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11 Corporation

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF SANTA CLARA**

14 BLOOM ENERGY CORPORATION, a Delaware
corporation,

15 Petitioner and Plaintiff,

16 v.

17 CITY OF SANTA CLARA, a municipal
18 corporation; SILICON VALLEY POWER, a
not-for-profit municipal electric utility; and DOES
19 1 through 10, inclusive,

20 Respondents and Defendants.
21

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF**

ACTION BASED ON CALIFORNIA
ENVIRONMENTAL QUALITY ACT

California Environmental Quality Act (Cal.
Pub. Resources Code § 2100 *et seq.*); Code
of Civil Procedure §§ 1094.5, 1085

1 Petitioner and Plaintiff Bloom Energy Corporation (“Petitioner”) hereby petitions for a
2 writ of mandamus and brings a complaint for injunctive and declaratory relief and for attorneys’
3 fees against Respondents and Defendants the City of Santa Clara (“City”) and Silicon Valley
4 Power (“SVP,” and collectively with City, “Respondents”), and alleges as follows.

INTRODUCTION

5
6 1. On May 7, 2019, the Santa Clara City Council adopted Resolution No. 19-8701, A
7 Resolution Amending Silicon Valley Power’s Rules and Regulations to Require New or
8 Modified Self-Generation Facilities to Utilize Renewable Generation and Fuel Sources (the
9 “Resolution,” attached hereto as **Exhibit A**). The Resolution requires that all of SVP’s
10 customers seeking to modify or install a self-generation power source and remain connected to
11 SVP’s electrical system (except for emergency backup power) must use only a “renewable
12 electrical generation facility,” as defined under Section 25741 of the California Public Resources
13 Code.

14 2. The Resolution represents a significant shift in the way SVP customers can use and
15 manage onsite power generation. Petitioner is informed and believes, and thereon alleges, that
16 the Resolution effectively bars residents and businesses in Santa Clara from installing
17 Petitioner’s fuel cells unless the fuel cells are powered by renewable fuels sourced solely from
18 within the State. It is infeasible, however, to satisfy this condition because renewable biogas
19 sourced solely from within the State is virtually non-existent as a reliable fuel source or
20 prohibitively expensive for a commercial user. Indeed, at present, there are only two
21 commercially operating biomethane developments connected to pipelines in California: CR&R
22 and Point Loma. Because of the high costs and long development timelines (2-5 years) to bring
23 these projects to market in California, the current supply of in-state biogas is extremely limited.
24 As a result, if a self-generating facility is even able to locate in-state biogas for its projects, the
25 prices are frequently 5-10 times greater than the cost of natural gas.

26 3. Moreover, Petitioner is informed and believes, and thereon alleges, that the supply and
27 cost of biomethane are further impacted by California’s current regulatory environment. The
28 combination of California’s Low Carbon Fuel Standard and the Federal Renewable Fuel

1 Standard provide significant incentives for biomethane suppliers to sell all biomethane (from in-
2 state or out-of-state) only for transportation uses, not for the generation of electricity. These
3 incentives are stackable; that is, biomethane products can benefit from both the Federal and State
4 incentives if that biomethane is used for transportation. The California Council on Science and
5 Technology provided an exhaustive analysis on these market influences and concluded:
6 ***“Financial incentives through the California Low Carbon Fuel Standard (LCFS) and the***
7 ***Federal Renewable Fuel Standard (RFS) programs can be a factor of up to 18 times greater***
8 ***than the commodity value of the biomethane itself.”***¹ (Emphasis added.) Current RFS prices
9 allow biogas developers to generate around \$30/MMBtu for the credit value alone if they sell
10 their product in the transportation market. Selling the same biogas into the electricity market
11 would not generate an RFS credit, and the developer would thus forgo this lucrative incentive
12 (worth more than the biogas itself). This market distortion further exacerbates the biogas price
13 challenges, making it uneconomical for non-transportation end users, such as building owners
14 and operators looking to install non-combustion, electricity generating fuel cells, to source
15 California renewable gas for their projects.

16 4. As such, Petitioner is informed and believes, and thereon alleges, that due to the
17 infeasibility of sourcing renewable natural gas in accordance with the Resolution’s requirements,
18 the Resolution causes environmental impacts by increasing electricity generation from traditional
19 gas-fired power plants to make up for the loss of electricity generation from fuel cells.

20 5. Fuel cells have been recognized by the US Department of Energy as “the most energy
21 efficient device[] for extracting power from fuels.” Fuel cells support California’s alternative
22 clean energy strategies under the California Public Utilities Commission’s Net Energy Metering
23 program and the California Air Resources Board’s Distributed Generation Certification Program.
24 In addition to providing reliable electricity, fuel cells reduce air quality emissions, health
25 impacts, greenhouse gas emissions and water usage compared to gas-fired power plants, such as

26
27 ¹ California Council on Science and Technology, Biomethane in California Common Carrier
28 Pipelines: Assessing Heating Value and Maximum Siloxane Specifications, An Independent
Review of Scientific and Technical Information (June 2018), p. 79, [https://ccst.us/publications/
2018/2018biomethane.pdf](https://ccst.us/publications/2018/2018biomethane.pdf).

1 the three power plants to which Petitioner is informed and believes, and thereon alleges, are
2 owned and operated by SVP. In addition, Petitioner is informed and believes, and thereon
3 alleges, that fuel cells provide a level of resiliency against wildfires, earthquakes and other
4 weather related events that cannot be provided by power supplied by the grid.

5 6. Substantial evidence in the record demonstrates that the Resolution may cause significant
6 impacts on the environment. Ramboll, a leading environmental consulting firm, evaluated the
7 potential environmental impacts of the Resolution and determined it likely will *increase*
8 greenhouse gas emissions and criteria pollutants, such as carbon monoxide, nitrogen oxides and
9 particulate matter. There is a well-established connection between increases in criteria pollutants
10 and human health impacts. In addition, two of the three power plants owned by SVP are located
11 in State-designated “disadvantaged” communities and the third power plant is located near a
12 residential area, increasing the risk of adverse impacts on sensitive receptors. Ramboll also
13 determined that the Resolution will increase water usage and ambient noise levels, while
14 eliminating numerous environmental benefits associated with fuel cells. Similar environmental
15 concerns were raised by stakeholders in comment letters to Respondents and by members of the
16 public at the City’s hearing on May 7, 2019.

