FuelCell Energy
3 Great Pasture Road
Danbury, CT 06810
www.fuelcellenergy.com

October 30, 2023

Via Federal eRulemaking Portal: https://www.regulations.gov

Commissioner Danny Werfel
Internal Revenue Service
CC:PA:LPD:PR
REG-100908-23
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: IRS REG-100908-23 – Notice of Proposed Rulemaking

Dear Commissioner Werfel:

FuelCell Energy, Inc. ("FuelCell Energy" or "FCE") submits these comments in response to the Internal Revenue Service's ("IRS" or "Service") Notice of Proposed Rulemaking ("NPRM") issued on August 30, 2023, regarding REG-100908-23: *See Increased Credit or Reduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements*, 88 Fed. Reg. 60,018 (August 30, 2023) (referred to herein as the "PWA Requirements"). FuelCell Energy thanks the IRS for this opportunity to provide comments and feedback on the NPRM.

FuelCell Energy Overview

FuelCell Energy is proud to be among the companies that have been dedicated to clean energy innovations since our inception over five decades ago. The company was founded in the United States in 1969 by two scientists devoted to pursuing technological innovations that address a wide variety of energy priorities through patent-protected U.S. innovation, compound combinations that produce and use energy in ways that are smarter and cleaner.

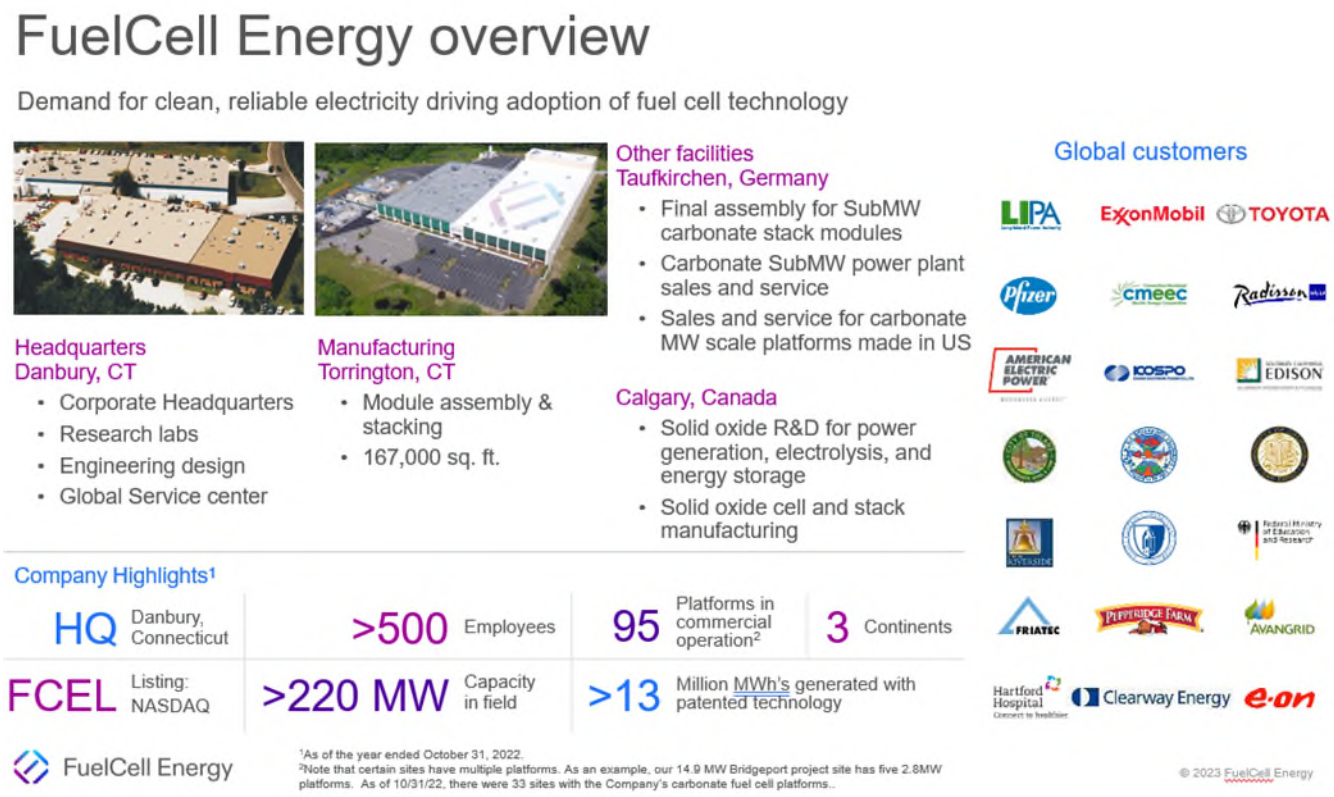
Our current product portfolio includes two dynamic electrochemical platforms: molten carbonate and solid oxide. Both platforms can support power generation and combined heat and power applications, CO_2 capture, and hydrogen generation from a variety of fuels, including natural gas, renewable biogas, or hydrogen. These fuel cells react with fuel electrochemically, without combusting the fuel, which avoids emissions produced by fuel combustion such as oxides of nitrogen, oxides of sulfur, and particulate emissions. In the electrochemical process, fuel and air are reacted in separate chambers in the fuel cell stack. As a result, the reactions producing CO_2 occur without mixing fuel and air. Thus, CO_2 remains concentrated and easy to remove. Both molten carbonate and solid oxide fuel cell systems

