



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

September 3, 2020

Samuel J. Winer, Esq.  
Foley & Lardner LLP  
3000 K Street, NW | Suite 600  
Washington, DC 20007-5109

Re: **In the Matter of FuelCell Energy, Inc.**  
**Waiver of disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D and Rule 262(b)(2) of Regulation A**  
**Release No. 33-10831, September 3, 2020**  
**Administrative Proceeding File No. 3-19957**

Dear Mr. Winer:

This letter responds to your letter dated September 3, 2020 (“Waiver Letter”), written on behalf of FuelCell Energy, Inc. (“FuelCell”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D and Rule 262(b)(2) of Regulation A under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, you requested relief from the disqualifications that arise by virtue of the Commission’s order entered September 3, 2020, in the Matter of FuelCell Energy, Inc. pursuant to Section 8A of the Securities Act of 1933, Release No. 33-10831 (the “Order”).

Assuming that FuelCell complies with the Order, we have determined that FuelCell has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D and Rule 262(b)(2) of Regulation A that it is not necessary under the circumstances to deny reliance on Regulation D or Regulation A by reason of the entry of the Order. Accordingly, the relief requested in the Waiver Letter regarding disqualifications that would arise as to FuelCell by reason of the Commission’s Order is granted on the condition that FuelCell fully complies with the terms of the Order. Any different facts or circumstances from those represented in the Waiver Letter or failure to comply with the terms of the Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler  
Chief, Office of  
Enforcement Liaison  
Division of Corporation Finance



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106876-0135

September 3, 2020

VIA ELECTRONIC MAIL

Timothy B. Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: In the Matter of FuelCell Energy Inc.

Dear Mr. Henseler:

We submit this letter on behalf of our client, FuelCell Energy, Inc. (the "Applicant," "FuelCell," or the "Company") in connection with the settlement of an anticipated enforcement proceeding involving the entry of a cease-and-desist order (the "Order") against the Applicant pursuant to Section 8A of the Securities Act of 1933, as amended (the "Securities Act"). On behalf of FuelCell, we hereby respectfully request, pursuant to Rule 262(b)(2) of Regulation A and Regulation D, a waiver of any disqualification that would arise as a result of the Order under Regulation A and Regulation D with respect to the Company.

FuelCell is a Delaware corporation based in Danbury, Connecticut. The company designs, manufactures, installs, and services fuel cell power plants and has nearly 300 employees. FuelCell stock is registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 and trades on the Nasdaq Global Market.

BACKGROUND<sup>1</sup>

The Applicant has informed the Staff of the Division of Enforcement that it submitted an Offer of Settlement pursuant to which it would agree to the entry of an order instituting cease and desist proceedings, making findings, and imposing a cease and desist order. In the Order, the Commission will find that the Company violated Section 5(b)(2) of the Securities Act, which makes it unlawful for any person, directly or indirectly, to carry or cause to be carried through the mails or interstate commerce any security for the purpose of sale or for delivery after sale, unless

<sup>1</sup> As stated in the Offer, FuelCell neither admits nor denies the activities described in the proposed Order. Factual statements in this section are restatements of or make reference to those included in or described in the proposed Order.

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Timothy B. Henseler, Esq.  
September 3, 2020  
Page 2

accompanied or preceded by a prospectus that meets the requirements of Section 10(a) of the Securities Act.

From August 2005 to April 2017, FuelCell sold over 70 million shares of its common stock through at-the-market shelf offerings raising over \$148 million from investors. The shares sold pursuant to these sales plans represented a portion of the shares offered by FuelCell pursuant to five shelf registration statements filed with the Commission during this time period. As permitted by Rule 430B(a) of the Securities Act, FuelCell omitted from the base prospectuses contained in these Form S-3 registration statements certain information about the offerings, including the specific plan of distribution and the nature and terms of compensation or other agreements with any underwriters, dealers, or agents. The base prospectuses in the 2013 and 2015 shelf registration statements also omitted the specific type and quantity of securities offered.

