UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98243 / August 30, 2023

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4452 / August 30, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21588

In the Matter of **Plug Power Inc.,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Plug Power Inc. ("Plug Power," or the "Company," or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Insituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

1. This matter involves financial reporting, accounting, and controls failures by Plug Power, a provider of green hydrogen and hydrogen-fuel-cell systems. These failures led to a multi-year restatement of Plug Power's financial statements concerning, among other things, reported assets and liabilities for leases, classification of certain operating costs, and loss accruals for service contracts.

2. From 2018 through the third quarter of 2020, Plug Power failed to properly account for its right-of-use ("ROU") assets and lease liabilities for certain sale-leaseback transactions, failed to properly classify and present certain costs related to research and development ("R&D") activities as cost of revenue, and failed to properly estimate loss accruals for extended-maintenance contracts. Plug Power also failed to properly account for other items, including bonus expense in the third quarter of 2020, and certain conversions of the Company's convertible preferred stock. On March 16, 2021, Plug Power announced that its prior annual reports on Form 10-K for 2018 and 2019, and prior quarterly reports on Form 10-Q for 2019 and 2020, should no longer be relied upon due to the Company's accounting errors. Plug Power subsequently restated these financial statements in the Company's 2020 Form 10-K filing on May 14, 2021. In the restatement, management identified a material weakness in internal control over financial reporting ("ICFR"), and ineffective disclosure controls and procedures ("DCP"), due to Plug Power's failure to maintain a sufficient complement of trained, knowledgeable personnel to execute their responsibilities for certain financial statement accounts and disclosures. Despite these control deficiencies, the Company raised over $5 billion from investors during the relevant Filing Period.[1] Plug Power's remediation efforts are ongoing but the Company's material weakness in ICFR and ineffective DCP have not been fully remediated.

3. As a result of this conduct, Plug Power violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act, and Rules 13a-1, 13a-13, and 13a-15(a) – (c) thereunder.

Respondent

4. Plug Power is a Delaware corporation headquartered in Latham, New York. Plug Power provides green hydrogen and hydrogen-fuel-cell solutions for electric motors in supply chain and logistics applications, electric vehicles, stationary power, and other markets. The Company's common stock is registered under Section 12(b) of the Exchange Act, and trades on the Nasdaq Stock Market under the symbol "PLUG."

Plug Power Releases 2020 Earnings

5. On February 24, 2021, Plug Power's management and its independent accounting firm at the time, KPMG LLP ("KPMG"), met with the Company's Audit Committee. During the meeting, management informed the Audit Committee that Plug Power's 2020 Form 10-K was

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[1] The "Filing Period" begins on March 13, 2019, which is the date when Plug Power filed its first financial statements that required restatement, and ends on May 14, 2021, which is the date when Plug Power filed the restated financial statements in the Company's 2020 Form 10-K.

substantially complete. Management and KPMG also reported that there were no significant audit issues, and any pending items were considered immaterial. The following day, February 25, 2021, Plug Power released its financial results for the fourth quarter and year-ended December 31, 2020.

6. As audit work continued over the next few days, KPMG's audit team examined Plug Power's impairment analysis for certain lease assets and questioned whether the Company had failed to identify a triggering event and potential impairment. KPMG's audit team also tried to address open questions concerning Plug Power's reclassification of certain hydrogen-fuel costs as R&D expenses. Plug Power and KPMG tried to resolve these issues before the prescribed filing date for the Company's Form 10-K, but Plug Power ultimately missed the March 1, 2021 date.

Plug Power Discloses Delayed Filing and Possible Restatement

7. On March 2, 2021, Plug Power filed a Notification of Late Filing on Form 12b-25 and disclosed that the Company needed "additional time to complete the procedures relating to its year-end reporting process," including "procedures relating to management's assessment of the effectiveness of internal controls." Plug Power stated that it was "working diligently to complete the necessary work, including review and assessment of the treatment of certain costs with regards to classification between [R&D] versus Costs of Goods Sold, the recoverability of [ROU] assets associated with certain leases, and certain internal controls over these and other areas." The Company also disclosed that "one or more of these items may result in charges or adjustments to current and/or prior period financial statements."

8. Over the next two weeks, KPMG's audit team continued to perform audit procedures on Plug Power's impairment analysis for certain lease assets and the reclassified costs. The audit team eventually concluded that Plug Power's ROU assets and lease liabilities for certain sale-leaseback transactions had been calculated incorrectly and materially overstated. They also concluded that certain hydrogen-fuel costs should not be reclassified and reported as R&D expenses. KPMG notified Plug Power about the accounting errors. Management consulted KPMG and Plug Power's Audit Committee about these issues, and on March 12, 2021, the Audit Committee concluded that the Company should restate its prior financial statements.