FuelCell Energy
3 Great Pasture Road
Danbury, CT 06810
www.fuelcellenergy.com

can benefit from this unique feature, with modifications enabling the capture of their own CO_2 for use or sequestration before it is emitted into the air.

FuelCell Energy's molten carbonate fuel cell is unique in its ability to also capture CO_2 from an external source, such as a power plant or an industrial boiler. Our solid oxide fuel cell can operate on pure hydrogen as a feedstock, emitting zero CO_2, which will become increasingly important as the uses of hydrogen for fuel become more widely adopted, and which complements the nation's current emphasis on deploying technology that enables hydrogen-based energy storage. We are also currently commercializing a solid oxide electrolyzer that will produce hydrogen from power and water, which will be well suited to partner with renewable energy projects and/or hydrogen storage infrastructure.

Simply put, our multi-featured platforms can be configured to provide multiple value streams, including electricity, hydrogen, high grade heat including steam, water, and CO_2 for sequestration and or utilization. The graphic below illustrates some of our key successes to date.



In addition, as a global leader in electrochemical technology, FuelCell Energy and its subsidiary Versa Power Systems, Inc. have: 158 U.S. patents covering their fuel cell technology, 47 U.S. patents pending, 338 patents in other jurisdictions covering their fuel cell technology and 128 patents pending in other jurisdictions.

FuelCell Energy
3 Great Pasture Road
Danbury, CT 06810
www.fuelcellenergy.com

Tri-gen Project

In 2023, FuelCell Energy and Toyota Motor North America announced the completion of the Tri-gen project at the Port of Long Beach in California ("Tri-gen Project"). FuelCell Energy's Tri-gen technology is the world's first deployed generation facility that uses biofuel to produce hydrogen, electricity, and water. Toyota uses these resources to power its operations at the port, fuel hydrogen vehicles, and to operate a car washing facility. Any unused electricity by Toyota generated by Tri-gen will be diverted to support the local grid in southern California.

Construction of the Tri-gen Project provides a good backdrop for FuelCell Energy's comments on this NPRM. Work on the Tri-gen Project began on September 1, 2021. After more than two years, FuelCell Energy reached the substantial completion milestone on September 13, 2023.

During that time, a multitude of people worked on the Tri-gen Project. FuelCell Energy had one major contractor responsible for the project, which in turn engaged 5 to 7 major subcontractors, which then engaged a number of smaller sub-subcontractors. At peak times, there were from 70 to more than 100 people laboring on the project, with an average of 35 people working daily. And even today, after the substantial completion milestone, people continue to perform ongoing work on the Tri-gen Project.