17 7. Respondents acknowledged the dispute over the Resolution’s environmental impacts,
18 both in informal letters from City staff and at the public hearing. Indeed, at the May 7, 2019,
19 hearing, the Assistant City Manager and Acting Electric Utility Director stated:

20 We do disagree with some of the elements in the communication
21 you received. We disagree that required renewable energy will
22 increase gas emissions and worsen air quality. We think having
23 renewable energy that is GHG free would actually do the opposite.
24 It will make better air quality. We’re not fully aligning with their
25 analysis, and that’s okay. **You know, experts can differ on
analysis when it comes to that for a number of reasons;** one is
26 that Bloom Energy is comparing their fuel cells just to our gas
27 generation facility.

28 In addition, in a letter dated April 30, 2019, in response to concerns from the Silicon Valley
Leadership Group, City staff stated without citing to technical evidence that “we disagree that
limiting [fuel cells] in Santa Clara ‘will likely increase its carbon emission and will certainly
worsen air quality.’”

1 8. Despite being aware of ample evidence that the Resolution may cause significant effects
2 on the environment, Respondents never completed a substantive environmental review under the
3 California Environmental Quality Act (“CEQA”) for public consideration. Instead, Respondents
4 simply claimed, with scant evidentiary support, that the Resolution falls within the CEQA
5 Guidelines² section 15061, subdivision (b)(3), “common sense” exemption.

6 9. Respondents erred because the common sense exemption does not apply if there is even a
7 *slight* showing of a reasonable possibility of a significant environmental impact. Respondents
8 were required to demonstrate “*with certainty* that there is *no possibility* that the [Resolution] *may*
9 have a significant effect on the environment.” (Guidelines §15061, subd. (b)(3), emphasis
10 added.) Respondents have not met this very high burden.

11 10. Ramboll’s technical report and public comments provide substantial evidence that the
12 Resolution may cause significant effects on the environment. Respondents have repeatedly
13 recognized that an evidentiary dispute exists over the Resolution’s environmental impacts, which
14 renders the City’s use of the common sense exemption flatly unlawful. CEQA requires an
15 Environmental Impact Report for exactly this reason—to allow the decision-makers to make
16 informed decisions about the environmental consequences of a proposed project and to ensure
17 that the public is fairly informed of the environmental effects of a proposed project.

18 11. By refusing to perform any environmental review, Respondents have defeated the core
19 purpose of CEQA, which is to protect the health and well-being of the environment and inform
20 the public of environmental impacts. By not following CEQA’s procedural requirements,
21 Respondents failed to proceed in a manner required by law. Respondents’ passage of the
22 Resolution must be rescinded and Respondents must be compelled to comply with CEQA.

23 **THE PARTIES**

24 12. Petitioner and Plaintiff Bloom Energy Corporation is, and at all times relevant hereto
25 was, a Delaware corporation that develops and manufactures fuel cells. Petitioner’s principal
26

27 ² CEQA authorizes and directs the State Office of Planning and Research to adopt guidelines for
28 the implementation of CEQA by public agencies. (Pub. Resources Code § 21083.) These
guidelines are found at title 14, California Code of Regulations, sections 15000, *et seq.*
 (“Guidelines”) and are binding on all state and local agencies, including Respondents.

1 place of business is located in San Jose, California.

2 13. Respondent and Defendant City of Santa Clara is, and at all times relevant hereto was, a
3 municipal corporation and charter city organized and existing under the laws of the State of
4 California.

5 14. Respondent and Defendant Silicon Valley Power is a municipal electric utility that is
6 wholly owned by the City. Petitioner is informed and believes, and thereon alleges, that SVP
7 owns and operates three natural gas power plants within the City.

8 15. Petitioner does not know the true names or capacities, whether individual, corporate,
9 associate or otherwise, of Respondents and Defendants Does 1 through 10, and therefore sues
10 said Respondents and Defendants under fictitious names. Petitioner will amend this petition and
11 complaint to show their true names and capacities when and if the same has been ascertained.

12 **JURISDICTION AND VENUE**

13 16. This Court has jurisdiction over this proceeding pursuant to Code of Civil Procedure
14 sections 1085 and 1094.5 and Public Resources Code sections 21168 and 21168.5. In addition,
15 the Court has jurisdiction to issue declaratory relief pursuant to Code of Civil Procedure section
16 1060.

17 17. Venue in this Court is proper pursuant to Code of Civil Procedure section 394, in that
18 Respondents are located within the County of Santa Clara.

19 **CALIFORNIA ENVIRONMENTAL QUALITY ACT**

20 18. The California Environmental Quality Act, found at Public Resources Code
21 sections 21000, *et seq.*, is based on the principle that “the maintenance of a quality environment
22 for the people of this state now and in the future is a matter of statewide concern.” (Pub.
23 Resources Code, § 21000, subd. (a).)

24 19. In CEQA, the California Legislature has established procedures designed to achieve this
25 overall purpose, principally the environmental impact report (“EIR”). The EIR is the very heart
26 of CEQA. (*Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9
27 Cal.App.4th 644, 652, *disapproved of on other grounds by Western States Petroleum Assn. v.*
28 *Superior Court* (1995) 9 Cal.4th 559.) CEQA’s procedures, including the EIR, provide both for

1 the determination and full public disclosure of the potential adverse effects on the environment
2 of discretionary projects that governmental agencies propose to approve, and require a
3 description of feasible alternatives to such proposed projects and feasible mitigation measures to
4 lessen their environmental harm. (Pub. Resources Code § 21002.)

5 20. CEQA has two primary goals. First, CEQA is intended to allow decision makers and the
6 public to understand the potential, significant environmental effects of a project. (Guidelines
7 § 15002, subd. (a)(1); *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.)
8 “[The EIR’s] purpose is to inform the public and its responsible officials of the environmental
9 consequences of their decisions before they are made. Thus, the EIR ‘protects not only the
10 environment but also informed self-government.’” (*Ibid.*) The EIR has been described as “an
11 environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to
12 environmental changes before they have reached ecological points of no return.” (*Mountain
13 Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1053.)

