent only that such costs and expenses are charged separately to and paid by the Tenant pursuant to other provisions of this Lease. Such costs and expenses shall be subject to annual estimate and year-end adjustment in the same manner as Operating Costs.~~

- c. ~~If required by the Landlord or any governmental agency the Tenant will remove from the Leased Premises any Hazardous Substances which are located, stored or incorporated in or on any part of the Leased Premises which the Tenant or those for whom the Tenant is in law responsible brings onto or generates from the Leased Premises or which the Tenant or those for whom the Tenant is in law responsible suffers or permits to be brought onto or generated from the Leased Premises at any time and for whatever reason (but this shall not imply any authority to bring onto or generate from the Leased Premises (or suffer or permit the same) any Hazardous Substances which are otherwise prohibited by this Lease). The foregoing obligation to remove Hazardous Substances will survive the expiration of the Term or earlier termination of this Lease.~~
  - d. The Tenant will not make any Alterations to the Leased Premises without the Landlord's prior written approval, which will not be unreasonably withheld if: (i) the Alterations meet the then current standard for the Building; (ii) adequate plans and specifications are produced; and (iii) the Tenant has obtained all requisite governmental approvals. The Tenant will pay to the Landlord, on demand, all costs incurred by the Landlord in connection with the approval and supervision of any Alterations, including architectural and engineering consultants' fees, plus a fee equal to five percent (5%) of the cost of the Alterations on account of the Landlord's overhead and administration costs.
  - e. All Alterations will be performed: (i) by competent workers whose labour union affiliations are compatible with others employed by the Landlord and its contractors; (ii) in a good and skillful manner; and (iii) in accordance with the approved plans and specifications and the Landlord's reasonable requirements.
  - f. The Landlord may require that any maintenance of or Alterations to the Leased Premises be performed by the Landlord at the Tenant's cost if they affect: (i) the Common Elements; or (ii) any part of the Building outside the Leased Premises. The Tenant will pay to the Landlord, on demand, the Landlord's costs of the maintenance or Alterations, including architectural and engineering consultants' fees, plus an Administration Fee.
  - g. If any part of the Building requires repair, replacement or alteration because of anything done or omitted to be done by the Tenant or its officers, directors, agents, employees, contractors, invitees or licensees then the Tenant will pay to the Landlord, on demand, the Landlord's cost of the repairs, replacements or alterations, plus an Administration Fee.
  - h. The Tenant shall not be entitled to install upon the roof of the Building any equipment except as consented to in writing by the Landlord, which consent may be arbitrarily withheld, but if given shall be subject to whatever conditions the Landlord, in its sole discretion, deems necessary in the circumstances.
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### 3.14 Removal of Alterations and Restoration of Leased Premises

All Alterations which are not the Tenant's trade fixtures (racking, signage) are leasehold improvements which include the following, fixtures, installations, alterations and additions from time to time made, erected or installed to or in the Leased Premises, in addition to, beyond or replacing the base building standards, including all partitions however affixed (excluding moveable and demountable partitions), millwork and affixed wall units, internal stairways, doors, hardware, light fixtures, carpeting and other applied floor finished, and heating, ventilating and air conditioning equipment and other building services not forming part of the Landlord's base building equipment and services and the property of the Landlord. The Tenant will not remove any leasehold improvements from the Leased Premises at any time prior to the expiry or earlier termination of this Lease. At that time, the Tenant will remove at its own expense those leasehold improvements installed by or on behalf of the Tenant that the Landlord requires it to remove and its trade fixtures, or else they will, at the Landlord's option, become the property of the Landlord. The Tenant will repair any damage caused to any part of the Building by such removal. At the expiry or termination of this Lease, the Tenant will also deliver all keys and security cards for the Leased Premises to the Landlord.

It is acknowledged by the Landlord that the Tenant has installed or shall be installing, clean rooms and ceramic or fuel cell manufacturing equipment and any associated air handling, ventilation or make-up air equipment in the Leased Premises and the Landlord acknowledges the Tenant can remove those aforementioned items at lease expiry.

However, in the event the Tenant removes anything from the Leased Premises as contemplated in the forgoing sentence, the Tenant shall put the Leased Premises back into the same condition as prior to the installation. For example, if the Tenant removes a make up air unit, they shall restore the roof to it's original state including new decking, insulation and repair of the membrane for the penetration. ~~All Alterations which are not the Tenant's trade fixtures are leasehold improvements and the property of the Landlord. The Tenant will not remove any leasehold improvements from the Leased Premises at any time prior to the expiry or earlier termination of this Lease. At that time, the Tenant will remove at its own expense those leasehold improvements installed by or on behalf of the Tenant that the Landlord requires it to remove and its trade fixtures, or else they will, at the Landlord's option, become the property of the Landlord. The Tenant will repair any damage caused to any part of the Building by such removal. At the expiry or termination of this Lease, the Tenant will also deliver all keys and security cards for the Leased Premises to the Landlord.~~

### 3.15 Signs and Advertising

- a. The Tenant shall, at its expense, erect and maintain identification signage of a type and in a location specified in writing by the Landlord, subject to the Landlord's prior approval of such signage and compliance with all governmental authorities and the Landlord's sign policy for the Building. The Landlord may require that any such sign be illuminated. Any such sign shall remain the property of the Tenant and shall be maintained by the Tenant at its sole cost and expense and the Tenant shall pay for the electricity consumed by such sign. If the electricity consumption for any of the Tenant's signs is not separately metered, the Tenant shall pay, on demand, such portion of the cost of such electricity as is equitably apportioned to the Leased Premises by the Landlord. At the expiration or earlier termination of this Lease, the Tenant will remove any such sign from the Leased Premises at its expense and will promptly repair all damage caused by its installation or removal.
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- b. If the Landlord, acting reasonably, objects to any sign, picture, advertisement, notice, lettering or decoration which may be painted, affixed or displayed in any part of the interior of the Leased Premises and which is visible from the exterior thereof, the Tenant shall forthwith remove or replace same at the Tenant's expense.
- c. If a free-standing pylon exists on the Lands, the Tenant shall, at its cost and upon the Landlord's request, place a sign standard on such pylon sign in such location and of such reasonable size as specified in writing by the Landlord, subject to the Landlord's prior approval of such sign standard and compliance with all governmental authorities and the Landlord's sign policy. The Tenant shall pay the monthly fee set out in Paragraph 10 of the Basic Terms towards the maintenance and operation of the pylon sign.

#### **ARTICLE 4**

#### **LANDLORD'S COVENANTS**

##### **4.1 Realty Taxes**

The Landlord will pay Realty Taxes. However, the Landlord may defer payment of Realty Taxes, or defer compliance with laws in connection with the levying of Realty Taxes, to the extent legally permitted, if it diligently prosecutes a contest or appeal of the Realty Taxes.

##### **4.2 Landlord's Insurance**

The Landlord will maintain: (a) all risks insurance on the Building (excluding any property of the Tenant or any other Persons on the Leased Premises); (b) public liability and property damage insurance with respect to the Landlord's operations in the Building; and (c) whatever other forms of insurance the Landlord or the Mortgagee reasonably consider advisable **including rental interruption insurance**. The Landlord's insurance will be in those reasonable amounts and with those reasonable deductibles that a prudent owner of a similar building would maintain, having regard to size, age and location. This Section does not relieve the Tenant from liability arising from or contributed to by its negligence or misconduct. The Tenant has no insurable interest and no right to receive proceeds or other benefits under any of the Landlord's insurance policies.

##### **4.3 Maintenance and Repairs**

Subject to Article 5, the Landlord will maintain and repair the Common Elements as would a prudent owner of a similar industrial building, having regard to size, age and location of the Building, subject to the following exceptions: (a) any occurrence not covered by insurance required to be maintained by the Landlord under this Lease, or where the cost of repair exceeds the insurance proceeds actually received by the Landlord (not taking into account deductibles); and (b) damage or injury caused or to the extent contributed to by anything done or omitted to be done by the Tenant or those for whom it is legally responsible.

##### **4.4 Control of the Building by the Landlord**

- a. The Landlord will control the management and operation of the Building. In doing so, the Landlord will have, among its other rights, the right to: (i) temporarily obstruct parts of the Building for necessary maintenance, repair or construction; (ii) employ managers for the operation, maintenance and control of the Building, which may be managed by any Person that the Landlord designates; and (iii) perform any act as, in the use of good business judgement, the Landlord determines to be advisable for the more efficient and proper
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operation of the Building; (iv) make changes or improvements to all or any part of the Building, acting reasonably and in such a way as to minimize disruption of the Tenants enjoyment of the Leases Premises; ~~(v) and diminish, expand, alter, relocate or rearrange the Building and, with the consent of the Tenant, which consent will not be unreasonably withheld, relocate or rearrange the Leased Premises from that shown on Schedule "A", the purpose of which Schedule is solely to show the approximate location of the Premises..~~

- b. Despite anything to the contrary in this Lease, the Landlord is not liable for and the Tenant will not be entitled to any compensation or Rent reduction as a result of any repairs, alterations, improvements or additions being made to the Common Elements or the Leased Premises.

#### **4.5 Landlord's Right of Entry**

It is not a re-entry or a breach of quiet enjoyment if the Landlord enters the Leased Premises at reasonable times after reasonable written notice (but if the Landlord determines there is an emergency, no notice is required): (i) to examine them, including an examination to ensure that there are no Hazardous Substances present and there are appropriate safeguards in place to avoid the existence of any Hazardous Substances; (ii) to make permitted or required repairs, alterations, improvements or additions to the Leased Premises or the Building; or (iii) to show them to prospective purchasers, tenants or mortgagees, in each case (to the extent reasonably possible in the circumstances) without unreasonably interfering with the Tenant's business operations in the Leased Premises. The Landlord may take material onto the Leased Premises for these purposes. **Landlord acknowledges that the Tenant may have proprietary or sensitive information or products in the Leased Premises and the Landlord shall cooperate with the tenant while entering the Leased Premises to protect any proprietary or sensitive information or products.** Rent will not abate or be reduced while the repairs, alterations, improvements or additions are being made. During the 6 months prior to the expiry of the Term, the Landlord may place upon the Leased Premises "For Rent" or "For Sale" notices of reasonable size and in reasonable locations.

### **ARTICLE 5 DAMAGE AND DESTRUCTION AND EXPROPRIATION**

#### **5.1 Damage to the Leased Premises**

Subject to Section 5.2, if the Leased Premises are damaged or destroyed as a result of a peril insured or required to be insured against by the Landlord, the Landlord will repair the Leased Premises promptly to the extent of the Landlord's Work, at the Landlord's expense. If part or all of the Leased Premises are not usable for the purposes contemplated by this Lease because of the damage or destruction, Base Rent and Additional Rent will abate in the proportion that the Leasable Area of the part of the Leased Premises that is not usable is to the Leasable Area of the whole of the Leased Premises from the date of the damage or destruction until the date when the Landlord substantially completes the Landlord's Work.

#### **5.2 Damage to or Expropriation of the Building**

- a. Despite anything to the contrary in this Lease, if the Building is damaged, destroyed or expropriated, whether or not the Leased Premises are affected, to such an extent that in the Landlord's opinion the repair or replacement of the Building is impractical, then the Landlord may, upon thirty (30) days' notice to the Tenant given within ninety (90) days after the damage, destruction or expropriation, terminate this Lease, and all Rent will abate

as of the effective date of the termination. A sale, conveyance, or other disposition to a governmental authority made in contemplation of an expropriation or a threatened expropriation will be considered an expropriation for the purposes of this Section.

- b. If the Landlord does not terminate this Lease, the Landlord will promptly rebuild or repair the Building to the extent of its obligations under its leases for leasable premises but the rebuilt or repaired Building may be different in configuration or design from the Building before the damage, destruction or expropriation.
- c. The Landlord and the Tenant will co-operate with each other if there is an expropriation of all or part of the Leased Premises or the Building, so that each may receive the maximum award to which it is legally entitled.

### **5.3 No Claim by Tenant**

Except in respect of abatement of Rent as provided for in this Article, no claim for compensation or damages, direct or indirect, shall be made by the Tenant by reason of the loss of use, inconvenience or otherwise arising from the necessity of repairing any portion of the Building however the necessity may arise so long as any such repair to be carried out by the Landlord is carried out with reasonable diligence.

## **ARTICLE 6 TRANSFERS BY TENANT AND SALE OR FINANCING BY LANDLORD**

### **6.1 Consent to Transfer**

- a. The Tenant will not enter into a Transfer without the Landlord's prior written consent. Notwithstanding any statute or common law, such consent may be unreasonably withheld if (1) the Tenant is not the original Tenant and itself in occupation of the whole of the Leased Premises, (2) there is an Event of Default; but otherwise consent will not be unreasonably withheld. The Landlord will be deemed to be reasonable in withholding its consent to any Transfer if:
    - i. the Transfer is, as of the date thereof, contrary to any covenants or restrictions granted by the Landlord to other existing tenants or occupants of the Building, or to the Mortgagee or any other parties;
    - ii. in the Landlord's opinion reasonably formed: (1) the financial background, business history and capability of the Transferee is not satisfactory; (2) the Transferee may not be able to pay the Rent in full when due and payable; or (3) the nature or character of the proposed business of the Transferee is such that it might harm the Landlord's business or reputation or reflect unfavourably on the whole or any part of the Building, the Landlord, the other tenants of the Building or the image of any of them, or is unethical, immoral or illegal;
    - iii. the Transferee pays or gives to the Transferor money or other value that is reasonably attributable to the Alterations that are owned by the Landlord or that the Landlord has paid for in whole or in part; or
    - iv. the Landlord does not receive sufficient information from the Tenant or the Transferee to enable it reasonably to make a determination concerning the matters set out above.
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This Section does not apply to a Transfer that occurs on the death of the Transferor, or a Transfer described in paragraph (c) of the definition of Transfer, where the Tenant occupies all of the Leased Premises and is either (A) a Public Corporation, or (B) a subsidiary body corporate (as currently defined under the Canada Business Corporations Act) of a Public Corporation and the shares of the Public Corporation (and not the Tenant or any of its affiliates) are transferred or issued. The Tenant will nevertheless notify the Landlord if any exempt Transfers take place.

- b. If the Tenant intends to effect a Transfer, then the Tenant will give prior written notice to the Landlord of such intent, specifying the proposed Transferee and providing additional information including, without limitation, a copy of a bona fide written offer with respect to the proposed Transfer which the Tenant is prepared to accept, subject to compliance with the provisions of this Lease and which must disclose any and all monetary payments or other consideration made or to be made by the proposed Transferee as consideration for such Transfer, and any other information concerning the financial or business status of the Transferee that the Landlord requires. The Landlord will, within thirty (30) days after having received notice and all necessary information, notify the Tenant in writing either that it consents or does not consent to the Transfer.

## **6.2 Transfer Condition**

The following conditions apply to Transfers and to consents given by the Landlord: (a) the Landlord's consent is not a waiver of the requirement for consent to subsequent Transfers; (b) the Transferor will remain liable for the Tenant's obligations and indemnify the Landlord against the Transferee's failure to perform the Tenant's obligations after the Transfer; (c) the Transferee will execute an agreement directly with the Landlord agreeing to be bound by this Lease as Tenant; (d) the Landlord may apply amounts collected from the Transferee to any unpaid Rent; and (e) once the Landlord's consent is given, the Transfer must take place within sixty (60) days or the consent will expire and the Transfer may not take place unless the Tenant again complies with Article 6.

## **6.3 Additional Terms Respecting Transfers**

- a. Acceptance by the Landlord of Rent or other payments by a Transferee is not, (i) a waiver of the requirement for the Landlord to consent to the Transfer, (ii) the acceptance of the Transferee as Tenant, or (iii) a release of the Tenant from its obligations under this Lease.
  - b. No part of the Leased Premises or this Lease will be listed or advertised by the Tenant or any other Person for the purpose of a Transfer, without the Landlord's written consent which consent shall not be unreasonably withheld.
  - c. Any documents evidencing the Transfer may be prepared by the Landlord.
  - d. The Landlord will not be liable for any claims, actions, damages, liabilities or expenses of the Tenant or any Transferee arising out of the Landlord delaying or unreasonably withholding its consent to any Transfer and the Tenant's only recourse will be to bring an application for a declaration that the Landlord must grant its consent to the Transfer.
  - e. In the event of any Transfer by the Tenant by virtue of which the Tenant receives a rent in the form of cash, goods or services from the Transferee which is greater than the Rent payable hereunder to the Landlord, the Tenant will pay any such excess to the Landlord
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in addition to all Rent payable under this Lease, and such excess rent shall be deemed to be further Rent payable hereunder.

#### **6.4 Sale by the Landlord**

If the Landlord transfers or disposes of all or any part of the Building or the Landlord's interest under this Lease, then to the extent that the transferee or disposee agrees with the Landlord to assume its obligations under this Lease, the Landlord will be released from them, **except for existing defaults as of the date of the transfer or disposition.**

#### **6.5 Subordination and Attornment**

This Lease is subordinate to every existing and future mortgage, charge, trust deed, financing, refinancing or collateral financing against the Leased Premises or the Building and any renewals or extensions of or advances under them (collectively, "encumbrances"). The Tenant will, on request, attorn to and recognize as landlord the holder of any such encumbrance, the Owner, or any transferee or disposee of the Building or of an ownership or equity interest in the Building.

The Tenant will, within fifteen (15) days after request, sign and deliver any reasonably requested subordination or attornment document.

#### **6.6 Status Statement**

Within fifteen (15) days after request, the Tenant will sign and deliver to the Landlord or anyone with or proposing to take an interest in all or part of the Building, a status statement or certificate in the form attached hereto as Schedule "F", stating that this Lease is in full force and effect, any modification to this Lease, the commencement and expiry dates of this Lease, the date to which Rent has been paid, the amount of any prepaid Rent or deposits held by the Landlord and whether there is any existing default and the particulars, ~~and any other information the Landlord may reasonably request.~~

~~If any such certificate requested by the Landlord is not returned to the Landlord within fifteen (15) days after its request therefore, the Landlord shall have the right and is hereby appointed by the Tenant as its agent and attorney to prepare and execute such certificate.~~

### **ARTICLE 7 DEFAULT**

#### **7.1 Right to Re-enter**

- a. If an Event of Default occurs, (i) the full amount of the current month's and the next three (3) months' installments of Rent (calculated according to Section 7.1(b), will immediately be due and payable, and (ii) ~~exercise its right of distress and (iii)~~ the Landlord may re-enter and re-possess the Leased Premises. If the Landlord re-enters, at the Landlord's option, this Lease and all of the Tenant's rights under it will terminate without prejudice to the Landlord's right to recover any arrears of Rent and damages for any previous breach by the Tenant of this Lease. Despite any termination for an Event of Default, the Landlord may sue the Tenant for damages, including loss of future Rent as a result of this Lease being prematurely terminated and the cost of recovering the Leased Premises. If any legal proceedings are instituted because of an Event of Default, the Tenant will pay the Landlord's expenses, including legal fees on a solicitor and client basis.
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On such a termination, the Tenant will promptly (and in any case within ten (10) days after written notice requiring it to do so) remove all of its property from the Leased Premises, or the Landlord may at any time remove all or part of the property from the Leased Premises and store it in a public warehouse or elsewhere at the cost of the Tenant. Despite anything to the contrary, in such event the Landlord will not be responsible for loss or damage to any of the Tenant's property regardless of how the loss or damage is caused, even if by negligence. If the Tenant fails to remove its property as required, or if it fails to pay the Landlord's costs of removal and storage within ten (10) days after written notice specifying those costs, the Tenant will be considered to have abandoned its property and the Landlord will be entitled to retain or to sell or dispose of it for the Landlord's own benefit.