Comments Regarding Proposed Rules

The Proposed PWA Requirements

The NPRM proposes to establish certain requirements for a taxpayer to be eligible for additional tax credits on qualified electric projects. In sum, as to prevailing wage standards, the proposed regulations would require that the taxpayer collect and maintain payroll records as to all of its employees (including independent contractors), all of its contractor's employees and all of any subcontractor's employees sufficient to prove that all such persons have been paid at the applicable prevailing wage rates as established by the Department of Labor. *Id.* Similarly, as to apprenticeship requirements, the proposed regulations would require that for all persons and projects as described above, the taxpayer be able to prove that a specified number of hours of work were performed by persons pursuant to a qualified apprenticeship program. *Id.* Together, these eligibility standards are referred to here as the PWA Requirements.

Privacy and Trade Secret Concerns

FuelCell Energy understands and accepts that prevailing wage and apprenticeships requirements are legally required to be imposed on projects for them to qualify for certain increased credit or deduction amounts. As proposed, however, the PWA Requirements present several layers of significant confidentiality concerns regarding personal, proprietary and/or trade secret information.

First, companies such as FuelCell Energy will face difficult, if not insurmountable, obstacles in obtaining payroll information for all those engaged on a project such as the Tri-gen Project. That Project, as described above, involved numerous contractors and subcontractors employing hundreds

and hundreds of persons over a period of more than two years.

The payroll information for all of these workers is personal information which may be protected by federal and state privacy laws. For example, such payroll records may include information related to age, sex, religion, race or national origin, which must remain confidential. Similarly, social security numbers, birth dates, home addresses and spousal information also must remain confidential within employee personnel files. *See, e.g.*, *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 500 (1994) (recognizing an individual's interest in controlling the dissemination of information regarding personal matters, including addresses); CAL. CIV. CODE §§ 1798.100–1798.199.100 (2023) (California Consumer Privacy Act (CCPA), granting employees the right to notice about how personal information is collected and used, the right to opt out of sales and sharing of information, and other rights); CONN. GEN. STAT. §§ 42-515–42-530 (2023) (granting individual rights to the way that personal information is used and disseminated).

In addition, even if such information is not made confidential by statute or regulation, employers may have written policies, agreed to between them and their employees, which preclude disclosure of such information to third parties. FuelCell Energy therefore may be precluded either by law or by a company's agreement with its employees from obtaining the payroll information required by the IRS's proposed rules. Finally, even if all confidential information can be removed from the records, that in itself would take time, effort and resources. It would also be subject to the risk of human error.

Second, the payroll and wage information contemplated by the proposed rules is likely proprietary financial and trade secret information for the contractors and subcontractors that work with a company such as FuelCell Energy. *See, e.g.*, *TFC Partners, Inc. v. Stratton Amenities, LLC*, No. 1:19-CV-58, 2019 WL 369152, at *3 (W.D. Tex. Jan. 30, 2019) (finding pricing structures, financial information, budgets, employee compensation structures, and labor distribution reports trade secrets); *Covenant Aviation Sec., LLC v. Berry*, 15 F.Supp.3d 813, 818 (N.D. Ill. 2014) (finding profit and loss information, internal costs and overhead, operational information . . ., and specific bid and proposal information" trade secrets); *Bureau Veritas Commodities & Trade, Inc. v. Nanoo*, No. 20-3374, 2021 WL 2142466, at *5 (E.D. La. May 26, 2021) (". . . internal operational and financial information concerning company performance evaluations, actual and forecast financial and budget information, and business plans and strategies, is the sort of unique and sensitive information that affords a business its competitive advantage."). The wages that each such company pays its employees go to the heart of each company's business and financial models. Indeed, this is the exact type of information that FuelCell Energy's contractors and subcontractors shield from disclosure. FuelCell Energy sees prices that the contractors and subcontractors charge to FuelCell Energy, not the wages or "prices" that they pay employees. Such pricing information is typically subject to markups on construction contracts of 20% or even more. The contractors and subcontractors will not want FuelCell Energy to know the actual wages they are paying their employees – effectively, their costs for labor. Such information would reveal profit margins, markups and other pricing factors, putting the contractor or subcontractor at a competitive disadvantage.