Plug Power Announces Restatement

9. On March 16, 2021, Plug Power filed a Form 8-K and announced that its prior annual reports on Form 10-K for 2018 and 2019, and quarterly reports on Form 10-Q for 2019 and 2020, should no longer be relied upon. Plug Power disclosed that it would restate the prior-period financial statements to correct numerous accounting errors, including: (i) the reported book value of ROU assets and related finance obligations; (ii) loss accruals for certain service contracts; (iii) impairment of certain long-lived assets; and (iv) classification of certain costs relating to R&D expense and cost of revenue. Plug Power stated that it expected to restate the impacted financial statements in the Company's 2020 Form 10-K.

Plug Power Files Restatement

10. On May 14, 2021, Plug Power filed a Form 10-K for 2020 that included restated annual financial statements for 2018 and 2019, and interim quarterly reports for 2019 and 2020. The restatement corrected numerous accounting errors, including the following:

a. $112.7 million overstatement of ROU assets and lease liabilities as of December 31, 2019 due to the failure to correctly calculate lease liabilities for certain sale-leaseback transactions ("Sale-Leaseback Errors");

b. $19.5 million overstatement of gross profit for 2019, and $21.2 million overstatement of gross profit for 2018, due to the failure to properly classify and present certain costs related to R&D activities as cost of revenue ("Cost-Classification Errors"); and

c. $1.6 million understatement of the benefit for loss accruals in 2019, and $5.3 million understatement of the provision for loss accruals in 2018, due to the failure to properly estimate loss accruals for extended-maintenance contracts ("Loss-Accrual Errors").

The restatement also corrected other accounting errors, including the Company's reported bonus expense in the third quarter of 2020, an error in prior lease accounting, an error from certain conversions of the Company's convertible preferred stock, and other items. Management concluded that the aggregate impact of these accounting errors was material to the Company's prior-period financial statements. Additionally, while not part of the restatement, Plug Power initially failed to identify triggering events in the fourth quarter of 2020 that caused a $5.7 million impairment of certain ROU assets.

11. In the 2020 Form 10-K, Plug Power's management also identified the following deficiency in the Company's ICFR:

> the Company did not maintain a sufficient complement of trained, knowledgeable resources to execute their responsibilities with respect to [ICFR] for certain financial statement accounts and disclosures. As a consequence, the Company did not conduct an effective risk assessment process that was responsive to changes in the Company's operating environment and did not design and implement effective process-level controls activities in the following areas: presentation of operating expenses; accounting for lease-related transactions; identification and evaluation of impairment, loss-contract accrual, certain expense accruals, and deemed dividends; and timely identification of adjustments to physical inventory in interim periods.

Management concluded that this deficiency constituted a material weakness in ICFR, and the Company's DCP were not effective, as of December 31, 2020. Plug Power later filed an amended Form 10-K on March 14, 2022 that provided management's discussion and analysis for the quarterly periods, and disclosed that the material weakness in ICFR and ineffective DCP also existed in 2018 and 2019. Despite these control deficiencies, Plug Power raised over $5 billion from investors during the relevant Filing Period, including approximately $4.8 billion from the sale of common stock, and approximately $244 million from the sale of convertible senior notes.

Plug Power's Sale-Leaseback Errors

12. In some sales transactions, Plug Power sells its hydrogen-power equipment to financial institutions and then leases the equipment back to provide power to customers under Power Purchase Agreements ("PPAs"). Sometimes Plug Power also sells its contractual future revenue streams from customers under the PPAs to financial institutions in exchange for cash. Plug Power repays that separate obligation to the financial institutions as the Company receives payments from customers under the PPAs.

13. There are two elements to these transactions with financial institutions: (i) a sale and leaseback of equipment; and (ii) a debt component for the proceeds that Plug Power received from financial institutions related to the sale of future revenues. Plug Power's lease liabilities and corresponding ROU assets for the sale and leaseback of equipment should be based on the present value of the portion of the Company's future payments to financial institutions that represent the lease component (i.e., excluding the portion representing the Company's debt-service repayments). Historically, Plug Power incorrectly included the entire repayment amount when determining lease liabilities and corresponding ROU assets even though the Company had separately recorded a debt obligation related to the cash received from the sale of future revenues.