- b. If the Landlord terminates this Lease for an Event of Default, then for the purpose of calculating future Rent, the annual Rent will be considered to be equal to: the aggregate of the annual Base Rent and Additional Rent payable under this Lease over the balance of the Term, assuming a five percent (5%) annual increase in Additional Rent year over year for the remainder of the Term.

## **7.2 Re-entry Without Termination**

No re-entry or taking possession of the Leased Premises by the Landlord will be considered an election to terminate this Lease unless a written notice of such intention is given to the Tenant. If the Landlord re-enters or takes possession of the Leased Premises, it may either terminate this Lease or make any necessary alterations and repairs in order to relet all or any part of the Leased Premises, for a term (which may extend beyond the Term), at a rental rate and on any other terms the Landlord in its sole discretion considers advisable. All Rent received by the Landlord from each reletting will be applied in the following order: any indebtedness other than Rent due; any costs of reletting including brokerage and legal fees (on a solicitor and client basis) and the costs of the required alterations and repairs; any arrears of Rent; and any remainder applied against future Rent. If rent received from the reletting for any month is less than the Rent to have been paid by the Tenant for that month, the Tenant will pay the deficiency monthly in advance on the first day of each month. If the Landlord relets without terminating, it may nevertheless subsequently terminate the Lease for the previous Event of Default.

## **7.3 Distress Waivers**

Despite any legislation or law: (a) none of the inventory, furniture, equipment or other property at any time owned by the Tenant is exempt from distress; and (b) no lack of compliance with any requirement concerning the day of the week, time of day or night, method of entry, giving of notice, appraising of goods, or anything else, will render any distress unlawful where the Tenant owes arrears of Rent at the time of the distress.

## **7.4 Landlord May Cure the Tenant's Default**

If the Tenant defaults in the payment of money that it is required under this Lease to pay to a third party, the Landlord may, after five (5) days' notice to the Tenant, pay all or part of the amount payable. If the Tenant otherwise defaults under this Lease the Landlord may give the Tenant at least ten (10) days' prior notice (except that no notice of any default will be required in an emergency) and if the Tenant does not, within such period, commence diligently and then proceed diligently to cure the default, the Landlord may perform or cause to be performed all or part of what the Tenant failed to perform. The Tenant will pay to the Landlord on demand, the Landlord's expenses incurred under this Section 7.4, plus an Administration Fee.

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## **7.5 Application of Money**

The Landlord may apply amounts received from or due to the Tenant against amounts due and payable under this Lease, even if otherwise requested by the Tenant, unless the Tenant can satisfactorily demonstrate to the Landlord, acting reasonably, that an amount is in fact not due and payable.

## **7.6 Remedies Generally**

The remedies under this Lease are cumulative and may be exercised independently or in combination with others. No remedy is exclusive or dependent on any other remedy. The specifying or use of a remedy under this Lease does not limit rights to use other remedies available at law generally.

## **7.7 Legal Costs**

The Tenant hereby agrees to pay to the Landlord, within five (5) days after demand, all legal fees, on a solicitor and his own client basis, incurred by the Landlord for the enforcement of any rights of the Landlord under this Lease or in the enforcement of any of the provisions of this Lease or in the obtaining of possession of the Premises or for the collection of any monies from the Tenant or for any advice with respect to any other matter related to this Lease.

# **ARTICLE 8 GENERAL PROVISIONS**

## **8.1 Net Lease**

- a. This Lease is a completely net lease to the Landlord. Except as otherwise provided in this Lease, the Landlord is not responsible for any costs relating to the Leased Premises, or its use, occupancy or contents, or the business carried on in it, and the Tenant will pay all charges, impositions, costs and expenses relating to the Leased Premises except as otherwise provided in this Lease.
- b. The Tenant will pay GST on Rent and any other GST imposed by the applicable legislation on the Tenant in respect of this Lease, in the manner and at the times directed by the applicable legislation. The Landlord will have all of the same remedies and rights of recovery for it as it has for non-payment of Rent.
- c. ~~The Landlord may from time to time remeasure the Leasable Area of the Leased Premises and the Leasable Area of the Building and readjust the Base Rent and the Tenant's Proportionate Share of Additional Rent accordingly, upon written notice to the Tenant.~~

## **8.2 Landlord and Representatives to Act Reasonably and in Good Faith**

In making a determination, calculation, estimate, or allocation or in granting any consent or approval under this Lease, the Landlord will act reasonably and in good faith, subject to the specific provisions of this Lease. Each accountant, architect, engineer, surveyor or other professional Person employed or retained by the Landlord will act in accordance with the applicable principles and standards of the Person's profession.

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### **8.3 Entire Agreement and General Interpretation**

This Lease includes any Schedules and riders attached to it. There are no covenants, promises, agreements, conditions or understandings, either oral or written, between the parties concerning this Lease, the Leased Premises, the Building or any other related matter, except those that are set out in this Lease. No amendment or addition to this Lease is binding upon the Landlord or the Tenant unless it is in writing and signed by the Tenant and the Landlord. Each obligation under this Lease is a covenant. The Basic Terms, captions, section numbers, article numbers and Table of Contents do not define, limit, construe or describe the scope or intent of the sections or articles. The use of the neuter singular pronoun to refer to the Tenant is a proper reference even though the Tenant is an individual, a partnership, a corporation or a group of two or more individuals, partnerships or corporations. The grammatical changes needed to make the provisions of this Lease apply in the plural sense when there is more than one Tenant and to corporations, associations, partnerships or individuals, males or females, are implied. Wherever the word "including" is used it is intended to mean "including but not limited to", and "includes" has a corresponding meaning. This Lease will be governed by the laws of Canada and the Province in which the Building is located. Time is of the essence of this Lease. The Landlord and Tenant agree that this Lease creates a relationship of landlord and tenant only and specifically does not create nor constitute a partnership between them.

### **8.4 Severability**

If a part of this Lease or the application of it is unenforceable or illegal to any extent, the part: (i) is independent of and severable from the remainder of this Lease, and its unenforceability or illegality does not affect the remainder of this Lease; and (ii) continues to be enforceable to the fullest extent permitted by law. No part of this Lease will be enforced against a Person, if, or to the extent that by doing so, the Person is made to breach a law, rule, regulation or enactment.

### **8.5 Overholding**

~~The Tenant shall surrender possession of the Leased Premises immediately upon the expiration or earlier termination of this Lease.~~ If the Tenant remains in possession of the Leased Premises after the Term, there is no tacit renewal of this Lease despite anything to the contrary, and the Tenant will occupy the Leased Premises as a month to month tenant. The monthly Base Rent, payable in advance on the first day of each month, will be equal to the total of: (a) twice the Base Rent payable for the last month of the Term and (b) the Additional Rent payable for the last month of the Term. All of the other provisions of this Lease will apply as far as they can to a monthly tenancy, with any necessary modifications being assumed.

### **8.6 Successors**

This Lease applies to the successors and assigns of the Landlord and the heirs, executors, administrators and permitted successors and permitted assigns of the Tenant. If there is more than one Tenant, they are individually and collectively liable under this Lease.

### **8.7 Waiver**

The waiver by the Landlord or the Tenant of a default under this Lease is not a waiver of any subsequent default. The Landlord's acceptance of Rent after a default is not a waiver of any preceding default under this Lease even if the Landlord knows of the preceding default at the time of acceptance of the Rent. No obligation or term of this Lease will be considered to have been waived by the Landlord or the Tenant unless the waiver is in writing.

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## **8.8 Notices**

Notices, demands, consents or requests (a "Notice") under this Lease will be in writing and will be delivered in person or sent by registered mail postage prepaid and addressed: (a) if to the Landlord, at the address specified in paragraph 2 of the Basic Terms or to such other Person at any other address that the Landlord designates by Notice; and (b) if to the Tenant, at the Leased Premises, or, at the Landlord's option, to the Tenant's address specified in Paragraph 4 of the Basic Terms.

A Notice will be considered to have been given or made on the day that it is delivered, or, if mailed, provided postal service is not or is not expected to be interrupted, three (3) days after the date of mailing. If there is more than one Tenant, it will suffice if the Landlord delivers or mails a Notice to only one of them.

## **8.9 Registration**

The Tenant will not allow or cause this Lease or any assignment or sublease or other document evidencing an interest of the Tenant in this Lease or the Leased Premises to be registered except that, the Tenant may register a caveat against title to the Lands, disclosing the existence of this Lease, describing the parties, the Term, and options to renew, if any, but not to disclose the rent or other financial details of this Lease.

The Tenant agrees that it will, at its sole expense, discharge and withdraw from title any such registration within thirty (30) days after the expiration or sooner termination of this Lease. If such registration is not discharged and withdrawn during the aforesaid time, the Landlord shall have the right and is hereby appointed by the Tenant as its agent and attorney to prepare, execute and register such documentation as is required to discharge and withdraw any such registration.

## **8.10 Secured Claims**

The Tenant will ensure that no Secured Claim is registered or filed against: (a) any part of the Building; (b) the Landlord's or any Owner's or Mortgagee's interest in any part of the Building; or (c) the Tenant's interest in the Leased Premises or any of the leasehold improvements in the Leased Premises; by any Person claiming by, through, under or against the Tenant or its contractors or subcontractors. If a Secured Claim is registered or filed and the Tenant fails to promptly discharge it after receipt of notice from the Landlord, the Landlord may discharge the Secured Claim or notice of it by paying the amount claimed to be due into court (together with whatever additional amounts are required to be paid into court to obtain its removal) or directly to the holder of the Secured Claim and the Tenant will pay to the Landlord on demand all costs (including legal fees) incurred by the Landlord in connection with the Secured Claim, plus an Administration Fee.

**8.10A** The Tenant acknowledges that, notwithstanding any other provision contained in this Lease, the obligations of and rights against the Landlord under this Lease shall be performed, satisfied and paid only out of and enforced against, and recourse hereunder shall be had only after judgement and only against, the right, title and interest of the Landlord from time to time in, and the Landlord's revenue derived from, the Building. No obligation of the Landlord hereunder or in respect hereof is personally binding upon, nor shall any resort or recourse be had, judgement issued or execution of other process levied against, the Landlord (except to the extent necessary for enforcement under the first sentence of this Section and only for that purpose), or against any other assets or revenues of the Landlord. The only remedy against the Landlord shall be an action for damages.

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### 8.11 Rules and Regulations

The Tenant will comply with ~~and shall cause its employees, agent, invitees and others over whom the Tenant can reasonably be expected to exercise control to comply with~~ the Rules and Regulations passed and revised by the Landlord from time to time ("Rules and Regulations"). However, the Tenant will not be responsible for complying with any Rules and Regulations in addition to those contained in Schedule "D", unless notice of them is first given to the Tenant. No Rules and Regulations will be enforced against the Tenant in a discriminatory manner or impose any charge or payment on the Tenant which is not expressly provided for in this Lease.

### 8.12 Indemnifier

**Intentionally deleted.** ~~The Tenant shall deliver to the Landlord, on or before the execution of this Lease by the Tenant, the Landlord's standard form of indemnity agreement duly executed by the Indemnifier, if any.~~

### 8.13 Force Majeure

Despite anything to the contrary, if the Landlord or the Tenant is, in good faith, prevented from doing anything required by this Lease because of Force Majeure, the doing of the thing is excused for the period of the Force Majeure and the party prevented will do what was prevented within the required period after the Force Majeure **but this does not excuse either party from payment of amounts they are required to pay at the times specified in this Lease.** ~~Neither party shall be entitled to any compensation for any inconvenience, nuisance or discomfort thereby occasioned, or to cancel or terminate this Lease and this does not excuse either party from payment of amounts they are required to pay at the times specified in this Lease.~~

### 8.14 Acceptance of Lease

The Tenant accepts this Lease of the Leased Premises to be held by it as Tenant, subject to the terms set out in this Lease.

### 8.15 Privacy Policy

The Tenant and/or Indemnifier hereby consents to the collection, use and disclosure of personal information collected by or on behalf of Bentall Real Estate Services Limited Partnership ("Bentall") or its agents, affiliates, or service providers for the purposes of: (i) considering the suitability of the Tenant and/or Indemnifier both for the initial Lease term and any renewals thereafter if applicable; (ii) taking action for collection of rents in the event of default by the Tenant; (iii) to facilitate the Pre-Authorization Payment plan and (iv) as otherwise provided in Bentall's Privacy Policy, a copy of which is available at [www.Bentall.com](http://www.Bentall.com). Consent under this agreement includes the disclosure of such information to credit agencies, collection agencies and existing or potential lenders, investors and purchasers. The Tenant also consents to, and confirms it's authority to consent to, Bentall's collection, use and disclosure, for such purposes, of personal information about employees of the Tenant and/or Indemnifier and other individuals whose personal information is provided to or collected by Bentall in connection with this Lease.

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**ARTICLE 9**  
**ENVIRONMENTAL MATTERS**

**9.1 Definitions**

For the purposes of this section:

- a. "Contaminants" means any pollutants, contaminants, deleterious substances, underground or above-ground tanks, asbestos materials, hazardous, corrosive, or toxic substances, special waste or waste of any kind, or any other substance which is now or hereafter prohibited, controlled or regulated under Environmental Laws; and
- b. "Environmental Laws" means any statutes, laws, regulations, orders, bylaws, standards, guidelines, permits, and other lawful requirements of any governmental authority having jurisdiction over the Leased Premises and the project now or hereafter in force relating in any way to the environment, health, occupational health and safety, or transportation of dangerous goods, including the principles of common law and equity.

**9.2 Tenant's Covenants and Indemnity**

The Tenant covenants and agrees as follows:

- a. **subject to Section 9 of the Basic Terms**, not to use or permit to be used all or any part of the Leased Premises for the sale, storage, manufacture, disposal, use, or any other dealing with any Contaminants, without the prior written consent of the Landlord, which may be unreasonably withheld;
  - b. to strictly comply, and cause any person for whom it is in law responsible to comply, with all Environmental Laws regarding the use and occupancy of the Leased Premises;
  - c. to promptly provide to the Landlord a copy of any environmental site assessment, audit, or report relating to the Leased Premises conducted by or for the Tenant at any time and at the Landlord's request from time to time to obtain from an independent environmental consultant approved by the Landlord an environmental site assessment of the Leased Premises or an environmental audit of the operations at the Leased Premises, including any additional investigations as the environmental consultant may recommend. Should any assessment recommend that a clean-up plan be prepared and that a clean-up be undertaken because of any deposit, spill, discharge, or other release of Hazardous Substances that occurs during the Term of this Lease, at or from the Premises or the Common Facilities, which arises at any time from the Tenant's use or occupancy of the Premises and the Common Facilities, then the Tenant shall, at the Tenant's own expense, prepare and submit the required plans and all related bonds and other financial assurances; and the Tenant shall carry out all such clean-up plans;
  - d. to maintain all environmental site assessments, audits, and reports relating to the Leased Premises or the project in strict confidence (including without limitation any governmental authority) except as required by law, or to the Tenant's professional advisers and lenders on a need-to-know basis, or with the prior written consent of the Landlord, which consent may be unreasonably withheld;
  - e. to promptly notify the Landlord in writing of any release of a Contaminant or any other occurrence or condition at the Leased Premises or the project or any adjacent property
-

which could contaminate the Leased Premises or the Project or subject the Landlord or the Tenant to any fines, penalties, orders, investigations, or proceedings under Environmental Laws;

- f. on the expiry or earlier termination of this Lease, or at any time if requested by the Landlord or required by any governmental authority under Environmental Laws, to remove from the Leased Premises all Contaminants, and to remediate any contamination of the Leased Premises or the project or any adjacent property resulting from Contaminants, in either case brought onto, used at, or released from the Leased Premises by the Tenant or any person for whom it is in law responsible. The Tenant shall perform these obligations promptly at its own cost and in accordance with Environmental Laws. All such Contaminants shall remain the property of the Tenant, notwithstanding any rule of law or other provision of this Lease to the contrary and notwithstanding the degree of their affixation to the Leased Premises or the project; and
  - g. at least three (3) months prior to the the expiry or earlier termination of this Lease, or at any time if requested by the Landlord or required by any governmental authority under Environmental Laws, to obtain a Phase II Report of the Leased Premises by an independent and qualified environmental consultant, which report shall include recommendations for remediation of the Leased Premises. If the Phase II Report reveals contamination or any Hazardous Substances at the Leased Premises the Tenant shall complete the remediation recommendations set out in the Phase II Report prior to the expiration of the Term of the Lease; and
  - h. remove from the Leased Premises all Contaminants, and to remediate any contamination of the Leased Premises or the project or any adjacent property resulting from Contaminants, in either case brought onto, used at, or released from the Leased Premises by the Tenant or any person for whom it is in law responsible. The Tenant shall perform these obligations promptly at its own cost and in accordance with Environmental Laws. All such Contaminants shall remain the property of the Tenant, notwithstanding any rule of law or other provision of this Lease to the contrary and notwithstanding the degree of their affixation to the Leased Premises; and
  - i. to indemnify, ~~defend and hold harmless~~ the Landlord and its directors, officers, employees, agents, successors and assigns from any and all liabilities, actions, damages, claims, losses, costs, fines, penalties, and expenses whatsoever (including all legal and consultants' fees and expenses and the cost of remediation of the Leased Premises, the project and any adjacent property) arising from or in connection with:
    - i. any breach of or non-compliance with the provisions of this Article by the Tenant; or
    - ii. any release or alleged release of any Contaminants at or from the Leased Premises related to or as a result of the use and occupation of the Leased Premises or any act or omission of the Tenant or any person for whom it is in law responsible.
-

The obligations of the Tenant under this Article shall survive the expiry or earlier termination of this Lease.

THE PARTIES HAVE SIGNED BELOW to indicate their agreement.