14 21. Second, CEQA requires that public entities avoid or reduce environmental impacts when
15 “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation
16 measures. (Guidelines § 15002, subs. (a)(2) and (3); *Citizens of Goleta Valley, supra*, 52
17 Cal.3d at 564.) The EIR provides agencies and the public with information about the
18 environmental impacts of a proposed project and identifies “ways that environmental damage
19 can be avoided or significantly reduced.” (CEQA Guidelines § 15002, subd. (a)(2).)

20 22. CEQA is not merely a procedural statute. CEQA imposes clear substantive
21 responsibilities on agencies that propose to approve projects, requiring that public agencies
22 refrain from approving projects that harm the environment unless and until all feasible mitigation
23 measures are employed to minimize that harm. (Pub. Resources Code §§ 21002, 21002.1, subd.
24 (b).)

25 23. The alternatives analysis is the “core of an EIR.” (*Citizens of Goleta Valley, supra*,
26 52 Cal.3d at 564.) The purpose of a CEQA alternatives analysis is to identify and analyze
27 alternatives to a project that will avoid or substantially lessen its significant environmental
28 impacts. (Pub. Resources Code § 21002.) Thus, “before conducting CEQA review, agencies

1 must not ‘take any action’ that significantly furthers a project ‘in a manner that forecloses
2 alternatives or mitigation measures that would ordinarily be part of CEQA review of that public
3 project.’” (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 138; *see also* Guidelines
4 § 15004, subd. (b)(2).)

5 24. “Environmental review derives its vitality from public participation.” (*Ocean View*
6 *Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 400.)
7 “The requirement of public review has been called ‘the strongest assurance of the adequacy of
8 [environmental review under CEQA].’” (*Mountain Lion Coalition v. Fish & Game Com.* (1989)
9 214 Cal.App.3d 1043, 1051.) Failure either to comply with the substantive requirements of
10 CEQA or to carry out the full CEQA procedures so that complete information as to a project’s
11 impacts is developed and publicly disclosed constitutes a prejudicial abuse of discretion that
12 requires invalidation of the public agency action, regardless of whether full compliance would
13 have produced a different result. (Pub. Resources Code § 21005.)

14 Exemptions to CEQA

15 25. Although CEQA provides some exemptions for certain projects (*see, e.g.*, Pub. Resources
16 Code § 21080, subd. (b), 21080.01 *et seq.*), exemptions are narrowly construed and may not be
17 expanded beyond the scope of their statutory language. (*Mountain Lion Foundation v. Fish &*
18 *Game Com.* (1997) 16 Cal.4th 105, 125.)

19 26. One CEQA exemption, known as the “common sense” exemption, narrowly applies
20 “[w]here it can be seen *with certainty* that there is *no possibility* that the activity in question *may*
21 have a significant effect on the environment.” (Guidelines § 15061, subd. (b)(3), emphasis
22 added.)

23 27. The lead agency “has the burden of establishing the commonsense exemption, i.e., that
24 there is *no possibility* the project may cause significant environmental impacts.” (*Cal. Farm*
25 *Bur. Federation v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 195, emphasis in
26 original.)

27 28. Unlike other exemptions, the common sense exemption does not provide an implied
28 finding that the project will not have a significant environmental impact. (*Davidon Homes v.*

1 *City of San Jose* (1997) 54 Cal.App.4th 106, 116.) Instead, the “exemption requires the agency
2 to be certain that there is no possibility the project may cause significant environmental
3 impacts.” (*Ibid.* at 117.)

4 29. A party challenging the applicability of the common sense exemption “need only make a
5 ‘slight’ showing of a reasonable possibility of a significant environmental impact.” (*Cal. Farm*
6 *Bur. Federation, supra*, 143 Cal.App.4th at 195; *Davidon Homes, supra*, 54 Cal.App.4th at 117.)
7 “If legitimate questions can be raised about whether the project might have a significant impact
8 and there is any dispute about the possibility of such an impact, the agency cannot find with
9 certainty that a project is exempt.” (*Davidon Homes, supra*, 54 Cal.App.4th at 117) Therefore,
10 “if a reasonable argument is made to suggest a possibility that a project will cause a significant
11 environmental impact, the agency must refute that claim *to a certainty* before finding that the
12 exemption applies.” (*Ibid.* at 118, emphasis in original; *Rominger v. County of Colusa* (2014)
13 229 Cal.App.4th 690, 704 [“For the commonsense exemption to apply, the county would have to
14 show as a factual matter, based on the evidence in the record, that there is no possibility that the
15 approval of the Adams subdivision may result in a significant effect on the environment”].)
16 Thus, even the possibility of a significant environmental effect necessitates conducting an initial
17 environmental study, and a notice of exemption is improper. (*See Myers v. Bd. of Supervisors*
18 (1976) 58 Cal.App.3d 413, 427.)

19 30. In addition, even to the extent a public entity can establish the applicability of an
20 exemption, such as the common sense exemption here, CEQA defines a number of exceptions to
21 the exemptions, which, if applicable, require the lead agency to conduct further environmental
22 review. (Pub. Resources Code § 21084; Guidelines § 15300.2.)

23 31. One such exception, known as the unusual circumstances exemption, is provided by
24 Guidelines section 15300.2, subdivision (c), which states that an “exemption shall not be used
25 for an activity where there is a reasonable possibility that the activity will have a significant
26 effect on the environment due to unusual circumstances.”

27 32. Courts review a public agency’s factual determination that a project presents unusual
28 circumstances under the substantial evidence standard. (*Berkeley Hillside Preservation v. City of*

1 *Berkeley* (2015) 60 Cal.4th 1086, 1114.) However, an agency’s determination of whether
2 significant environmental impacts result from an unusual circumstance is reviewed under the less
3 deferential fair argument standard. (*Ibid.* at 1115.)

4 **GENERAL ALLEGATIONS**

5 **Electric Generation and Fuel Cells**

6 33. Prior to passage of the Resolution, SVP’s customers had the ability to install a wide
7 variety of electric generation systems on their properties, including fuel cells, and still remain
8 connected to SVP’s electrical distribution system. (Report to Council Re File # 19-329 (the
9 “Staff Report”), attached hereto as **Exhibit B**, at 64.)

