



## **PLUG POWER INC.**

### **AUDIT COMMITTEE COMPLAINT PROCEDURES <sup>1</sup>**

Adopted by the Board of Directors on February 12, 2004

Revised and Adopted by the Board of Directors on February 9, 2006

This policy outlines the procedures that the Audit Committee of the Board of Directors of Plug Power Inc. (together with its subsidiaries, the "Company")<sup>2</sup> has established with respect to the receipt, treatment and retention of complaints received by the Company regarding accounting, internal accounting controls or auditing matters, including the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters (collectively, "Complaints").<sup>3</sup>

#### **I. Procedures for Receiving Complaints<sup>4</sup>**

Complaints may be submitted to the Company as follows:<sup>5</sup>

- The complaining party may place an anonymous phone call to the Audit Committee of the Board, or a designee of the Audit Committee, by contacting the "Anonymous Reporting" within the Company's internal phone system at extension 1505 (a phone extension used exclusively for the anonymous receipt of Complaints). During this phone call, the complaining party should identify the subject matter of his or her Complaint and the practices that are alleged to constitute an improper accounting, internal accounting control or auditing matter, providing as much detail as possible; and/or
- The complaining party may submit an anonymously confidential memorandum to the Audit Committee of the Board, or a designee of the Audit Committee, on the Company's internal website by accessing "powersource" or "ps". The memorandum should identify the subject matter of the Complaint and the practices that are alleged to constitute an improper accounting, internal accounting control or auditing matter, providing as much detail as possible.
- The complaining party may mail an anonymously confidential letter to the Audit Committee of the Board, or a designee of the Audit Committee, at the Company's headquarters address, 968 Albany Shaker Road, Latham, New York 12110. The correspondence should identify the subject matter of the Complaint and the practices that are alleged to constitute an improper accounting, internal accounting control or auditing matter, providing as much detail as possible.

All Company employees will be instructed through the Company's Code of Business Conduct and Ethics<sup>6</sup> that any and all Complaints may be made anonymously and in a confidential manner in accordance with the procedures set forth above.

Any Complaint received in accordance with the procedures set forth above will be forwarded in a confidential manner to the Chairman of the Audit Committee as soon as reasonably practicable following receipt of such Complaint. In addition, management will be informed that any Complaint received outside of these procedures should likewise be forwarded in a confidential manner to the Chairman of the Audit Committee for screening and delivery to the Audit Committee, as appropriate, as soon as reasonably practicable following receipt of such Complaint.

To ensure that the Company's clearinghouse mechanism is not inadvertently or improperly screening out Complaints that should be viewed by the Audit Committee, the Company's clearinghouse mechanism will be charged with preparing and submitting to the Chairman of the Audit Committee on a quarterly basis, a table or other report detailing the time, date, nature and disposition of each complaint received by the Company's clearinghouse mechanism since the date of the prior report. The table or other report will be reviewed by the Audit Committee at its next regularly scheduled meeting.<sup>7</sup>

## **II. Procedures for Treating Complaints**<sup>8</sup>

Following receipt of a Complaint, the Chairman of the Audit Committee will begin to conduct an initial evaluation of the Complaint.<sup>9</sup> The Chairman may delegate this authority to another member of the Audit Committee.<sup>10</sup> In connection with the initial evaluation, the Chairman or his or her designee will make a determination of:

- whether the Complaint requires immediate investigation;
- whether it can be held for discussion at the next regularly-scheduled meeting of the Audit Committee or whether a special meeting of the Audit Committee should be called; or
- whether the complaint should be reviewed by a party other than the Audit Committee if it is determined that the complaint is not related to accounting, internal accounting controls or auditing.

In any event, each Complaint will be discussed at the next meeting of the Audit Committee. At that meeting, the Audit Committee will make a determination as to whether and how such Complaint will be investigated, or if the investigation has commenced, how to proceed with such investigation. The Audit Committee may elect among the following options or may investigate the Complaint in another manner it determines to be appropriate:

- The Audit Committee may choose to investigate the Complaint on its own.
- The Audit Committee may select a responsible designee within the Company to investigate the Complaint. Under no circumstances should a member of the division

of the Company that is the source of the Complaint be charged with its investigation. In addition, if the Complaint was not made on an anonymous basis, the Audit Committee will determine whether it is appropriate to provide the designee with the identity of the complaining party.<sup>11</sup>

- The Audit Committee may retain an outside party (other than the Company's independent auditor) to investigate the Complaint and assist in the Complaint's evaluation.
- The Audit Committee may retain outside counsel to initiate an investigation and work either with internal parties or an outside financial/forensic auditing company to assist in such investigation.<sup>12</sup>

The investigating party designated by the Audit Committee will be permitted reasonable access to the Company and its documents and computer systems for purposes of conducting the investigation. At the conclusion of its investigation, the investigating party will be responsible for making a full report to the Audit Committee with respect to the Complaint and, if requested by the Audit Committee, to make recommendations for corrective actions, if any, to be taken by the Company.

