

**RIGHT OF ENTRY AGREEMENT
BETWEEN THE CITY OF SAN JOSE
AND UTS SJ-1 LLC.**

THIS RIGHT OF ENTRY AGREEMENT (“AGREEMENT”) is made this 28th day of January 2022, by and between SJ-1 UTS SJ-1 LLC. (“UTS”), 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 SJ-1 INC. represent that they have settled¹ the litigation related to the system, and agreed pursuant to the settlement that SJ-1 INC. shall have title to the DFC 1500 Cell Module currently installed at Property; and
- D. **WHEREAS**, UTS desires to enter the Property for the purpose of demolition and removal of various components of fuel cell, and associate components located at the Property; and
- 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.;
- 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, UTS and CITY agree as follows:

1. Right of Entry. CITY hereby grants to UTS, its employees, agents, contractors, and consultants, a right of entry as hereinafter described, subject to all licenses,

¹ The settlement agreement, entitled “SETTLEMENT AND RELEASE AGREEMENT” was entered into between Fuel Cell Energy Inc. on the one hand, and RP1 Fuel Cell, LLC and UTS SJ-1, LLC on the other hand, dated August 20, 2020.

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 performing demolition, and removal of equipment and facilities associated with the fuel cell and various components, 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 be for a period of ninety (90) calendar days, commencing upon written notice of intent to mobilize to the Property from UTS (the "UTS Notice"), that shall be provided two (2) weeks prior to UTS's planned date of entry.
4. Terms and Conditions. The Right of Entry is given subject to the following terms and conditions:
 - 4.1 UTS acknowledges its right of entry will be limited to the areas designated on **Exhibit A**, as described in detail on Recital B above and attached hereto.
 - 4.2 UTS acknowledges the condition of the areas designated on **Exhibit A** and accepts the "as is" condition of the designated areas.
 - 4.3 CITY representatives shall be entitled to observe all activities conducted hereunder.
 - 4.4 UTS shall be responsible for coordination of work to avoid any conflicts with operations and maintenance at CITY's Properties.
 - 4.5 UTS shall proceed with its scope pursuant to the proposed demolition and removal work plan as set forth in **Exhibit B** attached hereto and incorporated herein.
 - 4.6 Prior to any work, all staff of UTS 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 UTS shall not leave any substances, equipment or materials, specifically including, without limitation, any debris generated during performance of the proposed work on the site. Any and all debris generated during this work shall

all be stored in proper containers or at an agreed location at the site and characterized by UTS for off-site disposal. The disposal must occur at an appropriate facility such as a landfill or waste disposal/recycling facility, and such removal from the site shall occur within the time period of this agreement.

- 4.9 UTS 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 work 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.
- 4.10 Prior to the execution of this Agreement, UTS shall provide CITY with certificates of insurance acceptable to CITY, showing CITY as an additional insured party as to all insurance coverage provided by UTS 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.
- 4.11 UTS 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 UTS's negligent acts or willful misconduct in its exercise of rights granted hereunder by UTS, its employees, agents, contractors, or representatives, except to the degree of any damage or injury arising out of CITY's or any third party's negligence or willful misconduct.

UTS 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 UTS 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 UTS'S PRESENCE ON CITY'S PROPERTIES.

- 4.12 Nothing herein shall be construed as a grant of title or any interest in the CITY's Properties.
- 4.13 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 UTS as to any Hazardous Materials which may be found on the CITY's Properties.
- 4.14 UTS shall restore the Property as provided in Exhibit B following exercise of the rights granted by this Right of Entry. If the restoration is not so performed by UTS within fifteen (15) calendar days after termination of this Right of Entry, CITY shall have the right (but not the obligation) to perform the necessary restoration. Upon receipt of the notice of reasonable and substantiated restoration costs, UTS agrees to promptly reimburse CITY for such restoration costs incurred, plus an additional amount equal to ten (10%) percent thereof for administrative overhead. The demand for payment by CITY shall be documented pursuant to good business practice, and shall constitute prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by CITY on behalf of UTS.
5. Termination of Right of Entry. CITY shall have the right to terminate this Agreement, for cause, by giving not less than sixty (60) days (after the UTS Notice) written notice of termination. However, if the parties terminate the agreement without cause, paragraph 4.14 shall not apply.
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

UTS SJ-1 LLC.
Albert Gardiner
5780 Fleet Street, Suite 310
Carlsbad, CA 92008
(760) 436 8870
<mailto:operations-usa@anaergia.com>

With a copy to:

Thor Erickson, General Counsel
5780 Fleet Street, Suite 310
Carlsbad, CA 92008
(760) 436 8870
legal-usa@anaergia.com

IN WITNESS WHEREOF, the parties have executed this instrument the day and year first above written.