**WESTPEN PROPERTIES LTD.**  
(Landlord)

Per: /s/ Clark Morris

Name: Clark Morris

Title: Vice President, Asset Management

Per: /s/ Malcolm F. Leitech

Name: MALCOLM F. LEITECH

Title: CHIEF OPERATING OFFICER

I/We have the authority to bind the Corporation.

**VERSA POWERS SYSTEMS LTD.**  
(Tenant)

Per: /s/ Robert A. Stoke

Name: ROBERT A. STOKES

Title: PRESIDENT

Per: /s/ Brian P. Borglum

Name: Brian P. Borglum

Title: Vice President and Chief Technology Officer

I/We have the authority to bind the Corporation.

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**AFFIDAVIT VERIFYING  
CORPORATE SIGNING AUTHORITY**

I, Robert Stokes of Golden, Colorado

(city, province)

make oath and say:

1. I am an officer or a director of Versa Power Systems, Ltd. named in the within or annexed Agreement.
2. I am a proper signing officer of the corporation and am authorized by it to execute the Agreement without affixing a corporate seal.

SWORN before me at the City of \_\_\_\_\_ >

\_\_\_\_\_ State >  
Des Plaines in the ~~Province~~ >

of Illinois this > /s/ Harriet V. Heidelmeier  
> (signing office)

25th day of May, 2005 >  
>  
>

Notary Public  
~~A Commissioner for Oaths~~ in and  
for the Province of Illinois  
Expiry Date:

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**AFFIDAVIT VERIFYING  
CORPORATE SIGNING AUTHORITY**

I, Brian Borglum of Calgary, Alberta

(city, province)

make oath and say:

1. I am an officer or a director of Versa Power Systems, Ltd. named in the within or annexed Agreement.
2. I am a proper signing officer of the corporation and am authorized by it to execute the Agreement without affixing a corporate seal.

SWORN before me at the City of

>

State

>

Des Plaines in the ~~Province~~

>

of Illinois this

>

>

/s/ Harriet V. Heidelmeier

(signing office)

>

25th day of May, 2005

>

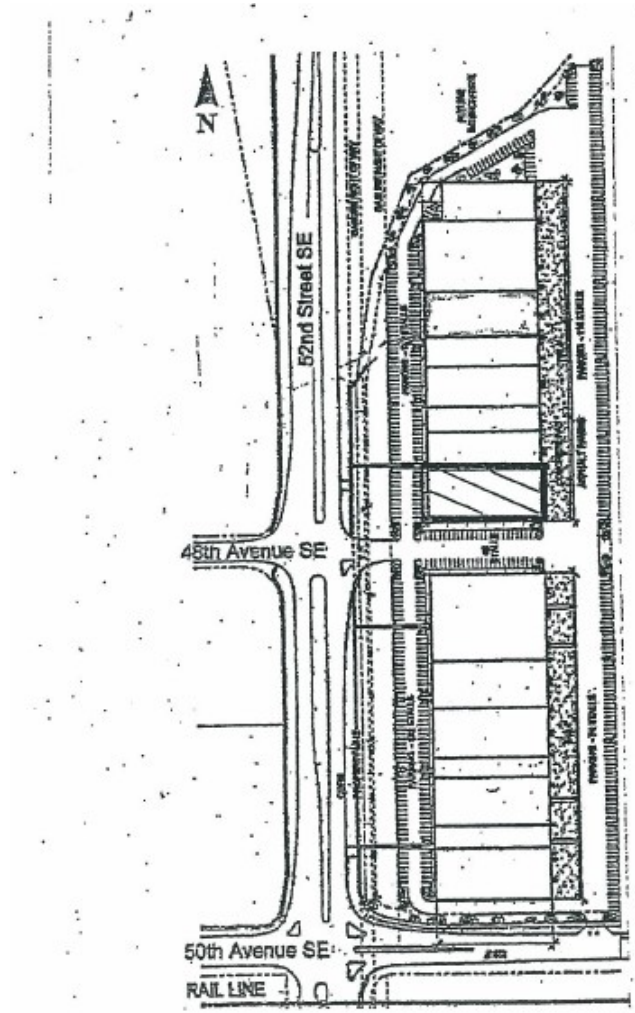
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Notary Public  
~~A Commissioner for Oaths~~ in and  
for the Province of Illinois  
Expiry Date:

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**PLAN OF THE INDUSTRIAL BUILDING**  
**52ND STREET BUSINESS PARK**  
**4820 - 52ND STREET SE**



**SCHEDULE "B"**  
**LEGAL DESCRIPTION**

Plan Industrial Sites Calgary 2725BA, Block 4

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## **SCHEDULE "C"**

### **DEFINITIONS**

"Administration Fee": fifteen percent (15%) of the amounts to which the fee is applied.

"Alterations": any repairs, alterations, replacements, decorations or improvements to the Leased Premises.

"Applicable Rate": the capital tax rate specified from time to time under any statute of Canada and any statute of the Province which imposes a tax in respect of the capital of corporations. Each Applicable Rate will be considered to be the rate that would apply if none of the Landlord or the Owners employed capital outside of the Province.

~~"Architect" means the independent architect, engineer, surveyor, or other qualified professional from time to time named by the Landlord. The decision of the Architect whenever required and any related certificate shall be final and binding on the parties.~~

"Base Rent": shall be that amount as described in item #7 of the Basic Terms.

"Building" means the property municipally described in paragraph 5 of the Basic Terms, including the Lands and the structures, buildings, Common Elements, Facilities and all leasable premises located on them from time to time.

"Building Capital": the amount of capital which the Landlord determines is invested from time to time by the Landlord and the Owners, without duplication, in acquiring, developing and improving the Building. Building Capital will not be increased by any financing or refinancing except to the extent that the proceeds are invested directly as Building Capital. In determining Building Capital, where part of the Landlord's or the Owners' (or any related or associated corporations') capital is not taxable under any statute imposing a tax in respect of corporations' capital, the exempt capital will be apportioned by the Landlord among the assets of the Landlord, the Owner and the related or associated corporations.

"Business Taxes": the taxes, license fees and other charges for the Tenant's improvements, equipment and facilities in any part of the Building, the business carried on in the Leased Premises, the use, occupancy or ownership of any part of the Building by the Tenant or its subtenants or licensees, or the Landlord or the Owner, and any substitute taxes and other charges whether imposed against the Landlord or the Tenant.

"Capital Tax": an amount determined by multiplying each of the Applicable Rates by the Building Capital and totaling the products.

"Common Elements": the structural elements and the Facilities (a) in the Building that, from time to time, are not designated or intended to be leased to tenants of the Building, (b) in leasable premises that are provided for the benefit of the tenants of the Building and their employees, customers and other invitees, in common with others, or (c) designated from time to time as Common Elements by the Landlord, including the HVAC System and any Facilities outside the Building that serve the Building.

"Deposit": means the sum of money set out in paragraph 8 of the Basic Terms;

"Event of Default": whenever:

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- a. any Rent is not paid when due and the non-payment continues for five (5) days after notice to the Tenant;
- b. any of the Tenant's obligations under this Lease is breached (other than a breach specified in paragraph (c)) and (i) the breach is not remedied within ten (10) days after notice to the Tenant specifying particulars of the breach, or (ii) if ten (10) days is not a reasonable time to remedy the breach, the Tenant has not commenced diligently to remedy the breach within the ten (10) day period or is not proceeding diligently to remedy the breach within a reasonable time; or
- c. any of the following events occurs: (i) the Tenant or a Person carrying on business in a part of the Leased Premises, or an Indemnifier becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment or arrangement with its creditors; (ii) a receiver or manager is appointed for all or a part of the property of the Tenant or of another Person carrying on business in the Leased Premises, or of an Indemnifier or any of the Tenant's assets are taken or seized under a writ of **execution enforcement**, assignment, charge or other security instrument; (iii) steps are taken for the dissolution, winding up or other termination of the Tenant's or the Indemnifiers existence or for the liquidation of their respective assets; (iv) the Tenant or the Indemnifier makes or attempts to make a bulk sale of assets regardless of where they are situated; (v) the Tenant abandons or attempts to abandon the Leased Premises; or (vi) the Tenant effects or attempts to effect a Transfer that is not permitted under this Lease.

"Facilities": the areas, facilities, Utilities, improvements, equipment, fixtures and installations.

"Force Majeure": a strike, labour trouble, inability to get materials or services, power failure, restrictive governmental laws or regulations, riots, insurrection, sabotage, rebellion, war, act of God, or any other similar reason, that is not the fault of the party asserting it. Force Majeure does not include inability to obtain funds.

"GST": goods and services taxes, value-added taxes, multi-stage taxes, business transfer taxes or other similar taxes however they are characterized.

"HVAC System": the heating, ventilating and air-conditioning Facilities, if any, serving the Leased Premises.

"Hazardous Substances": any hazardous or toxic substances or materials including any products of waste, asbestos, urea formaldehyde foam insulation, radon gas and PCB's, or any other contaminant or pollutant, including any substance from time to time defined as a contaminant or pollutant or as a hazardous or toxic substance or material under any environmental law now or hereafter enacted or promulgated by any governmental authority.

"Landlord's Work": the condition in which the Leased Premises are delivered by the Landlord to the Tenant prior to the commencement of any improvements to the Leased Premises by or on behalf of the Tenant ~~as described in Schedule "E"~~.

"Lands": the lands described in Schedule "B", as they may be altered from time to time.

"Leasable Area": the area of the Leased Premises expressed in square feet measured from (a) the exterior face of exterior walls, doors and windows; (b) the exterior face of interior walls, doors and windows, separating the Leased Premises from Common Elements, if any; and (c) the centre

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line of interior party walls separating the Leased Premises from adjoining leasable premises, all as determined by the Landlord's Architect. Leasable Area includes interior space even if it is occupied by projections, structures or columns (which may even be Common Elements). ~~Second story office or mezzanine area of the Leased Premises will be added to the Leasable Area of the Leased Premises as calculated on the foregoing bases. Additionally, the Leasable Area of the Leased Premises will include a proportionate share designated by the Landlord of the area of electrical/utility closet/rooms in the Building.~~ The Leasable Area of the Building will be equal to the aggregate of the Leasable Area of all leasable premises in the Building, calculated on the foregoing basis.

"Leased Premises": those premises in the Building which are described and identified in item 5 of the Basic Terms Sheet attached to this Lease and as more specifically shown in Schedule "A" hereto.

"Mortgagee": a creditor that holds all or part of the Building as security, but a creditor, chargee or security holder of a tenant is not a Mortgagee.

"Operating Costs": the total amounts incurred by or on behalf of the Landlord in insuring, operating, cleaning, administering, managing, supervising, maintaining, repairing and replacing the Building ~~including the Facilities and Common Elements~~, including net G.S.T. paid thereon, calculated as if the Building were 100% occupied by tenants during the Term, including without duplication: (a) costs of Utilities and supplies and the cost of heating, ventilating and air-conditioning the Building, including any outside maintenance contracts; (b) salaries and benefits of personnel employed in connection with the maintenance, operation and management and administration and supervision of the Lands and Building whether on or off site; (c) costs of any Facilities added to the Building for the greater comfort and convenience of tenants; (d) costs of environmental inspections or audits of the Building; (e) depreciation or amortization of any costs (which are not charged fully in the financial year they are incurred) of the maintenance, cleaning and operating equipment, master utility meters and all other Facilities that are part of the Common Elements including the HVAC System, in accordance with sound accounting principles; (f) interest, calculated at two (2) percentage points above the Prime Rate, on any undepreciated part of the costs referred to in paragraph (e); (g) Business Taxes and Realty Taxes payable by the Landlord with respect to the Common Elements, and Capital Tax; (h) the cost of repairs to, and maintenance of, the Building, and the costs of supplies and equipment used in connection therewith (i) premiums and other charges incurred by the Landlord with respect to insurance on the Building, including, without limitation, fire and "All Risk" perils insurance, public liability and property damage insurance, boiler and machinery insurance, and loss of rental income insurance, worker's compensation insurance for the employees specified in subsection (b) above and other casualties against which the Landlord may reasonably insure provided that if the Landlord shall self insure, the Landlord shall include a deemed amount equal to the amount that would have been included if the Landlord had placed insurance with a third party; costs incurred in connection with inspection and servicing of transportation vehicles and equipment, electrical distribution and mechanical equipment and the costs of supplies and equipment used in connection therewith; (j) costs incurred for fuel or other energy for heating and air-conditioning the Building and operating, maintaining and repairing the HVAC System thereof, (except to the extent that such costs are payable by or recoverable from one or more tenants directly other than as part of Operating Costs) and for electricity, steam or other power required in connection with the lighting, use and operation of the Building but excluding costs for power for lighting and equipment that are additional service costs; (k) water, sewer and service charges, garbage and waste removal costs; (l) unemployment insurance expenses, pension plan and any other payments payable in connection with the employment of any of the employees specified in subsection (b) above; (m) sales and excise

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taxes on goods and services provided by the Landlord to manage, operate or maintain the Development and its equipment; (n) fees and expenses of accountants, lawyers and other professionals pertaining to services performed by them relating to the Building; (o) all costs and expenses (including legal and other professional fees) incurred in good faith in verifying the reasonableness of, or in contesting, resisting or appealing, assessments and levies for Taxes or taxes charged against the business of the Landlord which pertains to the management, operation and maintenance of the Building; (p) costs of telephone, stationery, office supplies, and the fair market rental value of space occupied by the Landlord for management, supervisory or administrative purposes relating to the Building and furnishing and fixtures for such space and other materials required for routine operation of the Building; (q) Taxes to the extent attributable to the Lands and/or the Common Elements that are separately assessed and not included as part of the assessed value of premises occupied or to be occupied by tenants (including the Tenant) of the Building (but only if and to the extent that such Taxes have not been taken into account by the Landlord in making any attribution or calculation for the purpose of determining the Tenant's contribution to Taxes); (r) the cost of policing, security, supervision and traffic control; (s) such other direct operating costs, charges and expenditures of a like nature as may be incurred in respect of the property preservation, protection, maintenance and operation of the Building; (t) other costs and expenses not otherwise expressly included hereunder attributable to the maintenance, repair, inspection and operation of the Lands and Building including expenses incurred for the proportionate use of a spur line and switch (if applicable); (u) a management fee equal to **three (3%)** ~~four (4%)~~ percent of Rental Income from the Lands and Building.

Operating Costs will not include, or there will be deducted from Operating Costs: (i) net proceeds of insurance received by the Landlord from its insurers, to the extent that the proceeds relate to costs previously included in Operating Costs; (ii) repairs or maintenance specific to certain tenants or unleased Leasable Premises; (iii) tenant improvements, tenant allowances and leasing commissions; (iv) income taxes (business taxes and Capital Taxes are not considered to be income tax); (v) interest on and capital retirement of debt except (e) and (f); (vi) ground rentals; (vii) expenses relating to the correction of initial construction defects or deficiencies or initial equipment modifications or adjustments; (viii) any costs resulting from any breach of the Landlord's covenants under this Lease; (ix) costs of structural repairs or replacements (other than relating to the roof repairs or replacement of the non-structural components of the roof, which will be included in Operating Costs); (x) costs of repairs or replacements attributable to inherent structural defects or weaknesses; and (xi) costs of remedying any non-compliance with laws in connection with the original construction of the Building or any renovation of or expansion to the Building.

"Owner": any owner of freehold or leasehold title(s) of all or a part of the Building, but a tenant of leasable premises is not an Owner.

"Person": any person, firm, partnership, corporation or other legal entity, including any combination of them.

"Prime Rate": the annual rate of interest from time to time publicly quoted by the Landlord's bank as its reference rate of interest (commonly known as its "prime rate") for determining rates of interest chargeable in Toronto on Canadian dollar demand loans to commercial customers.

"Proportionate Share": a fraction which has as its numerator the Leasable Area of the Leased Premises and as its denominator the Leasable Area of the Building.

"Public Corporation": a corporation whose shares are traded and listed on a recognized stock exchange in Canada or the United States.

"Realty Taxes": the total of: (a) all real property taxes or charges (including local improvement and commercial concentration taxes) from time to time imposed in respect of all or any part of the Building by a taxing authority, and any other amounts that may be imposed instead of or in addition to them, whether against the Landlord, the Tenant or the Owner and whether or not similar to the foregoing, in existence at the Commencement Date, or within the contemplation of the parties and (b) all consulting, appraisal, legal and other costs reasonably incurred in attempting to minimize or reduce those amounts. Realty Taxes do not include corporate, income, profits or excess profits taxes assessed upon the income of the Landlord except those that may be imposed instead of or (so long as they are based on real property) in addition to the taxes and charges described above. Realty Taxes shall in every instance be calculated on the basis of the total Leasable Area of the Building being assessed as fully leased and operational.

"Released Persons": the Landlord and any Owner or Mortgagee, and each of their respective ~~management companies~~, directors, officers, employees (while in the ordinary course of their employment) and agents. In connection with any release or other exculpatory language or an indemnity in favour of the Released Persons, the Landlord is the agent or trustee of and for the benefit of the Owner, the Mortgagee and all of the directors, officers, employees and agents mentioned above.

"Rent": Base Rent and Additional Rent. Rent is payable in Canadian funds without any deduction, abatement or set-off. Rent payable to the Landlord will be paid to the address set out in Paragraph 2 of the Basic Terms or at any other place which the Landlord designates in writing. Rent for any fractional month at the beginning or end of the Term will be pro-rated on a daily basis using a period of 365 days.

"Rental Income" means the total of Base Rent and Additional Rent.

"Secured Claim": a construction or other lien or claim, a fixed or floating charge, mortgage, security interest, debenture or other encumbrance, or a notice of any of them.

"Stipulated Rate": the annual rate of interest that is the lesser of (a) the Prime Rate plus five (5) percentage points and (b) the maximum rate permitted by law.

"Transfer": (a) an assignment, sale, conveyance, sublease, licensing or other disposition, or a mortgage, charge or debenture (floating or otherwise) or other encumbrance of this Lease or any interest in it or all or any part of the Leased Premises (whether by operation of law or otherwise), or of any interest in a partnership that is a Tenant under this Lease; (b) a parting with or sharing of possession of all or part of the Leased Premises; (c) a transfer or issue by sale, subscription, assignment, bequest, inheritance, operation of law or other disposition, of all or part of the shares of the Tenant or any of its affiliates (as currently defined under the Canada Business Corporations Act) which results in a change in the effective voting control of the Tenant; or (d) a merger, amalgamation or other similar corporate reorganization involving the Tenant. "Transferor" and "Transferee" have corresponding meanings.

"Utilities Charge": the total, without duplication, of: (a) the cost of water, fuel, power and any other utilities used in the Building allocated to the Leased Premises by the Landlord in accordance with Section 3.3(c) ("Utilities"); (b) the Landlord's costs of determining the Utilities Charge including professional, engineering and consulting fees.

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**SCHEDULE "D"**  
**RULES AND REGULATIONS**

The Tenant will:

- (1) comply with reasonable requests of the Landlord for conservation of energy and life safety; and
- (2) keep the Leased Premises free of insects, rodents and other pests and, if the Landlord requires, retain the services of a pest extermination contractor designated by or acceptable to the Landlord, at the Tenant's expense.

The Tenant will not:

- A) install equipment that overloads the capacity of any utility, electrical or mechanical Facilities in or serving the Leased Premises;
  - B) bring into the Leased Premises any utility, electrical or mechanical Facilities or service not approved by the Landlord in advance;
  - C) bring anything upon the Leased Premises that might damage them or overload the floors;
  - D) allow or cause any trash or debris to be left on any part of the Building or the Lands outside of the Leased Premises, other than in bins or containers designated by the Landlord; and will not remove from the Leased Premises or dispose of any trash or debris other than in the manner and at the times prescribed by the Landlord, at the Tenant's expense;
  - E) allow the roadways, parking areas, sidewalks, entrances, passages, elevators and staircases to be obstructed or used by the Tenant, its agents, servants, contractors, invitees or employees for any purpose other than ingress to and egress from the Leased Premises or the Building;
  - F) place or cause to be placed any additional locks upon any doors of the Leased Premises without the approval of the Landlord and subject to any conditions imposed by the Landlord;
  - G) use the plumbing facilities for any other purpose than that for which they were constructed;
  - H) use any part of the Leased Premises for lodging, sleeping or any illegal purpose;
  - I) **subject to Section 9 of the Basic Terms**, use the Leased Premises for any activity which directly or indirectly involves the preparation, production, generating, storage, removal or disposal of any Hazardous Substances;
  - J) canvass, solicit or peddle in or about the Building;
  - K) allow any odours, vibrations, noises, electronic interference or other undesirable effects to emanate from the Leased Premises or the Lands or any equipment or installation therein, which in the Landlord's opinion, are objectionable or cause any interference with the safety, comfort or convenience of the Building;
  - L) obstruct or otherwise interfere with the heating, air-conditioning or ventilation units contained in the Building;
-

- M) permit any of its servants, invitees, employees or agents to bring upon the Building or the Leased Premises any animals.
-

**SCHEDULE "E"**

**CONSTRUCTION OF THE LEASED PREMISES**

The Tenant acknowledges, having viewed the Leased Premises, and understands and agrees that notwithstanding anything to the contrary contained herein, the same will be delivered and leased to the Tenant and the Tenant hereby agrees to accept the same on an "as is" basis.

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**SCHEDULE "F"**  
**TENANT ACKNOWLEDGMENT**

TO:     =

**Re: [Unit #, Building]**

We hereby certify, with the intent that you and any of your lenders may rely on this and that the information contained herein shall be binding upon us that:

1.       We are a tenant of space in the above building under a lease between (    ) (the "Landlord") and as tenant dated ●, 19●, as amended or renewed (collectively, the "Lease"), details of which are set out in Exhibit A.
  2.       The Lease is unamended except as provided in Exhibit A, is in full force and effect and contains the entire agreement between the Landlord and us relating to the terms of the use and occupation by us of our space, and there are no other agreements or understandings between us and the Landlord.
  3.       The space which is leased to us pursuant to the Lease comprises the area as provided in Exhibit A.
  4.       Except as provided in Exhibit A, the Lease has not been assigned nor has the whole or any part of the space been sublet by us.
  5.       The base rent payable under the Lease is as set out in Exhibit A. There is no free rent period under the Lease except as set out in Exhibit A. Base rent and additional rent under the Lease have been paid to today's date and there has been no prepayment of base rent other than payment of the current month's installment and no security deposit or other prepayment has been made under the Lease, except as provided in Exhibit A.
  6.       We have taken possession of our space and have commenced payment of regular installments of full monthly rent. Our premises are being used for the purpose set out in the Lease. All improvements required to be made to our space by the Landlord have been fully completed and our space is entirely satisfactory for our use.
  7.       There is no default or breach under the Lease on our part nor, to our knowledge, on the part of the Landlord, and the Lease is in good standing.
  8.       There are no loans outstanding between us and the Landlord, whether for tenant improvements or for any other purpose.
  9.       We have no right of termination, option to purchase, right of first refusal or renewal right pursuant to the Lease, except as provided in Exhibit A.
  10.      There is no existing dispute, claim, setoff, defense or counterclaim by or against the Landlord, except as provided in Exhibit A.
  11.      There is no litigation or governmental or municipal proceeding commenced or pending or threatened against us or with respect to the space leased by us.
  12.      We have not received any notice that the Landlord has assigned the Lease or the rent payable under the Lease.
-

13. We have not received the benefit of, and there are no allowances, incentive, inducements, benefit packages or any other moneys owing or which may become due and owing by the Landlord to us at any time (howsoever characterized) under the Lease, except as provided in Exhibit A.

DATED this \_\_\_\_ day of \_\_\_\_\_, 19●.

**[NAME OF TENANT]**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Exhibit A - Lease Information

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**EXHIBIT A**  
**[TO THE TENANT ESTOPPEL CERTIFICATE]**

Unit No.:	_____
Date of Lease:	_____
Gross Rentable Area:	_____
Net Rentable Area:	_____
Annual Base Rent:	_____
Annual Base Rent/Sq. Ft.:	_____
Percentage Rent:	_____
Net Rent:	_____
Expiry of Term:	_____
Renewal Options:	_____
Prepaid Rent:	_____
Security Deposit:	_____
Amendments to Lease:	_____
Inducements:	_____
Tenant Loans:	_____

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LEASE AMENDING AGREEMENT

This Agreement made as of the 20<sup>th</sup> day of April, 2006.

BETWEEN:

**WESTPEN PROPERTIES LTD.**  
(hereinafter referred to as the "Landlord")

OF THE FIRST PART

and

**VERSA POWER SYSTEMS LTD.**  
(hereinafter referred to as the "Tenant")

OF THE SECOND PART

Whereas:

1. By lease indenture dated the 20<sup>th</sup> day of May, 2005, (hereinafter referred to as the "Lease") the Landlord leased and demised unto the Tenant certain premises comprising of thirty two thousand two hundred twenty (32,220) square feet, in the 52<sup>nd</sup> Street Business Centre, in the City of Calgary, in the Province of Alberta, all as described in the Lease, for a term of Five (5) years, the term expiring on the 31<sup>st</sup> day of January, 2011.
2. The Tenant has requested and the Landlord has granted permission for the Tenant to install an Electron Capture Detector in the Leased Premises, upon the terms and conditions set out herein.
3. The Landlord and the Tenant have deemed it expedient and advisable to enter into this Lease Amending Agreement to reflect and set out the agreements and arrangements that have been made respecting the amendments to the Lease.

IN CONSIDERATION of the mutual covenants herein contained the parties hereto agree as follows:

1. The parties acknowledge that the foregoing recitals are true in substance and in fact.
2. The following shall be added to Item 9 of Basic Terms of the Lease:

“Notwithstanding the foregoing, the Landlord hereby grants the Tenant permission to install an Electron Capture Detector in an open warehouse area of the Leased Premises, subject to 9.3 of the Lease set out herein.

3. Section 9.1(a) and (b) of the Lease is hereby deleted in its entirety and replaced with the following:

- a. “Contaminants” means any pollutants, contaminants, deleterious substances, underground or above-ground tanks, asbestos materials, hazardous, corrosive, or toxic substances, special waste or waste of any kind, radioactive materials and substances, or any other substance which is now or hereafter prohibited, controlled or regulated under Environmental Laws; and
- b. “Environmental Laws” means any statutes, laws, regulations, orders, bylaws, standards, guidelines and guideline notes, permits, policies, judge made laws and/or common laws and any orders of a court or governmental authority, public or occupational health and safety having jurisdiction over the Leased Premises and the project now or hereafter in force relating in any way to the environment, health, occupational health and safety or transportation of dangerous goods including the principles of common law and equity, and the manufacture importation, handling, use, reuse, recycling, transportation, storage, disposal, elimination and treatment of a substance, hazardous or otherwise.

4. The following shall be added to Section 9.2(f) to the Lease:

“In addition, the Tenant shall expeditiously and diligently undertake and complete remediation to the satisfaction of the Landlord, of any contamination, excepting radiation which has specific remediation requirements as set out in Section 9.3, of soil, groundwater, surface water, air, and real, personal, moveable and immoveable property caused by Contaminants brought onto, used, stored at, or released from the Leased Premises and/or the Project by the Tenant, its agents, invitees, visitors, licensees, contractors and any person for whom it is at law responsible, prior to the end of the Term, including any extension, early termination or renewal thereof (the Remediation), and should the Tenant be unable to complete Remediation prior to the end of the such Term, then the Tenant shall access the Project at times acceptable to the Landlord and the Tenant shall use efforts to cause the Remediation not to interfere with the operations of those occupants of the Project, including the Landlord, and its obligations to its lenders, successors and assigns. The Tenant further acknowledges and agrees that the obligations of the Tenant with regard to Remediation, including but not limited to radiation, shall survive the expiry, assignment, repudiation, disclaimer or earlier termination of this Lease.”

5. The following shall be added as Section 9.3 to the Lease:

9.3 Radioactive Materials and Substances

The Tenant acknowledges and agrees that it shall not bring on to the Lands any radioactive substances without first providing:



- (a) proof of having obtained all required regulatory approvals regarding radioactive substances; and
- (b) proof of having implemented precautionary measures to prevent a release of radioactive substances; and
- (c) written procedures to respond to a release of radioactive materials from the Project, including the Leased Premises,

to the Landlord and obtaining the Landlord's prior written consent to the use by the Tenant of radioactive materials in or on the Lands, which consent may be withdrawn by the Landlord at any time during the Term or any extension or renewal thereof, on 24 hours written notice to the Tenant, providing the Tenant has not complied with the provisions of this Section 9.3, specifically including but not limited to the Tenant's obligation to Remedy as described in Section 9.2. The Tenant further acknowledges and agrees that if the Landlord, acting reasonably, consents to the use by the Tenant of radioactive materials in the Leased Premises then subject to the provisions of this Lease, the Tenant may use such radioactive substances only in amounts necessary to conduct its business as described herein and the Tenant further acknowledges and agrees that it shall take all precautions and steps recommended and or required under Environmental Laws and as set out in guidelines and guidance notes on the use of radioactive materials (the "Consent") in the Leased Premises.

The Tenant shall forthwith notify the Landlord in writing of any breach, including the details thereof, of any of the provisions of Section 9 of the Lease as soon as the Tenant learns of same. If the Landlord believes on reasonable grounds that radiation is or has been used or created by the Tenant or any person for whom the Tenant is in law responsible including invitees and visitors, in excess of amounts permissible under applicable Environmental Laws and or regulatory authorities governing radiation, then the Tenant shall, if so requested by the Landlord in writing:

(i) conduct within 24 hours of receipt of the Landlord's written notice, at the Tenant's sole cost and expense, a survey and testing by an accredited and qualified firm of consultants specializing in the testing for radiation ("Consultants"), which Consultants must be acceptable to the Landlord, the Landlord acting reasonably, in order to determine the level of radiation in the Leased Premises and outside of the Leased Premises; and

(ii) provide the Landlord with a copy of its Consultant's report forthwith after received by the Tenant, along with written reliance from the Consultants on the report as if the report had been commissioned by, paid for and prepared for the Landlord.

The Tenant acknowledges and agrees that if the levels of radiation in and or outside of the Leased Premises are in excess of amounts permissible under applicable Environmental Laws or are in excess of the standards set by regulatory authorities governing radiation, at the Leased Premises and or Project, as a result of Tenant's

actions or omissions and or the actions or omissions of the Tenant's agents, invitees, visitors, licensees, contractors and any person for whom the Tenant is in law responsible then the Tenant shall, at its own cost and expense and on terms and conditions prepared by the Landlord, reduce the level of radiation forthwith to a level allowable under such applicable Environmental Laws and as set by the regulatory authorities governing radiation and the Landlord, if any (the "Remedy"). In the event the Tenant fails to diligently and expeditiously undertake and complete the Remedy, the Landlord may on prior written notice to the Tenant undertake the Remedy at the Tenant's sole cost and expense but if the Landlord undertakes the Remedy it shall not be under any obligation to complete the Remedy.

The Tenant acknowledges and agrees, even if the Landlord has provided its Consent to the Tenant, to indemnify and hold harmless the Landlord, employees, officer and directors, agents, contractors, invitees and those for whom the Landlord is in law responsible, from and against any and all losses, damages, penalties, fines, costs, fees and expenses (including legal fees on a solicitor and client or substantial indemnity basis and consultants' fees and expenses), resulting from:

(a) any breach of or non-compliance with the obligations and covenants of the Tenant as set out in this Lease; and

(b) any legal or administrative action commenced by, or claim made or notice from, any third party, including, without limitation, any governmental authority, to or against the Landlord and pursuant to or under any Environmental Laws or concerning a release or alleged released of Contaminants at the Leased Premises and or Project into the environment and related to or as a result of the operations of the Tenant or those acting under its authority or control at the Leased Premises or any other premises in the Project, and any and all costs associated with air quality issues, if any, and whether during the Term of this Lease or any prior lease by the tenant of the Leased Premises or any other premises in the Project.

The obligations of the Tenant hereunder relating to Contaminants including but not limited to radiation, shall survive the expiry, assignment, repudiation, disclaimer or earlier termination of this Lease.

The Tenant further acknowledges and agrees, notwithstanding any other provisions of this Lease to the contrary relating to the matter of assignment of this Lease, that the provisions of this Section 9.3 shall not be assigned without the Landlord's written consent to the assignment, which consent may be arbitrarily withheld by the Landlord."

6. With the exception of the amendments to the Lease, insofar as the same relates to the herein contained all of the terms and conditions in the Lease are hereby confirmed and shall remain in full force and effect.

7. This Lease Amending Agreement shall enure to the benefit of the Landlord and the Tenant and their respective successors and assigns.

IN WITNESS WHEREOF the parties have hereto set their hands and seals as of the date first above written.

LANDLORD:

**WESTPEN PROPERTIES LTD.**

Per: /s/ Clark Morris  
c/s

Per: /s/ Malcom F. Leitch

TENANT:

**VERSA POWER SYSTEMS LTD.**

Per: /s/ Robert Stokes  
c/s

Per: /s/

**LEASE RENEWAL AGREEMENT**

This agreement made as of the 11<sup>th</sup> day of November 2010.

BETWEEN:

**52<sup>ND</sup> STREET BUSINESS CENTRE LP**  
**BY ITS GENERAL PARTNER**  
**52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.,**  
a body corporate, authorized to conduct business  
in the Province of Alberta  
(hereinafter referred to as the "Landlord")

OF THE FIRST PART

and

**VERSA POWER SYSTEMS LTD.,**  
a body corporate, authorized to conduct business  
in the Province of Alberta  
(hereinafter referred to as the "Tenant")

OF THE SECOND PART

WHEREAS:

- (a) By lease indenture dated the 20<sup>th</sup> day of May 2005 (hereinafter referred to as the "Original Lease"), Westpen Properties Ltd. (hereinafter referred to as the "Original Landlord") leased and demised unto the Tenant certain premises comprising of thirty two thousand two hundred twenty (32,220) square feet, in the 52<sup>nd</sup> Street Business Centre, in the City of Calgary, in the Province of Alberta, all as described in the Lease, for a term of Five (5) years, the term expiring on the 31<sup>st</sup> day of January, 2011;
- (b) By an amendment of lease dated the 20<sup>th</sup> day of April 2006 (the "Lease Amending Agreement") between the Original Landlord and the Tenant, Paragraph 9 of the Basic Terms and certain provisions contained in Article 9 (Environmental Matters) were amended;
- (c) Effective October 1, 2010 the Original Landlord transferred ownership of the Building and assigned all of its interest as landlord under the Lease to the Landlord named herein;
- (d) The Original Lease together with the Lease Amending Agreement are herein collectively referred to as the "Lease";

- (e) The Lease does contain provisions for the Tenant to be granted a renewal Lease for the Leased Premises; however, the Tenant did not exercise its right to such renewal as outlined in the Lease;
- (f) The Landlord and the Tenant have agreed to enter into a Lease Renewal Agreement for the Leased Premises for a renewal term of three (3) years on the terms and conditions hereinafter set forth.

NOW THEREFORE this agreement witnesseth that in consideration of the premises and of the mutual covenants and agreements herein contained, (the receipt and sufficiency of which is hereby acknowledged) the parties hereto agree as follows:

1. The parties hereby acknowledge, confirm and agree that the foregoing recitals are true in substance and in fact.
2. The Lease shall be renewed for a term of three (3) years to be computed from the 1<sup>st</sup> day of February 2011 and to expire on the 31<sup>st</sup> day of January 2014 (hereinafter referred to as the "Renewal Term").
3. The Base Rent payable by the Tenant pursuant to Paragraph 7 of the Basic Terms of the Lease, yearly, throughout the Renewal Term shall be:

Time Period	Per Sq. Ft. Per Annum	Per Annum	Per Month
1-3	\$7.00	\$225,540.00	\$18,795.00

4. Paragraph 13. a. (Option to Renew) of the Basic Terms of the Lease shall be deleted in its entirety.
5. Schedule "E" of the Lease shall be deleted in its entirety and replaced with:

#### CONDITION OF THE LEASED PREMISES

During the Renewal Term and subject to Landlord's continuing obligation for maintenance and repair as provided in the Lease, the Landlord is not required to perform any work or provide any materials to or in respect of the Leased Premises and the Tenant continues to occupy the Leased Premises in "as-is" condition."

6. With the exception of the amendments to the Lease herein contained, during the Renewal Term all of the terms and conditions contained in the Lease are hereby confirmed (excluding any provisions for free, inducements, Landlord's Work, and any rights to lease additional space and other financial incentives) and the Lease is in full force and effect. Each capitalized term used in this Lease Renewal Agreement and not defined herein shall be deemed to have the same meaning ascribed to it in the Lease.
7. This Lease Renewal Agreement may be executed in any number of counterparts, with the same effect as if all parties had signed the same document and will become effective once a signed counterpart is delivered by each of the parties to the other. The parties agree that the delivery of an executed copy of this Lease Renewal Agreement by facsimile or

electronically shall be legal and binding and shall have the same full force and effect as if the original executed copy of this Lease Renewal Agreement had been delivered.

8. This Lease Renewal Agreement shall enure to the benefit of the Landlord and the Tenant and their respective successors and assigns.