Third, the personal, confidential and trade secret information at issue may very well, if the rules are enacted, ultimately be provided to IRS. This presents yet another level of confidentiality concerns, as such information in the possession of the IRS may be subject to requests under the Freedom of

Information Act ("FOIA"). *See* 5 U.S.C. § 552. Although FOIA contains exemptions from disclosure for certain such information, there are requirements for the exemption to be met and risks that the exemption may be overcome. There is also the risk of inadvertent disclosure. The type of financial and payroll information involved here would be of great interest to a contractor's competitor.

In sum, the confidentiality interests in the payroll information specified by the PWA Requirements are high. And the prohibitions, or at least cognizable interests, against disclosure are equally high. These factors may make it difficult or infeasible for a taxpayer to comply with the PWA Requirements.

Compliance and Record Keeping Burdens

Even if a company like FuelCell Energy is able to overcome the confidentiality and trade secret challenges involved in obtaining the payroll records of its contractors and subcontractors, it must then face the administrative and recordkeeping burdens implicated by obtaining and managing those records. The NPRM discuss the recordkeeping burden the proposed rules would place on a taxpayer, but only briefly and without the benefit of the experience of companies like FuelCell Energy.

In fact, the recordkeeping and administrative burdens involved in proving compliance with the PWA Requirements would be imposing. First, the taxpayer would have to obtain the payroll records for all employees (and independent contractors) of its contractors and subcontractors. While some large engineering and construction companies may have standardized automated payroll systems, many – or perhaps most – smaller companies do not. To the extent they have computerized or electronic payroll systems, they may not be compatible with or easily transferred to the taxpayer's systems. And if the records are not electronic, the taxpayer must obtain the paper records. As with the example of the Tri-gen Project, this effort could extend to hundreds of employees. In addition, because the taxpayer would not have a contract directly with subcontractors, it would have to require its contractors to obtain those records from the subcontractors and provide them to the taxpayer.

The Administration and the Department of Energy are especially focused on companies like FuelCell Energy using local and small businesses for qualifying energy projects. Working with such companies, especially as subcontractors, may exacerbate the difficulties of obtaining payroll records, as smaller companies may be less likely to have inter-operable, automated electronic payroll record systems.

Second the taxpayer would have to review the records to ensure that prevailing wage requirements and apprenticeship hours have been met. Again, this might involve numerous employees across a multitude of companies. The taxpayer would need to ensure that each and every employee has been paid at the applicable prevailing wage rate. It would also have to ensure that the apprenticeship requirements have been met. And this effort could extend for several years during the life of a construction project. If, as with the Tri-gen Project, work is still ongoing, the compliance burden then becomes an ongoing one, with no definite end in sight. Ultimately, this puts the taxpayer in the long-term and continuing role of ensuring the accuracy of the information provided by all of its contractors and subcontractors.

Third, the taxpayer would be faced with the prospect of enforcing the prevailing wage and apprenticeship requirements. If, for example, the taxpayer receives the payroll records from numerous companies regarding numerous employees on a quarterly basis, then the taxpayer has limited time to review the records for compliance with the PWA requirements. And if the taxpayer discovers an issue of noncompliance, or perhaps many issues of noncompliance, then the taxpayer must act to police the matter and force the contractor into compliance. That may take time, meetings, resources and possibly legal assistance. The question would remain as to whether the taxpayer could enforce compliance across all contractors and employees in all instances in a reasonable time. Now the taxpayer would become the regulator for PWA requirement issues.