10 34. Typical customer-owned self-generation systems include “technologies such as solar
11 photovoltaics, internal combustion driven emergency back-up generators, fuel cells, steam
12 generators, and gas turbines. Nearly all types of self-generation resources currently in use, other
13 than solar systems, use fossil-fuels such as diesel or natural gas.” (*Ibid.*)

14 35. The US Department of Energy has recognized that fuel cells “are the most energy
15 efficient devices for extracting power from fuels.” (May 6, 2019, Ramboll Analysis on the
16 Potential Environmental Impacts Related to the City of Santa Clara’s Proposed Resolution,
17 attached to Letter from Latham & Watkins LLP to the City, attached hereto as **Exhibit C**, at 90.)

18 36. Fuel cells advance California’s distributed energy strategies as recognized by the
19 California Public Utilities Commission, through the Net Energy Metering program, and by the
20 California Air Resources Board, through the Distributed Generation Certification Program.
21 (**Exhibit C**, at 74.)

22 37. Moreover, fuel cells can be used for power in remote locations, distributed power
23 generation, cogeneration (in which excess heat released during electricity generation is used for
24 other applications) and backup power when the grid has failed during emergencies or other
25 outages at critical facilities, such as emergency centers, universities, housing developments, and
26 other public facilities. (**Exhibit C**, at 74, 90.)

27 38. Petitioner is informed and believes, and thereon alleges, that fuel cells present a number
28 of advantages as compared to traditional thermoelectric power generation plants, such as those

1 operated by SVP. Fuel cells do not use combustion. Therefore, fuel cells generate substantially
2 fewer pollutants, such as carbon monoxide and oxides of nitrogen and sulfur, as compared to
3 natural gas-fired power plants. In addition, fuel cells lack moving parts. As such, fuel cells are a
4 relatively quiet form of energy generation. Fuel cells require minimal water upon start-up (about
5 250 gallons) and then require no ongoing water use, resulting in virtually no impact on local
6 water supplies. Finally, fuel cells can reduce the use of natural gas and the need for diesel
7 generators. (**Exhibit C**, at 74.)

8 39. In addition to the environmental benefits, Petitioner is informed and believes, and thereon
9 alleges, that fuel cells are more resilient than other forms of energy generation and can continue
10 to provide power during wildfires, earthquakes and other weather-related events. (April 26,
11 2019, Bloom Energy email to City Council, attached hereto as **Exhibit E**, at 100.)

12 **Proposed Resolution**

13 40. Petitioner is informed and believes, and thereon alleges, that on May 2, 2019, the City
14 posted the agenda for the City Council’s May 7, 2019, public meeting, which included Item 6 to
15 allow the City Council to take action on the Resolution.

16 41. Petitioner is informed and believes, and thereon alleges, that the Staff Report to the City
17 Council recommending approval of the Resolution was made available to the public on or about
18 May 2, 2019. (**Exhibit B**.)

19 42. The Staff Report includes four alternatives:

20 1. Adopt a Resolution amending Silicon Valley Power’s Rules and
21 Regulations to require that new or modified customer-owned
22 self-generation units utilize only CEC approved renewable
23 generation and fuel sources, providing definition of renewable
24 electric generation facility, and requiring customers to provide
25 proof of eligible certification through the California Energy
26 Commission’s certification process for self-generation other than
27 solar photovoltaic.

28 2. Do not adopt a Resolution amending Silicon Valley Power’s
Rules and Regulations to require that new or modified
customer-owned self-generation units utilize only CEC approved
renewable generation and fuel sources, providing definition of
renewable electric generation facility, and requiring customers to
provide proof of eligible certification through the California
Energy Commission’s certification process for self-generation
other than solar photovoltaic.

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3. Authorize the City Manager to modify the term of the contract and/or usage requirements for the existing Electric Service Agreement with Intel Corporation.

4. Do not authorize the City Manager to modify term of the contract and/or usage requirements for the existing Electric Service Agreement with Intel Corporation.

43. The Staff Report recommended the adoption of the Resolution, through Alternatives 1 and 3, so “that customers that wish to install self-generation resources (other than emergency backup generation) and remain connected to the SVP electrical system be required to use a ‘renewable electrical generation facility’ as defined in California Code, Public Resources Code Section 25741.”³ (**Exhibit B**, at 65.)

44. The Staff Report found that the Resolution is “exempt from the California Environmental Quality Act (“CEQA”) pursuant to CEQA Guidelines section 15061(b)(3) as the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.” (**Exhibit B**, at 67.)

Extensive Public Opposition

45. Despite the fact that the text of the Resolution was only available to the public from May 2 to May 7, 2019, Petitioner is informed and believes, and thereon alleges, that Respondents received extensive public comments opposing the adoption of the Resolution due to the potential for significant environmental impacts.

46. Petitioner is informed and believes, and thereon alleges, that, before the City Council considered the Resolution, the City received comments letters opposing the Resolution, including correspondences from Petitioner (including the May 6, 2019, technical analysis of the Resolution that was conducted by Ramboll), James “Jim” Sweeney (Stanford Professor of

³ “Renewable electrical generation facilities” include “biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, and any additions or enhancements to the facility using that technology” and must meet certain locational requirements. (Pub. Resources Code § 25741.)

1 Management Science and Engineering; Senior Fellow of the Stanford Institute for Economic
2 Policy Research; Senior Fellow of the Precourt Institute for Energy; and until recently, Director
3 of Stanford's Precourt Energy Efficiency Center),⁴ Catherine Sandoval, (a law professor from
4 Santa Clara University and former CPUC Commissioner),⁵ Equinix, Inc., and the Silicon Valley
5 Leadership Group, among others. Many individuals also raised environmental concerns during
6 the public comment period at the City's hearing. Collectively, these public comments
7 constituted substantial record evidence regarding the Resolution's potentially significant
8 environmental impacts.

9 **The Resolution Will Cause Significant Environmental Impacts**

10 47. On the basis of Bloom Energy's and Ramboll's comments, and other public comments
11 submitted to Respondents, Petitioner is informed and believes, and thereon alleges, that the
12 Resolution, which effectively precludes the installation of fuel cells and other clean-running self-
13 generation sources, will cause a shift in energy production to power generation facilities that are
14 not powered by renewable or clean fuel sources, including SVP's natural gas-fired power plants:
15 Donald Von Raesfeld Plant, Santa Clara Cogeneration Plant, and Gianera Plant. Moreover, it is
16 infeasible for fuel cells to be powered entirely by renewable fuels, as the Resolution requires,
17 because renewable biogas sourced from within State is virtually non-existent as a reliable fuel
18 source or prohibitively expensive for a commercial user. (**Exhibit A**, at 28-30; **Exhibit F**, at
19 102-03.)

20 48. Petitioner is informed and believes, and thereon alleges, that California has limited the
21 definition of renewable biogas to in-state biogas and California has incentivized the use of biogas
22 for vehicles and transportation, as discussed in Professor Sweeney's comment letter to the City.
23 (**Exhibit F**, at 103.)

24 49. Petitioner is informed and believes, and thereon alleges, that SVP's customers' increased
25 reliance on SVP's natural gas-fired power plants is, at minimum, reasonably likely to cause
26

27 _____
28 ⁴ May 6, 2019, Jim Sweeney letter to City Council, attached hereto as **Exhibit F**.)

⁵ May 6, 2019, Catherine Sandoval letter to City Council, attached hereto as **Exhibit G**.)

1 significant environmental impacts with respect to air quality, greenhouse gases, hydrology/water
 2 quality, noise, and land use.

3 *Air Quality and Health*

4 50. Fuel cell technology inherently results in lower pollutant emissions per megawatt-hour
 5 (“MWh”) compared to traditional natural gas power generation. (**Exhibit C**, at 80-81.)

6 51. **Table 1**, which was prepared by Ramboll as part of its environmental analysis submitted
 7 to the City by Petitioner, indicates the significant reduction in emissions resulting from the use of
 8 Petitioner’s fuel cells as compared to SVP’s primary natural gas power plant, Donald Von
 9 Raesfeld Power Plant, with respect to carbon monoxide (“CO”), oxides of nitrogen (“NOx”), and
 10 oxides of Sulfur (“SOx”). (**Exhibit C**, at 80.)

Table 1. Criteria Pollutant Emission Factor Comparison between a Bloom Energy Fuel Cell and the Donald Von Raesfeld Power Plant							
	DVR Power Plant Reported Emissions^(a)			DVR Power Plant Net Generation^(b)	Calculated Emission Factors		
Year	CO (tons)	NOx (tons)	SOx (tons)	(MWh)	CO (lbs/MWh)	NOx (lbs/MWh)	SOx (lbs/MWh)
2016	20.92	20.83	2.26	934,537	0.045	0.045	0.005
2017	17.33	17.23	1.87	642,620	0.054	0.054	0.006
Average	19.13	19.03	2.06	788,579	0.049	0.049	0.005
Bloom Energy Emission Factors^{(c)(d)}					0.034	0.0017	Negligible
% Difference					-31%	-97%	-100%
Notes:							
^(a) Emissions data queried from the California Air Resources Board at: https://www.arb.ca.gov/app/emsinv/facinfo/facinfo.php . Accessed: May 2019.							
^(b) Net generation data queried from the U.S. Energy Information Administration at: https://www.eia.gov/electricity/data/browser/ . Accessed: May 2019.							
^(c) Emission factors for the Bloom Energy 300 kilowatt ES-5 obtained from: https://bloomenergy.com/datasheets/energy-server-es5-300kw . Accessed: May 2019.							
^(d) California Air Resources Board certification of the Bloom Energy 300 kilowatt ES-5 available at: https://ww2.arb.ca.gov/our-work/programs/distributed-generation/current-distributed-generation-executive-orders . Accessed: May 2019.							
Abbreviations:							
CO – carbon monoxide			MWh – megawatt-hour				
DVR – Donald Von Raesfeld			NOx – oxides of nitrogen				
lbs – pounds			SOx – oxides of sulfur				

23 52. Thus, Petitioner’s fuel cells have emissions that are *31 to 100 percent lower* than the
 24 Donald Von Raesfeld Power Plant’s emissions. Petitioner is informed and believes, and thereon
 25 alleges, that this is particularly noteworthy for NOx emissions, as Santa Clara County has been
 26 designated a “nonattainment area” for ozone, as defined by the California Air Resources Board,
 27 and NOx reductions are critical to bringing the county back into compliance. (**Exhibit C**, at 81.)
 28

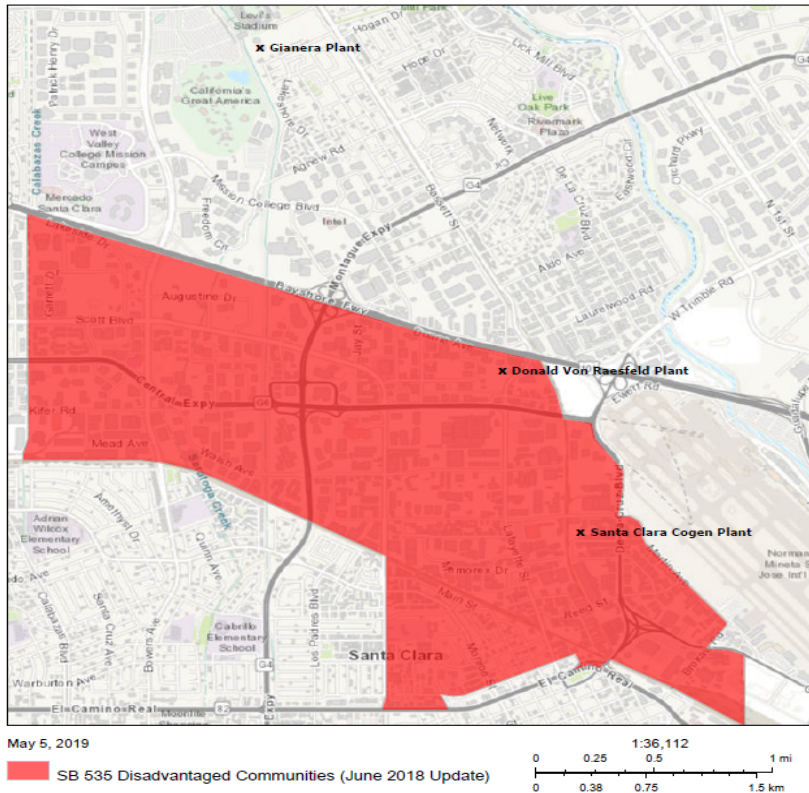
1 53. In addition, Petitioner is informed and believes, and thereon alleges, that there is a
2 well-established connection between increases in criteria pollutant emissions and health impacts
3 on humans. For example, localized exposure to NOx causes respiratory impacts to humans (*e.g.*,
4 decreased lung function, increased inflammation, asthma development) and cardiovascular
5 impairment (*e.g.*, congestive heart failure). (*See Exhibit C*, at 81.)

6 54. As reflected in **Figure 1** below, which was prepared by Ramboll as part of its
7 environmental analysis submitted to the City Council, two of the three natural gas power
8 plants—Donald Von Raesfeld Plant and Santa Clara Cogeneration Plant—are located within
9 communities designated as “disadvantaged” by Senate Bill (SB) 535. Moreover, the third plant,
10 Gianera Plant, is located adjacent to a residential area. The location of SVP’s power plants
11 means that increased power plant reliance will disproportionately impact the health of
12 individuals in disadvantaged communities and sensitive receptors in residential areas.
13 (**Exhibit C**, at 81, 93.)

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Figure 1: SB 535 Disadvantaged Communities



55. Petitioner is informed and believes, and thereon alleges, that because the Resolution is likely to shift power generation from lower-emitting sources such as fuel cells to higher emitting sources such as SVP’s natural gas-fired power plants, the Resolution is likely to have a significant environmental impact on air quality and the health of the City’s residents.

56. Respondents did not evaluate or disclose to the public these significant environmental impacts before adopting the Resolution as required by CEQA.

Greenhouse Gases

57. Fuel cell usage also results in lower greenhouse gas emissions on a per MWh basis.

58. For example, as shown in **Table 2**, Ramboll’s comparison of Petitioner’s fuel cells to SVP’s Donald Von Raesfeld Power Plant reflects a 20 percent reduction in greenhouse gas emissions with respect to Petitioner’s fuel cells. (See **Exhibit C**, at 82.)

Table 2. Greenhouse Gas Emission Factor Comparison between a Bloom Energy Fuel Cell and the Donald Von Raesfeld Power Plant

	DVR Power Plant Reported Emissions^[a]	DVR Power Plant Net Generation^[b]	Calculated Emission Factors
Year	(MT CO₂e)	(MWh)	(lbs/MWh)
2016	400,837	934,537	946
2017	278,898	642,620	957
Average	339,867	788,579	950
Bloom Energy Emission Factor^[c]			756
% Difference			-20%

59. As such, Petitioner is informed and believes, and thereon alleges, that the Resolution’s consequential shift of power generation from fuel cells to SVP’s natural gas-fired plants will result in increased greenhouse gas emissions and, therefore, a significant environmental impact. (See **Exhibit C**, at 81-82.)

60. Respondents did not evaluate or disclose to the public the Resolution’s significant environmental impact to greenhouse gas emissions before adopting the Resolution as required by CEQA.

Hydrology/Water Quality

61. Thermoelectric power generation requires significant amounts of water for cooling.

62. Petitioner is informed and believes, and thereon alleges, that, in 2015, for example, thermoelectric power generation made up 41% of the nation’s freshwater withdrawals. (**Exhibit C**, at 82.)

63. In addition, Petitioner is informed and believes, and thereon alleges, that the Donald Van Raesfeld Power Plant is permitted with a cooling tower with a rated capacity of 34,980 gallons per minute. (*Ibid.*)

64. By contrast, fuel cells are highly water efficient, requiring only minimal water on start-up and no ongoing water use. (**Exhibit C**, at 82.)

65. In sum, Petitioner is informed and believes, and thereon alleges, that the Resolution’s resultant shift of generation from fuel cells to SVP’s power plants will result in significant

1 impacts on local hydrology and water quality due to the increase in water usage associated with
2 traditional natural gas-fired power plants. (**Exhibit C**, at 82-83.)

3 66. Respondents did not evaluate or disclose to the public these significant environmental
4 impacts before adopting the Resolution as required by CEQA.

5 Noise

6 67. Traditional natural gas-fired power plants produce noise from equipment such as
7 air-cooled condensers, cooling towers, and turbines/generators.

8 68. Fuel cells, on the other hand, have no moving components and operate extremely quietly.

9 69. Thus, Petitioner is informed and believes, and thereon alleges, that by shifting generation
10 from fuel cells to traditional power plants, there will also be an associated increase in noise
11 levels in Santa Clara, which will disproportionately impact individuals in disadvantaged
12 communities and sensitive receptors in residential areas. This is particularly true of the Gianera
13 Plant, which is located near a residential neighborhood containing sensitive receptors.
14 (**Exhibit C**, at 83.)

15 70. Respondents did not evaluate or disclose to the public these significant environmental
16 impacts before adopting the Resolution as required by CEQA.

17 Land Use

18 71. Petitioner is informed and believes, and thereon alleges, that the aforementioned
19 environmental impacts, including, but not limited to, increased water usage and noise levels, may
20 conflict with the City's General Plan, which poses an additional significant environmental
21 impact.

22 **Respondents did not Properly Consider Evidence of Possible Environmental Impacts**

23 72. Although City staff provided insubstantial responses to some of the comment letters
24 Respondents received on the Resolution, Petitioner is informed and believes, and thereon alleges,
25 that the City did not disclose to the public a technical environmental analysis of the Resolution or
26 the Resolution's potential environmental impacts as required by CEQA.

27 73. Similarly, at the May 7, 2019, City Council meeting, City staff attempted to dispute
28 various public comments about the environmental impacts associated with the Resolution.

1 However, Petitioner is informed and believes, and thereon alleges, that the City relied on the
2 *opinions* of SVP staff members and gave little or no weight to the *expert* analysis submitted by
3 Ramboll, subject matter experts from Stanford University and Santa Clara University and other
4 members of the public.

5 74. For example, at the May 7, 2019, City Council meeting, despite significant evidence in
6 the record that the Resolution would cause environmental impacts, Respondents relied on the
7 opinion of its Assistant City Manager and “Acting” Chief Utility Electric Officer, who, in
8 response to the Ramboll report, stated:

9 We do disagree with some of the elements in the communication
10 you received. We disagree that required renewable energy will
11 increase gas emissions and worsen air quality. We think having
12 renewable energy that is GHG free would actually do the opposite.
13 It will make better air quality. We’re not fully aligning with their
14 analysis, and that’s okay. **You know, experts can differ on
analysis when it comes to that for a number of reasons;** one is
that Bloom Energy is comparing their fuel cells just to our gas
generation facility.

15 However, Petitioner is informed and believes, and thereon alleges, that, in approving the
16 Resolution, Respondents ignored that the elimination of fuel cell use will result in an increase of
17 emissions from traditional power plants that can result in significant environmental impacts.

18 75. At the May 7, 2019, City Council meeting, City staff attempted to dispute various public
19 comments about the environmental impacts associated with the Resolution during a presentation
20 to City Council. However, the public was not given a copy of staff’s presentation in advance and
21 was not given an opportunity to respond to staff’s comments (which followed the public
22 comment period).

23 **Passage of the Resolution**

24 76. Notwithstanding the significant and compelling evidence before the City Council that the
25 Resolution would cause environmental impacts, and despite the complete lack of “certainty”
26 over whether “there is no possibility that the activity in question may have a significant effect on
27 the environment,” at the May 7, 2019, City Council meeting, the City Council relied on the
28 common sense exemption when adopting the Resolution. (See **Exhibit B**, at 67.)

1 77. The Resolution significantly modified SVP’s Rules and Regulations in two significant
2 ways:

3 a. Section 11.A of the Rules and Regulations was amended to include the
4 requirement that:

5 Only generating facilities that qualify as renewable electric generation facilities,
6 as defined in these Rules and Regulations, will be connected for Parallel
7 Generation with Silicon Valley Power’s Distribution System.

8 **(Exhibit A, at 55.)**

9 b. Section 11.A.1(i) of the Rules and Regulations was added, and states:

10 Only generating facilities that qualify as renewable electric generation
11 facilities, as defined in these Rules and Regulations, will be connected for
12 Parallel Generation. With the exception of solar photovoltaic systems,
13 which are considered inherently renewable, Customers will be required to
14 provide proof of eligible certification that the facility is a qualifying
15 renewable electric generation facility from the California Energy
16 Commission prior to interconnection and upon request from Silicon
17 Valley Power. All precertification and certification must be completed
18 through the California Energy Commission’s online application process
19 found on the Commission’s website. Customers will provide an annual
20 attestation demonstrating continued compliance with the California
21 Energy Commission’s renewable certification status or documentation
22 from a CEC approved reporting entity.

23 **(Exhibit A, at 56.)**

24 78. Due to the new restrictions of the Resolution, SVP’s customers will not be permitted to
25 install many self-generation systems, including Petitioner’s fuel cells, which run on extremely
26 clean non-combustion (but nonrenewable) fuels while maintaining their connection to SVP’s
27 electrical system.

28 79. Despite the substantial volume of evidence presented to Respondents regarding the
Resolution’s significant environmental impacts, Respondents refused to perform any
environmental analysis pursuant to CEQA and passed the Resolution without any environmental
review and no public disclosure of the Resolution’s environmental impacts.

80. Rather, on May 8, 2019, the City filed a Notice of Exemption, stating that “[t]he
amendments to Silicon Valley Power’s Rules and Regulations [are] subject to Section
15061(b)(3) as the activity is covered by the general rule that CEQA applies only to projects

1 which have the potential for causing a significant effect on the environment.” (Notice of
2 Exemption, attached hereto as **Exhibit D.**) The City further concluded that “[a]mendments to
3 the agency rules and regulations do not have the possibility of having a significant effect on the
4 environment, therefore, the code amendments are not subject to CEQA in accordance with
5 Section 15061(b)(3).” (*Ibid.*)

6 81. As explained, however, the Notice of Exemption, based on the common sense exemption,
7 is improper. Respondents have not demonstrated with certainty that there is no possibility that
8 the Resolution may cause a significant effect on the environment. To the contrary, the record
9 provides ample evidence that the Resolution may cause significant environmental impacts and
10 Respondents have acknowledged that an evidentiary dispute exists over the Resolution’s
11 environmental impacts.

12 **Exhaustion of Administrative Remedies and Inadequate Remedies at Law**

13 82. Petitioner has exhausted all available administrative remedies as required by Public
14 Resources Code section 21177. In particular, Petitioner, through its counsel, sent a letter to the
15 City on May 6, 2019, which included a technical report from Ramboll, demonstrating that the
16 Resolution would cause significant environmental impacts and that a CEQA exemption was
17 inappropriate.

18 83. Petitioner has no plain, speedy, or adequate remedy at law, and thus seeks a writ of
19 mandate from this Court.

20 84. Petitioner has complied with the requirements of Public Resources Code section 21167.5
21 by mailing a written notice of commencement of this action to Respondents, a copy of which is
22 attached hereto as **Exhibit H.**

23 85. Petitioner will comply with Public Resources Code section 21167.7 by filing a copy of
24 this petition with the California Attorney General.

25 86. Pursuant to Public Resources Code section 21167.6, subdivision (b)(2), Petitioner hereby
26 elects to prepare the administrative record and the record of proceedings in connection with this
27 action. The Notice of Election to Prepare the Administrative Record is filed concurrently
28 herewith.

1 **FIRST CAUSE OF ACTION**
2 **Writ of Mandate Due to Ineligibility for CEQA Exemption – Code of Civil Procedure**
3 **§§ 1085, 1094.5 and Public Resources Code §§ 21168, 21168.5**
4 **(Against All Respondents and Defendants)**

5 87. Petitioner incorporates herein and realleges the allegations in paragraphs 1 through 86,
6 inclusive, as if fully set forth herein.

7 88. An actual and justiciable controversy has arisen and now exists between Petitioner and
8 Respondents, concerning whether Respondents’ environmental determination complies with
9 Public Resources Code sections 21002, 21002.1, and 21084 regarding the requirements for
10 conducting environmental review, and determining that a project is exempt from CEQA.

11 89. Respondents improperly exempted the Resolution from CEQA pursuant to Guidelines
12 section 15061, subdivision (b)(3), the common sense exemption. (*See Exhibit D.*)

13 90. The common sense exemption only applies “[w]here it can be seen with certainty that
14 there is no possibility that the activity in question may have a significant effect on the
15 environment.” (Guidelines § 15061, subd. (b)(3).)

16 91. A party, such as Petitioner, challenging the applicability of the common sense exemption
17 “need only make a ‘slight’ showing of a reasonable possibility of a significant environmental
18 impact.” (*Cal. Farm Bur. Federation, supra*, 143 Cal.App.4th at 195.) It is the Respondents’
19 burden to establish the applicability of the common sense exemption, *i.e.*, “that there is *no*
20 possibility the project may cause significant environmental impacts.” (*Ibid.*)

21 92. Here, at minimum, the Resolution presents a reasonable possibility of significant
22 environmental impacts. Petitioner is informed and believes, and thereon alleges, that the
23 Resolution will cause a shift in power generation from fuel cells to SVP’s traditional natural gas-
24 fired power plants. As a result of this shift in the composition of electric generation, there will
25 be significant environmental impacts, including increased pollutants such as CO, NOx, and SOx;
26 increased greenhouse gas emissions; impacts to hydrology and water quality; increased noise;
27 and impacts on the City’s general plan.

28 93. Respondents’ scant evidence to date does not establish with a certainty that there is no
possibility the Resolution may cause significant environmental impacts.

1 94. Respondents did not evaluate or disclose to the public these significant environmental
2 impacts before adopting the Resolution as required by CEQA.

3 95. In sum, Respondents improperly relied on the common sense exemption to CEQA in
4 deciding to forego any environmental review of the Resolution. Respondents, therefore, violated
5 CEQA by failing to perform any environmental review prior to the passage of the Resolution.

6 96. Additionally, even if the common sense exemption applied, an exception to the
7 exemption would preclude using it here, meaning that Respondents must perform environmental
8 review of the Resolution. Specifically, Guidelines section 15300.2, subdivision (c), applies,
9 which states that an “exemption shall not be used for an activity where there is a reasonable
10 possibility that the activity will have a significant effect on the environment due to unusual
11 circumstances.”

12 97. Here, unusual circumstances generate significant environmental impacts. In particular,
13 the Gianera Plant is located near a residential community and SVP’s two remaining power plants
14 are located within disadvantaged communities. Thus, the increased pollutants and noise caused
15 by greater reliance on SVP’s traditional power plants will be borne by the sensitive receptors in
16 these residential and disadvantaged communities.

17 98. In violation of Public Resources Code sections 21002 and 21002.1, Respondents failed to
18 conduct sufficient environmental review, review the factual record, identify significant
19 environmental impacts, or mitigate for significant environmental impacts. As such, Respondents
20 have failed to establish the applicability of the common sense exemption and/or the
21 inapplicability of the unusual circumstance exception to the exemption. Therefore, Respondents
22 violated CEQA by failing to perform any environmental analysis of the Resolution.

23 99. Petitioner respectfully requests that the Court set aside the Resolution, the Notice of
24 Exemption, and the CEQA determination that the Resolution is exempt from CEQA as contrary
25 to law, and remand the matter to Respondents to conduct the requisite environmental review.

26 100. Reversing and remanding the environmental determination is necessary and
27 appropriate at this time and under these circumstances.

28

1 **SECOND CAUSE OF ACTION**
2 **Declaratory Relief – Code of Civil Procedure § 1060 *et seq.***
3 **(Against All Respondents and Defendants)**

4 101. Petitioner incorporates herein and realleges the allegations in paragraphs 1
5 through 100, inclusive, as if fully set forth herein.

6 102. An actual controversy exists between Petitioner and Respondents concerning
7 Respondents' non-compliance with CEQA. Specifically, Petitioner contends that Respondents
8 were not entitled to rely on the common sense exemption to CEQA provided by Guidelines
9 section 15061, subdivision (b)(3), in determining that the Resolution is not subject to CEQA
10 review.

11 103. Respondents, in their Notice of Exemption and other communications, dispute
12 this contention and assert that no CEQA review of the Resolution is necessary due to the
13 operation of the common sense exemption.

14 104. Petitioner requires a declaration establishing that Respondents have violated
15 CEQA by foregoing environmental review of the Resolution based upon the misapplication of
16 the common sense exemption.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Petitioner respectfully prays for the following relief:

19 a. For the First Cause of Action for Writ of Mandate due to Ineligibility of CEQA
20 Exemption:

- 21 i. A writ of mandate directing Respondents to rescind and set aside their
22 approvals of the Resolution;
- 23 ii. A temporary restraining order, preliminary injunction, and permanent
24 injunction restraining the Respondents and their agents, servants, and
25 employees, and all others acting in concert with the Respondents, from
26 taking any action to implement the Resolution pending full compliance
27 with the requirements of CEQA, the Guidelines, and all other applicable
28 laws and regulations;

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- iii. An award of costs of suit and litigation expenses, including, without limitation, attorneys' fees incurred herein as permitted or required by law; and/or
- iv. An award of such other and further relief as the court deems just and proper.

b. For the Second Cause of Action for Declaratory Relief:

- i. A declaration finding that Respondents may not rely on the common sense exemption to CEQA to avoid performing environmental review of the Resolution and that Respondents violated CEQA by failing to perform environmental review prior to passing the Resolution;
- ii. An award of costs of suit and litigation expenses, including, without limitation, attorneys' fees incurred herein as permitted or required by law; and/or
- iii. An award of such other and further relief as the court deems just and proper.

Dated: June 11, 2019

LATHAM & WATKINS LLP
 James L. Arnone
 Marc T. Campopiano
 Lucas I. Quass

By: 
 James L. Arnone
 Attorneys for Petitioner and Plaintiff Bloom
 Energy Corporation

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VERIFICATION

I, Dr. KR Sridhar, declare as follows:

1. I am the Chief Executive Officer of Petitioner and Plaintiff Bloom Energy Corporation.
2. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory Relief ("Verified Petition") and know its contents.
3. The matters stated in the foregoing Verified Petition are true of my own knowledge, except as to the matters which are stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 11th day of June, 2019, at San Jose _____, California _____.

Signature:  _____

Name: Dr. KR Sridhar