

**RIGHT OF ENTRY AGREEMENT  
BETWEEN THE CITY OF SAN JOSE  
AND FUELCELL ENERGY INC.**

**THIS RIGHT OF ENTRY AGREEMENT (“AGREEMENT”)** is made this 2nd day of December, 2021 (“Contract Date”), by and between FUELCELL ENERGY INC. (“FCE”), and the City of San José, a California municipal corporation (“CITY”).

**RECITALS**

- A. **WHEREAS**, CITY operates the San José-Santa Clara Regional Wastewater Facility located at 700 Los Esteros Road, San José, California (“RWF”); and
- B. **WHEREAS**, the CITY entered into Fuel Cell Services Site Lease Agreement with UTS SJ-1, LLC on November 11, 2010 to lease a site to install, operate and maintain a system that produces electricity from fuel cells powered by digester gas within a portion of RWF more particularly described in Exhibit A (“Property or Properties”); and
- C. **WHEREAS**, UTS SJ-1 in a letter to the CITY dated November 5, 2020 and FUELCELL ENERGY INC. (“FCE”) represent that they have settled the litigation related to the system, and agreed pursuant to the settlement that FUELCELL ENERGY INC. shall have title to the DFC 1500 Fuel Cell Module currently installed at Property; and
- D. **WHEREAS**, FUELCELL ENERGY INC. desires to enter the Property for the purpose of disconnecting and removing the DFC 1500 Fuel Cell Module (the “Module”) located at the Property;
- E. **WHEREAS**, this Agreement shall not in any way modify or alter the agreements, terms and conditions of any existing agreements between FCE and UTS SJ-1; and
- F. **WHEREAS**, the recitals are incorporated into and shall constitute a part of the Agreement.

**NOW THEREFORE**, in consideration of the mutual covenants herein contained, FCE and CITY agree as follows:

1. Right of Entry. CITY hereby grants to FCE, its employees, agents, contractors, and consultants, a right of entry as hereinafter described, subject to all licenses, easements, leases, encumbrances and claims of title affecting CITY's Properties (“Right of Entry”).

2. Purpose. Subject to the limits herein stated, the Right of Entry granted herein is a right to enter onto CITY's Properties for the purpose of disconnecting and removing the Module, as outlined in detail in **Exhibit B** of this Agreement.
3. Term of Agreement. Subject to the termination provision set forth in Section 5 below, the term of the Agreement shall begin upon execution by the CITY and continue for a period of ninety (90) calendar days, commencing upon written notice from FCE, that shall be provided two (2) weeks prior to FCE's planned date of entry.
4. Terms and Conditions. The Right of Entry is given subject to the following terms and conditions:
  - 4.1 FCE acknowledges its right of entry will be limited to the areas designated on **Exhibit A**, as described in detail on Recital B above.
  - 4.2 FCE acknowledges the condition of the areas designated on **Exhibit A** and accepts the "as is" condition of the designated areas; and
  - 4.3 CITY representatives shall be entitled to observe all activities conducted hereunder.
  - 4.4 FCE shall be responsible for coordination of Module removal work to avoid any conflicts with operations and maintenance at CITY's Properties.
  - 4.5 FCE shall proceed with the proposed Module removal as set forth in **Exhibit B** attached hereto and incorporated herein.
  - 4.6 Prior to any work, all staff of FCE shall complete the on-site identification badge access request form for processing at 700 Los Esteros Road, San Jose, CA. All personnel shall have a valid badge and shall be displayed at all time while on RWF premises. All badges shall be collected and returned to the CITY at the end of the proposed work.
  - 4.7 Access to the RWF shall only be allowed thru Gate Z12 (construction enabling road entrance), along Zanker Road, Monday through Friday, between 6:30 a.m. and 4:00 p.m., by contacting the City designated staff.
  - 4.8 FCE shall not leave any substances, equipment or materials, specifically including, without limitation, any debris generated during performance of the Module removal on the site. Any and all debris generated during the Module removal shall all be stored in proper containers, off-site, or at an agreed location at the site and characterized by FCE for off-site disposal. The disposal of debris, not including equipment (the Module), must occur at an appropriate facility such as a landfill or waste disposal/recycling facility, within the time period of this agreement. For purposes of clarity, all portions of the facility other

than the Module to be disconnected, demolished, and removed by UTS SJ-1 or others. UTS will provide the appropriate Lockout/Tagout LOTO isolation points and will lock out and tag out all utilities; including air, water, electrical, and fuel; and FCE will confirm those isolations with LOTO Tags prior in order for FCE to safely perform their work.

- 4.11 FCE and its officers, employees, agents, and invitees shall comply with all applicable local, state, and federal laws and regulations including those laws which govern worker health and safety and reporting the use, handling, treatment, removal, or disposal of toxic or hazardous substances, materials or wastes, including without limitation all substances described in the definition of Hazardous Materials set forth in **Exhibit C** attached hereto and incorporated herein, which may exist on CITY's Properties (hereinafter "Hazardous Materials"); and shall obtain all required regulatory and governmental permits and licenses necessary to perform the Module removal hereunder; shall conduct their operations on the CITY's Properties so as to avoid unfavorable impact upon the environment; shall comply with all applicable provisions of the Environmental Quality Act of 1970 (California Public Resources Code, Sections 21,000, et. seq.); and shall take all required steps to minimize dust and noise in conformance with neighborhood and governmental standards.
- 4.12 Prior to the execution of this Agreement, FCE shall provide CITY with certificates of insurance acceptable to CITY, showing CITY as an additional insured party as to all insurance coverage provided by FCE concerning use of the CITY's Properties. Insurance Coverage shall meet, at a minimum, the requirements set forth in **Exhibit D** attached hereto and incorporated herein.
- 4.13 FCE agrees to indemnify, defend, and hold harmless CITY and its officers, agents, and employees against all loss, damage, liability, and liability for damages, whether for loss of or damage to property, or injury to or death of persons, arising out of FCE's negligent acts or willful misconduct in its exercise of rights granted hereunder by FCE, its employees, agents, contractors, or representatives, except to the degree any damage or injury arising out of CITY's active negligence or willful misconduct, or any third party's negligence or willful misconduct.

**FCE ACKNOWLEDGES THAT IT IS AWARE THAT EXERCISE OF THE RIGHTS GRANTED MAY EXPOSE ITS EMPLOYEES, AGENTS, CONTRACTORS, AND REPRESENTATIVES TO INHERENTLY DANGEROUS ACTIVITIES CONDUCTED BY THE CITY ON THE CITY'S PROPERTIES INCLUDING EXPOSURE TO POTENTIALLY HAZARDOUS MATERIALS, AND FUELCELL ENERGY IS VOLUNTARILY EXERCISING THE RIGHTS HEREBY GRANTED WITH KNOWLEDGE OF THE DANGER INVOLVED AND EXPRESSLY WAIVES AND RELEASES CITY AND ITS OFFICERS, AGENTS, AND EMPLOYEES FROM ALL LIABILITY ARISING OUT OF FCE'S PRESENCE ON CITY'S PROPERTIES.**

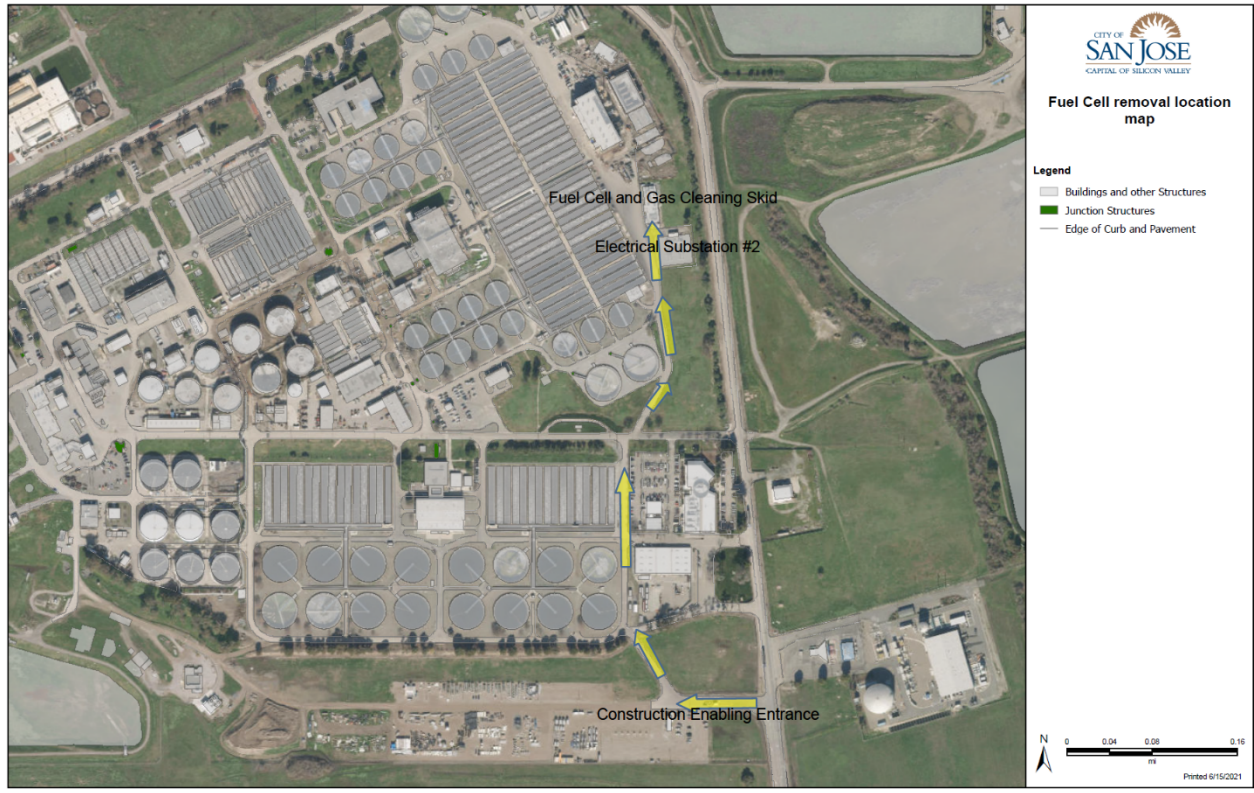
- 4.14 Nothing herein shall be construed as a grant of title or any interest in the CITY's Properties.
- 4.15 Nothing herein shall be construed as an admission of liability by CITY of its responsibility as to any Hazardous Materials which may be found on the CITY's Properties, nor, except as expressly provided herein, as an admission of liability by FCE as to any Hazardous Materials which may be found on the CITY's Properties.
- 4.16 Pursuant to a Settlement and Release Agreement between UTS SJ-1, LLC and Fuelcell Energy, Inc. dated October 5, 2020 UTS SJ-1 alone is responsible for restoration of the CITY's Properties as set forth in §4.16 of the ROE Agreement between the City and UTS SJ-1. FCE represents and warrants that above stated material fact is true and disclaims any obligation or duty to site restoration following completion of its scope of work at site, which scope of work is set forth in its entirety within the attached Exhibit B to this Agreement.
5. Termination of Right of Entry. CITY shall have the right to terminate this Agreement, with cause immediately.
6. Electronic Signature of Documents: Unless otherwise prohibited by law or policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of an original signed contract in a portable document format. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved the Parties
7. Notices. All notices given in conjunction with this Agreement shall be written, and shall be effective five (5) days after deposit in the U.S. Mail, first-class postage prepaid to the applicable address stated below, or to such other address as the party may designate by written notice:

CITY: Director of Environmental Services  
City of San José  
San José/Santa Clara Regional Wastewater Facility  
700 Los Esteros Road  
San José, CA 95138  
(408) 945-5300

FCE: FUELCELL ENERGY, INC.  
Clinton Smith, Director of Customer Service  
3 Great Pasture Road  
Danbury, CT 06810



# EXHIBIT A



1.