FuelCell did not file or deliver prospectus supplements as required (or otherwise fulfill the requirements of Rule 172) in connection with the above at-the-market offerings of securities. Nor did it otherwise disclose timely the information omitted from its shelf registration statements. Throughout the relevant time period, FuelCell did not intend to keep this information from the investing public and subsequently disclosed in its annual and quarterly reports filed with the Commission on Forms 10-K and 10-Q, respectively, its at-the-market sales made during the reporting period. These disclosures stated that “[t]he Company may sell stock on the open market from time to time,” and provided the number of shares FuelCell had sold over the reporting period, along with the net proceeds earned by FuelCell from those sales and a description of their use. These disclosures, however, did not cure FuelCell’s failure to file prospectus supplements or otherwise fulfill its obligations under Section 5(b)(2).

At all relevant times, FuelCell did not have its own general counsel and retained outside securities counsel to help prepare and file its registration statements in connection with its at-the-market stock offerings. Outside counsel advised FuelCell that it did not need to file or deliver prospectus supplements in connection with its at-the-market offerings. ¶ 15 of proposed Order Instituting Proceedings. In January 2018, after FuelCell hired its first general counsel and retained new outside securities counsel, FuelCell self-reported the facts concerning this matter to the Commission and disclosed in its annual report the company’s failures to file or deliver prospectus supplements.

Pursuant to the proposed Order, the Applicant would be required to cease and desist from committing or causing any violations and any future violations of Section 5(b)(2) of the Securities Act. The proposed Order does not require FuelCell to pay any civil penalties, disgorgement, or pre-judgment interest.

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 3

## DISCUSSION

The Applicant understands that the proposed Order, if entered, would disqualify it from relying on the offering exemptions provided by Regulations A and D when issuing securities absent the waiver requested here. The Commission has the authority to waive these disqualifications upon a showing of good cause that such disqualifications are not necessary under the circumstances.<sup>2</sup>

On March 13, 2015, the Division of Corporation Finance (the “Division”) published guidelines setting forth the factors the Division will consider in determining whether to grant a waiver under Regulations A and D.<sup>3</sup> These factors include the following:

1. The nature of the violation;
2. Whether the violation involved the offer and sale of securities;
3. Whether the misconduct involved a criminal conviction or scienter-based violation, as opposed to a civil or administrative non-scienter-based violation;
4. Who was responsible for the misconduct;
5. What was the duration of the misconduct;
6. What remedial steps have been taken; and
7. What the impact will be if the waiver request is denied.

The Applicant believes that it can show good cause for concluding that the disqualifications are not necessary based on a consideration of these factors. For the reasons set forth below, in particular the extensive remediation that has been undertaken and the adverse impact if a waiver request were denied, the Applicant respectfully requests that the Commission waive any disqualification that the proposed Order might impose under Regulation A or Regulation D.

1. The nature of the violation. In the proposed Order, the Commission would find that the Applicant violated Section 5(b)(2) of the Securities Act, which makes it unlawful for any person, directly or indirectly, to carry or cause to be carried through the mails or interstate commerce any security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a

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<sup>2</sup> See 17 C.F.R. §§ 230.505(b)(2)(C)(iii) and 230.506(d)(2)(ii).

<sup>3</sup> See SEC, Division of Corporate Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D, March 13, 2015, at <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml> (last accessed March 24, 2020).

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 4

prospectus that meets the requirements of Section 10(a) of the Securities Act. The Commission will find that the Appellant failed to file or deliver prospectus supplements in connection with at-the-market shelf offerings of its common stock.

From 2005 to 2017, FuelCell conducted at-the-market sales of its common stock without those sales having been accompanied or preceded by a prospectus supplement. FuelCell disclosed these sales in reports on Form 10-K and 10-Q filed with the Commission. These disclosures stated that “[t]he Company may sell stock on the open market from time to time,” and provided the number of shares FuelCell had sold over the fiscal period covered by the report, along with the net proceeds earned by FuelCell from those sales and a description of their use. These disclosures, however, did not cure FuelCell’s failure to file or deliver prospectus supplements. Pursuant to the advice it received from its outside counsel, FuelCell did not timely file or deliver prospectus supplements, and therefore did not disclose before or at the time of these sales the specific plan of distribution and nature and terms of compensation or other agreements with any underwriters, dealers, or agents for its at-the-market sales plans. The proposed Order would contain no scienter-based charges.

2. Whether the violation involved the offer and sale of securities. In the proposed Order, the Commission will find that the Applicant violated Section 5(b)(2) of the Securities Act in connection with the offer and sale of securities by failing to timely file or deliver prospectus supplements that would have disclosed information previously omitted from base prospectuses when the Applicant sold its common stock pursuant to its at-the-market sales plans. As described below, FuelCell acted on the advice of its outside counsel, who erroneously advised the Company that it did not need to file or deliver prospectus supplements in connection with its at-the-market offerings.

3. Whether the conduct involved a criminal conviction or scienter-based violation, as opposed to a civil or administrative non-scienter-based violation. The Division’s statement on “bad actor” waivers states that the Division will “consider whether the conduct involved a criminal conviction or scienter based violation, as opposed to a civil or administrative non-scienter based violation.”<sup>4</sup> That statement also indicates that “where there is a ... scienter based violation involving the offer and sale of securities, the burden on the party seeking the waiver to show good cause that a waiver is justified would be significantly greater.”<sup>5</sup>

The activities described in the proposed Order do not involve a criminal conviction and do not relate to a violation of any antifraud proscription—scienter or non-scienter based. FuelCell, therefore, is not subject to a “greater” burden under the Division’s waiver policy.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 5

4. Who was responsible for the misconduct. The Applicant accepts responsibility for the conduct described in the Order. Before April 2017, however, the Applicant did not have a general counsel and relied exclusively on outside counsel for legal advice concerning compliance with applicable securities laws in connection with each of its shelf registrations and at-the-market sales of its stock. FuelCell's Chief Financial Officer did not have any legal training and, in the absence of a general counsel, was responsible for communicating with outside counsel concerning the Company's at-the-market sales plans and related securities filings and followed outside counsel's advice.

Outside counsel specifically advised FuelCell during the relevant period that it did not need to file or deliver prospectus supplements in connection with its at-the-market offerings, paragraph 15 of proposed Order Instituting Proceedings, and FuelCell relied on that advice.

In April 2017, FuelCell hired its own general counsel, who began reviewing the Company's securities filings. Around the same time, the Company suspended its use of its at-the-market sales plans to pursue a different form of equity transaction. In January 2018, with newly retained outside securities counsel, the Applicant self-reported the facts concerning this matter to the Enforcement Staff and disclosed in its annual report on Form 10-K the Company's failures to file or deliver prospectus supplements. The Company later resumed the use of at-the-market sales plans only after hiring an experienced general counsel, retaining a national law firm to serve as its new securities counsel, and changing the underwriters, dealers, or agents involved with its sales pursuant to the at-the-market sales plans; those sales were accompanied by prospectus supplements which included the information required under Item 508 of Regulation S-K.

5. What was the duration of the misconduct. In the proposed Order, the Commission would find that securities law violations occurred over a period of approximately 12 years, beginning in 2005 and continuing until April 2017.

6. What remedial steps have been taken. In addition to its self-report described in the Commission's Order, FuelCell has taken the following remedial steps to ensure compliance with applicable securities laws and Section 5(b)(2).

a. Disclosure. In addition to reporting to the Enforcement Staff in January 2018 the Company's failure to timely file or deliver prospectus supplements, FuelCell included a disclosure in its annual report on Form 10-K for its fiscal year 2017 filed with the Commission on January 11, 2018 that provided details concerning the specific plans of distribution and the nature and terms of compensation or other agreements with any underwriters, dealers, or agents.<sup>6</sup> For example, the

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<sup>6</sup> FuelCell Energy, Inc., Annual Report (Form 10-K), at 48-50 (Jan. 11, 2018), *available at* [https://www.sec.gov/Archives/edgar/data/886128/000156459018000401/fcel-10k\\_20171031.htm](https://www.sec.gov/Archives/edgar/data/886128/000156459018000401/fcel-10k_20171031.htm).

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 6

disclosure included the date of, and the maximum number of shares authorized for sale under, each sales plan approved by its Board of Directors and/or its Audit and Finance Committee. FuelCell's disclosure in its annual report on Form 10-K also reflected the average sale price per share, the average commission per share, and the average per share proceeds to the Company (with such averages based on all sales made pursuant to the sales plans between August 2005 and April 2017).

b. Changes in Responsibility. FuelCell's hiring of a general counsel in April 2017 and the retention of new outside securities counsel have led to changes in responsibility at the Company related to its coordination with outside counsel for preparing and filing its securities filings. Pursuant to its prescribed protocol, the Company will continue to retain outside securities counsel with respect to every offering of FuelCell's securities to ensure compliance with the Commission's regulations and state law. Such outside counsel has extensive processes and controls to ensure its clients' compliance with Section 5 of the Securities Act. In addition to the Company's retention of new outside counsel, the Company has changed the underwriters, dealers, or agents involved with its sales under the at-the-market sales plans and improved the documentation governing its sales agreements for at-the-market sales by negotiating a separate stand-alone contract focusing solely on its at-the-market sales plan and reviewing and refreshing that agreement each time it enters the market. The Company also periodically reviews its relationship with its underwriters, dealers or agents and solicits new proposals from potential new underwriters, dealers or agents.

7. What the impact will be if the waiver request is denied. FuelCell has transitioned from a research-and-development company to a commercial-products manufacturer, services provider, and developer, but it has not been profitable since its fiscal year ended October 31, 1997. Fiscal year 2019 was one of transformation for FuelCell Energy. The Company restructured its management team and its operations in ways that are intended to support its growth and achieve its profitability and sustainability goals.

Nevertheless, FuelCell expects to continue to incur net losses and generate negative cash flows until it can produce sufficient revenues and margins to cover its costs. As a result, FuelCell relies on financing in the public markets in order to fund operations and will continue to do so for the foreseeable future. Consistent with past practice, the Company expects to continue to raise funds through the sale of securities in the capital markets. The Company has considered and closed in the past, and expects to consider and close in the future, transactions involving both private placements and public offerings of securities, depending on market conditions and the Company's capital needs. FuelCell will likely need to use private securities offerings in reliance on Regulation A and/or Regulation D as part of its corporate financings, and as such, the utilization of such rule-based exemption[s] remains a vital prong in the Company's overall capitalization strategy for the foreseeable future.

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 7

The flexibility and expediency afforded by Regulation A and Regulation D, including the allowance of general solicitation and advertising if FuelCell elects to rely upon Rule 506(c) and certain preemptive effects on state securities laws, will be critically important for FuelCell to raise private capital and to respond to market and industry shifts. Investors will require representations from the issuer in equity financing rounds that the issuance was in full compliance with securities laws, and the ability to rely on the clear rules of the Regulation A or Regulation D safe harbors, as opposed to the common law judicial interpretations of Section 4(a)(2), will expedite and facilitate FuelCell's ability to affirmatively provide such a representation to the satisfaction of its investors. FuelCell would incur lower transaction costs in due diligence, related legal services, and state filing fees in an offering pursuant to these regulations than in offerings made under Section 4(a)(2). In addition, such transactions are more likely to satisfy typical investor closing conditions requiring demonstrable evidence of the exemption from registration. Such cost savings and increased certainty of closing would provide a meaningful benefit to the Company and its stockholders as the Company's business seeks additional capital in the near future, particularly in those instances in which the Company seeks capital on an expedited basis as market opportunities arise.

Although the Company has not historically utilized Regulation A, the availability of such an exemption, the resulting certainty of the exempt status of an offering in compliance with Regulation A, and the lower cost in effecting an offering under the exemption are important to the Company in seeking future access to the capital markets. In addition, so long as the requisite elements of a Regulation A or Regulation D offering are satisfied (as compared to the reliance on case law in determining the availability of the exemption under Section 4(a)(2), resulting in greater uncertainty as to the validity of any particular offering thereunder), the preemptive effects on state registration that are provided by each of Regulation A and Regulation D would allow the Company to raise capital without the additional time and expense of registering, or seeking an exemption from registration, under applicable state securities laws.

Finally, FuelCell may seek strategic partnerships based upon long-term value creation and alignment through the offer and sale of equity securities to such partners. The Company has done so repeatedly in the past, including separate strategic transactions in 2002, 2007, 2012, and 2014 (the latter two transactions having involved the placement of securities pursuant to Regulation D), and continues to seek such strategic partnerships. Investment and partnership opportunities in this industry are highly competitive and require quick response, negotiation, and closing. FuelCell will need to rely on Regulation D to offer timing that would be competitive with that provided by other similarly-situated alternative-energy companies to attract and close strategic partner investment opportunities. Strategic partners will require representations from the issuer that the issuance will be in full compliance with the securities laws, and the ability to rely on the Regulation A and Regulation D safe harbors, as opposed to the common law judicial interpretations of Section 4(a)(2), will expedite and facilitate FuelCell's ability to provide those representations to the immediate satisfaction of its potential strategic partners. The ability to quickly close such transactions, without

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 8

time-consuming consultation with counsel and possible legal opinions associated with reliance on Section 4(a)(2), will be essential for FuelCell.

FuelCell has undertaken from time to time various at-the-market offerings to raise capital, including an offering this summer. While such offerings provide access to capital, they saddle the Company with greater cost and uncertainty than private placements under Regulation D. Unlike such private placements, in an at-the-market offering, the Company is wholly dependent on prevailing market conditions and prices, which determine the timing of the new cash infusion, the amount of funds it can obtain when it offers its stock for sale, and the number of shares that must be sold in order to raise such funds. This uncertainty contributes to the challenges the Company would face in financial planning and managing cash and, as a consequence, poses an implicit additional cost of capital. Moreover, at-the-market offerings would not be a substitute for a private placement which the Company utilizes to facilitate entry into strategic alliances. These alliances have proven to be important in achieving FuelCell's strategic objectives.

In 2019 and 2020, the company explored raising capital in various offerings, including in reliance on Regulation D, and expects to do so in the near future. If FuelCell is not able to raise additional funds or create long-term strategic partnerships by reliance on Regulation A and Regulation D, its competitive position would be immediately harmed, its growth prospects would be limited, its ability to hire technical and operational specialists might be limited given the competitive market for talent in the industry, and its overall operations and prospects would likely be severely negatively affected. In addition, in November 2019, FuelCell entered into a \$200 million credit agreement with Orion, supplying the Company with a significant source of funding. In the credit agreement, FuelCell represented and warranted that it is not subject to any of the "bad actor" disqualifications described in Rule 506. On October 31, 2019, FuelCell drew down \$14.5 million and on November 22, 2019 drew down an additional \$65.5 million. FuelCell may draw the remainder of the facility, up to \$120.0 million, over an 18-month period from the initial funding date. Under the terms of the credit agreement, each funding is subject to the condition that FuelCell's representations and warranties are "true and correct in all material respects on and as of such Funding Date." Accordingly, the Company believes that without the waiver of its disqualification under Regulation D, this funding condition may not be met. No assurance can be given that Orion would waive this requirement. The Company believes that an inability to make additional draws on its primary credit facility could have severe adverse consequences on the Company's ability to operate its business.

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For the foregoing reasons, we believe that disqualification is not necessary under the circumstances and that the Applicant has shown good cause that relief should be granted. Accordingly, we respectfully request that the Commission, pursuant to Rule 262(b)(2) of Regulation



FOLEY & LARDNER LLP

Timothy B. Henseler, Esq.  
September 3, 2020  
Page 9

A and Rule 506(d)(2)(ii) of Regulation D waive any disqualification provisions in Regulation A and Rule 506 of Regulation D under the Securities Act to the extent that they may be applicable as a result of the entry of the Order, effective as of the date of the Order.

Very truly yours,

A handwritten signature in blue ink that reads 'Samuel J. Winer'.

Samuel J. Winer

cc: Jennifer D. Arasimowicz, Esq., General Counsel, FuelCell Energy, Inc.  
Beth I.Z. Boland, Esq., Foley & Lardner LLP