The Audit Committee will consider, if applicable, the recommendations of the investigating party and determine whether any corrective actions should be taken. The Audit Committee will report to the Board of Directors not later than its next regularly scheduled meeting with respect to the Complaint for which such investigation has been completed and, if applicable, any recommended corrective actions. In the event that the Complaint involves any Director of the Company (whether in his or her role as a director, employee or officer of the Company or otherwise), the Audit Committee will make its report in an Executive Session of the Board of Directors (exclusive of any Director involved in such Complaint).

### **III. Procedures for Retaining Records Regarding Complaints**<sup>13</sup>

The Audit Committee will seek to ensure that all Complaints received by the Audit Committee, together with all documents pertaining to the Audit Committee's or its designee's investigation and treatment of any such Complaint, are retained in a secure location in accordance with the Company's record retention policy.<sup>14</sup> If a Complaint becomes the subject of a criminal investigation or civil litigation, all documents related to that Complaint will be retained until such investigation or litigation is resolved, including all appeals. The Audit Committee may delegate this record retention obligation to the Company's clearinghouse mechanism.

### **IV. Protection for Whistleblowers**<sup>15</sup>

At no time will there be any retaliation by the Company or at its direction against any employee for making a good faith complaint pursuant to the procedures described herein regarding accounting, internal accounting controls or auditing matters.

## V. Disciplinary Action

Nothing in these procedures shall limit the Company or the Board of Directors or a committee or designee thereof in taking such disciplinary or other action under the Company's Code of Business Conduct and Ethics or other applicable policies of the Company as may be appropriate with respect to any matter that is the subject of a Complaint.

## VI. Periodic Review of Procedures<sup>16</sup>

The Audit Committee will review the procedures outlined above and consider changes to such procedures on an annual basis.

---

*Endnotes are not an official part of these Audit Committee Complaint Procedures. Rather, they are annotations for the convenience of the reader of this working draft of the Procedures during their preparation, consideration and approval.*

- <sup>1</sup> These model Audit Committee Complaint Procedures are designed to address the requirements of Section 301 of the Sarbanes-Oxley Act of 2002, which added Section 10A(m)(4) to the Securities Exchange Act of 1934. The SEC directed the national securities exchanges and associations to prohibit the listing of any security of a company that has not established procedures for: (1) the receipt, retention and treatment of complaints received by a company regarding accounting, internal accounting controls or auditing matters and (2) the confidential, anonymous submission by employees of a company of concerns regarding questionable accounting or auditing matters. See NYSE Rule 303A.07(c)(iii), AMEX Section 803(a) and NASDAQ Rules 4350(d)(1)(D) and (d)(3), which all reference Rule 10A-3(b)(3) under the Exchange Act. The final Procedures must be approved by the Company's Audit Committee, and members of the Audit Committee, as well as senior management of the Company, should be involved in the preparation of the Procedures and the consideration of the various alternatives available.
- <sup>2</sup> These Procedures should apply to accounting, internal accounting controls and auditing matters with respect to the Company and all of its subsidiaries.
- <sup>3</sup> The introduction to these Procedures, including endnote 1, discusses their purpose. The Sarbanes-Oxley Act and related rules only require that the Audit Committee establish procedures with respect to complaints regarding "accounting, internal accounting controls or auditing matters," not all complaints that may be submitted to the company. While the scope of the requirements generally includes all accounting/auditing complaints received by a company, the requirement referring to confidential, anonymous submission of concerns regarding questionable accounting and auditing matters is directed only to employees of a company.
- <sup>4</sup> Neither the Sarbanes-Oxley Act nor the applicable rules provide any guidance on what appropriate procedures for receiving Complaints should be, except that employees need to have the option to submit Complaints on a confidential, anonymous basis. The alternatives listed for consideration are based on the following: (1) members of the Audit Committee are outside directors who usually have substantial responsibilities beyond the duties that they owe the Company and (2) the Audit Committee generally will not have existing permanent staff or existing infrastructure to assist it in performing its obligations. In addition, the Company should consider whether a structure for dealing with employee complaints already exists or will exist under the Company's Code of Business Conduct and Ethics or otherwise that could be used as part of these Procedures. Generally, it may be difficult and confusing to establish a dual reporting requirement under which employees would be required to report certain types of issues to the Audit Committee and others to some other designee(s) in the organization. Likewise, it may be difficult to devise a comprehensible definition of "accounting, internal

---

accounting controls or auditing matters” that would ensure that the Audit Committee does not receive complaints that are irrelevant to its obligations resulting from Section 301 of the Sarbanes-Oxley Act. As a result, consider putting in place a single, coordinated process under which employees are required to report questionable or allegedly illegal conduct or conduct violative of the Company’s policies to a central “clearinghouse” within or outside of the Company. Personnel within that clearinghouse would be responsible for directing complaints as appropriate to the Audit Committee or elsewhere (e.g., internal audit, human resources, etc.). Smaller companies may prefer to have Complaints submitted directly to a member of the Audit Committee.