14. To correct these errors, Plug Power reduced the lease liabilities and corresponding ROU assets to exclude the double-counting of the debt obligation at the inception of the leases. The restatement reduced Plug Power's ROU assets and lease liabilities on December 31, 2019 by $112.7 million. Relative to the Company's previously reported ROU assets of $245 million, and total assets of $771 million, the correction reduced Plug Power's ROU assets by approximately 46%, and total assets by nearly 15%.

Plug Power's Cost-Classification Errors

15. When Plug Power started deploying its GenKey hydrogen-power systems in 2014, the Company had to learn how to install and maintain these systems at different sites. Plug Power encountered numerous problems during this process, including the loss of hydrogen fuel that occurs during transportation, delivery, installation, and maintenance of equipment. Over time, however, Plug Power developed better methods and generally reduced the amount of lost fuel.

16. To account for these efforts, the Company reclassified a portion of such fuel-loss costs to R&D expenses rather than cost-of-sales expenses. During the 2020 audit, KPMG identified the reclassified costs as a potential adjustment because the audit team believed the

reclassification was a departure from generally accepted accounting principles ("GAAP"). KPMG continued to perform audit procedures on these accounts in early March 2021, and the audit team eventually concluded that the costs should be reported as cost of revenue (i.e., cost-of-sales expenses). Management decided to restate the previously reported amounts.

17. In the restatement, management concluded that Plug Power should have properly classified these fuel costs as cost of revenue rather than R&D expenses. The restated expenses negatively impacted the Company's previously reported gross profit. For example, Plug Power's gross profit for 2019 decreased by $19.5 million — a 68% decrease in the previously reported gross profit of $28 million — and its gross profit for 2018 decreased by $21.2 million — which turned a $2.6 million gross profit into a gross loss of $18.6 million.

Plug Power's Loss-Accrual Errors

18. Plug Power sells extended-maintenance contracts to customers that generally provide five-to-ten-year coverage in exchange for up-front payments. The Company's future service obligations are recorded as deferred revenue, which is recognized over the life of the contract, generally on a straight-line basis. When expected future service costs are projected to exceed revenues over the remaining term of a contract, the Company records an accrual for loss.

19. Plug Power failed to properly estimate loss accruals for extended-maintenance contracts for two reasons. First, due to the Company's prior reclassification of certain fuel costs as R&D expenses, the Company failed to consider these historical costs when estimating future services and potential loss accruals. Second, Plug Power also failed to properly consider certain service costs for hydrogen infrastructure, and costs from stock warrants issued to large customers, when estimating potential loss accruals. Initially, these costs were considered immaterial, but over time the costs became material and the Company failed to include them in the loss-accrual estimates.

20. The restatement increased Plug Power's 2018 loss accrual by $5.3 million — which turned a $2.6 million gross profit into a gross loss of $2.7 million — and reduced the 2019 loss accrual by $394,000 due to a partial release of the 2018 loss accrual.

Plug Power's Internal Control Deficiencies

21. During the restatement process, Plug Power identified numerous control failures, design deficiencies, and absent controls related to the Company's accounting errors. In particular, management determined that Plug Power did not have the appropriate level of accounting personnel and technical expertise to properly assess the accounting implications of many complex business transactions. Management concluded that this design deficiency was primarily caused by a lack of sufficient qualified technical accounting and financial reporting personnel to perform control activities for complex and non-routine transactions.

22. Due to this deficiency, management determined that certain process-level controls did not operate effectively to mitigate identified risks in the following areas: (i) accounting for

certain sale-leaseback transactions; (ii) classification of certain operating expenses; and (iii) identification and evaluation of certain management estimates concerning loss accruals, quarterly bonus expenses, and impairment. Management also determined that: (i) the Company's process when applying GAAP to complex accounting matters was insufficient; (ii) its estimation policies and procedures were not consistent with overall market dynamics; and (iii) it did not have sufficient tools and tracking mechanisms to maintain appropriate documentation for the classification of certain operating expenses. Plug Power also failed to design sufficient controls for: (i) lease accounting; (ii) presentation of operating expenses; (iii) identification and evaluation of impairment; (iv) accrual for loss contracts; (v) accruals for certain expenses; and (vi) physical inventory controls at interim periods.

Plug Power's Material Weakness Has Not Been Fully Remediated

23. Management concluded that the failure of Plug Power's process-level controls resulted in material misstatements of the Company's financial statements, and when considered in aggregate, the deficiencies constituted a material weakness in ICFR in 2018, 2019, and 2020. Management also concluded that Plug Power's DCP were not effective during these periods because of this material weakness in ICFR.

