STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of GLOBALFOUNDRIES U.S. 2 LLC for a Certificate of Public Good pursuant to 30 V.S.A. § 231 to operate a Self-Managed Utility.	))))	Case No. 21-1107-PET
Petition of Green Mountain Power Corporation for approval to modify service territory pursuant to 30 V.S.A. § 249	)))	Case No. 21-1109-PET

GLOBALFOUNDRIES U.S. 2 LLC'S OPPOSITION TO CONSERVATION LAW FOUNDATION, INC.'S MOTION TO COMPEL GLOBALFOUNDRIES U.S. 2 LLC TO RESPOND TO INITIAL DISCOVERY REQUESTS

Petitioner GLOBALFOUNDRIES U.S. 2 LLC, by and through counsel, submits this memorandum in opposition to Conservation Law Foundation, Inc.'s ("CLF") Motion to Compel.

Memorandum

On June 11, 2021, Petitioner served responses to CLF's Initial Set of Discovery Requests. Now, more than three months later—and with less than one month to go before the technical hearings in this proceeding, which have been scheduled since May—CLF has moved to compel further responses. The delay might be understandable if there had been some continuous dialogue and negotiation over that period as to GLOBALFOUNDRIES' response to the requests CLF's Motion places in issue. There has not. The parties met and conferred regarding these requests in June and exchanged follow-up correspondence in July, in the course of which counsel for GLOBALFOUNDRIES made two things clear. First, counsel explained that no responsive information exists for several of the requests at issue—e.g., GLOBALFOUNDRIES does not meter electricity for any of its Essex facility's tenants aside from ASK-IntTag, and thus has no means of knowing those tenants' electricity usage. Second, GLOBALFOUNDRIES' counsel explained that the information sought by the remaining requests at issue was not proportional to the needs of this proceeding, and thus GLOBALFOUNDRIES would not be making any further response.

Those facts have not changed with the passage of time. Why CLF has now decided, after waiting two months, to file a motion to compel—and to seek information that either does not exist or, where it does exist, bears an attenuated relation to this proceeding—is unclear. What is clear, however, is that there is no basis to compel a response, particularly at this late hour. Accordingly, the Commission should deny CLF's Motion.

A. CLF's Motion to Compel Is Untimely.

CLF's Motion must be denied in the first instance because it comes too late. In a proceeding with a compressed timeline, it is important that issues be raised in a timely fashion so that they may be addressed and disposed of without disrupting the overall schedule (to the extent feasible). This CLF has failed to do. The schedule has been in place since May, and both GLOBALFOUNDRIES and GMP have requested that the Commission issue a decision by the end of the year if possible. For CLF to sit on discovery responses for three months and then move to compel less than a month before the technical hearings poses a significant risk of impacting the schedule—and there is absolutely no justification for entertaining this last-minute discovery dispute where CLF has known GLOBALFOUNDRIES' position for over two months and could have raised the issues much earlier.

Public Utility Commission Rule 2.206 provides that "[t]he Commission may decline to consider a motion not made within a reasonable time after the issue first arises with respect to the moving party." This is consistent with procedure in civil practice with respect to filing motions to compel. *See* Charles Alan Wright et al., 8B Fed. Prac. & Proc. Civ. § 2285 (3d ed.) (noting that a "moving party must seek a Rule 37(a) order in a timely fashion" and "belated motions to compel are not favored"); *cf. Audi AG v. D'Amato*, 469 F.3d 534, 541 (6th Cir. 2006) (affirming denial of motion to compel responses to discovery propounded on the last possible day where the requesting party "had been aware of the issue this request pertained to . . . a full two-and-a-half months before the discovery deadline"); *Rossetto v. Pabst Brewing Co., Inc*., 217 F.3d 539, 542 (7th Cir. 2000) (affirming denial of motion "filed two months after the date set by the court for the completion of discovery" accompanied by "no excuse for [the moving party's] tardiness"). In considering the timeliness of a motion to compel, "[f]actors that should be considered include when the moving party learned of the issue that is the subject of discovery, how the discovery would affect the ruling [in the case], the length of the discovery period, whether the moving party was dilatory, and whether the adverse party was responsive to prior discovery requests." *Audi AG,* 469 F.3d at 541.

Here, CLF's pursuit of the discovery requests at issue is untimely, especially in light of the constrained schedule in this case. GLOBALFOUNDRIES served its responses to CLF's initial requests on June 11, 2021. After an initial meet-and-confer in late June[1]—in which the issues that are the subject of the present motion were raised and discussed—counsel for GLOBALFOUNDRIES confirmed its positions in writing on July 14, 2021. *See* Exhibit A, July 14, 2021 Letter from Justin Barnard to Chase Whiting. Subsequent to this, counsel for the

[1] On June 25, two weeks after GLOBALFOUNDRIES served its responses, CLF contacted GLOBALFOUNDRIES to ask for time to confer regarding discovery issues. At GLOBALFOUNDRIES' request, CLF sent a letter identifying the issues it wished to discuss on June 29, and counsel held a conference call to walk through the issues on June 30.

parties exchanged communications concerning a proposed protective order (which, as GLOBALFOUNDRIES is not withholding any information it otherwise would produce subject to a protective order, is not pertinent to the present dispute). Then, on August 26, CLF sent a letter reiterating many of its prior requests and effectively ignoring the fact that GLOBALFOUNDRIES had already responded on those points. CLF's counsel again sought a meet-and-confer, which GLOBALFOUNDRIES accommodated, and at which the same subject matter was discussed as in the prior communications. On September 17, CLF filed its motion seeking to compel further responses on these issues.

When the amended scheduling order was entered in May, there were fewer than five months until the technical hearings. CLF provides no cogent justification for its decision to let a full three of those months pass by (from receipt of GLOBALFOUNDRIES' responses on June 11) before moving to compel. To be sure, the parties had an obligation to meet and confer in good faith, which they did—but CLF had conferred with GLOBALFOUNDRIES and had its position on the requests at issue as of July 14, and thereafter waited two months to move. Given that, as discussed below, the issues here are not central to the matters before the Commission on GLOBALFOUNDRIES' Petition, the Commission should deny CLF's Motion as untimely.

B. The Documents and Information Sought Either Do Not Exist or Are Not Proportional to the Needs of the Case.

To the extent that the Commission does consider the merits of CLF's belated Motion to Compel, it should be denied on the grounds that GLOBALFOUNDRIES has already confirmed that the information sought does not exist or, where it exists, disclosure is not relevant or proportional to the needs of this proceeding. Each request is addressed in turn below.

1. Interrogatory 2.d.

It is wholly unclear why CLF has moved to compel a further response to Interrogatory 2.d, which seeks to have GLOBALFOUNDRIES identify and describe the "annual energy consumption" for each of its tenants at the Essex facility. GLOBALFOUNDRIES has provided the requested data for the one tenant whose electricity is metered and has repeatedly explained to CLF that such information does not exist for the facility's other tenants. In its June 11, 2021 discovery responses to CLF's Interrogatory 2.e, GLOBALFOUNDRIES stated unambiguously:

> GLOBALFOUNDRIES U.S. 2 LLC monitors ASK-IntTag, LLC's electricity consumption for purposes of annually reconciling the cost of this and other additional services under ASK-IntTag, LLC's lease. <u>GLOBALFOUNDRIES U.S. 2 LLC does not meter or monitor the other tenants' electricity usage</u>.

(Emphasis added.) In the discovery conference and communications with CLF in late June/early July, GLOBALFOUNDRIES agreed to turn over electricity usage data for ASK-IntTag and again explained that no data existed for other tenants. GLOBALFOUNDRIES reiterated this in more recent communications.

GLOBALFOUNDRIES' clarity notwithstanding, CLF's Motion contends that "[s]uch information likely exists," suggesting that GLOBALFOUNDRIES' counsel represented that "electricity is one of several costs, including mortgage costs and other costs, that GF rolls-up [sic] into the overall rent it charges IBM, Marvell, New England Federal Credit Union, and Garnet EMS."[2] The unavoidable inference from this statement is that GLOBALFOUNDRIES

[2] Neither of GLOBALFOUNDRIES' attorneys on the September 8, 2021 call with CLF recall making a statement that GLOBALFOUNDRIES "rolls up" electricity costs into rent—for, in fact, it does not. *See* Exhibit B, Affidavit of Justin B. Barnard, ¶ 11. What they do recall discussing is the fact that electricity is one of a number of general, facility-wide costs (including property taxes, etc.) that rent helps defray, but—as GLOBALFOUNDRIES' counsel repeatedly emphasized—it is not calculated or factored into the rent for these tenants in any specific way, given that

in fact has additional information on its tenants' electricity usage—which is simply not the case. GLOBALFOUNDRIES has explicitly told CLF's counsel multiple times that it does not track electricity usage for the tenants at issue. Absent such information, GLOBALFOUNDRIES has no further response to provide regarding the "annual electricity consumption" of its individual tenants. CLF's Motion to Compel should be denied on that basis.

2. Requests to Produce 3.a-3.f.

As with the preceding item, CLF's motion to compel a response to Requests to Produce 3.a-3.f must be denied for the simple reason that GLOBALFOUNDRIES does not have any responsive documents—and has told CLF so for months.

As CLF explained in its Motion, it seeks non-privileged documents relating to GLOBALFOUNDRIES' proposal for the Self-Managed Utility to be exempted from certain regulatory requirements and its intention to locate the Self-Managed Utility in a division of GLOBALFOUNDRIES U.S. 2 LLC.[3] In the parties' initial discovery conference and communications, GLOBALFOUNDRIES explained that, other than the Petition and accompanying documents, there exist no non-privileged documents responsive to CLF's requests: these were decisions made by and in consultation with counsel, and

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it is not metered and GLOBALFOUNDRIES has no way of knowing how much electricity is utilized by each tenant. *Id.*.

[3] It is clear what is driving CLF's interest in the latter: CLF suggests that the operation of the Self-Managed Utility in a division of GLOBALFOUNDRIES may have been motivated by a desire to "avoid taxable retail sales." Motion at 9. This is not true—as CLF has reason to know. CLF squarely asked in its second set of discovery if the choice to house the Self-Managed Utility in a division was made "at least in part, to eschew 'formal[]' operating revenue generated from the transfer of electricity . . . to GF" or to "eschew 'retail' electricity transactions between the proposed SMU . . . to GF." *See* CLF's Second Set of Discovery, Interrogatories 6.a.3 and 6.a.4. In its responses—which CLF had before it filed its Motion—GLOBALFOUNDRIES confirmed that neither of these considerations was a factor in its decision. Moreover, GLOBALFOUNDRIES has already confirmed its willingness to pay a tax on the notional gross revenue of the Self-Managed Utility.

GLOBALFOUNDRIES confirmed that there was no documentation relating to the decisions that was not attorney work product or a communication with counsel subject to privilege. This was confirmed in counsel's July 14, 2021 letter:

> **Request to Produce No. CLF.GF.3:** This request seeks documents relating to specific aspects of GLOBALFOUNDRIES' proposal, including the decision to operate the self-managed utility within a division of GLOBALFOUNDRIES and the decision to seek exemption from certain regulatory requirements. GLOBALFOUNDRIES does not have any responsive, non-privileged documents bearing on these requests.

Exhibit A at 4. When CLF raised the issue again in August and September, GLOBALFOUNDRIES again confirmed the absence of responsive documents. There being nothing to compel, the Commission should deny CLF's Motion.

3. Request to Produce 8.a.

CLF next seeks to compel "all documents" identifying the source of electricity generation for the two GLOBALFOUNDRIES facilities located in East Fishkill and Malta, New York from 2015 to the present. This is little more than a fishing expedition. The two facilities (neither of which is at issue in this proceeding or subject to regulation in Vermont) are located in a different jurisdiction and within the territory of another Independent Service Operator (NYISO). As the non-public details of these facilities' power supply are neither relevant nor proportional to the needs of this case, the Commission should deny the request.

Rule 26(b)(1) explains that, to fall within the scope of permissible discovery, information sought must be both "relevant" and "proportional to the needs of the case." V.R.C.P. 26(b)(1). "In deciding whether particular discovery inquiries are proportional to the needs of a case, a court must consider the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Investigation into Meteorological Tower at 700 Kidder Hill Rd. in Irasburg, Vermont*, Case No. 8585, 2020 WL 1432588, at *3–4 (Vt. P.U.C. Feb. 28, 2020) (Hearing Officer decision denying motion to compel on proportionality grounds).

Here, CLF's justification for its request—that the New York facilities "provide the best available electricity-based GHG information about the proposed SMU," Motion at 11—fails to establish that the request is proportional to the needs of the case. GLOBALFOUNDRIES has fully disclosed its power supply plans for the initial operation of the Self-Managed Utility, if it is approved: it will procure power from GMP pursuant to a Power Purchase Agreement for four years, including the renewable attributes associated with GMP's mix of power supply sources. Thereafter, GLOBALFOUNDRIES has committed to report on its power supply plans no later than January 1, 2026 (ten months prior to the end of its Power Purchase Agreement with GMP), as well as to provide annual reports on its greenhouse gas emissions, power portfolio, and energy efficiency and greenhouse gas reduction investments. At present, GLOBALFOUNDRIES does not have any specific, additional information on its power procurement five years from now—but it has made clear that it will disclose its plans.

CLF's contention that the production of historical power procurement data for the period 2015-2020 for facilities in another jurisdiction, under a separate ISO, will shed light on GLOBALFOUNDRIES' potential procurement of power in Vermont five years from now does not hold water. To the extent that there is a thread of relevance tying that historical data to GLOBALFOUNDRIES' as-of-yet unformed plan for procuring power in Vermont, it is an extremely attenuated and speculative one: the market conditions and options for purchasing power in 2026 are likely to be significantly different than present conditions, and certainly different than the conditions under which GLOBALFOUNDRIES procured power in New York five years ago. Given that GLOBALFOUNDRIES has disclosed its immediate procurement plans and agreed to disclose its future power procurement plans before it transitions away from supply through GMP, compelling it to disclose confidential, non-public information on historical power procurement at other facilities—simply in order to fuel speculation about as-of-yet unformed future plans—is not necessary or proportional to the needs of the case.

4. Request to Produce 16.

Likewise, CLF's request to compel the production of non-public, commercial leases between GLOBALFOUNDRIES U.S. 2 LLC and its tenants does not serve—and is not proportional to—the needs of this case, and should be denied on that basis.

Per CLF's Motion, it seeks copies of the leases in support of its argument that the provision of electricity to tenants constitutes the sale of electricity to members of the public. *See* Motion at 6, 12. GLOBALFOUNDRIES does not agree with the premise—the Commission has previously declined to treat the provision of electricity by a landlord to a tenant as a matter within its jurisdiction[4]—and reserves the right to provide briefing on the issue at an appropriate time. However, regardless of the merits of CLF's argument, GLOBALFOUNDRIES has already disclosed: (a) that it passes through electricity to tenants in its Essex facility; (b) that GLOBALFOUNDRIES only meters electricity for one of those tenants; (c) the terms upon which GLOBALFOUNDRIES allocates the cost of electricity to the one tenant it meters, as well

[4] *See, e.g., Petition of Darlene Beaupre et al re: alleged diversion of service,* Case No. 5898, Order of August 27, 1997 (affirming hearing officer's conclusion that Board lacked jurisdiction over private landowners in matters relating to provision of electricity to tenants).

as a copy of the lease reflecting those terms; and (d) the electricity consumed by the one tenant whose usage is metered over the preceding three years. CLF has the relevant facts with respect to the tenants whose leases it now seeks: GLOBALFOUNDRIES supplies their electricity, but does not individually meter or charge them based on their utilization. Production of the underlying leases, which are non-public, commercially sensitive documents, will not advance any of the issues in this proceeding and is not proportional to the needs of the case.

Conclusion

For all of the foregoing reasons, GLOBALFOUNDRIES respectfully requests that the Commission deny CLF's Motion to Compel.

Dated at Burlington, Vermont this 23rd day of September, 2021.

By *_/s/ Justin B. Barnard_*

Shapleigh Smith, Jr., Esq.
Justin B. Barnard, Esq.
DINSE
209 Battery Street
Burlington, VT 05401
(802) 864-5751
ssmith@dinse.com
jbarnard@dinse.com

Counsel for GLOBALFOUNDRIES U.S. 2 LLC