## EXHIBIT B

### FCE Scope of Work

#### FCE Scope

1. Coordinate and supply crane, trucks, equipment and labor to remove Module(s)
  - A. Not less than 1 Month prior to removal:
    - (2) Personnel with vehicles onsite for 1 hour
  - B. Two weeks prior to removal:
    - (3) Personnel with vehicles onsite during working hours
    - (1) Boom Forklift
  - C. Day(s) of removal:
    - (1) Crane with (2-3) counterweight trucks
    - (1) Oversized Load truck per Module with Escort
    - (8-10) Personnel with vehicles
2. Isolate Module(s) from system
  - A. LOTO Tie Breaker
  - B. LOTO NG/ADG
3. Determine DC Cabling from Module(s) and remove (set aside) DC Cable Tray
4. Remove Module Top Hats and install Shipping Restraints
5. Disconnect Skid 2 interconnect piping from Modules
  - A. (4) Flanged connections/Module
  - B. (2) Clamped connections/Module
6. Disconnect Instrument Panel connections from Module IJB(s)
  - A. 24VDC Power and Ethernet Cable
7. Remove Module Anchors and Grounding Cables (nuts/washers only)
8. Rig and lift Module(s) onto trucks, secure for transport, escort offsite
9. Clear FCE LOTO's
10. Remove FCE Property

**EXHIBIT C**

**HAZARDOUS MATERIALS**

For the purpose of this Agreement, “**Hazardous Materials**” shall mean any and all (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws, and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products, or waste.

For the purposes of this Agreement, “**Environmental Laws**” shall mean and include all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational, health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or cleanup of, any and all Hazardous Materials, including without limitation, all federal or state super lien or environmental clean-up statutes.



**EXHIBIT D**  
**INSURANCE**

FUELCELL ENERGY, at FUELCELL ENERGY'S sole cost and expense, shall procure and maintain for the duration of this AGREEMENT, insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by FUELCELL ENERGY, its agents, representatives, employees or subcontractors.

**A. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance.
4. Pollution Liability Insurance including coverage for all operations, completed operations, and professional services.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

**B. Minimum Limits of Insurance**

FUELCELL ENERGY shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and

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3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and
4. Pollution Liability Insurance: \$1,000,000 each event limit.

**C. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to and approved by CITY's Risk Manager. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officer, employees, agents and contractors; or FUELCELL ENERGY shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

**D. Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

**1. Commercial General Liability, Automobile Liability, and Pollution Liability Coverages**

- a. The City of San José, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, FUELCELL ENERGY; products and completed operations of FUELCELL ENERGY; premises owned, leased or used by FUELCELL ENERGY; and automobiles owned, leased, hired or borrowed by FUELCELL ENERGY. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.
- b. FUELCELL ENERGY's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents, and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents, or contractors shall be excess of FUELCELL's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by FUELCELL ENERGY shall not affect coverage provided CITY, its officers, employees, agents, or contractors.

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- d. Coverage shall state that FUELCELL ENERGY's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
  - e. Coverage shall contain waiver of subrogation in favor of the City of San José, its officers, employees, agents, and contractors
2. Workers' Compensation and Employers' Liability  
Coverage shall contain waiver of subrogation in favor of the City of San José, its officers, employees, agents and contractors
3. All Coverages  
Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days prior written notice has been given to CITY, except that ten (10) days prior written notice shall apply in the event of cancellation for non-payment of premium.

**E. Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

**F. Verification of Coverage**

FUELCELL ENERGY shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov), or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San José - Finance  
Risk Management  
200 East Santa Clara St., 13th Floor Tower  
San José, CA 95113-1905

**G. Subcontractors**

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FUELCELL shall include all subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.