"CITY"

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

Cameron Day

Email: cameron.day@sanjoseca.gov

CAMERON DAY
Deputy City Attorney

:

Sarah Zarate

Email: sarah.zarate@sanjoseca.gov

SARAH ZARATE
Director, Office of City Manager

UTS SJ-1 LLC.

By:

arun.sharma@anaergia.com

Email: arun.sharma@anaergia.com

ARUN SHARMA
President

EXHIBIT A

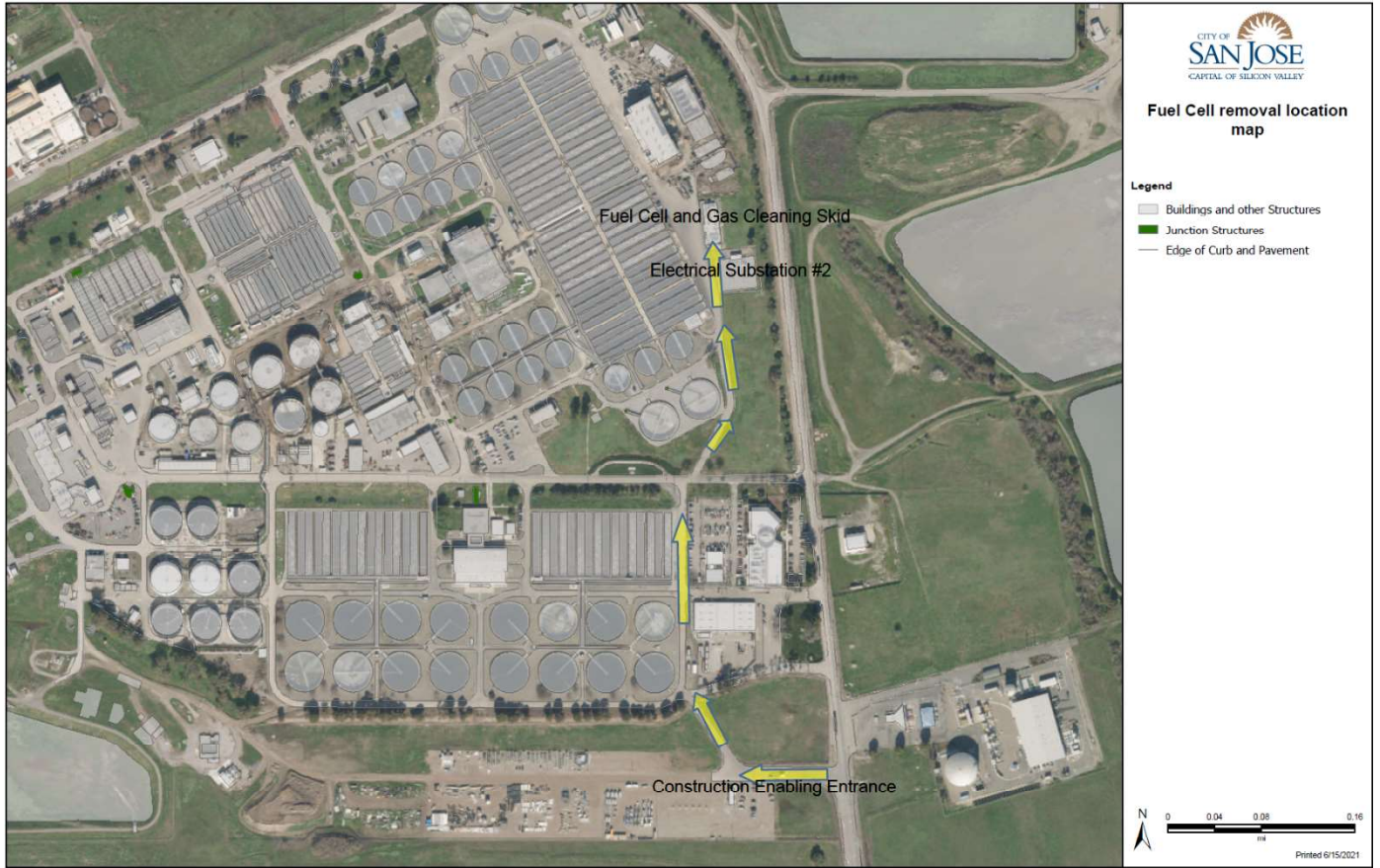


EXHIBIT B

UTS Scope of Work
December 21, 2021

References to UTS herein shall be understood to include its authorized contractor Anaergia Technologies LLC.

PURPOSE: The purpose of this plan is to accurately communicate UTS' demolition and removal strategy for equipment installed by UTS and Fuel Cell Energy Inc. at the RWF. Demolition and removal includes equipment such as transformers, inverters, load leveler, control cabinets, motors, blowers, conduit, and wire, vessels, skids, desulfurizers, piping, supports, etc. Demolition and removal includes equipment in the Fuel Cell Energy Inc scope of work, as set forth in Exhibit B of that certain agreement entitled "RIGHT OF ENTRY AGREEMENT BETWEEN THE CITY OF SAN JOSE AND FUELCELL ENERGY INC."

ORDER OF WORK: Fuel Cell Energy will first remove their Fuel Cell. Once the removal has been completed, UTS will begin its work. UTS will start with the removal of the Iron Sponge media. The iron sponge vessels will be filled with water well before any media is removed, days or even weeks prior. This will ease the removal of the media and aid in the passivation (more about the Iron Sponge media passivation in the following paragraph). Once the Iron Sponge has been removed we will move on to Activated Carbon removal, then ultimately Nickel Catalyst. After all media has been removed from the vessels, we will begin the demolition of the station.

EQUIPMENT USED: The majority of the piping, conduit, and small equipment will be removed and placed in bins with forklifts. Bins will be placed outside of normal traffic flow just west of the Fuel Cell (See Recycle Bin Locations Drawing). There will be separate bins for: stainless steel, carbon steel, and electrical wire. Bins will be hauled offsite and replaced by UTS when they are at capacity. Trench plates may have to be used to allow forklifts to drive over elevation changes caused by raised foundations or utility trenches which may not be strong enough to drive on. A hydraulic crane will be used to load the large equipment- transformers, load leveler, large chiller, large heat exchanger, ISO containers, onto flatbed trucks. Longer pieces of I beam skid frames may have to be cut onsite to facilitate shipment, UTS will procure a hot work permit pursuant to applicable facility rules.

METHOD OF REMOVAL: Piping - Pipe spools will be disassembled by unbolting them at the flanges, disconnecting piping at equipment and vessels through unbolting as well and hauled offsite by UTS. Cutting of piping will be minimized as much possible for natural gas, cooling water, potable water, etc. No disconnecting or cutting will be done until Nitrogen purge has been completed and both a calibrated methane detector and H2S detector have given us safe readings. Electrical conduit will be disassembled as well. For convenience some electrical conduit may be cut, but only after thorough purging with nitrogen and clear readings on both methane and H2S detectors as well.

EQUIPMENT REMOVED: Generally, equipment not removed by Fuel Cell Energy will be removed by UTS and retained for storage.

MEDIA: Media will be removed from its respective vessels with the use of a super sucker type Vacuum Truck. Iron Sponge media is pyrophoric, as such it requires passivation before disposal. Passivation will take place by placing it in a 12'w x 50'l containment berm, approximately 6" thick, and soaking with water for a period of at least ten (10) days. Neither Activated Carbon nor Nickel catalyst will require such treatment. Those will be transferred from the Super Sucker trucks to roll off bins which then will be hauled offsite to appropriate legal destination which may include reuse or disposal. Iron Sponge media passivation berm and Activated Carbon & Nickel Catalyst rolloffs will be placed in the open area directly east of the Fuel Cell (See Media Bin Locations Drawing).

DEBRIS: A separate bin/dumpster will be used to consolidate debris which cannot be recycled. Pipe insulation and various materials produced or uncovered will be disposed of in this dumpster. UTS will make sure housekeeping is a priority in daily activities. Notification: UTS will notify CITY personnel prior to any work which may impact plant operations, specifically affecting normal traffic flow. This would mainly be loading major equipment on flatbed trucks with a hydraulic crane.

PPE: All workers will wear proper Personal Protective Equipment at all times. This includes, but is not limited to safety toe boots, hard hat, reflective shirt or vest, eye protection, hearing protection and breathing protection when necessary.

SAFETY: A daily safety meeting will take place to discuss the work of the day and any hazards which would need to be dealt with. CITY personnel are welcome to participate in the meetings.

PERSONNEL: UTS will have onsite personnel to answer any questions or deal with any issues CITY representatives might have.

COMPLETION: All flanges left open because of UTS' work will be fitted with a blind flange and bolts. Any piping or conduit which is to be demolished at the ground surface will be cut flush, no filling or capping is included. All anchor bolts will be cut off, flush with surrounding concrete. Drypack grout will be removed, area will be swept clean. Bollards and any improvements not directly related to the fuel cell will remain in place.

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

UTS, at UTS'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 UTS, 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

UTS 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 UTS 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, UTS; products and completed operations of UTS; premises owned, leased or used by UTS; and automobiles owned, leased, hired or borrowed by UTS. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.
- b. UTS'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 UTS's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by UTS shall not affect coverage provided CITY, its officers, employees, agents, or contractors.
- d. Coverage shall state that UTS'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.

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11/11/2020

- 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

UTS 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, 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

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