- <sup>5</sup> Companies can mix and match methods of reporting Complaints as long as they have at least one means by which employees may submit Complaints on an anonymous and confidential basis. The two methods of communication, telephone call and submission of a confidential memorandum, were chosen because, under normal circumstances, these methods will ensure that employees who wish to do so may make their Complaints anonymously and confidentially. (Special attention, however, should be given to the potential use of telephone communications due to the prevalence of caller identification technology, as well as to the use of the Company’s communications equipment generally.) As technology advances, a properly designed web-based reporting system may become available.
- <sup>6</sup> The Company’s Code of Business Conduct and Ethics or similar code should set forth the same procedures for employees to submit Complaints as included in Item I and should indicate the means for making confidential, anonymous submissions. The procedures in Item I may also be posted on the Company’s internal website and/or in all employee work areas where postings are usually placed and/or included in the Company’s employee handbook.
- <sup>7</sup> The purpose of this provision is to have the Audit Committee police the clearinghouse mechanism to ensure that the Audit Committee is informed of, and treats in accordance with these Procedures, any complaints relating to accounting, internal accounting controls or auditing matters. The appropriate frequency of review may depend upon the volume of complaints typically received by the clearinghouse and the type of clearinghouse mechanism chosen (e.g., internal mechanism vs. third-party service), but this review should be performed on a regular basis. It is suggested that this review be performed at least on a quarterly basis, such that the Audit Committee will have a report to review at each regularly-scheduled meeting. This paragraph may be omitted if Complaints will be submitted directly to the Audit Committee.
- <sup>8</sup> Neither the Sarbanes-Oxley Act nor the applicable rules provide any guidance on what the appropriate treatment of Complaints should be. These provisions are provided for consideration in drafting the Procedures.
- <sup>9</sup> In practice, the review should be prompt, so there can be no allegation that the Company was made aware of illegal or improper conduct and failed to quickly take action to investigate and correct the conduct. The Procedures may or may not include the qualifier.
- <sup>10</sup> Although the Sarbanes-Oxley Act does not explicitly require that a member of the Audit Committee conduct the initial review of the Complaint, an argument can be made that the intent of the statute suggests that such review should not be delegated other than to a member of the Audit Committee.
- <sup>11</sup> Safeguarding the identity of a complaining employee, if known by the Audit Committee, may be one way to minimize the potential for retaliation against that employee (see also endnote 19).
- <sup>12</sup> Section 301 of the Sarbanes-Oxley Act authorizes the Audit Committee to retain independent advisors and requires the Company to provide appropriate funding for such advisors. See also Rules 10A-3(b)(4) and (5) under the Exchange Act.
- <sup>13</sup> Neither the Sarbanes-Oxley Act nor the applicable rules provide any guidance on what the appropriate retention of records regarding Complaints should be. However, Section 1102(l) of the Sarbanes-Oxley Act, “Tampering With a Record or Otherwise Impeding an Official Proceeding,” sets forth strict document retention requirements, stating that “whoever corruptly alters, destroys, mutilates or conceals a record, document or other

---

object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding...shall be fined under this title or imprisoned not more than 20 years, or both." It is currently unclear how this section will dovetail with the Audit Committee's requirement to establish procedures to retain complaints regarding accounting, internal accounting controls or auditing matters. The provisions concerning the retention of records regarding Complaints are provided for consideration in drafting the Procedures.

- <sup>14</sup> If the Company does not have a records retention policy, check with Goodwin Procter regarding current best practices.
- <sup>15</sup> Section 806 of the Sarbanes-Oxley Act includes severe penalties associated with any retaliatory actions by the Company against whistleblowers. The Company (and its officers, employees, contractors and agents) cannot subject an employee to adverse employment action because the employee provides information or assists in an investigation regarding conduct that the employee reasonably believes constitutes a violation of federal criminal anti-fraud law, any SEC rule or regulation, or any federal law relating to fraud against shareholders. Likewise, states in which the Company does business may have statutory and common law protections for whistleblowing. These Procedures should be drafted with an eye toward minimizing the chance that whistleblowers in this context will be retaliated against by managers or others in the organization - for instance, by having whistleblowers and low-level managers who may initially receive complaints report them to a person or committee acting as a clearinghouse with training as to how to process complaints properly. While the commentaries to the rules regarding Codes of Business Conduct and Ethics state that to encourage employees to report violations, a company must ensure that employees know that the company will not allow retaliation for reports made in good faith, this specific statement is more appropriately included in the Code itself. The Company, however, may wish to stress its commitment to protect whistleblowers in these Procedures as well.
- <sup>16</sup> Neither the Sarbanes-Oxley Act nor the SRO rules require annual or other periodic review of these Procedures. Good corporate governance procedures, however, would suggest that these Procedures be reviewed on a periodic basis in light of any changes in the law and the Company's experience in receiving and investigating Complaints. It would, at a minimum, make sense for the Audit Committee to review these Procedures in conjunction with any re-assessment of its Audit Committee Charter.