24. Plug Power prepared a remediation plan during the restatement process, and began implementing the plan in 2021, which includes numerous measures to remediate the material weakness in ICFR and ineffective DCP. In Plug Power's 2022 Form 10-K, filed on March 1, 2023, the Company disclosed management's determination that certain enhancements to Plug Power's risk-management process, and enhancements to certain process-level controls and information-technology controls, are operating effectively. The Company also disclosed that management considers the risk-management process, process-level and general information-technology material weaknesses that were identified in 2021 to be remediated as of December 31, 2022. Despite Plug Power's ongoing remediation efforts, however, the Company's material weakness has not been fully remediated.

Violations

25. As a result of the conduct described above, Plug Power violated Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, which require every issuer of a security registered under Section 12 of the Exchange Act to file with the Commission complete and accurate annual and quarterly reports.

26. In addition, as a result of the conduct described above, Plug Power violated Section 13(b)(2)(A) of the Exchange Act, which requires issuers such as Plug Power to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of assets.

27. In addition, as a result of the conduct described above, Plug Power violated Section 13(b)(2)(B) of the Exchange Act, which, among other things, requires issuers such as Plug Power to devise and maintain a system of internal accounting controls sufficient to provide

reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements.

28. In addition, as a result of the conduct described above, Plug Power violated Exchange Act Rules 13a-15(a) – (c), which require issuers such as Plug Power to maintain and evaluate the effectiveness of: (i) disclosure controls and procedures that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms, and that such information is accumulated and communicated to the issuer's management to allow timely decisions regarding required disclosure; and (ii) internal control over financial reporting to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP. Under Item 308 of Regulation S-K, management must provide an annual report that discloses management's assessment of the effectiveness of ICFR and any material weakness in ICFR, and management is not permitted to conclude that the registrant's ICFR is effective if there are one or more material weaknesses in the registrant's ICFR.

Plug Power's Remedial Efforts

29. In determining to accept Plug Power's Offer, the Commission considered remedial acts promptly undertaken by the Company and cooperation afforded the Commission staff. Specifically, Plug Power prepared and began implementing a remediation plan in 2021, which includes the following remedial measures: (i) hiring additional resources, including approximately 60 new employees in its accounting and finance department and internal audit; (ii) utilizing third-party resources with appropriate technical accounting expertise, and strengthening internal training, to help the Company's employees identify and address complex technical accounting issues that affect the financial statements; (iii) designing and implementing a continuous risk-assessment process to identify and assess risks of material misstatements, and to help ensure that financial-reporting processes and related internal controls are properly designed, maintained, and documented to respond to such risks in financial reporting; (iv) implementing more analysis and review procedures and documentation for the application of GAAP, complex accounting matters, and key accounting policies; (v) augmenting estimation policies and procedures to be more robust and consistent with overall market dynamics, including evaluating the Company's operating environment to ensure operating effectiveness of certain process-level controls; (vi) deploying new tools and tracking mechanisms to enhance and maintain appropriate documentation concerning the classification of certain operating expenses; and (vii) reporting regularly to Plug Power's Audit Committee concerning progress and results, including the identification, status, and resolution of control deficiencies.

Undertakings

30. Plug Power has undertaken to:

a. Fully remediate its material weakness in ICFR, and ineffective DCP, within one year from the date of this Order.

b. Publicly disclose, within one year from the date of this Order, whether in management's opinion, Plug Power has fully remediated its material weakness in ICFR and ineffective DCP.

c. Certify, in writing, compliance with the undertakings set forth above. The Commission staff may make reasonable requests for evidence of compliance, including a narrative and supporting exhibits, and Plug Power agrees to provide such evidence. The certification and any requested supporting materials shall be submitted to James E. Etri, Assistant Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the agreed sanctions in Respondent's Offer.

Accordingly, it is hereby ORDERED that**:**

A. Pursuant to Section 21C of the Exchange Act, Respondent Plug Power cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1, 13a-13, and 13a-15(a) – (c) thereunder.

B. Respondent shall comply with the undertakings enumerated in Paragraph 30 above.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $1,250,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

D. If Respondent fails to comply with the undertakings enumerated in Paragraph 30 above, Respondent shall, within ninety (90) days after one year from the date of this Order, pay an additional civil money penalty in the amount of $5,000,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

E. Payment(s) must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payment(s) by check or money order must be accompanied by a cover letter identifying Plug Power as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Eric Werner, Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, Suite 1900, Fort Worth, Texas 76102.

F. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of any civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary