OFFICE OF THE CITY ATTORNEY
CITY OF SANTA CLARA
BRIAN L. DOYLE, City Attorney, SBN 112923
bdoyle@santaclaraca.gov
ALEXANDER E. ABBE, Assistant City Attorney, SBN 204782
aabbe@santaclaraca.gov
1500 Warburton Ave.
Santa Clara, California 95050
Tel (408) 615-2230 Fax (408) 249-7846

THOMAS LAW GROUP
TINA A. THOMAS, SBN 088796
tthomas@thomaslaw.com
AMY R. HIGUERA, SBN 232876
ahiguera@thomaslaw.com
CHRISTOPHER J. BUTCHER, 253285
cbutcher@thomaslaw.com
455 Capitol Mall, Suite 801
Sacramento, California 95814
Tel (916) 287-9292 Fax (916) 737-5858

Attorneys for Respondents City of Santa Clara and Silicon Valley Power

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

BLOOM ENERGY CORPORATION, a Delaware corporation, Petitioner and Plaintiff, v. CITY OF SANTA CLARA, a municipal corporation; SILICON VALLEY POWER, a not-for-profit municipal electric utility; and DOES 1 through 10, inclusive Respondents and Defendants.	Case No. 19CV348838 **RESPONDENTS' OPPOSITION BRIEF** ACTION BASED ON CALIFORNIA ENVIRONMENTAL QUALITY ACT Assigned to: Honorable Thomas E. Kuhnle Department: 5 Petition Filed: June 11, 2019 Trial: December 18, 2019 Time: 9:00 a.m.

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I. INTRODUCTION

California's leadership with regard to climate change law and policy is well recognized. Due to the social, economic, and environmental costs of delayed action, the City of Santa Clara (the City) has likewise chosen to be a leader in the fight against climate change. As part of its sustainability efforts, it adopted a Climate Action Plan (CAP) in 2013 and is committed to meeting or exceeding State mandated greenhouse gas (GHG) reduction targets including the State's recently enacted goal to eliminate reliance on natural gas and, to instead, rely 100 percent on renewable energy and zero-carbon resources by 2045.

The City owns and operates Silicon Valley Power (SVP), a publicly owned power utility with generation, transmission, and distribution capabilities to provide electricity to City residents and businesses. To further align with State GHG reduction targets and its commitment to sustainability, the City passed Resolution no. 19-8701 (the Regulations), which updated SVP's Rules and Regulations to require that new self-generating energy facilities[1] (excluding back-up generators) installed by its customers in the future qualify as renewable electric generation facilities if the owner also wishes to interconnect to SVP's electrical grid.

Fuel cell projects are one type of self-generating energy facility. Fuel cells may run on either natural gas or biogas; biogas is derived from renewably sourced methane produced, for example, by dairies, landfills, or waste water treatment facilities. As Petitioner Bloom (Bloom) acknowledges, fuel cells that run on non-renewable natural gas emit both GHGs and criteria air pollutants whereas fuel cells that run on biogas are "carbon neutral." (AR 8601.)

Fuel cells, once installed, generally operate for 15-20 years. Therefore, natural gas fuel cells that are installed in the City in the future will potentially emit GHGs and criteria air pollutants for decades to come. As these emissions are inconsistent with both the City's and State's GHG and green energy goals, the City adopted the Regulations, in part, to encourage development of biogas fuel cells instead of natural gas fuel cells in the City.

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[1] Self-generation facilities are private electrical generation systems that an electrical customer installs on its own property for its own use. (AR 84.)

Contrary to the arguments advanced by Bloom in its Opening Brief, substantial evidence in the record demonstrates that Bloom can operate fuel cells using biogas. While doing so may reduce Bloom's profit, impacts to Bloom's profit margin do not constitute potentially significant impacts for the purposes of CEQA. As demonstrated below, Bloom's challenge is premised on a misunderstanding of how alleged indirect environmental impacts are evaluated pursuant to CEQA as well as on a series of unreasonable and unforeseeable assumptions. Each of these flaws in Bloom's challenge constitute an independent basis for this Court to deny the Petition for Writ of Mandate and enter judgment in favor of the City.

II. STATEMENT OF FACTS

California is a global leader with respect to climate change law and policy. Reducing GHG emissions requires actions on numerous fronts, including energy, transportation, land use, waste disposal, and water resource planning. (See, e.g. AR 17366.) This litigation concerns an action taken by the City to align energy production in the City with both the State's and City's GHG emission reduction goals.

A. State legislative emissions goals and targets

1. SB 350

The Legislature has declared that "[s]upplying electricity to California end-use customers that is generated by eligible renewable energy resources *is necessary* to improve California's air quality and public health … ." (Sen. Bill No. 350 (2015-2016 Reg. Sess.), § 17 [Pub. Utilities Code, § 399.11, subd. (e)(1) (emphasis added)].) In 2015, the Legislature passed the Clean Energy and Pollution Reduction Act (SB 350), which established new clean energy, clean air, and greenhouse gas reduction goals through 2030 and beyond. Specifically, as part of the effort to achieve the State's GHG reduction goals, SB 350 directs "electrical corporations to file applications for programs and investments to accelerate widespread transportation electrification to reduce dependence on petroleum, meet air quality standards, achieve the goals set forth in the Charge Ahead California Initiative . . . , and reduce emissions of greenhouse gases to 40 percent below 1990 levels by 2030 and to 80 percent below 1990 levels by 2050." (Sen. Bill No. 350 (2015-2016 Reg. Sess.) § 32 [Pub. Utilities Code, § 740.12, subd. (b)]; see also AR 84.)

2. SB 100

In 2018, the Legislature passed the California Renewables Portfolio Standard Program: Emissions of Greenhouse Gases (SB 100) to transition the State to a 100 percent "zero-carbon electric system … ." (Sen. Bill No. 100 (2017-2018 Reg. Sess.) § 5 [Pub. Utilities Code, § 454.53, subd. (a)].) Specifically, SB 100 declares that it is "the policy of the state that eligible renewable energy resources and zero-carbon resources supply 100 percent of all retail sales of electricity to California end-use customers and 100 percent of electricity procured to serve all state agencies by December 31, 2045." (*Ibid.*; see also AR 84.) To achieve the 2045 zero-carbon goal, SB 100 also establishes new targets for renewable energy production for 2026 and 2030. (Sen. Bill No. 100 (2017-2018 Reg. Sess.) § 2 [Pub. Utilities Code, § 399.11, subd. (a)] [establishing a target for total retail sales of electricity in California from eligible renewable energy resources of "50 percent by December 31, 2026, and 60 percent by December 31, 2030 … ."].)

B. Availability of renewable energy on the California energy market

In part due to California's aggressive GHG reduction goals, the California energy market has become markedly cleaner and more sustainable in recent years. (AR 1159.) The California energy market is operated by the California Independent System Operator (ISO). Renewable generation in California has made such strides that, at times, the supply of clean, renewable energy exceeds demand. (See AR 1157, 9685.) When this occurs, the California ISO is forced to curtail production of this clean and GHG-free energy. (AR 1157, 9685.)

As discussed further below, at times when clean and GHG-free energy is available in excess on the California energy market, SVP has the ability to rely on that available clean energy instead of on natural gas whereas Bloom's fuel cells cannot ramp up or down their reliance on natural gas to take advantage of available clean energy.

C. The City's energy framework

Since 2013, the City has been working aggressively to meet or exceed the goals set forth in its CAP. Its CAP calls for reducing GHG emissions to 15 percent below 2008 levels by 2020, and 55 percent below baseline levels by 2035 through a continuing increase in reliance on renewable and GHG-free electrical generation facilities. (AR 17363, 17369, 17392.) In recent years, SVP has

diversified its energy portfolio to meet these goals and presently supplies power to the community through a mix of large and small hydro, wind, geothermal, landfill gas, solar, and natural gas sources. (AR 16362-16363.) Pursuant to the CAP, the City closed its coal-fired power plant well ahead of schedule to support sustainability and fight climate change. (AR 233, 1150, 17277.)

For the last 10 years, the City has been committed to only adding renewable or GHG-free electricity to its portfolio. (AR 9167.) Accordingly, the City's energy portfolio has become substantially more sustainable. Additionally, SVP's portfolio approach enables it to ramp down or turn off its natural gas power production completely if additional renewable energy supplies are available on the California energy marketplace. (AR 1160, 9685.)

Since the City adopted its CAP in 2013, SVP's reliance on natural gas fell from nearly 45 percent of its portfolio to 16 percent in 2017. (AR 16361, 17278.) In that same timeframe, SVP's reliance on renewable and GHG-free energy increased significantly to 36 percent renewable and 72 percent GHG-free.[2] (AR 152-153, 9740, 17278.) Since adopting its CAP, SVP has also achieved 100 percent GHG-free energy for residential customers. (AR 17277.)

The City's 2018 Integrated Resource Plan (IRP) for SVP demonstrates that reliance on natural gas will continue to substantially decrease in the future: for instance, in 2018, SVP's Donald Von Raesfeld (DVR) natural gas power plant produced 899,242 megawatt hours (MWh) of energy. (AR 303; see also AR 85 [discussing GHG impacts of natural gas fuel cells compared to baseline emissions associated with SVP's 2018 electric load], 158 [discussing SVP's 2018 baseline emissions].) By 2038, DVR energy generation is projected to decrease by nearly 50 percent to 470,000 MWh. [3] (City's RJN,

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[2] Under California law, hydroelectric facilities larger than 30 megawatts do not qualify as renewable energy. (Public Resources Code, § 25741.) However, they are characterized as GHG-free. (See AR 16359.) SVP's use of hydroelectric power accounts for the difference in percentage between its renewable and GHG-free portfolio.

[3] SVP currently obtains energy produced using natural gas from four sources: Donald Von Raesfeld (DVR), Gianera Generating Station, Lodi Energy Center (NCPA Joint Powers Agency Resource), and Santa Clara Cogeneration. (AR 8533; City's RJN, Exhibit A, p. 8-8.) In 2019, these facilities are projected to produce 835, 8, 394, and 48 gigawatt hours (GWh) of electricity respectively (or 1,285 GWh collectively or 1,285,000 MWh). (City's RJN, Exhibit A, p. 8-8.) By 2038, these facilities are projected to produce 470, 0, 195, and 48 GWh of electricity respectively (or 713 GWh collectively or 713,000 MWh). (*Ibid.*)

Exhibit A, p. 8-8.)

D. Resolution No. 19-8701's update to SVP's Rules and Regulations

In keeping with its commitment to reduce GHG emissions and align its policies with those of the State of California and its CAP, the City proposed the Regulations. The Regulations require any customer that decides to seek future permits to develop a new self-generation energy facility, and desires to remain connected to SVP's grid, use a renewable electric generation facility as defined by the State.[4] (AR 77, 159-160.) With respect to fuel cells, this means that they must be powered by California Energy Commission (CEC) approved renewable generation and fuel sources rather than by natural gas. (See AR 77.)

Importantly, the Regulations only apply to self-generation facilities modified or installed *after* the passage of Resolution No. 19-8701. (AR 86.) Therefore, all preexisting fuel cells, including Bloom's, may continue operating without any changes whether they are currently operating on natural gas or biogas. (AR 86.)

Requirements such as those implemented by the Regulations are not uncommon within the State. For example, "cities like the cities of Pasadena and Burbank … have each adopted similar requirements which are already in place -- which is indicative of cities trying to advance … [the] mutual goal of advancing renewable energy policy." (AR 83; see also AR 137, 151-152, 9367, 9368-9373 [agenda for Pasadena's Regulations], 9372 [Pasadena concluded the Regulations "would not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment."].)

E. Bloom fuel cells

Bloom is an energy corporation that produces fuel cells which generate electricity through an electrochemical reaction. (AR 1226.) Bloom's fuel cells are generally used by larger industrial operations (like data storage operations) or institutional clients (like hospitals and universities). (See, e.g., AR 173, 181, 9579.) Bloom's promotional material state that the company has approximately 100

[4] The Regulations do not apply to emergency back-up generators. (AR 84, 160.) Therefore, both before and after the Regulations were adopted, emergency back-up generator projects could be developed in the City.

customers and, in total, operates fuel cells rated for approximately 300 MWh of energy. (AR 144, 209 [Bloom fuel cells are operating at approximately 80 sites around the world].)

While fuel cells can operate on biogas, Bloom's fuel cells generally utilize natural gas, which means they are 0 percent renewable and 0 percent GHG-free. (AR 85, 153.) *As a result, Bloom's fuel cells emit twice as much GHG as SVP's portfolio.* (AR 137 ["when SVP power content is compared to a natural gas fuel cell, the natural gas fuel cell will produce approximately 100% more GHG emissions than SVP during an annual time frame"], 9683.)

Furthermore, Bloom overstates the efficiency of its natural gas fuel cells. Bloom's Opening Brief and its expert claim their emission factor is 756 lbs/MWh. (Bloom's Opening Brief, p. 26; AR 16428.) However, in an application submitted to the State of Delaware, Bloom reported its emission factor was 884 lbs/MWh (a difference of nearly 17 percent), and one expert has reported the actual emission factor may exceed 900 lbs/MWh. (AR 11364, 17433; see also AR 1156 [noting Bloom's information lists CO_2 emissions of 735-849 lbs/MWh but "analysts have speculated that emissions are higher in actual operation"], 1174 [showing decrease in fuel cell efficiency over time].) Moreover, unlike SVP's electrical grid, natural gas fuel cells cannot ramp up or down, but rather run continuously 24 hours a day, 365 days a year, constantly emitting GHGs. (See AR 85, 1150.) Thus, because natural gas fuel cells – once installed – typically operate for 15-20 years, their dependence on natural gas is generally locked in on a continuous basis for well over a decade. (AR 217.)

In addition to GHG emissions, fuel cells generate NO_x, CO, VOCs, and hazardous solid waste. (See AR 155, 1156, 1172, 11364, 16361.) Sulfur compounds from natural gas must be filtered out, and other toxins such as benzene, toluene, xylene, lead, chromium, and arsenic also become trapped. (AR 11364.) The filtering material together with the trapped toxins becomes hazardous solid waste. (AR 11364.)

Bloom has aggressively lobbied for years for government subsidies to further its business interests notwithstanding the environmental impacts associated with fuel cells operating using natural gas. (AR 16355-16357, 17315-17316.) Initially Bloom's lobbying efforts were tremendously successful, resulting in hundreds of millions of dollars in subsidies. (See AR 16355-16357, 17316.) Specifically, Bloom has obtained over $400 million in rate-payer subsidies from the State's Self-

Generation Incentive Program (SGIP). (AR 1156.)

In 2015, after the Legislature renewed the SGIP until 2021, State Assemblymembers sent a letter to the Public Utilities Commission criticizing the existing SGIP eligibility criteria, which "maintain[ed] eligibility for existing technologies operating on 100 percent conventional natural gas." (AR 17316.) The letter urged that such technologies are not "consistent with the state's long term climate and energy goals." (*Ibid.*) The letter also noted that these existing natural gas technologies would emit significantly less GHGs if they used renewable biogas. (*Ibid.*) For these reasons, the letter concluded that if the SGIP eligibility criteria are not updated "SGIP will continue the increasingly absurd practice of subsidizing natural gas consumption, supporting existing technologies that have already taken hundreds of millions of dollars from SGIP and other public subsidies without producing substantial efficiency improvements, cost reductions, or general benefits to ratepayers … and undermining our collective efforts to clean the grid and transition away from fossil fuels." (*Ibid.*)

F. Summary of the administrative process

On May 7, 2019, the City Council held a hearing on the Regulations. Manuel Pineda, Interim Chief Electric Utility Officer, discussed the City's sustainability achievements and goals going forward and detailed why the Regulations would not cause significant environmental impacts. (AR 147-171, 220-230.) Three additional members of the public spoke in strong support for the Regulations, citing the need to advance energy policies in favor of renewable energy and pointing out the inefficiency of Bloom's fuel cells. (AR 212-214, 216-219.) Bloom employees spoke in opposition to the Regulations (AR 172-186, 191-193, 199-203), and several other speakers, including representatives of businesses that use Bloom's fuel cells, opposed the Regulations citing economic concerns. (AR 193-199.) Several comment letters were also submitted in opposition to the Regulations, including letters by Professor Catherine Sandoval and Professor James Sweeney, stating generally that federal and State subsidies have incentivized directing biogas towards transportation use, thereby artificially inflating its market value. (AR 16411-16414.) At the conclusion of the public comment period and after City Council deliberation, the City Council voted unanimously to adopt the Regulations. (AR 51.)

On May 8, 2019, the City issued a Notice of Exemption (NOE). (AR 48.) The NOE explains that the Regulations are exempt from CEQA pursuant to CEQA Guidelines section 15061(b)(3), which

is commonly referred to as the commonsense exemption, based on the City's determination that the Regulations do not have the potential to result in any significant effect on the environment as defined by CEQA. (*Ibid.*) Bloom filed suit under CEQA, alleging that the Regulations are not exempt from CEQA pursuant to the commonsense exemption.

III. STANDARD OF REVIEW

Bloom's Opening Brief mostly ignores the applicable standard of review.[5] Instead, Bloom compares its product to the natural gas component of SVP's grid. As explained below, this is a misleading and false comparison as SVP's grid relies substantially, and increasingly, on renewable and GHG-free energy sources; natural gas is but a small, and decreasing, component of SVP's grid. Moreover, CEQA's evaluation of environmental impacts is not based on false comparisons of alleged future scenarios, but instead mandates analysis of a project (here, the Regulations) against the existing environmental baseline. In evaluating whether the City complied with CEQA when it concluded that the Regulations do not have the potential to result in any significant environmental impacts, the Court must determine whether substantial evidence supports the City's determination.

A. The commonsense exemption is subject to the substantial evidence standard of review and SVP met its burden of demonstrating that the exemption applies.

The commonsense exemption applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment . . . ." (Guidelines, §15061(b)(3); *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 385-386 (*Muzzy Ranch*).) "[W]hether a particular activity qualifies for the commonsense exemption presents an issue of fact, and . . . the agency invoking the exemption has the burden of demonstrating it applies." (*Muzzy Ranch*, *supra*, 41 Cal.4th at p. 386.) "[T]he agency's exemption determination must [rely on] evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision." (*Id.* at pp. 386-387, quoting *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117 (*Davidon*).) However, "[d]etermining whether a project

[5] Bloom appears to concur that the substantial evidence standard of review applies since Bloom argues that "the City did not produce substantial evidence supporting its reliance on the common sense exemption…." (See Bloom's Opening Brief, p. 21:3-6; see also *id.* at pp. 16:22-23, 20:13-15, 22:6-8.)

qualifies for the commonsense exemption need not necessarily be preceded by detailed or extensive factfinding. Evidence appropriate to the CEQA stage in issue is all that is required." (*Muzzy Ranch*, *supra*, 41 Cal.4th at p. 388.)

As explained in *Muzzy Ranch*, when legitimate questions are raised about a project's possible environmental impacts, the lead agency has "the burden to elucidate the facts that justified its invocation of CEQA's commonsense exemption." (*Muzzy Ranch*, *supra*, 41 Cal.4th at p. 387.) As a result of this required factual inquiry, the lead agency serves as "the finder of fact," and the appropriate standard of review for the reviewing court is substantial evidence. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114 (*Berkeley Hillside*); see also 2 Kostka & Zischke, Practice Under the Environmental Quality Act (2d ed. Cal. CEB 2018) § 5.129 ["In the authors' view, the statements in the *Muzzy Ranch* decision implicitly indicate that the court was applying the substantial evidence standard…."].)

To the extent *Muzzy Ranch* leaves any ambiguity about the standard of review applicable to the commonsense exemption, *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171 (*Union*) and *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488 (*CREED-21*) resolves the ambiguity. In *Union*, the Supreme Court distinguished the standard of review applicable to determining whether a government approval constituted a "project" pursuant to CEQA from the standard of review applicable to the commonsense exemption. (*Union*, *supra*, 7 Cal.5th at pp. 1195-1197.) Interpreting *Muzzy Ranch*, the Supreme Court stated that the question whether a government approval constitutes a "project" is a "an issue of law… ." (*Id*. at p. 1196.) Whereas, the commonsense exemption "presents an issue of fact" and, therefore, even where a project may result in a "*possible* environmental impact[,]" the commonsense exemption may still apply. (*Ibid*. (original emphasis).)

Consistent with the Court's holding in *Union*, the court in *CREED-21* rejected the petitioner's argument that the city improperly relied on the commonsense exemption in approving a revegetation project. (*CREED-21*, *supra*, 234 Cal.App.4th at pp. 497-498.) In doing so, the court explained that, based on its review of the administrative record, "there is substantial evidence to support [c]ity's determination that the revegetation project was exempt from CEQA pursuant to the commonsense exemption under Guidelines section 15061, subdivision (b)(3)." (*Id*. at p. 511; accord. *Committee to*

Save the Hollywoodland Specific Plan v. City of Los Angeles (2008) 161 Cal.App.4th 1168, 1187 [stating "courts apply the substantial evidence test to the agency's factual determination that the exemption applies in the first instance"].)

Substantial evidence is an "extremely deferential standard of review." (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1073.) Substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 [quoting CEQA Guidelines, § 15384, subd. (a)].) Substantial evidence "includes fact[s], a reasonable assumption predicated upon fact[s], or expert opinion supported by fact[s]" (Pub. Resources Code, § 21080, subd. (e)), such as the "expertise of [an agency's] planning staff in determining whether a project will not have a significant impact on the environment." (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 529-530.)

"In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 [quotation marks omitted].) "[T]he question is not whether substantial evidence would support a different decision from the one the agency made; the question is whether the agency's decision is supported by substantial evidence." (*Committee for Re-Evaluation of T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237, 1255.) In other words, "[t]he court must 'accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the [administrative decision].'" (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607, 616 [quoting *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1074]; see also *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 953 [courts do not to weigh conflicting evidence].)

B. Because substantial evidence supports SVP's use of the commonsense exemption, the exemption must be upheld.

Bloom suggests that this Court must grant Bloom's petition because the City's staff report and

findings do not set forth the substantial evidence that supports the City's decision to rely on the commonsense exemption. (Bloom's Opening Brief, pp. 13:24-26, 16:18 – 18:20.) However, as illustrated by *Muzzy Ranch*, the relevant question is whether the record *as a whole* supports the commonsense exemption. There the lead agency "merely invoke[d] section 15061, subdivision (b)(3)" in its notice of exemption. (*Muzzy Ranch*, *supra*, 41 Cal.4th at p. 386.) Nevertheless, the Court explained that "[d]etermining whether a project qualifies for the commonsense exemption need not necessarily be preceded by detailed or extensive factfinding. Evidence appropriate to the CEQA stage in issue is all that is required." (*Id.* at p. 388.) In consideration of substantial evidence in the administrative record, the Court held that the lead agency "reached the correct result" when it relied on the commonsense exemption. (*Ibid.*)

Moreover, in *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690 (disapproved on another ground in *Union*, *supra*, 7 Cal.5th at p. 1194, fn. 10), the court held that even without invoking the commonsense exemption during the administrative process, a lead agency may nevertheless rely on the exemption (if applicable) during CEQA litigation. (*Id.* at pp. 700-701.) Therefore, the relevant question is only whether substantial evidence in the administrative record supports the City's reliance on the commonsense exemption and not, as Bloom would seem to believe, whether all the evidence was expressly set forth in the City's staff report or findings.

As demonstrated below, Bloom's challenge is not only based on a misunderstanding of the law, but substantial evidence in the administrative record demonstrates both that Bloom's argument is premised on a series of unreasonable and unforeseeable assumptions and that the Regulations do not have the potential to result in any significant environmental impacts pursuant to CEQA.

IV. ARGUMENT

Focusing on a handful of statements in the administrative record and ignoring the extensive evidence, Bloom suggests SVP adopted its Regulations for the purpose of stifling competition. (Bloom's Opening Brief, p. 5:12-18.) Not true. The record is replete with evidence that the City adopted the Regulations because self-generation projects that rely on fossil fuels are inconsistent with the City's and State's goals that future energy production qualify as renewable or GHG-free. (AR 86, 139, 159, 224-225, 227, 1150, 1574, 9584.) The Regulations help the City achieve these goals while

reducing future carbon emissions from self-generation projects that rely on fossil fuels within the City. (AR 84, 152, 154, 217, 1150.)

As it relates to fuel cells, the Regulations would generally require fuel cells to run on biogas (which is carbon neutral) instead of GHG-emitting natural gas. (AR 167-168, 8601, 9652; see also AR 77, 162, 1151.) And the evidence, including Bloom's own promotional materials, demonstrates that fuel cells operating on biogas are better for the environment than fuel cells running on natural gas. (AR 1156, 8601.) Moreover, Bloom's allegation that SVP adopted the Regulations to protect its business interests is not only wrong but it is irrelevant to this litigation. The sole legal question raised in this litigation is whether the City complied with CEQA in adopting the Regulations.

As demonstrated below, Bloom's CEQA challenge is meritless for multiple reasons. First, Bloom's entire challenge is premised on a speculative and – for the purposes of CEQA – irrelevant analysis. Bloom compares hypothetical future fuel cells running on natural gas to SVP's natural gas power plants, rather than advancing evidence or arguments concerning any potentially significant impacts of the Regulations as compared to SVP's existing baseline conditions. (See *infra* Section IV.A.) Second, substantial evidence in the record demonstrates that the Regulations do not have the potential to result in any potentially significant environmental impacts as compared to baseline physical conditions. (See *infra* Section IV.B.) Third, contrary to Bloom's allegations, substantial evidence in the record demonstrates that the Regulations do not ban the future development of fuel cells in the City. (See *infra* Section IV.C.1.) Fourth, even if the Regulations could lead to a future reduction in the development of fuel cells in the City, other renewable self-generation options are available as alternatives to fuel cells. (See *infra* Section IV.C.2.) Fifth, even if future development of renewable self-generation projects decreased in the future and SVP energy production increased as a result, substantial evidence in the record demonstrates that energy produced by SVP's electrical grid is better for the environment than Bloom's natural gas fuel cells. (See *infra* Section IV.C.3.) Each of these five reasons constitute an independent basis for this Court to deny Bloom's Petition.

A. Bloom fails to identify any potentially significant impact of the Regulations as defined by CEQA.

Instead of identifying any potential direct environmental impacts of the Regulations, Bloom

implicitly argues that the Regulations will result in indirect environmental impacts in the future. "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project . . . ." (CEQA Guidelines, § 15064, subd. (d)(2).) "An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (CEQA Guidelines, § 15064, subd. (d)(3).)

Here, the Regulations are several steps removed from the indirect and clearly speculative environmental impacts raised by Bloom in its Opening Brief. Specifically, Bloom alleges that, as a result of the Regulations, Bloom will not be able to develop future fuel cells in the City and that, if Bloom does not develop future fuel cells in the City, then SVP will be required to increase production at its natural gas power plants in the future and such future increases in production at SVP's natural gas power plants would result in greater environmental impact than Bloom's potential operation of additional natural gas fuel cells in the City in the future. As discussed *infra* Section IV.C, Bloom's attenuated indirect impact argument is implicitly based on a series of speculative and unreasonable assumptions. However, this court does not need to address the unreasonable and speculative nature of Bloom's assumptions to deny Bloom's Petition because all of Bloom's arguments are premised on a misunderstanding of how environmental impacts are evaluated pursuant to CEQA.

Pursuant to CEQA, a petitioner cannot establish that a regulation adopted by a city has the potential to result in a significant impact cognizable under CEQA by comparing future scenarios that it believes would exist with and without a regulation in place. For example, in *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273 (disapproved on other grounds by *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279) (*Wal-Mart*), the city adopted an ordinance that prohibited the future development of discount superstores within the City after determining that the ordinance was exempt from CEQA. (*Id.* at pp. 283-284.) Wal-Mart filed a lawsuit alleging, in part, that the ordinance was not exempt from CEQA. To advance its argument, Wal-Mart asserted that the ordinance prevented it from developing a planned store in the city and indirect environmental impacts would result either from "the possible development of a multitenant shopping center where Wal-Mart initially planned to build its supercenter . . . [or from] the possible construction of a Wal-Mart Supercenter outside the boundaries of

[c]ity . . . ." (*Id*. at p. 289.) In rejecting this false dichotomy, the court aptly explained:

> Fundamentally, a physical change is identified by comparing *existing* physical conditions with the physical conditions that are predicted to exist at a later point in time, after the proposed activity has been implemented. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246–247 [effects of rezoning are evaluated against existing physical conditions, not against hypothetical conditions permitted by land use plan].) The difference between these two sets of physical conditions is the relevant physical change.
>
> Using the idea of photographic snapshots to illustrate our point, the baseline environment can be depicted in a snapshot of the physical conditions that exist at the time when the environmental review of the proposed activity begins. Next, an array of snapshots is created by picturing the physical conditions that one can reasonably foresee existing in the future. The physical changes that are reasonably foreseeable are the differences between the baseline snapshot and any one of the snapshots depicting future conditions.
>
> One can identify an error in Wal-Mart's analysis of physical change by using this photography illustration. Wal-Mart argues that "the Ordinance will likely result in alternative developments that will have worse environmental effects than the banned Discount Superstores." By comparing alternative developments on one hand with the discount superstores prohibited by the Ordinance on the other hand, Wal-Mart has compared two snapshots of future conditions and failed to use the snapshot of existing baseline conditions. This comparison by Wal-Mart fails to identify the relevant change. Instead, it identifies *changes to the changes* in the physical environment, which is a step removed from the inquiry relevant to CEQA. (See *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal. App. 3d 350, 358 [error to compare population capacities designated under existing general plan with population capacities designated in two-area plan proposed as amendments to general plan; the impact of development associated with proposed area plans must be determined by comparing that development with existing physical conditions].)
>
> The correct analysis of the relevant physical change in the environment involves a comparison of (1) the physical conditions that existed at the time the Ordinance was proposed or approved with (2) forecasts of reasonably foreseeable future conditions that may occur as a result of the adoption of the Ordinance.

(*Wal-Mart*, *supra*, 138 Cal.App.4th at pp. 289-291 (original emphasis, footnotes omitted).)

Similarly, in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 162 (*Manhattan Beach Plastic Bag*),[6] a coalition of plastic bag manufacturers and distributors submitted letters and evidence to a city opposing a ban on grocery store plastic bags and an associated mitigated negative declaration. During the subsequent litigation challenging the plastic bag ban, the city

[6] See also *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 227-228 [upholding county's determination that its grocery store plastic bag ban was categorically exempt from CEQA]; *Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863, 883 [same].

conceded that the evidence submitted by the business coalition demonstrated that "the manufacture, transportation, recycling, and landfill disposal of paper bags entail more negative environmental consequences than do the same aspects of the plastic bag 'life cycle.'" (*Id.* at p. 172.) The California Supreme Court, however, rejected that this constitutes evidence of a potentially significant impact as defined by CEQA. (*Id.* at p. 175.) In doing so, the Court recognized that CEQA did not require the City to compare the alleged global impacts of a future where plastic bags were banned in the city to one where they were not; instead, the Court explained that the inquiry "*shall be limited to substantial, or potentially substantial, adverse changes* in physical conditions which exist within the area as defined in [Public Resources Code] Section 21060.5." (*Id.* at p. 172 (original emphasis), quoting Pub. Resources Code, § 21151, subd. (b).) In consideration of the relevant question for the purpose of CEQA, the Court held that "the city acted within its discretion when it determined that its ban on plastic bags would have no significant effect on the environment." (*Ibid.*)

Here, Bloom has committed the same error as the petitioners in *Wal-Mart* and *Manhattan Beach Plastic Bag*. Rather than comparing the "reasonably foreseeable . . . differences between the baseline snapshot and any one of the snapshots depicting future conditions" after the Regulations are implemented, Bloom is comparing two hypothetical snapshots of what it believes future conditions would be with and without implementation of the Regulations. (*Wal-Mart*, *supra*, 138 Cal.App.4th at p. 290.) In other words, Bloom's entire argument is premised on comparing a future scenario where Bloom develops future natural gas fuel cells in the City to a future scenario where it does not and – as a result – SVP increases energy production at its natural gas power plants. (See, e.g., Bloom's Opening Brief, pp. 22:18-20 [arguing that the impact of the Regulations is that "the *electricity that fuel cells would have otherwise provided* would have to come from other sources of electricity" and not that the regulations would result in any increase in environmental impacts over baseline conditions] (emphasis added); see also *id.* at pp. 19:8-10 [arguing the "Fuel Cell Ban would increase NOx emissions *when comparing a fuel cell* to the City's Donald Von Raesfeld ('DVR') Power Plant"] (emphasis added), 21:15-20 [arguing DVR noise impacts are greater than fuel cell noise impacts], 22:1-5 [arguing DVR water demands are greater than fuel cell water demands], 22:27-28 [arguing "a fuel cell would substantially reduce emissions . . . compared to the DVR power plant"], 26:1-2 [arguing GHG impacts

are greater "when comparing a fuel cell to SVP's power plants"].) But, this comparison between a hypothetical world with more of Bloom's natural gas fuel cells and a hypothetical world with fewer of Bloom's natural gas fuel cells and increased energy production at SVP's natural gas power plants is "a step removed from the inquiry relevant to CEQA." (*Wal-Mart*, *supra*, 138 Cal.App.4th at p. 291.)

As illustrated in *Wal-Mart* and *Manhattan Beach Plastic Bag*, for the purposes of CEQA, the relevant question is only whether the Regulations have the potential to result in increased environmental impacts compared to baseline environmental conditions. But, Bloom's Opening Brief does not include any arguments or evidence to suggest that the Regulations will result in any potentially significant impacts as compared to baseline conditions. Instead, Bloom simply alleges that its fuel cell technology is better than SVP's natural gas power plants and, thus, Bloom believes the environment would be better off in the future with more of its fuel cells. Because Bloom's Opening Brief fails to advance any evidence or arguments relating to the relevant question pursuant to CEQA, Bloom's CEQA challenge necessarily fails for this reason alone. (See, e.g., *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 679 [arguments not raised in a petitioner's opening brief are "forfeited"]; *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 343, fn. 13 [court ordinarily will not consider issues raised for the first time on reply].)

B. The Regulations do not have the potential to result in any significant environmental impacts as compared to baseline conditions.

Even if Bloom's Opening Brief argued that the Regulations have the potential to result in a potentially significant environmental impact as compared to baseline environmental conditions, the argument would fail. For a project to have the potential to result in a significant environmental impact as defined pursuant to CEQA, the project must result in environmental impacts that *exceed* baseline conditions. (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 512 (*CREED-21*) [upholding city's reliance on the commonsense exemption because an approved revegetation plan did not have the potential to result in any environmental impacts as compared to baseline conditions].)

Here, two facts must be assumed in order for the Regulations to have the potential to result in any significant impacts as defined by CEQA: (1) energy demand within the City must increase into the

future, and (2) the amount of energy produced by SVP using its natural gas power plants must also increase into the future.[7] (See, e.g., *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 872 ["noting 'the physical impacts of established levels of a particular use have been considered part of the existing environmental baseline …'; thus, the agency needed only to analyze proposed *increases in intensity or rate of use*"], quoting *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1196 (emphasis added).) Bloom's Opening Brief advances no evidence or argument concerning either future increases in energy demand in the City or SVP's reliance on energy produced using natural gas. As demonstrated herein, SVP's reliance on natural gas is limited and declining.

The City's adopted energy projections are set forth in the 2018 IRP for SVP. (See City's RJN, Exhibit A, p. 8-8.) The IRP establishes that energy demand in the City is projected to increase into the future. (*Ibid.*) However, it also demonstrates that the City's reliance on the production of energy using natural gas will continue to *decrease* in the future as compared to baseline conditions. (*Ibid.*) For example, as discussed *supra* Section II.C, in 2018, the DVR natural gas power plant produced 899,242 MWh of energy. (AR 303; see also AR 85, 158.) By the end of 2019, DVR energy generation is projected to decrease to 835,000 MWh and, by 2038, it is projected to decrease to 470,000 MWh. (City's RJN, Exhibit A, p. 8-8.) Therefore, as compared to baseline energy production at DVR in 2018, future energy production at DVR is anticipated to decrease by approximately 64,000 MWh[8] in 2019 and by 420,000 MWh[9] in 2038.

This substantial projected decrease in SVP's reliance on production of energy using natural gas

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[7] All of the indirect environmental impacts of the Regulations claimed by Bloom are associated with the environmental impacts allegedly caused by SVP producing additional energy in the future using natural gas.

[8] 899,242 MWh (baseline DVR natural gas energy production [AR 303]) – 835,000 MWh (2019 projected DVR natural gas energy production [City's RJN, Exhibit A, p. 8-8]) = ~64,000 MWh reduction in DVR natural gas energy projection as compared to the baseline level.

[9] 899,242 MWh (baseline DVR natural gas energy production [AR 303]) – 470,000 MWh (2038 projected DVR natural gas energy production [City's RJN, Exhibit A, p. 8-8]) = ~420,000 MWh reduction in DVR natural gas energy projection as compared to the baseline level.

is supported by extensive evidence in the record. For example, for the last 10 years, the City has only acquired renewable and GHG-free energy sources. (AR 9167.) Moreover, the City fully divested from its coal-fired power generation two years ahead of schedule, despite financial losses, because divestment aligned with its environmental and sustainability goals. (AR 167, 225, 233, 243, 1150, 1574, 17277.) Actions like these resulted in the City's GHG emissions decreasing, even in sectors where energy demand increased. (AR 17272; see also AR 1151.)

Furthermore, in the last five years, the City has acquired the following assets to further reduce its reliance on fossil fuels: 124 megawatts from tri-dam hydroelectric power; 19 megawatts from Rooney Ranch wind power; 30 megawatts Sand Hill A & B wind power; 40 megawatts Central 40 solar power; and 200 megawatts Viento Loco wind power. (AR 159, 16363.) The wind and solar acquisitions will come online in 2020 and 2021. These additional renewable resources will be added to SVP's portfolio and will further reduce the City's reliance on its natural gas power plants in the future.

Additionally, independent of the City's commitment to sustainability, State mandates require that SVP's energy supply become even cleaner and more sustainable in the future. As discussed further above (*supra* Section II.A.2), SB 100 requires energy providers such as SVP to provide 50 percent renewable energy by 2026, 60 percent renewables by 2030, and 100 percent GHG-free energy by 2045. To meet these goals and mandates, SVP must reduce and entirely phase out natural gas and expand the renewable and GHG-free energy components of its portfolio. In direct contrast, Bloom fuel cells powered by natural gas are, and will remain, 0 percent renewable and 0 percent GHG-free for their entire useful life — approximately 15-20 years — while the rest of the grid moves to 100 percent GHG-free energy. (AR 217, 239.)

Put simply, while substantial evidence in the record clearly shows a dramatic and increasing shift by SVP to renewable and GHG-free energy sources consonant with State policy (see AR 17278 [SVP energy portfolio chart showing a substantial increase in renewable and GHG-free energy and a steep decline in natural gas reliance]), no evidence supports the argument – even if not forfeited by Bloom (see *supra* Section IV.A) – that the Regulations will cause SVP's natural gas energy production to increase above existing baseline levels. Thus, as in *CREED-21*, because the Regulations do not have the potential to result in any adverse change in physical conditions as compared to baseline conditions,

"the administrative record shows 'with certainty that there is no possibility that the activity in question . . . may have a significant effect on the environment' (Guidelines, § 15061, subd. (b)(3)), . . . [and, as a result,] there is substantial evidence to support City's determination that the… [Regulations are] exempt from CEQA pursuant to the commonsense exemption (i.e., Guidelines, § 15061, subd. (b)(3)) . . . ." (*CREED-21*, *supra*, 234 Cal.App.4th at p. 512.)

C. Bloom's arguments are premised on a series of unreasonable assumptions.

As demonstrated above, Bloom has not argued that the Regulations have the potential to result in any significant environmental impacts as compared to baseline conditions. (See *supra* Section IV.A.) Moreover, even if Bloom had advanced such an argument, substantial evidence demonstrates that it is not reasonably foreseeable that the Regulations will result in any potentially significant environmental impacts as compared to baseline conditions. (See *supra* Section IV.B.) Either one of these reasons is sufficient to deny Bloom's CEQA challenge. However, as discussed below, the argument advanced in Bloom's Opening Brief is also premised on a series of unreasonable assumptions. Each unreasonable assumption constitutes an additional reason why Bloom's CEQA challenge is meritless. (See, e.g., CEQA Guidelines, §§ 15064, subd. (d)(2), 15358, subd. (a)(2) [a lead agency is only required to consider reasonably foreseeable indirect effects of a project].)

1. Bloom misrepresents that the Regulations create a "Fuel Cell Ban."

Bloom's Opening Brief repeatedly misrepresents that the Regulations constitute a "Fuel Cell Ban." The Regulations, however, do not prohibit the development of fuel cells in the City. Instead, the Regulations only require that SVP customers that develop self-generating energy facilities in the City in the future, and that want to remain connected to the SVP electrical system, must use renewable self-generating facilities. (AR 77, 1150.) With respect to fuel cells, the Regulations would require that fuel cells installed in the City in the future run on biogas instead of natural gas. (AR 1151.) Therefore, the Regulations do not ban fuel cells; the Regulations only require future fuel cells to run on biogas if a

customer wants to remain connected to the SVP electrical system.[10]

Bloom does not dispute that fuel cells that run on biogas are better for the environment than fuel cells that run on natural gas. Indeed, Bloom's own promotional materials highlight the environmental benefits of fuel cells that use biogas. (AR 8601 [stating its fuel cells running on natural gas generate 679-883 lbs of CO2 per MWh whereas fuel cells running on biogas are "carbon neutral"].) Thus, the intended effect of the Regulations is to require that fuel cells used in the City in the future *reduce* environmental impacts. Fuel cells that run on natural gas do not.

Nevertheless, in an effort to establish that the Regulations will result in potentially significant indirect environmental impacts, Bloom alleges that the environmental benefits of requiring fuel cells to run on biogas should be ignored because Bloom claims that it is not possible to install fuel cells that run on biogas. (See, e.g., Bloom's Opening Brief, p. 9:5-22.) For example, Bloom cites two letters submitted on its behalf that suggest use of "biomethane is prohibitively expensive if used for electricity generation." (AR 16411-16414.) However, these comments cannot be reconciled with the evidence in the record demonstrating that biogas is currently being used to generate electricity and, specifically, is being used to operate fuel cells. Moreover, these comments do nothing to further Bloom's obligation to demonstrate an impact of the Regulations on the existing environmental baseline.

For example, Bloom acknowledges that "Bloom's Energy Server is capable of running on biogas." (AR 1225.) Bloom also admits that it is "pioneering new on-site biogas projects across the state . . . ." (*Ibid.*; see also AR 9637 [Bloom "signed a bio-gas deals with Mountain View and have started operating their equipment on biogas"], 9435 (City's RJN, Exhibit C) [Emeryville IKEA uses

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[10] Bloom alleges that the Regulations require that the biogas come from an in-State source. (See, e.g., Bloom's Opening Brief, pp. 8:24 – 9:2, citing AR 17997 [SVP Rules & Regs. § 11.A.1(i)].) This is not correct. The Regulations require that fuel cells qualify as renewable electrical generation facilities as defined by the California Energy Commission. (AR 77.) Therefore, the Regulations do not establish any sourcing criteria; instead, the Regulations defer to State requirements concerning what qualifies as a renewable electrical generation facility. The City also notes that the State's discretion in establishing and updating its requirements for renewable electrical generation facilities, including the origin of biogas, is not unlimited. For example, the State cannot adopt requirements that violate the dormant Commerce Clause. (*Am. Trucking Ass'ns v. Mich. PSC* (2005) 545 U.S. 429, 432 [the dormant Commerce Clause "prevents a state from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear'"].)

fuel cells that run on biogas].) "However, [Bloom asserts that] because available supplies of this feedstock are limited and very costly, only a few of Bloom's customers are currently running on directed biogas." (AR 1225; see also AR 16450 [asserted without any supporting economic data that biogas is "prohibitively costly"].)

The City acknowledges that operating fuel cells using biogas will likely be more expensive than using natural gas. But, despite the added costs, Bloom admits that it operates fuel cells that run on biogas. This fact alone supports the conclusion that it is possible for Bloom to operate fuel cells on biogas in the City. If it were not possible, then Bloom's existing biogas fuel cell projects would not likely exist. (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600, citing *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430 ["No proponent, whether wealthy or not, is likely to proceed with a project that will not be economically successful."].) Moreover, Bloom proposed operating fuel cells running on biogas to SVP. (AR 11458 [biogas project summary], 11456 [email from Bloom executive stating Bloom was excited to work with SVP on a potential biogas project].) If Bloom was unable to operate fuel cells running on biogas, Bloom presumably would not have submitted a proposal to the City to do just that. Thus, rather than demonstrating that the Regulations render fuel cells economically infeasible, the administrative record merely suggests that requiring fuel cells to run on biogas may reduce Bloom's profit. While it is certainly understandable that Bloom desires to ensure its fuel cells are as profitable as possible, economic impacts to Bloom do not constitute environmental impacts pursuant to CEQA. (CEQA Guidelines, § 15382 ["An economic or social change by itself shall not be considered a significant effect on the environment."].) Bloom's argument is a policy argument; not a CEQA argument.

Moreover, even if it is assumed that Bloom's business model is not efficient enough to generate profit operating fuel cells that run on biogas, that would not establish that new fuel cells will not be developed in the City in the future by other companies. (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 691 [concluding that, if a project drives a store out of business, "a more efficiently run store of the same type . . . might move in"].) Thus, Bloom's claim that the Regulations constitute a "Fuel Cell Ban" is not borne out by either the evidence in the record or CEQA case law concerning economic impacts.

In summary, the evidence in the record supports the conclusion that new fuel cells can operate in the City after implementation of the Regulations; only now new fuel cells will need to be cleaner biogas fuel cells. As fuel cells may continue to be developed in the City in the future, Bloom's CEQA challenge must fail because it is premised on an assumed future scenario where a purported "Fuel Cell Ban" prohibits the future development of fuel cells in the City.

2. Bloom fails to acknowledge the availability of alternative renewable self-generation options.

The environmental impacts alleged by Bloom are premised on the theory that, if fuel cells are not developed in the City in the future, then the energy will instead come from SVP's gas power plants. However, even if Bloom's allegation that neither it nor any other company could develop fuel cells using biogas in the City in the future is – for the sake of argument – assumed to be a reasonably foreseeable outcome, substantial evidence in the administrative record demonstrates that alternative renewable self-generation options are available. For example, renewable self-generation technologies such as solar and wind power, combined with battery storage, are available as alternatives to fuel cells. (See, e.g., AR 9604-9605.) In light of this evidence, it is reasonably foreseeable that SVP customers that want to both use a self-generation facility in the future and remain connected to SVP's grid will use other available renewable self-generation options (like wind or solar with battery storage) if biogas fuel cells are unavailable. (See *Manhattan Beach Plastic Bag*, *supra*, 52 Cal.4th at p. 174 [holding that the "actual increase in paper bag use as a result of the ordinance is necessarily uncertain, given that some percentage of local residents may be expected to turn to the city's favored alternative, reusable bags"].) Therefore, no evidence in the record supports the conclusion that a reduction in fuel cell use will lead to a decrease in self-generation projects in the City in the future. As it is reasonably foreseeable that other self-generation options would be available to replace fuel cells in the future, Bloom's CEQA challenge fails because it is premised on an assumed future scenario where a decline in fuel cell development is replaced by an increase in SVP's natural gas energy production.

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3. Even if renewable self-generation is not developed in the future and reliance on SVP's energy grid increases in the future as a result, substantial evidence demonstrates that use of SVP's energy grid would result in a reduction in environmental impacts as compared to use of Bloom's natural gas fuel cells.

Even if a comparison between Bloom's natural gas fuel cells and SVP energy production was somehow relevant to this litigation (as Bloom argues throughout its Opening Brief), the comparison provided by Bloom is premised on the false assumption that every 1 MWh of fuel cell power replaces 1 MWh of energy produced at SVP's natural gas power plants. (Bloom's Opening Brief, pp. 19:8-27:18.) Bloom has presumably taken this approach because, when Bloom's natural gas fuel cells are compared to SVP's diversified energy portfolio, the evidence demonstrates that Bloom's natural gas fuel cells result in greater environmental impacts than energy from SVP's power grid. SVP's portfolio consists of wind, solar, geothermal, hydroelectric, landfill gas, and natural gas. (AR 17277.) In 2017, SVP's power content was 36 percent renewable and 72 percent GHG-free. (AR 152, 9740.) Its energy portfolio emits approximately half the GHG emissions per megawatt hour as fuel cells do. (See AR 137, 9683.)

Additionally, SVP's portfolio approach to energy procurement enables it to ramp down or completely shut down its natural gas plants to take advantage of renewable energy available on the California marketplace. (AR 1157, 9685; see also AR 85.) **Figure 1** (below) reflects such circumstances. SVP's use of natural gas is represented in light orange on top of the dark blue for large hydro. Over the two-week period recorded in the graph, natural gas production is almost imperceptible because SVP needed to generate very little energy from natural gas due to the abundant renewable energy supplies on the marketplace including large and small hydro, wind, geothermal, landfill gas, and solar energy production. (AR 16362-16363.)

Unlike SVP's natural gas power plants, Bloom's fuel cells are technologically incapable of ramping down to take advantage of a surplus of renewable, clean energy on the marketplace; rather, Bloom's fuel cells operate 24 hours a day, 365 days a year on natural gas. (AR 85, 9167.) This means—unless they run on biogas as incentivized by the Regulations—they are permanently 0 percent renewable and 0 percent GHG-free facilities. (AR 85-86, 153.)

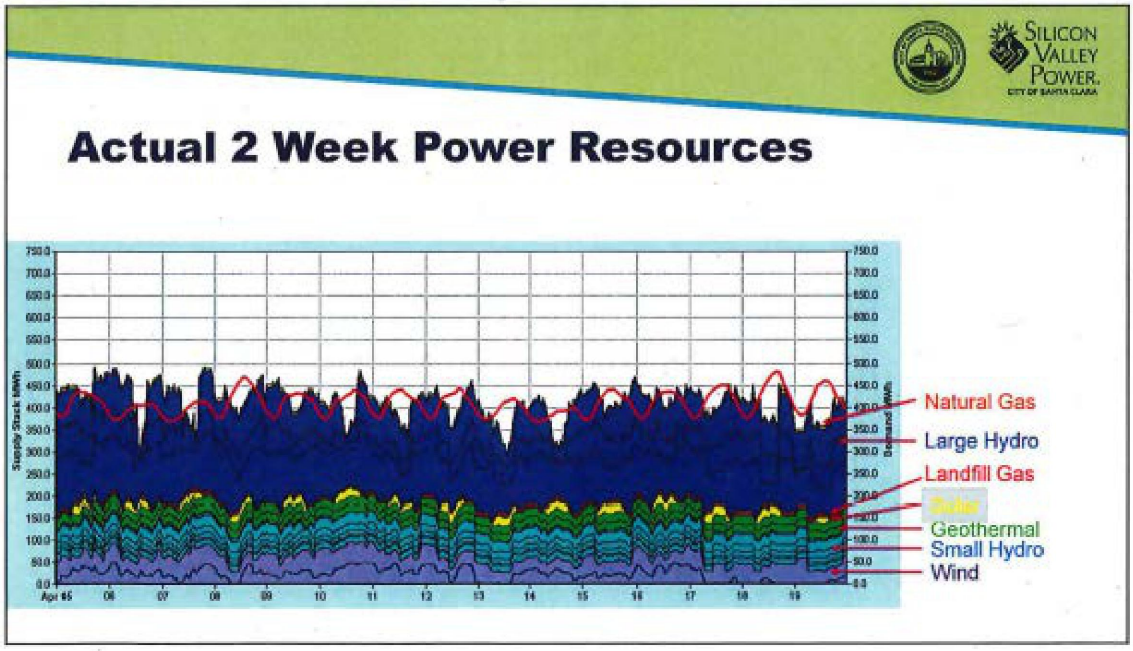

Figure 1: SVP Two-Week Actual Procurement – April 5, 2019 to April 20, 2019. (AR 16362.)

As a result of the City's vast renewable energy portfolio, it is apparent that the majority of the City's energy production emits 0 pounds/MWh of NOx, SOx, CO, or VOCs. (AR 155, 16361.)

Thus, Bloom presents a false dichotomy by suggesting that in the future either Bloom must develop additional natural gas fuel cells in the City or SVP will need to provide an equivalent amount of energy using its natural gas power plants. In truth, under baseline conditions only about 16 percent of SVP's power comes from natural gas. (AR 155-156, 1291, 16361, 17278.) For these reasons, even if the Regulations lead to increased energy production by SVP, Bloom ignores that, at most, only a small percentage of that production would be generated by SVP's natural gas power plants.

In addition, Bloom's allegations that the Regulations will result in increased water use[11] and noise[12] impacts are likewise baseless because they rely on the assumption that the Regulations will

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[11] As discussed, alleged differences between water use required to operate natural gas fuel cells and natural gas power plants do not address the relevant question for purpose of CEQA: whether the Regulations have the potential to increase water use leading to water use impacts compared to "existing environmental baseline conditions, which baseline conditions include[] the impact of established levels of annual water use." (*North Coast Rivers Alliance v. Westlands Water Dist.*, *supra*, 227 Cal.App.4th at p. 875.)

require SVP to supply additional energy from its natural gas power plants. (See Bloom's Opening Brief, pp. 21:14 – 22:10.) As discussed, substantial evidence in the administrative record supports the conclusion that the Regulations do not constitute a "Fuel Cell Ban" and that alternative renewable self-generation options are available. Moreover, even if the Regulations lead to a future reduction in fuel cell development in the City, SVP has, and will have, abundant renewable energy sources to meet demand without increased reliance on its natural gas plants. Accordingly, Bloom's allegation that the Regulations will cause increased water use and noise impacts associated with an alleged increase in natural gas power generation is meritless.

Contrary to Bloom's claims, the record reflects SVP's energy portfolio is cleaner and more sustainable than fuel cells running on natural gas. (See also *supra* Section IV.B [demonstrating that the City's reliance on its natural gas power plants will continue to decrease in the future].) For a project such as the Regulations, this constitutes substantial evidence supporting the conclusion that the Regulations will result in no impact for the purposes of CEQA. (See, e.g., *Manhattan Beach Plastic Bag*, *supra*, 52 Cal.4th at pp. 172, 174 [holding that, in evaluating the impacts of the plastic bag regulations, "the city could evaluate the broader environmental impacts of the ordinance at a reasonably high level of generality[,]" and, based on such an evaluation, conclude the regulation "would have no significant effect on the environment"].) In light of this evidence, the City reasonably concluded that the commonsense exemption applies to the Regulations.

D. The case law relied on by Bloom is readily distinguishable.

Each of the cases cited by Bloom in its Opening Brief are readily distinguishable for at least two reasons. First, in each of the cases the petitioners argued that the lead agency approved a project that would result in significant impacts as compared to existing physical conditions. (See *Cal. Farm Bureau Fed. v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 195 [holding the project involved

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[12] It should also be noted that, for purposes of CEQA, where a lead agency has an enforceable noise ordinance, general accusations that a project will result in noise impacts does not satisfy a petitioner's "burden of showing that the noise generated by the project actually will have a significant environmental effect." (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 824 [rejecting petitioner's noise argument and upholding a city's approval of a car wash based on a categorical exemption].)

"the physical reshaping of the land"]; *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1244 [holding the project was intended to result in paving at least some new roads]; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 118 [holding invasive soil testing requiring sample borings and installation of monuments would "necessarily result in *some* physical changes in the environment"] (original emphasis); *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 657-658 [holding a regulation would "lead to a net increase in VOC emissions"]; *Myers v. Bd. of Supervisors* (1976) 58 Cal.App.3d 413, 425 [holding the project involved "the possible construction of 2 dwellings on adjoining [undeveloped rural] lots"]; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 704 [holding a project to subdivide four existing agricultural parcels resulted in the "property [being] more amenable to development by creating smaller parcels"].) Here, Bloom fails to advance any arguments or evidence alleging that the Regulations will result in increased environmental impacts as compared to baseline physical conditions. Instead, unlike the cases cited in Bloom's Opening Brief, Bloom simply compares the Regulations to two alleged future scenarios with and without the Regulations, which as discussed *supra* Section IV.A is not the proper inquiry pursuant to CEQA.

Second, in each of the cases cited in Bloom's Opening Brief, the administrative record lacked substantial evidence showing that the projects would not result in reasonably foreseeable environmental impacts as defined by CEQA. (See *Cal. Farm Bureau Fed. v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 195-196 [holding that the agency did not point to "any evidence" demonstrating that a project "requir[ing] the use of heavy earth moving equipment" and involving the creation of "[l]evees, ditches, swales, loafing bars, and other [physical] features" would not result in potentially significant environmental impacts]; *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1231 [holding that it was reasonably foreseeable that "road paving [projects] would tend to have adverse environmental effects" as compared to existing conditions]; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117-119 [holding the agency produced no evidence to support the conclusion that invasive soil testing would not result in potentially significant environmental impacts]; *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 658 [holding agency failed to identify evidence

demonstrating an increase in air quality impacts was not reasonably foreseeable]; *Myers v. Bd. of Supervisors* (1976) 58 Cal.App.3d 413, 430 [holding the administrative record lacked evidence refuting the environmental impacts associated with developing the rural properties]; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 704 [holding the record did not include evidence demonstrating future development of four agricultural properties would not result in significant effects on the environment].) Whereas, here, the record demonstrates it is not reasonably foreseeable that the Regulations will result in any environmental impacts in excess of existing baseline conditions. (See *supra* Section IV.B.) Moreover, Bloom's argument is premised on a number of assumptions that are not supported by the record and are unreasonable. (See *supra* Section IV.C.) Thus, each of the cases relied on by Bloom is readily distinguishable.

V. CONCLUSION

As demonstrated above, Bloom has failed to advance a cognizable CEQA challenge and, instead, has posited alleged environmental impacts comparing two hypothetical future scenarios. Moreover, substantial evidence in the record demonstrates that the Regulations will not result in any reasonably foreseeable indirect environmental impacts as compared to baseline conditions. Therefore, the City complied fully with CEQA in determining that the commonsense exemption applies. For these reasons, the City respectfully requests this Court deny Bloom's Petition and enter judgment in favor of the City.

Dated: November 19, 2019

THOMAS LAW GROUP

By: _____
For Tina A. Thomas
Attorneys for Respondents
CITY OF SANTA CLARA and
SILICON VALLEY POWER

Bloom Energy Corp. v. City of Santa Clara et al.
Santa Clara County Superior Court Case No. 19CV348838

PROOF OF SERVICE

I am a resident of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

On November 19, 2019, I served the following:

RESPONDENTS' OPPOSITION BRIEF

X On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

□ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

□ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 737-5858 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below; or

□ On the parties in this action by causing a true copy thereof to be hand-delivered to the following person(s) or representative at the address(es) listed below; or

X On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 19th day of November 2019, at Sacramento, California.

Stephanie Richburg

Bloom Energy Corp. v. City of Santa Clara et al.
Santa Clara County Superior Court Case No. 19CV348838

SERVICE LIST

James L. Arnone
james.arnone@lw.com
LATHAM & WATKINS LLP
355 South Grand Ave., Suite 100
Los Angeles, California 90071
Telephone: 213-485-1234
Facsimile: 213-891-8763

Marc T. Campopiano
marc.campopiano@lw.com
Lucas I. Quass
lucas.quass@lw.com
LATHAM & WATKINS LLP
650 Town Center Drive, 20th Floor
Costa Mesa, California 92626
Telephone: 714-540-1235
Facsimile: 714-755-8290

Attorneys for Petitioner and Plaintiff:
BLOOM ENERGY CORPORATION