[SIGNATURES APPEAR ON NEXT PAGE]

IN WITNESS WHEREOF the parties have hereto set their hands and seals as of the date first above written.

LANDLORD:

**52<sup>ND</sup> STREET BUSINESS CENTRE LP  
BY ITS GENERAL PARTNER  
52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**

Per: /s/ Clark Morris

Per: \_\_\_\_\_

I/We are authorized to bind the Corporation

TENANT:

**VERSA POWER SYSTEMS LTD.**

Per: /s/ Robert A. Stokes

Per: \_\_\_\_\_

I am/We are authorized to bind the Corporation

**LEASE EXTENSION AND AMENDING AGREEMENT**

THIS AGREEMENT dated the 29<sup>th</sup> day of October 2013 (the "Agreement").

BETWEEN:

**52<sup>ND</sup> STREET BUSINESS CENTRE LP**  
**BY ITS GENERAL PARTNER**  
**52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**  
 (the "Landlord")

OF THE FIRST PART

and

**VERSA POWER SYSTEMS LTD.**  
 (the "Tenant")

OF THE SECOND PART

**WHEREAS:**

- A. By a lease dated the 20<sup>th</sup> day of May 2005 (the "Original Lease"), made between Westpen Properties Ltd., as landlord, and the Tenant, the landlord did demise and lease unto the Tenant certain premises comprising approximately thirty two thousand, two hundred twenty (32,220) square feet, designated as Unit 4852 (the "Leased Premises"), in the building municipally located at 4800 - 52 Street SE in 52<sup>nd</sup> Street Business Centre in the City of Calgary, in the Province of Alberta, all as described in the Original Lease, for a term of five (5) years commencing on the 1<sup>st</sup> day of February 2006 and expiring on the 31<sup>st</sup> day of January 2011.
- B. By a lease amending agreement dated the 20<sup>th</sup> day of April 2006 (the "First Amendment"), the Original Lease was amended as more particularly set out therein.
- C. Effective the 1<sup>st</sup> day of October 2010, 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc. was the successor in title to Westpen Properties Ltd. as the Landlord named herein.
- D. By a lease renewal agreement dated 11<sup>th</sup> day of November 2010 (the "Second Amendment") the term of the Lease was extended for a further three (3) years as more particularly set out therein.
- E. The Original Lease, the First Amendment, and the Second Amendment are hereinafter collectively referred to as the "Lease".
- F. The Landlord and the Tenant have deemed it expedient and advisable to enter into this Agreement to reflect and set out the agreements and arrangements that have been made respecting the extension term.



**NOW THEREFORE** in consideration of the sum of Ten Dollars (\$10.00) now paid by the parties to the other (the receipt and sufficiency whereof is hereby acknowledged), and other mutual covenants and agreements, the parties do hereby agree as follows:

1. The parties hereby acknowledge, confirm and agree that the foregoing recitals are true in substance and in fact.
2. All words and expressions used in this Agreement, unless there is something in the subject matter or context inconsistent therewith, shall have the same meaning ascribed to them in the Lease.
3. The Term of the Lease shall be extended for a period of three (3) years to be computed from the 1<sup>st</sup> day of February 2014 and expiring on the 31<sup>st</sup> day of January 2017 (the “Extension Term”).
4. The Base Rent payable by the Tenant, pursuant to paragraph 7 of the Basic Terms and Section 3.1 of the Lease, annually, throughout the Extension Term shall be:
  - (a) During the entire Extension Term, two hundred forty one thousand, six hundred fifty dollars (\$241,650.00) annually payable in advance in equal consecutive monthly installments of twenty thousand, one hundred thirty seven dollars and fifty cents (\$20,137.50) on the first day of each and every calendar month during such period;

Base Rent has been calculated on the basis that the rental rate for the Leased Premises is seven dollars and fifty cents (\$7.50) per annum per square foot of Leasable Area for the entire Extension Term. Rent shall be adjusted from time to time, if necessary, to conform with the actual Leasable Area of the Leased Premises.

5. In Paragraph 2 of the Basic Terms of the Lease, the following shall be added as the first line:
- “c/o Bentall Kennedy (Canada) LP”
6. Effective the 1<sup>st</sup> day of February 2014, Paragraph 8, Deposit, of Basic Terms of the Lease shall be deleted in its entirety and replaced with the following:
- “8. DEPOSIT: \$45,000.00 of the original Deposit of \$90,000.00 to be applied to Rent for the first two (2) months of the Extension Term, being February and March 2014.
- The remaining \$45,000.00 to be held as security, subject to Section 3.6 of this Lease.”
7. The Tenant is continuing occupation of the Leased Premises in its “as is” condition and the Landlord is not required to perform any work to the Leased Premises.

8. All covenants, conditions and agreements contained in the Lease shall remain in full force and effect and unamended except as otherwise expressly set forth herein and shall apply to the Term herein provided.
9. This Agreement may be executed in any number of counterparts, with the same effect as if all parties had signed the same document and will become effective once a signed counterpart is delivered by each of the parties to the other. The parties agree that the delivery of an executed copy of this Agreement by facsimile or electronically shall be legal and binding and shall have the same full force and effect as if the original executed copy of this Agreement had been delivered.
10. This Agreement shall extend to, be binding upon, and enure to the benefit of, the parties hereto, their respective heirs, executors, administrators, successors and assigns.

**IN WITNESS WHEREOF** the parties hereto have duly executed this Agreement as of the day and year first above written, under the hands of their proper signing officers duly authorized in that behalf or by setting their respective hands and seals in their personal capacity, as the case may be.

**52<sup>ND</sup> STREET BUSINESS CENTRE LP BY ITS GENERAL  
PARTNER 52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**  
(Landlord)

**VERSA POWER SYSTEMS LTD.**  
(Tenant)

By: /s/ Clark Morris  
Name: Clark Morris  
Title: Vice President, Investment Mgmt.

By: /s/ Ross M. Levine, Esq.  
Name: Ross M. Levine, Esq.  
Title: Secretary

By: /s/ D. Azan  
Name: D. Azan  
Title:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

We are authorized to bind the corporation

I/We have authority to bind the corporation

**LEASE EXTENSION AGREEMENT**

THIS AGREEMENT dated the 9<sup>th</sup> day of November 2016 (the “Agreement”).

BETWEEN:

**52<sup>ND</sup> STREET BUSINESS CENTRE LP**  
 BY ITS GENERAL PARTNER  
**52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**  
 (the “Landlord”)

OF THE FIRST PART

- and -

**VERSA POWER SYSTEMS LTD.**  
 (the “Tenant”)

OF THE SECOND PART

**WHEREAS:**

- A. By a lease dated the 20<sup>th</sup> day of May 2005 (the “Original Lease”), made between Westpen Properties Ltd.(“Westpen”), as landlord, and the Tenant, Westpen did demise and lease unto the Tenant certain premises comprising approximately thirty two thousand two hundred twenty (32,220) square feet, designated as Unit 4852 (the “Leased Premises”), in the building municipally located at 4800 – 52 Street SE in 52<sup>nd</sup> Street Business Centre in the City of Calgary, in the Province of Alberta, all as described in the Original Lease, for a term of five (5) years commencing on the 1<sup>st</sup> day of February 2006 and expiring on the 31<sup>st</sup> day of January 2011 (the “Term”).
  - B. By a lease amending agreement dated the 20<sup>th</sup> day of April 2006 (the “1<sup>st</sup> Amendment”), the Original Lease was amended as more particularly set out therein.
  - C. Effective the 1<sup>st</sup> day of October 2010, 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., became the successor to Westpen in title and is the Landlord as named herein.
  - D. By a lease renewal agreement dated 11<sup>th</sup> day of November 2010 (the “1<sup>st</sup> Extension”), the Term was extended for a further three (3) years so to expire January 31, 2014, all upon the terms and conditions set out therein.
  - E. By a lease extension and amending agreement dated the 29<sup>th</sup> day of October 2013 (the “2<sup>nd</sup> Extension”), the Term was extended an additional three (3) years so to expire January 31, 2017, all upon the terms and conditions set out therein.
-

- F. The Original Lease, the 1<sup>st</sup> Amendment, the 1<sup>st</sup> Extension, and the 2<sup>nd</sup> Extension are hereinafter collectively referred to as the "Lease".
- G. The Lease does not contain provisions for the Tenant to be granted an extension term for the Premises.
- H. The Landlord and the Tenant have deemed it expedient and advisable to enter into this Agreement to reflect and set out the agreements and arrangements that have been made respecting the extension of the Term.

**NOW THEREFORE** in consideration of the sum of Ten Dollars (\$10.00) now paid by the parties to the other (the receipt and sufficiency whereof is hereby acknowledged), and other mutual covenants and agreements, the parties do hereby agree as follows:

1. The parties hereby acknowledge, confirm and agree that the foregoing recitals are true in substance and in fact.
2. All words and expressions used in this Agreement, unless there is something in the subject matter or context inconsistent therewith, shall have the same meaning ascribed to them in the Lease.
3. The Term shall be extended for a period of three (3) years to be computed from the 1<sup>st</sup> day of February 2017 and to expire on the 31<sup>st</sup> day of January 2020 (the "3<sup>rd</sup> Extension Term").
4. The Base Rent payable by the Tenant pursuant to paragraph 7 of the Basic Terms and Section 3.1 of the Lease, annually throughout the 3<sup>rd</sup> Extension Term shall be:

<b>Lease Period</b>	<b>Per Sq. Ft. of Rentable Area of Premises/Year</b>	<b>Per Year</b>	<b>Per Month</b>
February 1, 2017 to January 31, 2020	\$7.25	\$233,595.00	\$19,466.25

5. The Tenant is continuing occupation of the Leased Premises in an "as is" condition and the Landlord is not required to perform any work to the Leased Premises.
6. All covenants, conditions and agreements contained in the Lease shall remain in full force and effect and unamended except as otherwise expressly set forth herein.
7. This Agreement may be executed in any number of counterparts; with the same effect as if all parties had signed the same document and will become effective once a signed counterpart is delivered by each of the parties to the other. The parties agree that the delivery of an executed copy of this Agreement by facsimile or electronically shall be legal and binding and shall have the same full force and effect as if the original executed copy of this Agreement had been delivered.
8. This Agreement shall extend to, be binding upon, and ensure to the benefit of, the parties hereto, their respective heirs, executors, administrators, successors and assigns.

**IN WITNESS WHEREOF** the parties hereto have duly executed this Agreement as of the day and year first above written, under the hands of their proper signing officers duly authorized in that behalf or by setting their respective hands and seals in their personal capacity, as the case may be.

**52<sup>ND</sup> STREET BUSINESS CENTRE LP**  
by its General Partner  
52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.  
(Landlord)

**VERSA POWER SYSTEMS LTD.**  
(Tenant)

By: /s/ Clark Morris  
Name: Clark Morris  
Title: Vice President, Investment Management

By: /s/ Anthony Leo  
Name: Anthony Leo  
Title: Director & President

By: /s/ D. Azan  
Name:  
Title:

By:   
Name:  
Title:

We are authorized to bind the corporation

I/We have authority to bind the corporation

**LEASE EXTENSION AGREEMENT**

**THIS AGREEMENT** dated the 10<sup>th</sup> day of January 2020 (the "Agreement").

**BETWEEN:**

**52<sup>ND</sup> STREET BUSINESS CENTRE LP**  
 BY ITS GENERAL PARTNER  
**52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**  
 (the "Landlord")

OF THE FIRST PART

- and -

**VERSA POWER SYSTEMS LTD.**  
 (the "Tenant")

OF THE SECOND PART

**WHEREAS:**

- A. By a lease dated the 20<sup>th</sup> day of May 2005 (the "Original Lease"), made between Westpen Properties Ltd. ("Westpen"), as landlord, and the Tenant, Westpen did demise and lease unto the Tenant certain premises comprising approximately thirty two thousand two hundred twenty (32,220) square feet, designated as Unit 4852 (the "Leased Premises"), in the building municipally located at 4800 - 52 Street SE in 52<sup>nd</sup> Street Business Centre in the City of Calgary, in the Province of Alberta, all as described in the Original Lease, for a term of five (5) years commencing on the 1<sup>st</sup> day of February 2006 and expiring on the 31<sup>st</sup> day of January 2011 (the "Term").
  - B. By a lease amending agreement dated the 20<sup>th</sup> day of April 2006 (the "1<sup>st</sup> Amendment"), the Original Lease was amended as more particularly set out therein.
  - C. Effective the 1<sup>st</sup> day of October 2010, 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., became the successor to Westpen in title and is the Landlord as named herein.
  - D. By a lease renewal agreement dated 11<sup>th</sup> day of November 2010 (the "1<sup>st</sup> Extension"), the Term was renewed for a further three (3) years so to expire the 31<sup>st</sup> day of January 2014, all upon the terms and conditions set out therein.
  - E. By a lease extension and amending agreement dated the 29<sup>th</sup> day of October 2013 (the "2<sup>nd</sup> Extension"), the Term was extended an additional three (3) years so to expire the 31<sup>st</sup> day of January 2017, all upon the terms and conditions set out therein.
  - F. By a lease extension and amending agreement dated the 9<sup>th</sup> day of November 2016 (the "3<sup>rd</sup> Extension"), the Term was extended an additional three (3) years so to expire the 31<sup>st</sup> day of January 2020, all upon the terms and conditions set out therein.
  - G. The Original Lease, the 1<sup>st</sup> Amendment, the 1<sup>st</sup> Extension, the 2<sup>nd</sup> Extension and the 3<sup>rd</sup> Extension are hereinafter collectively referred to as the "Lease".
  - H. The Lease does not contain provisions for the Tenant to be granted an extension term for the Premises.
  - I. The Landlord and the Tenant have deemed it expedient and advisable to enter into this Agreement to reflect and set out the agreements and arrangements that have been made respecting the extension of the Term.
-

**NOW THEREFORE** in consideration of the sum of Ten Dollars (\$10.00) now paid by the parties to the other (the receipt and sufficiency whereof is hereby acknowledged), and other mutual covenants and agreements, the parties do hereby agree as follows:

1. The parties hereby acknowledge, confirm and agree that the foregoing recitals are true in substance and in fact.
2. All words and expressions used in this Agreement, unless there is something in the subject matter or context inconsistent therewith, shall have the same meaning ascribed to them in the Lease.
3. The Term shall be extended for a period of three (3) years to be computed from the 1<sup>st</sup> day of February 2020 and to expire on the 31<sup>st</sup> day of January 2023 (the "4<sup>th</sup> Extension Term").
4. The Base Rent payable by the Tenant pursuant to paragraph 7 of the Basic Terms and Section 3.1 of the Lease, annually throughout the 4<sup>th</sup> Extension Term shall be:

<b>Lease Period</b>	<b>Per Sq. Ft. of Rentable Area of Premises/Year</b>	<b>Per Year</b>	<b>Per Month</b>
February 1, 2020 to January 31, 2023	\$7.25	\$233,595.00	\$19,466.25

5. The Lease is hereby amended by inserting the following as paragraph 13 b) to the Basic Terms of the Lease:

"b. Telecommunications

The Tenant acknowledges that it shall be responsible for the installation of any new telecommunications systems in the Leased Premises which installations shall be approved in writing by the Landlord before the commencement of the work. Permission for all telecommunications services to the Building and to or from the telephone room(s) must be received from the Landlord before the commencement of the work. If required by the Landlord, the telecommunication provider must have an access agreement for the Building, and must provide drawings to the Landlord with the request for its installation. Drawings are to be done by the Landlord's building consultant at the Tenant's expense.

All telecommunications installations installed by or on behalf of the Tenant will be kept installed in the Leased Premises or removed (with any damage from such removal repaired) by the Tenant at the Tenant's sole cost and expense, as the Landlord may direct, upon expiration or sooner termination of the lease. The responsibility for maintaining, repairing, servicing and removal of the installations shall be solely that of the Tenant, and not of the Landlord."

6. The Lease is hereby amended by deleting the first sentence of Section 5.1 (Damage to the Leased Premises) and replacing it with "If the Leased Premises or the Building are damaged or destroyed, in whole or in part, by fire or any other occurrence, this Lease shall nonetheless continue in full force and effect and to the extent to which this Lease is not terminated pursuant hereto, the Landlord will repair the Leased Premises as expressly provided in Section 5.2"
7. The Tenant is continuing occupation of the Leased Premises in an "as is" condition and the Landlord is not required to perform any work to the Leased Premises, except the Landlord shall complete the following work, at the Landlord's expense, on a once only basis:
  - (i) Main front doors shall be repaired, including the lock protection metal plate and base plate repaired and adjusted so the door hinge no longer sinks and rubs along the bottom.

The Tenant acknowledges that the Landlord will not complete this work until this Agreements has been fully executed.

8. All covenants, conditions and agreements contained in the Lease shall remain in full force and effect and unamended except as otherwise expressly set forth herein.

9. This Agreement may be executed in any number of counterparts; with the same effect as if all parties had signed the same document and will become effective once a signed counterpart is delivered by each of the parties to the other. The parties agree that the delivery of an executed copy of this Agreement by facsimile or electronically shall be legal and binding and shall have the same full force and effect as if the original executed copy of this Agreement had been delivered.
10. This Agreement shall extend to, be binding upon, and enure to the benefit of, the parties hereto, their respective heirs, executors, administrators, successors and assigns.

**IN WITNESS WHEREOF** the parties hereto have duly executed this Agreement as of the day and year first above written, under the hands of their proper signing officers duly authorized in that behalf or by setting their respective hands and seals in their personal capacity, as the case may be.

**52<sup>ND</sup> STREET BUSINESS CENTRE LP**  
**by its General Partner**  
**52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**  
(Landlord)

**VERSA POWER SYSTEMS LTD.**  
(Tenant)

By: /s/ Shaun Wuschke  
Name: Shaun Wuschke  
Title: Managing Director, Office and Industrial Services  
Alberta

By: /s/ Anthony Leo  
Name: Anthony Leo  
Title: President

By: /s/ David McLean  
Name: David McLean  
Title: Vice President, Asset Management

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

We are authorized to bind the corporation

I/We have authority to bind the corporation



## LEASE EXPANSION, EXTENSION AND AMENDING AGREEMENT

This agreement ("Agreement") is dated January 5, 2023 and is made

## BETWEEN:

**52<sup>ND</sup> STREET BUSINESS CENTRE LP,  
BY ITS GENERAL PARTNER,  
52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.**  
("Landlord")

OF THE FIRST PART

- and -

**VERSA POWER SYSTEMS LTD.**  
("Tenant")

OF THE SECOND PART

- A. By a lease dated the 20<sup>th</sup> day of May 2005 (the "Original Lease"), made between Westpen Properties Ltd. ("Westpen"), as landlord, and the Tenant, Westpen did demise and lease unto the Tenant certain premises comprising approximately thirty-two thousand, two hundred and twenty (32,220) square feet identified as unit 4852 ("Original Premises") in the building municipally known as 4800 - 52<sup>nd</sup> Street SE, Calgary, Alberta ("4800 Building") located within the project known as 52<sup>nd</sup> Street Business Centre ("Project"), for a term of five (5) years commencing on the 1<sup>st</sup> day of February, 2006 and expiring on the 31<sup>st</sup> day of January, 2011, on the terms and conditions more particularly set forth in the Original Lease;
- B. By a lease amending agreement dated the 20<sup>th</sup> day of April 2006 (the "1<sup>st</sup> Amendment"), the Original Lease was amended as more particularly set out therein;
- C. Effective the 1<sup>st</sup> day of October 2010, 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., became the successor to Westpen in title and is the Landlord named herein.
- D. By a lease renewal agreement dated 11<sup>th</sup> day of November 2010 (the "Renewal"), the Original Lease was renewed for a further term of three (3) years so to expire on the 31<sup>st</sup> day of January 2014, all upon the terms and conditions set out therein;
- E. By a lease extension and amending agreement dated the 29<sup>th</sup> day of October 2013 (the "1<sup>st</sup> Extension"), Landlord and Tenant agreed to amend the Original Lease to, amongst other things, extend the term thereof for a period of three (3) years so to expire on the 31<sup>st</sup> day of January 2017, all upon the terms and conditions set out therein;
- F. By a lease extension and amending agreement dated the 9<sup>th</sup> day of November 2016 (the "2<sup>nd</sup> Extension"), Landlord and Tenant agreed to amend the Original Lease to, amongst other things, extend the term thereof for a period of three (3) years so to expire on the 31<sup>st</sup> day of January 2020, all upon the terms and conditions set out therein;
- G. By a lease extension and amending agreement dated the 10<sup>th</sup> day of January 2020 (the 3<sup>rd</sup> Extension"), Landlord and Tenant agreed to amend the Original Lease to, amongst other things, extend the term thereof for a period of three (3) years so to expire on the 31<sup>st</sup> day of January 2023, all upon the terms and conditions set out therein;
- H. The Original Lease, the 1<sup>st</sup> Amendment, the Renewal, the 1<sup>st</sup> Extension, the 2<sup>nd</sup> Extension and the 3<sup>rd</sup> Extension are hereinafter collectively referred to as the "Lease".
- I. By an offer to lease dated September 29, 2022, Landlord and Tenant have agreed to amend the Lease, to, amongst other things: (a) extend the term thereof for a period of 5 years and 8 months from February 1, 2023 to expire on September 30, 2028; and (b) expand the Original Premises to include additional space ("Additional Premises") designated as unit 4908 in the building municipally known as 4900 - 52<sup>nd</sup> Street SE, Calgary, Alberta ("4900 Building") containing a Rentable Area of approximately 48,308 square feet, approximately as shown outlined on Schedule "A" attached hereto, for a period of 5 years from October 1, 2023 to expire co-terminously with the Extension Term (as hereinafter defined), all as more particularly set forth herein;
- J. Except as otherwise expressly set out herein, the Original Premises and the Additional Premises are hereinafter collectively referred to as the "Leased Premises";

**WITNESS** that in consideration of the sum of one dollar (\$1.00) now paid by each party to the other, and for other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged), the parties hereto do hereby agree as follows:

1. The above recitals are true both in substance and in fact.

2. Where used hereinafter, the term "Lease" shall mean the Lease, as amended by this Agreement, except where a contrary intent is expressly provided.

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3. Capitalized terms used herein that are not otherwise defined herein shall have the meanings ascribed thereto in the Lease.

4. **Extension of Term of Original Premises**

Landlord and Tenant hereby acknowledge and confirm that they have agreed to extend the term of the Lease for a further period of 5 years and 8 months commencing February 1, 2023 and expiring September 30, 2028 ("Extension Term"), on the same terms and conditions as contained in the Lease during the term, save and except as hereinafter set forth.

5. **Grant and Term of Additional Premises**

(a) Subject to Section 6 and subsection 8(b) below, Landlord hereby grants to Tenant and Tenant hereby leases from Landlord unit 4908 in the 4900 Building containing approximately 48,308 square feet of Rentable Area, subject to final measurement in accordance with the Lease, for a period of 5 years (the "Additional Premises Term"), commencing on October 1, 2023 (the "Additional Premises Commencement Date") and expiring co-terminously with the Term, on the same terms and conditions as contained in the Lease for the Original Premises, save and except as set forth herein.

(b) It is acknowledged and agreed by the parties that the term "Leased Premises" as used in the Lease shall:

- (i) from the commencement date of the Lease to and including the date immediately preceding the Additional Premises Commencement Date, be deemed to mean only the Original Premises; and
- (ii) from and after the Additional Premises Commencement Date, and throughout the remainder of the Term and any renewal or extension thereof, be deemed to mean the whole of the Original Premises and the Additional Premises,

without the need for any further agreement between the parties to incorporate this change to the term "Leased Premises" and the parties hereto do hereby covenant and agree with each other accordingly.

(b) From and after the Additional Premises Commencement Date, Tenant shall be liable for all of the covenants, obligations, terms and conditions of the Lease in respect of the Additional Premises, at which time the Original Premises and the Additional Premises shall be deemed to be and shall be treated as one single premises and Schedule "A" of the Lease ("Floor Plan") shall be deleted and replaced with Schedule "A" attached hereto indicating the Original Premises in cross-hatch and the Additional Premises outlined in bold. For clarity, the foregoing shall not limit Tenant's obligations in connection with the Additional Premises during the Fixturing Period as set out in subsection 8(d) below.

(d) If the Lease is terminated for any reason (including, without limitation, due to an uncured Event of Default or damage and destruction) prior to the Additional Premises Commencement Date, then such termination automatically shall apply to the Original Premises and the Additional Premises, without the need for any additional action or delivery of any additional notices regarding such termination and the parties hereto do hereby covenant and agree with each other accordingly.

6. **Vacant Possession of the Additional Premises**

As at the date hereof, the Additional Premises are occupied by a third party pursuant to a lease which expires March 31, 2023. The Landlord shall use commercially reasonable efforts to obtain vacant possession of the Additional Premises from such third party on March 31, 2023, but if Landlord is unable to do so for any reason whatsoever: (i) this Agreement shall not be void or voidable; (ii) the Landlord shall not be responsible for any liabilities, losses, costs, damages or expenses whatsoever resulting therefrom; (iii) the Delivery Date and Additional Premises Commencement Date shall be delayed by the corresponding number of days until the day immediately following the date upon which Landlord obtains vacant possession of the Additional Premises from the existing tenant thereof; and (iv) the parties shall execute and deliver an agreement (to be prepared by Landlord) to amend the Lease to give effect to such delay.

7. **Condition of Leased Premises and Landlord's Work and Tenant's Work**

(a) Landlord shall, at its sole cost and expense, complete the following work in the Additional Premises ("the "Landlord's Work") in a good and workmanlike manner using base building standard materials and finishes to a maximum amount of \$161,056.00:

- (i) ensure that all building systems in the Additional Premises are in good working order as of the Commencement Date. Including the roof, all HVAC, other heating, electrical, lighting

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in the office area (including light bulbs, fluorescent tubes and covers as applicable), plumbing, mechanical, overhead doors, hinged entry doors, passage doors and building hardware;

- (ii) install new base building LED lighting in the warehouse area of the Additional Premises; and
  - (iii) complete selective demolition of office on the main and second floors of the Additional Premises and make walls ready for finishes (the "Demolition Work"). The Demolition Work shall include removal of the flooring and partition walls. Any remaining walls shall be patched and repaired if damaged from the Demolition Work and ready for finishes. The existing ceiling grid and office lighting shall remain in place. The Landlord acknowledges that Tenant has not finalized its plans for the Additional Premises, which impacts the Demolition Work being completed. Tenant shall endeavour to provide Landlord with their final plans for the Additional Premises which will outline the required Demolition Work on or before February 28, 2023 and Landlord shall, upon receipt of the final plans, provide Tenant a timeline for the Demolition Work and commence commercially reasonable efforts to complete the Demolition Work in a timely manner thereafter. In the event that the the Demolition Work is not completed prior to June 1, 2023, Tenant's occupancy of the Additional Premises will be non-exclusive while Landlord and its contractors, sub-contractors, servants, agents and employees access the Additional Premises and, during such period of shared access, the parties shall co-operate with one another so as to ensue each party is able to complete its respective work obligations as expeditiously as possible but Tenant hereby acknowledges and agrees that, in the event of a conflict, the completion and scheduling of Landlord's Work shall take precedence. Notwithstanding anything contained in this Agreement to the contrary, Landlord's access to the Additional Premises as provided herein shall not be deemed to be a re-entry of the Leased Premises and shall not constitute a breach by Landlord of its obligations for quiet enjoyment under the Lease. For greater certainty, if the Tenant's delivery of the Demolition Work plans are delayed and results in the Demolition Work going beyond June 1, 2023 or the Additional Premises Commencement Date, then: (i) this Agreement shall not be void or voidable; (ii) Landlord shall not be responsible for any losses, costs or damages whatsoever resulting therefrom; (iii) Tenant shall not be entitled to any abatement or reduction of Rent or other payments or any other rights in respect thereof by reason of any delay in its occupancy; and (v) for greater certainty, there shall be no delay to the Additional Premises Commencement Date.
- (b) The term "Substantially Complete", when applied to any Landlord's Work, means (**with the exception of the Demolition Work**) sufficiently completed: (i) to the point where Tenant may commence the Tenant's Work (as hereinafter defined), if any; and (ii) if no such Tenant's Work is required to be performed, to the point where Tenant may commence the use of the Additional Premises, in either case without undue interference by Landlord (**with the exception of any Landlord occupancy to complete the Demolition Work**). "Substantially Completed" and "Substantial Completion" shall have corresponding meanings.
- (c) Tenant accepts the Additional Premises in the state and condition in which they are received from Landlord, "as is", except only to the extent of any deficiency in the Landlord's Work, if any, which is expressly and particularly set out in a written deficiency list developed by the parties during their initial move-in inspection of the Additional Premises. For greater certainty, Landlord shall have no obligation to complete any Leasehold Improvements in the Original Premises, or, subject to Section 12 below, provide any financial inducement, in connection with Tenant's continued occupancy of the Original Premises during the Extension Term and Tenant's continued occupancy of the Original Premises will be conclusive evidence against Tenant that the Original Premises are in good order and satisfactory condition, "as is".
- (d) Tenant shall, at its cost and expense, prior to the Additional Premises Commencement Date, complete or cause the completion of all Leasehold Improvements (**save and except for the Landlord's Work**), which are required to complete the Additional Premises for Tenant's permitted use therein, and to renovate the Original Premises for Tenant's continued use thereof during the Extension Term, to no less than the then current base building standard in effect for the Project, all in accordance with the applicable provisions of the Lease and the Tenant Design Criteria Manual, if any, applicable to the Project ("Tenant's Work"). Landlord acknowledges that as part of the Tenant's Work, the Tenant may elect to install or replace the power service to the Premises. For greater certainty, in the event that Tenant elects to do such work, it shall be at Tenant's sole cost and expense, and the work shall be completed by Landlord's designated contractor, acting reasonably.

#### 8. **Delivery of Additional Premises and Fixturing Period**

- (a) The date upon which Landlord delivers vacant possession of the Additional Premises to Tenant with the Landlord's Work Substantially Completed shall be herein referred to as the "Delivery Date".

- (b) Provided this Agreement has been fully executed and delivered on or before January 5, 2023 and Landlord has obtained vacant possession of the Additional Premises on or before April 1, 2023, Landlord shall use commercially reasonable efforts to have the Delivery Date occur on June 1, 2023, but if the Delivery Date has not occurred on June 1, 2023 for any reason other than Tenant Delay (as hereinafter defined) including, without limitation, any delays in Landlord obtaining any requisite permits for the completion of the Landlord's Work then: (i) this Agreement shall not be void or voidable; (ii) Landlord shall not be responsible for any losses, costs or damages whatsoever resulting therefrom; and (iii) the Additional Premises Commencement Date shall be delayed by the number of days, if any, which fall between June 1, 2023 and the Delivery Date. For greater certainty, notwithstanding any delay to the Additional Premises Commencement Date, there shall be no delay to the Expiry Date of the Lease. The parties shall execute an agreement (to be prepared by Landlord) to confirm the Additional Premises Commencement Date as soon as reasonably possible following the occurrence of the Delivery Date
- (c) If the Delivery Date has not occurred on or before June 1, 2023 as a result of the failure by Tenant to execute and deliver this Agreement on or before January 5, 2023 or as a result of any Event of Default or other act or omission of Tenant (collectively, "Tenant Delay"), then: (i) this Agreement shall not be void or voidable; (ii) Landlord shall not be responsible for any losses, costs or damages whatsoever resulting therefrom; (iii) the Delivery Date shall be such date upon which Landlord would have Substantially Completed the Landlord's Work but for such Tenant Delay (notwithstanding that Tenant shall not be entitled to occupancy of the Additional Premises until such date upon which the Landlord's Work is Substantially Complete); (iv) Tenant shall not be entitled to any abatement or reduction of Rent or other payments or any other rights in respect thereof by reason of any delay in its occupancy; and (v) for greater certainty, there shall be no delay to the Additional Premises Commencement Date.
- (d) Subject to the provisions of subsection 8(c)(iii) above, Tenant shall be entitled to possession of the Additional Premises from the Delivery Date until the date immediately preceding the Additional Premises Commencement Date in order to complete the Tenant's Work in the Additional Premises and, thereafter, in order to commence carrying on business therefrom ("Fixturing Period"). During the Fixturing Period, Tenant shall not be obligated to pay Base Rent, Operating Costs, or Realty Taxes in respect of the Additional Premises but shall be liable for all other costs and obligations in respect of the Additional Premises and its occupancy thereof (including charges for utilities and the costs of any additional services) in accordance with the Lease, all of which Tenant will continue to be obligated to pay, and Tenant shall be subject to all the other terms and conditions of the Lease insofar as they are applicable to Tenant's use and occupancy of the Additional Premises during the Fixturing Period including, without limitation, the obligation to maintain insurance, and the provisions relating to the liability of Tenant for its acts and omissions, and the acts and omissions of its servants, employees, agents, contractors, invitees, concessionaires and licensees and the indemnification of Landlord and others under the Lease. For greater certainty, Tenant shall continue to remain liable for all obligations under the Lease in respect of the Original Premises during the Fixturing Period.
- (e) On or before the Delivery Date, Tenant shall deliver to Landlord: (i) certificate(s) evidencing the requisite insurance coverage under the Lease for the Additional Premises; and (ii) evidence, satisfactory to Landlord, that the meters for measuring consumption of gas and electricity in the Additional Premises have been transferred into the name of the Tenant. Landlord shall be under no obligation to deliver possession of the Additional Premises to Tenant until Landlord is in receipt of all of the foregoing and, notwithstanding any delay in Landlord's delivery of possession of the Additional Premises to Tenant as a result of Tenant's failure to provide all of the foregoing, there shall be no corresponding delay in the Additional Premises Commencement Date.
- (f) **Early Occupancy Period.** Subject always to Section 6 of this Agreement, from April 1, 2023 until the Delivery Date, Landlord shall permit access to and give non-exclusive possession of the warehouse portion of the Additional Premises to Tenant (the "**Early Occupancy Period**") for the purpose of allowing Tenant to store materials provided this Agreement has been fully executed and Tenant has delivered to Landlord a certificate of insurance indicating that a policy of Tenant's insurance for the Additional Premises is in full force and effect. In consideration of having access to the Additional Premises during this Early Occupancy Period, Tenant shall pay Landlord a one-time gross rent of \$2,500.00 and all other terms of the Lease shall apply during the Early Occupancy Period. For greater certainty, in the event that Landlord does not obtain vacant possession as described in Section 6 of this Agreement, Landlord shall not be liable for being unable to provide the Early Occupancy Period to the Tenant and there shall be no recourse other than Landlord continuing to use commercially reasonable efforts to obtain such vacant possession.

9. **Base Rent for Original Premises**

Time Period	Rate/Sq. Ft. of Area of the Original Premises/Annum
February 1, 2023 – September 30, 2024	\$8.00
October 1, 2024 – September 30, 2025	\$8.25
October 1, 2025 – September 30, 2026	\$8.50
October 1, 2026 – September 30, 2027	\$8.75
October 1, 2027 – September 30, 2028	\$9.00

10. **Base Rent for Additional Premises**

Time Period	Rate/Sq. Ft. of Area of the Additional Premises/Annum
October 1, 2023 – September 30, 2024	\$8.00
October 1, 2024 – September 30, 2025	\$8.25
October 1, 2025 – September 30, 2026	\$8.50
October 1, 2026 – September 30, 2027	\$8.75
October 1, 2027 – September 30, 2028	\$9.00

11. **Additional Rent**

The Tenant acknowledges that notwithstanding that the Original Premises is located within the 4800 Building and the Additional Premises within the 4900 Building, Additional Rent will be estimated and charged separately based on the costs applicable to each building, respectively.

12. **Free Base Rent**

If Tenant is itself occupying all of the Leased Premises, is carrying on its permitted Use in the Leased Premises and has not been and is not in default under the Lease, then Base Rent shall abate for the first 5 months of the Additional Premises Term.

The foregoing Base Rent abatement is deemed to have terminated one day before the Tenant makes a proposal or assignment or is the subject of a bankruptcy order under the *Bankruptcy and Insolvency Act* (Canada) or is the subject of proceedings under the *Companies Creditors Arrangements Act* (Canada) or similar legislation.

The Tenant shall pay its share of the Operating Costs and Realty Taxes and other charges provided for in the Lease in the manner set out in the Lease during the entire Term. For clarity, the Free Base Rent period shall be applied to 80,528 square foot Leased Premises and shall commence October 1, 2023, subject to any delay provisions in this Agreement.

13. **Allowance**

- (a) Landlord shall pay to the Tenant named herein, one time only, a leasehold improvement allowance in the amount calculated at \$3.00 per square foot of the measured Rentable Area of the Leased Premises, plus applicable taxes ("Allowance"), to be applied by Tenant toward the cost of the Tenant's Work.
- (b) Subject to the provisions of subsections 13(d) and (e) below, Landlord shall pay the Allowance to Tenant within 90 days following Tenant's delivery to Landlord of a formal written invoice requesting payment of the Allowance, which invoice must be delivered within 12 months following the Additional Premises Commencement Date.
- (c) Landlord shall be under no obligation to pay any portion of the Allowance to Tenant until Tenant has executed and delivered to Landlord this Lease in the agreed upon form, and the following have occurred:
  - (i) the Tenant's Work has been completed expressly in accordance with the terms of the Lease;
  - (ii) the Additional Premises Commencement Date;
  - (iii) the actual, physical occupancy by Tenant of the whole of the Leased Premises for the active and diligent conduct of business therefrom; and
  - (iv) Tenant's delivery to Landlord of:
    - (A) "as built" drawings for the Tenant's Work;
    - (B) copies of invoices (accompanied by reasonable back-up confirming such invoices have been paid in full) for the performance of all of the Tenant's Work evidencing payment of an aggregate amount at least equal to the amount of the Allowance;

- (C) a statutory declaration signed by Tenant (or a senior officer of Tenant), to be issued after the expiry of all applicable statutory lien periods, certifying that: (I) the Tenant's Work has been completed, and the date of such completion; (II) Tenant has paid in full its general contractor engaged to complete the Tenant's Work; (III) no lien has been, or may be, claimed with respect to the Tenant's Work; and (IV) all construction lien periods have expired;
  - (D) a statutory declaration signed by Tenant's general contractor (or a senior officer thereof), to be issued after the expiry of all applicable statutory lien periods, certifying that: (I) the Tenant's Work has been completed, and the date of such completion; (II) the contractor has been paid in full by Tenant; (III) all subcontractors engaged by the general contractor in connection with the Tenant's Work have been paid in full by the general contractor; (IV) no lien has been, or may be, claimed with respect to the Tenant's Work; and (V) all construction lien periods have expired; and
  - (E) evidence, satisfactory to Landlord, acting reasonably, that all building permits related to the Tenant's Work have been properly closed.
- (d) Notwithstanding the foregoing, Landlord shall be under no obligation to pay the Allowance to Tenant if, upon the date of such intended payment, a claim for lien or certificate of action has been registered on title to the Project in connection with the Tenant's Work or there is then an Event of Default. If any of the foregoing have occurred on the date upon which Landlord intends to deliver the Allowance to Tenant, Landlord shall hold the Allowance, without interest, until such time as such claim for lien or certificate of action has been discharged or such Event of Default has been remedied in accordance with this Lease, at which time Landlord shall release the Allowance to Tenant.
- (e) Landlord shall have the right to deduct from the Allowance all bona fide amounts owing to Landlord by Tenant under this Lease and Landlord shall have the right to pay itself or any other contractor of Tenant any amounts payable in respect of any of the Tenant's Work, and it is agreed that any such deduction or payment by Landlord shall constitute a payment on account of Landlord's obligation to pay the Allowance.
- (f) If at any time during the initial Term hereof:
- (i) this Lease is terminated by reason of an Event of Default;
  - (ii) Tenant has become bankrupt or insolvent or has taken the benefit of any statute for bankrupt or insolvent debtors, or has filed a proposal, or has made an assignment for the benefit of creditors or any arrangement or compromise,
- then in such event, and without prejudice to any of the Landlord's other rights and remedies available to it under the Lease and at law, the unamortized portion of the Allowance calculated from the Commencement Date on the basis of an assumed rate of depreciation of 8% interest rate charged on the unamortized portion each year of the Term up to and including the last day of the Term shall immediately become due and payable to Landlord as Additional Rent.
- (g) Subject to subsection (h) below, until such time as the Allowance has been paid by Landlord pursuant hereto, the Allowance shall be held by Landlord without interest.
- (h) For greater certainty, any portion of the Allowance not claimed by Tenant expressly in accordance herewith on or before the first anniversary of the Additional Premises Commencement Date shall be applied towards Base Rent.

14. **Right of First Offer**

- (a) The parties hereto acknowledge and confirm that, as of April 1<sup>st</sup>, 2023, Unit 4912 located in the 4900 Building are vacant and available for lease (the "ROFO Space"). Notwithstanding anything contained herein, Landlord shall have the ability to lease the whole of the ROFO Space to a third party or parties on such terms and condition as Landlord shall determine, acting in its sole, absolute and unfettered discretion, without triggering the provisions hereof (individually or collectively, the "First Lease(s)").
  - (b) Subject to the rights of other tenants then existing in the Project, from and after the Commencement Date, Tenant shall have a one-time only right of first offer to lease the ROFO Space whenever such space becomes, or is becoming, available for re-leasing from time to time by Landlord after:
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- (i) the First Lease(s) have expired or been terminated either by the tenant (pursuant to any rights of termination it may have under its lease) or by Landlord (as a result of an event of default) or by mutual consent between such parties; or
- (ii) any options to renew or extend the First Lease(s) have not been exercised or have expired.

For greater certainty:

- (A) Landlord shall be entitled to enter into an agreement to renew or extend any First Lease(s) outside of an exercised option without triggering this right of first offer; and
  - (B) ROFO Space which becomes vacant and available for lease as a result of Landlord's exercise of its right of relocation in order to accommodate a new or expansion tenancy in the 4900 Building shall not trigger this right of first offer.
- (c) In the event that the ROFO Space becomes, or is becoming, available for lease pursuant to the provisions of subsection (b) above, Landlord shall provide Tenant with Notice ("Landlord's Notice") specifying the availability date for the ROFO Space and Tenant shall have three (3) business days from receipt of the Landlord's Notice within which to deliver Notice ("ROFO Notice") to Landlord of its agreement to lease the whole of the ROFO Space failing which this right of first offer shall be null and void and Landlord shall be free to lease the ROFO Space or any part thereof to a third party or parties on such terms and conditions as Landlord, in its sole, absolute and unfettered discretion, determines and this right of first offer shall become null and void and forever extinguished.
- (d) The ROFO Notice shall be deemed validly delivered only if, on the date thereof:
- (i) the Tenant in actual, physical occupancy of the whole of the Leased Premises for the active and diligent conduct of business therefrom is Versa Power Systems Ltd. and/or any affiliated body corporate (as the term "affiliate" is defined in the *Canada Business Corporations Act* as at the date hereof);
  - (ii) there has been no Transfer of this Lease, save and except to an affiliated body corporate (as the term "affiliate" is defined in the *Canada Business Corporations Act* as at the date hereof);
  - (iii) there is then no uncured Event of Default; and
  - (iv) there will be no less than three (3) years remaining in the Term (including any then exercised options to extend) from the commencement date for the ROFO Space.
- (e) Upon Landlord's receipt of the ROFO Notice, Tenant shall be deemed to have leased the ROFO Space on the same terms and conditions as contained in this Lease for the Leased Premises save and except that:
- (i) there shall be no Landlord's Work, rent free period or other financial inducements;
  - (ii) the base rent payable for the ROFO Space shall be the ROFO Market Rent, where the term "ROFO Market Rent" means the annual base rental which could reasonably be obtained by Landlord for the ROFO Space from a willing tenant or willing tenants dealing at arms' length with Landlord in the market prevailing for a term commencing on the commencement date of the term of lease for the ROFO Space, having regard to all relevant circumstances including the size and location of the ROFO Space, the facilities afforded, the terms of the lease thereof (including its provisions for Additional Rent), the terms aforesaid regarding tenant inducements, the condition of the ROFO Space and the use of the ROFO Space, and having regard to rentals currently being obtained for space in the 4900 Building and for comparable space in other buildings comparably located, and inducements being offered to tenants (including rent free periods, allowances and other inducements);
  - (iii) the commencement date shall be as specified by Landlord in the Landlord's Notice;
  - (iv) parking spaces, if any, shall be made available to Tenant in accordance with the then prevailing ratio and rates (if any) in effect for the Project; and
  - (v) the expiration date shall be coterminous with the Expiry Date of this Lease.
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- (f) If the ROFO Market Rent is not agreed upon between the parties within thirty (30) days of the delivery of the ROFO Notice, the ROFO Market Rent shall be established in the manner set out in the Lease and, in such event, there shall be no delay to the commencement date of the ROFO Space as set forth in the Landlord's Notice and, until such time as the ROFO Market Rent is determined, Tenant shall pay to Landlord the Base Rent then payable hereunder for the Leased Premises, adjusted accordingly as applicable to the Rentable Area of the ROFO Space, and upon determination of the ROFO Market Rent for the ROFO Space, either Landlord shall pay to Tenant any excess, or Tenant shall pay to Landlord any deficiency, in the payments of Base Rent previously made by Tenant with respect to the ROFO Space, without interest.
- (g) Within ten (10) business days following determination of the ROFO Market Rent, Landlord shall prepare and deliver to Tenant an agreement amending the provisions of this Lease to incorporate the ROFO Space into the Leased Premises and to incorporate the other provisions contemplated herein and such other amendments required to give effect to the foregoing, and Tenant hereby covenants and agrees to execute and deliver such agreement to Landlord within ten (10) business days of receipt thereof; Tenant's failure to execute and return such amending agreement as and when required pursuant hereto shall not void Tenant's lease of the ROFO Space.
- (h) Any ROFO Space which is made available to the Tenant herein shall be dealt with as a whole. Any ROFO Space leased by Tenant pursuant hereto is subject to measurement by Landlord's Expert in accordance with this Lease.

15. **Use**

Tenant acknowledges that Landlord is making no representation or warranty as to Tenant's ability to use the Additional Premises or Tenant's continued ability to use the Original Premises, in either case, for its/their intended use and Tenant shall, prior to executing this Agreement, perform such searches, and otherwise satisfy itself, that its use is permitted under all applicable laws, and that Tenant will be able to, and shall, at its sole cost and expense, obtain an occupancy permit and/or renewal occupancy permit, if required, as well as a building permit, and any other permit required for Tenant to complete any Tenant's Work or other Alterations and to use the Leased Premises in accordance with Item 9 of the Basic Terms sheet of the Lease; in addition, Tenant agrees to be responsible to pay any additional development charges or permitting costs associated with: the construction of any Leasehold Improvements on or serving the Leased Premises; and Tenant's use of the Leased Premises in accordance with the Lease.

16. **Restoration**

For greater certainty, the provisions of Section 3.14 of the Lease, being Tenant's obligation to remove such of the Leasehold Improvements (including any of the same existing in the Leased Premises (including, for greater certainty, the Additional Premises, as of the date hereof), if any, as expressly required by the Lease to be removed, remains in full force and effect, unmodified hereby. **Notwithstanding the foregoing, throughout the Term, the Tenant shall be permitted to remove any office space within the Premises, as required by the Tenant's use, at its sole cost and expense (in addition to the agreed upon Demolition Work). On the expiry or earlier termination of the Lease, the Tenant shall not be required to restore the office spaces back to their original condition.**

17. **Environmental**

Tenant has completed the environmental questionnaire attached hereto as Schedule "B" and agrees to forthwith advise Landlord, in writing, of any amendments thereto.

A tenant notification is attached hereto as Schedule "C". Landlord will not grant any environmental representation or warranty in respect of the condition of the Leased Premises, the 4800 Building and the 4900 Building. Landlord will not provide any indemnity in the Lease, environmental or otherwise.

18. **Sustainability**

- (a) Upon request from Landlord from time to time, Tenant shall be required to submit to Landlord any utilities consumption data and costs, and/or any information relating to waste removal and diversion, if applicable, in a format deemed acceptable to Landlord, acting reasonably
- (b) Landlord and Tenant shall each provide a point of contact to discuss issues related to sustainability and energy such as, but not limited to, retrofit projects, billing issues, energy efficiency upgrades, and data access.

**Sustainability Contact:**

For Tenant: Art Leong ;

Email: \_\_\_\_\_ ; and

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Phone: \_\_\_\_\_.

For Landlord: Troy Robinson, Property Manager

Email:

Phone:

For more information on BentallGreenOak's sustainability program, please visit: <https://www.bentallgreenoak.com/sustainable-investing.php>

19. **Agency Disclosure**

Landlord hereby discloses that BentallGreenOak is acting in its capacity as authorized agents for Landlord, in accordance with the 'Real Estate and Business Brokers' Act, 2002 (Ontario), and that BentallGreenOak: (a) acts on behalf of Landlord; (b) owes a fiduciary duty to Landlord in this transaction; and (c) shall be compensated by Landlord.

20. The parties hereto shall, at all times hereafter, upon the reasonable request of the others make or procure to be made, done or executed, all such further assurances and to do all such things as may be necessary to give full force and effect to the full intent of this Agreement.
21. The parties hereto hereby acknowledge, confirm and agree that in all other respects the terms of the Lease are to remain in full force and effect, unchanged and unmodified except in accordance with this Agreement.
22. This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but subject always to the provisions of the Lease restricting or limiting Tenant's right to assign the Lease or sublet the Leased Premises or carry out any other transfer, as provided in the Lease. **For further certainty, both Landlord and Tenant and their respective successors and assigns shall be bound by the terms and conditions of the Lease.**
23. Landlord shall not be bound pursuant hereto until Landlord is in receipt of a fully-executed original of this Agreement.
24. The parties hereto do hereby acknowledge and confirm with one another that, notwithstanding anything contained in the Lease to the contrary:
- (a) this Agreement may be executed by counterparts and by electronic transmission ("email") and, if so executed, each document shall be deemed to be an original, shall have the same effect as if all parties had executed the same copy of this Agreement, and all of which copies (when taken together) shall constitute one and the same document and shall be legal and binding upon the parties hereto; and
  - (b) with respect to the execution of this Agreement, they will each accept electronic signatures in accordance with the *Electronic Commerce Act* (Alberta).

IN WITNESS WHEREOF the parties have executed this Agreement.

**VERSA POWER SYSTEMS LTD.**  
(Tenant)

Per: /s/ Michael S. Bishop  
Name: Michael S. Bishop  
Title: EVP, CFO FuelCell Energy, Inc

Per: /s/ Michael J. Lisowski  
Name: Michael J. Lisowski  
Title: EVP, COO FuelCell Energy, Inc.

I am/We are authorized to bind the corporation

**52<sup>nd</sup> STREET BUSINESS CENTRE LP,**  
**by its General Partner,**  
**52<sup>nd</sup> STREET BUSINESS CENTRE GP INC.**  
(Landlord)

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Per: /s/ Brad Alton

Name: Brad Alton

Title: Vice President, Leasing

Per: /s/ Shaun Wuschke

Name: Shaun Wuschke

Title: Managing Director, Office and Industrial Services

We are authorized to bind the corporation

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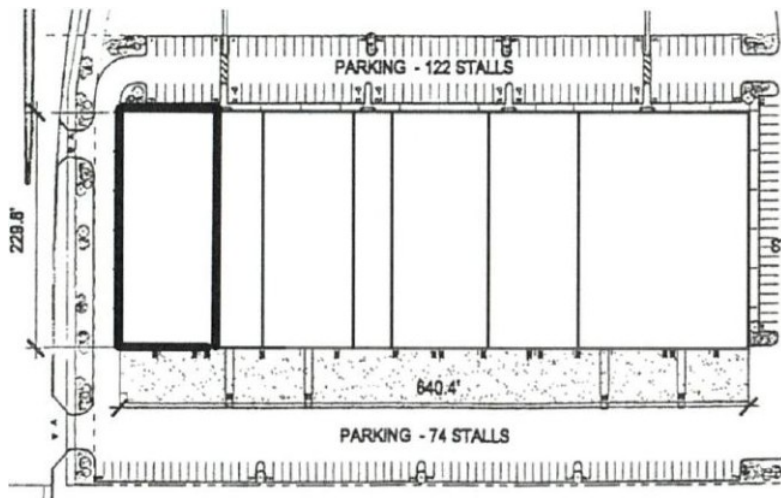
**SCHEDULE "A"**  
*(to be attached to the Lease as Schedule "A")*

**Floor Plan of the Leased Premises**

**Original Premises**



**Additional Premises – 4908 – 52nd Street SE**



**SCHEDULE "B"**  
**Environmental Questionnaire**

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**SCHEDULE "C"**  
**Environmental Questionnaire**  
**Tenant Notification**

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**LEASE EXPANSION AND AMENDING AGREEMENT - SHORT TERM**

This agreement ("Agreement") is dated February 20, 2023 and is made

**B E T W E E N:**

**52<sup>ND</sup> STREET BUSINESS CENTRE LP,  
BY ITS GENERAL PARTNER,  
52<sup>ND</sup> STREET BUSINESS CENTRE GP INC.  
("Landlord")**

OF THE FIRST PART

- and -

**VERSA POWER SYSTEMS LTD.  
("Tenant")**

OF THE SECOND PART

- A. By a lease dated the 20<sup>th</sup> day of May 2005 (the "Original Lease"), made between Westpen Properties Ltd. ("Westpen"), as landlord, and the Tenant, Westpen did demise and lease unto the Tenant certain premises comprising approximately thirty-two thousand, two hundred and twenty (32,220) square feet identified as unit 4852 ("Original Premises") in the building municipally known as 4800 - 52<sup>nd</sup> Street SE, Calgary, Alberta ("4800 Building") located within the project known as 52<sup>nd</sup> Street Business Centre ("Project"), for a term of five (5) years commencing on the 1<sup>st</sup> day of February, 2006 and expiring on the 31<sup>st</sup> day of January, 2011, on the terms and conditions more particularly set forth in the Original Lease;
- B. By a lease amending agreement dated the 20<sup>th</sup> day of April 2006 (the "1<sup>st</sup> Amendment"), the Original Lease was amended as more particularly set out therein;
- C. Effective the 1<sup>st</sup> day of October 2010, 52<sup>nd</sup> Street Business Centre LP, by its General Partner, 52<sup>nd</sup> Street Business Centre GP Inc., became the successor to Westpen in title and is the Landlord named herein.
- D. By a lease renewal agreement dated 11<sup>th</sup> day of November 2010 (the "Renewal"), the Original Lease was renewed for a further term of three (3) years so to expire on the 31<sup>st</sup> day of January 2014, all upon the terms and conditions set out therein;
- E. By a lease extension and amending agreement dated the 29<sup>th</sup> day of October 2013 (the "1<sup>st</sup> Extension"), Landlord and Tenant agreed to amend the Original Lease to, amongst other things, extend the term thereof for a period of three (3) years so to expire on the 31<sup>st</sup> day of January 2017, all upon the terms and conditions set out therein;
- F. By a lease extension and amending agreement dated the 9<sup>th</sup> day of November 2016 (the "2<sup>nd</sup> Extension"), Landlord and Tenant agreed to amend the Original Lease to, amongst other things, extend the term thereof for a period of three (3) years so to expire on the 31<sup>st</sup> day of January 2020, all upon the terms and conditions set out therein;
- G. By a lease extension and amending agreement dated the 10<sup>th</sup> day of January 2020 (the "3<sup>rd</sup> Extension"), Landlord and Tenant agreed to amend the Original Lease to, amongst other things, extend the term thereof for a period of three (3) years so to expire on the 31<sup>st</sup> day of January 2023, all upon the terms and conditions set out therein;
- H. By a lease expansion, extension and amending agreement dated the 5<sup>th</sup> day of January 2023 (the "Expansion and Extension Agreement", Landlord and Tenant have agreed to amend the Lease, to, amongst other things: (a) extend the term thereof for a period of 5 years and 8 months from February 1, 2023 to expire on September 30, 2028; and (b) expand the Original Premises to include additional space ("Additional Premises") designated as unit 4908 in the building municipally known as 4900 - 52<sup>nd</sup> Street SE, Calgary, Alberta ("4900



Building”) containing a Rentable Area of approximately 48,308 square feet, for a period of 5 years from October 1, 2023 to September 30, 2028, all as more particularly set forth herein;

- I. The Original Lease, the 1<sup>st</sup> Amendment, the Renewal, the 1<sup>st</sup> Extension, the 2<sup>nd</sup> Extension, the 3<sup>rd</sup> Extension and the Expansion and Extension Agreement are hereinafter collectively referred to as the “Lease” and except to the extent used separately within this Agreement the Original Premises and the Additional Premises shall be referred to as the “Existing Premises”; and
- J. Tenant is desirous of leasing additional premises in the 4900 Building on a temporary basis, and Landlord and Tenant have accordingly agreed to amend the Lease, all on terms and conditions more particularly set forth herein;

**W I T N E S S** that in consideration of the sum of \$1.00 now paid by each party to the other, and for other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged), the parties hereto do hereby agree as follows:

1. The above recitals are true both in substance and in fact.
2. Where used hereinafter, the term “Lease” shall mean the Lease, as amended by this Agreement, except where a contrary intent is expressly provided.

3. **Schedule “A” Correction - Expansion and Extension Agreement**

The outlined premises identifying the Additional Premises in the Expansion and Extension Agreement was incorrect, so the Schedule “A” attached thereto and the Lease, respectively, shall be replaced with the Schedule “A” attached hereto.

4. **Grant of Temporary Premises**

Landlord hereby leases to Tenant and Tenant hereby accepts the lease from Landlord of certain premises (“Temporary Premises”) designated as unit 4912, being a portion of the 4900 Building containing approximately 18,627 square feet of Rentable Area, being approximately as shown outlined on Exhibit “1” annexed hereto, subject to measurement by the Expert in accordance with the applicable provisions of the Lease, on the same terms and conditions as contained in the Lease for the Existing Premises, save and except as hereinafter set forth.

5. **Temporary Premises Term**

- (a) Subject to Section 6 below, the term (“Temporary Premises Term”) of this Agreement shall commence on April 1, 2023 (“Temporary Premises Commencement Date”) and shall expire on July 31, 2024 (“Temporary Premises Expiry Date”).
  - (b) It is acknowledged and agreed by the parties that the term “Leased Premises” as used in the Lease shall:
    - (i) from the commencement date of the Lease to and including the date immediately preceding the Temporary Premises Commencement Date, be deemed to mean only the Original Premises;
    - (ii) from and after the Temporary Premises Commencement Date, to and including the date immediately prior to the Additional Premises Commencement Date, be deemed to mean the Original Premises and the Temporary Premises;
    - (iii) from and after the Additional Premises Commencement Date, to and including the Temporary Premises Expiry Date, be deemed to mean the whole of the Original Premises the Additional Premises and the Temporary Premises; and
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- (iv) from the date immediately after the Temporary Premises Expiry Date, and throughout the remainder of the Term and any renewal or extension thereof, be deemed to mean the Original Premises and the Additional Premises,

without the need for any further agreement between the parties to incorporate this change to the term “Leased Premises” and the parties hereto do hereby covenant and agree with each other accordingly.

- (c) From and after the Temporary Premises Commencement Date, Tenant shall be responsible for all of the covenants, obligations, terms and conditions of the Lease for the Temporary Premises, and the Original Premises and the Temporary Premises, or the Original Premises, the Temporary Premises and the Additional Premises shall be deemed to be and shall be treated as one single premises, as the case may be, from time to time.
- (d) If the Lease is terminated for any reason (including, without limitation, due to an Event of Default or damage and destruction) prior to the Temporary Premises Commencement Date, then such termination automatically shall apply to the Existing Premises and the Temporary Premises, without the need for any additional action or delivery of any additional notices regarding such termination and the parties hereto do hereby covenant and agree with each other accordingly.

6. **Vacant Possession or the Temporary Premises**

As at the date hereof, the Temporary Premises are occupied by a third party pursuant to a lease which expires March 31, 2023. The Landlord shall use commercially reasonable efforts to obtain vacant possession of the Temporary Premises from such third party on March 31, 2023, but if Landlord is unable to do so for any reason whatsoever: (i) this Agreement shall not be void or voidable; (ii) the Landlord shall not be responsible for any liabilities, losses, costs, damages or expenses whatsoever resulting therefrom; (iii) the Temporary Premises Commencement Date shall be delayed by the corresponding number of days until the day immediately following the date upon which Landlord obtains vacant possession of the Temporary Premises from the existing tenant thereof; and (iv) the parties shall execute and deliver an agreement (to be prepared by Landlord) to amend the Lease to give effect to such delay.

7. **Rent**

Tenant shall pay, in lawful money of Canada, at such address as shall be designated from time to time by Landlord, Base Rent for the Temporary Premises based on an amount per square foot of Rentable Area of the Temporary Premises per annum, in accordance with the following rental schedule:

TIME PERIOD	RATE/SQUARE FOOT RENTABLE AREA/ANNUM
April 1, 2023 to Jul 31, 2024	\$8.00

In addition to the foregoing Base Rent, Tenant shall pay to Landlord Additional Rent for the Temporary Premises, in accordance with the applicable provisions of the Lease. **The Tenant acknowledges that notwithstanding that the Original Premises is located within the 4800 Building and the Temporary Premises within the 4900 Building, Additional Rent will be estimated and charged separately based on the costs applicable to each building, respectively.**

8. **Use**

Tenant acknowledges that Landlord is making no representation or warranty as to Tenant’s ability to use the Temporary Premises for its intended use and Tenant shall, prior to executing this Agreement, perform such searches, and otherwise satisfy itself, that its use is permitted under all applicable Laws, and that Tenant will be able to, and shall, at its sole cost and expense, obtain an occupancy permit, if required, as well as a building permit, and any other permit required for Tenant to complete the Tenant’s Work and to use the Premises in accordance with subsection 1(i) of the Lease; in addition, Tenant agrees to be responsible to pay any additional development charges or permitting costs associated with: the construction of any Leasehold Improvements on or serving the Premises; and Tenant’s use of the Premises in accordance with the Lease.

9. **Applicability of Lease**

- (a) All obligations of Tenant under the Lease in respect of the Premises shall apply and be obligations of Tenant in respect of the Temporary Premises, except where they appear pursuant to the terms hereof to be inapplicable or in conflict with any other express provisions of this Agreement. Without limiting the generality of the foregoing, all obligations of Tenant pursuant to the Lease, including obligations in respect of maintenance, repair and replacement and in respect of insurance and any other amounts payable by Tenant pursuant to the Lease, shall be applicable *mutatis mutandis* to this Agreement. All terms used herein shall have the same meanings respectively as they have pursuant to the Lease to the extent to which the context permits.
- (b) All amounts payable by Tenant pursuant to this Agreement shall also be payable pursuant to the Lease as Additional Rent. An Event of Default by Tenant under this Agreement shall also constitute an Event of Default under the Lease, and an Event of Default by Tenant under the Lease shall also constitute an Event of Default under this Agreement, and Landlord shall be entitled to all remedies in respect thereof to which Landlord would be entitled pursuant to the Lease and to this Agreement and at law. If the Lease expires or is terminated, this Agreement shall thereupon automatically be deemed to be terminated.
- (c) **For greater certainty, Section 12 (Free Base Rent) and Section 13 (Allowance) and the bolded language of Section 16 (Restoration) of the Expansion and Extension Agreement shall not apply to the Temporary Premises.**
- (d) **As the Temporary Premises is the same as the ROFO Space outlined in Section 14 (Right of First Offer) of the Expansion and Extension Premises, the Landlord and Tenant agree that the Tenant's rights under this clause are postponed until the Temporary Premises Term is expired.**

10. **Condition of the Temporary Premises**

- (a) Tenant shall accept possession of the Temporary Premises in the condition in which they are received from Landlord without any obligation on the part of Landlord to perform any Leasehold Improvements in the Temporary Premises and without any obligation on Landlord's part to provide any inducement in connection with Tenant's occupancy thereof, and occupancy of the Temporary Premises by Tenant shall be conclusive evidence against Tenant that, at the time Tenant assumed occupancy thereof, the Temporary Premises were in good order and satisfactory condition and that Tenant has accepted the Temporary Premises "as is".
- (b) Tenant shall, at its cost and expense, complete or cause the completion of any Leasehold Improvements (including creating any openings in the demising wall between the Temporary Premises and the Additional Premises ("Openings")) to at least base building standard condition and so as to render uniformity to the whole of the Leased Premises) which may be required to complete the Temporary Premises for Tenant's business operations thereon ("Tenant's Work") in accordance with the applicable provisions of the Lease and in accordance with the "*Tenant Design Criteria Manual*", if any, applicable to the Project.
- (c) Upon the expiry or earlier termination of this Agreement, Tenant shall, at its sole cost and expense, remove from the Temporary Premises all of its trade fixtures (provided there is no Event of Default) and all of Tenant's personal property and such of the Leasehold Improvements as Landlord shall require to be removed and shall restore the Temporary Premises (including the closure, repair and patching of all Openings and the separation of all base Building standard services) to the condition in which they existed prior to the installation and removal of such trade fixtures, personal property and Leasehold Improvements (including any Openings), or to Landlord's then base building standard, as determined by Landlord, and shall repair any damage caused thereby.

11. **Environmental Questionnaire**

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Tenant agrees to complete the environmental questionnaire attached hereto as Schedule "B" and to forthwith advise Landlord, in writing, of any changes in its activities that may alter the information provided therein.

A tenant notification is attached hereto as Schedule "C". Landlord will not grant any environmental representation or warranty in respect of the condition of the Leased Premises, the 4800 Building and the 4900 Building. Landlord will not provide any indemnity in the Lease, environmental or otherwise.

12. **Agency Disclosure**

Landlord hereby discloses that BentallGreenOak is acting in its capacity as authorized agents for Landlord in accordance with applicable legislation, and that BentallGreenOak: (a) acts on behalf of Landlord; (b) owes a fiduciary duty to Landlord in this transaction; and (c) shall be compensated by Landlord

13. The parties hereto shall, at all times hereafter, upon the reasonable request of the others make or procure to be made, done or executed, all such further assurances and to do all such things as may be necessary to give full force and effect to the full intent of this Agreement.
14. The parties hereto hereby acknowledge, confirm and agree that in all other respects the terms of the Lease are to remain in full force and effect, unchanged and unmodified except in accordance with this Agreement.
15. This Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but subject always to the provisions of the Lease restricting or limiting Tenant's right to assign the Lease or sublet the Premises or carry out any other Transfer, as provided in the Lease. **For further certainty, both Landlord and Tenant and their respective successors and assigns shall be bound by the terms and conditions of the Lease.**
16. Landlord shall not be bound pursuant hereto until Landlord is in receipt of a fully-executed copy of this Agreement.
17. The parties hereto do hereby acknowledge and confirm with one another that, notwithstanding anything contained in the Lease to the contrary:
- (a) this Agreement may be executed by counterparts and by electronic transmission ("email") and, if so executed, each document shall be deemed to be an original, shall have the same effect as if all parties had executed the same copy of this Agreement, and all of which copies (when taken together) shall constitute one and the same document and shall be legal and binding upon the parties hereto; and
  - (b) with respect to the execution of this Agreement, they will each accept electronic signatures in accordance with the electronic commerce/transactions legislation in the Province in which the Premises are located.

THE NEXT PAGE IS THE EXECUTION PAGE

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IN WITNESS WHEREOF the parties have executed this Agreement.

**VERSA POWER SYSTEMS LTD.**  
(Tenant)

Per: /s/ Michael S. Bishop

Name: Michael S. Bishop  
Title: EVP, Chief Financial Officer

Per: /s/ Michael Lisowski

Name: Michael Lisowski  
Title: EVP, Chief Operating Officer

I am/We are authorized to bind the corporation

**52<sup>nd</sup> STREET BUSINESS CENTRE LP,**  
**by its General Partner,**  
**52<sup>nd</sup> STREET BUSINESS CENTRE GP INC.**  
(Landlord)

Per: /s/ Dave McLean

Name: Dave McLean  
Title: Vice President, Portfolio Management

Per: /s/ Brad Alton

Name: Brad Alton  
Title: Vice President, Leasing - Alberta

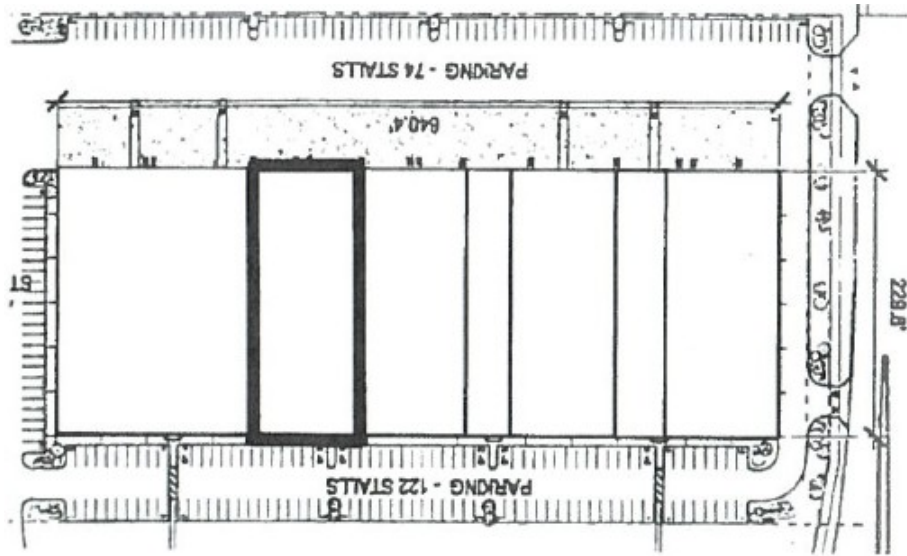
We are authorized to bind the corporation

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EXHIBIT "1"

Outline Plan of the Temporary Premises

4912 – 52<sup>nd</sup> Street SE



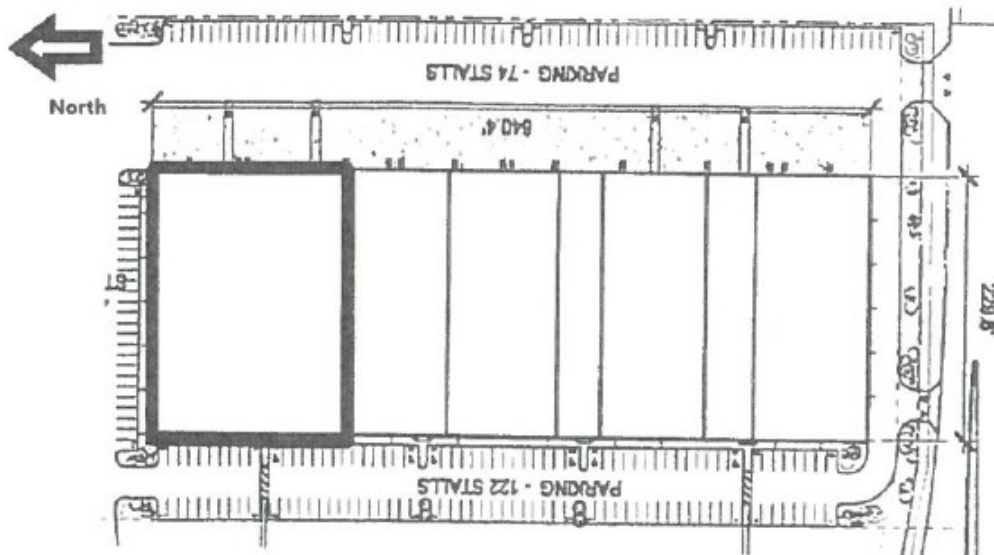
**SCHEDULE "A"**  
(to be attached to the Lease as Schedule "A")

**Floor Plan of the Leased Premises**

**Original Premises - 4852 - 52<sup>nd</sup> Street SE**



**Additional Premises - 4908 - 52<sup>nd</sup> Street SE**



**SCHEDULE “B”**

**Environmental Questionnaire**

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**SCHEDULE “C”**

**Environmental Questionnaire**

**Tenant Notification**

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**CERTIFICATION**

I, Jason B. Few, certify that:

1. I have reviewed this quarterly report on Form 10-Q of FuelCell Energy, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation, and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

March 9, 2023

/s/ Jason B. Few

Jason B. Few

President and Chief Executive Officer

(Principal Executive Officer)

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## CERTIFICATION

I, Michael S. Bishop, certify that:

1. I have reviewed this quarterly report on Form 10-Q of FuelCell Energy, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation, and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

March 9, 2022

/s/ Michael S. Bishop

Michael S. Bishop

Executive Vice President and Chief Financial Officer

(Principle Financial Officer and Principle Accounting Officer)

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**CERTIFICATION PURSUANT TO  
18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the quarterly report of FuelCell Energy, Inc. (the “Company”) on Form 10-Q for the quarter ended January 31, 2023 as filed with the Securities and Exchange Commission on the date hereof (the “Report”), I, Jason B. Few, President and Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. § 1350, as adopted pursuant to § 906 of the Sarbanes-Oxley Act of 2002, that:

- (1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78m or 78o(d)); and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

March 9, 2023

/s/ Jason B. Few

\_\_\_\_\_  
Jason B. Few  
President and Chief Executive Officer  
(Principal Executive Officer)

A signed original of this written statement has been provided to the Company and will be retained by the Company and furnished to the SEC or its staff upon request.

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**CERTIFICATION PURSUANT TO  
18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the quarterly report of FuelCell Energy, Inc. (the "Company") on Form 10-Q for the quarter ended January 31, 2023 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, Michael S. Bishop, Chief Financial Officer of the Company, certify, pursuant to 18 U.S.C. § 1350, as adopted pursuant to § 906 of the Sarbanes-Oxley Act of 2002, that:

- (1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78m or 78o(d)); and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

March 9, 2023

/s/ Michael S. Bishop

\_\_\_\_\_  
Michael S. Bishop  
Executive Vice President and Chief Financial Officer  
(Principal Financial Officer and Principal Accounting Officer)

A signed original of this written statement has been provided to the Company and will be retained by the Company and furnished to the SEC or its staff upon request.

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