Moreover, given the potential penalties to the taxpayer for its own noncompliance, the taxpayer would necessarily have to devote substantial resources to these ongoing monitoring and compliance efforts. For a company like FuelCell Energy, there are no personnel currently available and able to fulfill such a role. It could not currently legitimately and realistically enforce the PWA requirements as to its contractors and subcontractors. The proposed rules would therefore require FuelCell Energy to hire one or more full-time employees dedicated solely to compliance with the PWA Requirements.

Suggested Alternatives

The issue presently before the IRS appears to be a matter of first impression. That is, there does not appear to be any precedent for the process of a taxpayer being required to collect, review, monitor and vouch for the payroll records of all employees of the taxpayer's independent contractors and subcontractors, then police and enforce compliance with IRS regulations, in order to qualify for tax credits.

There also does not appear to be a wholly analogous protocol in other regulatory paradigms. The NPRM looks to the Davis-Bacon Act ("DBA") for guidance as to certain payroll recordkeeping and compliance aspects of the PWA Requirements. Reporting under the DBA, however, is more straightforward: certain employers – that is, contractors of government contracts – must report the wages paid their own employees to the Department of Labor. Subcontractors can meet their obligations by providing a certification or attestation that they are paying employees no less than the prevailing wage. These reporting requirements do not raise the complex set of issues that the proposed rules here do.

FuelCell Energy asks the IRS to recognize and accommodate the immense burdens, responsibilities, costs and potential liabilities the proposed rules place upon taxpayers. The IRS should allow companies like FuelCell Energy – the taxpayers/technology companies at the heart of the Administration's efforts – to rely upon two other possible options to establish compliance with the PWA Requirements.

First, the IRS should allow taxpayers like FCE to rely on written certifications or attestations from contractors and subcontractors that they are complying with the PWA Requirements. If the taxpayer has such certifications or attestations and is reasonably relying on them, then the taxpayer does not need to have the payroll data on hand. In addition, the certification could include a covenant from the

contractor or subcontractor promising to allow access to the actual payroll records in the case of an IRS audit. The IRS allows taxpayers to rely on such certifications or attestations for other tax obligations, such as withholding under the Foreign Investment in Real Property Tax Act ("FIRPTA"). So, the IRS is familiar with allowing taxpayers to rely on third-party verifications.

Second, the IRS should allow taxpayers to rely on robust and express contractual provisions with their contractors and subcontractors that require strict adherence to the IRS's goals and standards. FuelCell Energy should be able to satisfy its obligations to the IRS by including provisions in its agreements with its contractors that require the contractors to represent, warrant and ensure that they are meeting the IRS's PWA Requirements and maintaining all records necessary to prove such compliance. The same agreements would require the contractors to demand the same assurances in their agreements with any subcontractors. In this way, should the IRS ever question the legitimacy of a taxpayer's claims for credit, the taxpayer can ensure that the parties with primary and real-time responsibility for and access to the necessary information will assist and cooperate with the investigation or face legal consequences.

Conclusion

FuelCell Energy is at the forefront of the renewable energy transition and the Administration's efforts to look to hydrogen as an integral part of a clean energy economy. At FuelCell Energy, we are particularly proud of our history as an energy technology innovator and we celebrate the men and women on our team who have, for decades, been driven to create and share new technologies that produce multiple value streams for our customers worldwide. We are proud to source the vast majority of our technical manufacturing equipment (i.e., the equipment we use daily that we have not invented) almost exclusively from U.S. based manufacturers across the country. We are also proud that we have an opportunity to demonstrate our commitment to empower a world with clean energy by partnering with the Department of State to deliver our differentiated highly efficient electrolysis platform to Ukraine for the production of hydrogen and ammonia, demonstrating America's energy technology leadership around the world.

FuelCell Energy
3 Great Pasture Road
Danbury, CT 06810
www.fuelcellenergy.com

We thank you for the opportunity to submit these comments to the IRS and appreciate your willingness to consider our recommendations. Should you need any additional information, please contact the undersigned.

Sincerely,

/s/ *Alexandrea L. Isaac*

Alexandrea L. Isaac
Assistant General Counsel
aisaac@fce.com