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STATE OF VERMONT
SENATE

December 8, 2021

Anthony Z. Roisman, Chair
Margaret Cheney, Commissioner
Sarah Hofmann, Commissioner
Vermont Public Utility Commission
112 State St, Montpelier, VT 05620

Re: 21-1107-PET

Chairman Roisman and Commissioners Cheney and Hofmann,

As Chair of the Senate Natural Resources and Energy Committee, I am writing to you about the GlobalFoundries petition (Case No. 21-1107-PET) to receive a Certificate of Public Good for the operation of a new entity, which they have named a "Self-Managed Utility."

For reasons that I will elaborate on below, I would ask the PUC to reject this petition on Constitutional and statutory grounds, concluding that the PUC does not "have jurisdiction to grant GlobalFoundries' request to operate as a self-managed utility under de minimis regulation."

One of the suggestions made to me as a freshman legislator when considering to speak or remain silent during floor debate was "If you don't have anything new to add to the discussion, don't speak." With that in mind, I will largely avoid repeating any of the arguments in the ample record you have compiled.

Before proceeding, I want to thank the Commission for its vigorous investigation of this application as exemplified by its requests in numerous orders for additional information. A fuller record provides the basis for better deliberations. In the spirit of developing a fuller record, I write today.

I. Should the PUC rule on this application or reject it?

One of the watershed questions the Commission faces is "Does the PUC have the authority to rule on this application?"

This then sends us to statute and its interpretation, and yet another watershed: "Should the PUC only act in a manner explicitly prescribed by the law, or should the PUC see itself at liberty to act in a manner not proscribed by the relevant law?"

There are two competing canons of statutory interpretation. In lay terms, what's not forbidden is allowed versus what's not allowed is forbidden.

Regardless of which canon of interpretation the PUC settles on, I think they lead to the same conclusion: the application must be rejected.

Canon 1: What's not allowed is forbidden

In this case, the statutes do not provide for the creation of a "self-managed utility," a fact explicitly highlighted by the Department of Public Service when it calls the proposal "novel." Therefore, the PUC therefore rejects the application.

Canon 2: What's not forbidden is allowed

Given that statutes rarely, if ever, include an entirely explicit prohibition on action by entities such as the PUC, a more nuanced version of the question becomes "Has the Legislature acted on this question previously?" If yes, then deference to the Legislature is merited, as any ruling would become interpretive and originative in a manner that is reserved to the Legislative branch.

I would argue that the record demonstrates that the Legislature has spoken on this precise issue, and thus, in a sense, occupied the field.

II. Senate Bill 280 of 2004

In 2004, the Vermont Senate passed S.280, which included the following language:

> "Notwithstanding any other provision of this chapter, upon joint petition by an electric company and a customer who in the previous calendar year, had a metered peak demand of at least 25,000 kilowatts of electricity in any month, the public service board may, after opportunity for hearing, approve a plan for the customer to negotiate independently its own power supply contracts. Before doing so, the board shall find that the plan will promote the general good of the state and that the electric rates of the remaining customers of the electric company and other ratepayers will not be increased as a result and shall issue a certificate to that effect. The board shall ensure that the electric rates for distribution service of the customer in the plan shall include all charges in this title generally applicable to all ratepayers that applied to such a customer before the plan, calculated on

> the gross electric bill of the customer. Any such certificate shall also provide that before an independent customer may return as a customer to its jurisdictional utility, the board must find that the conditions of return ensure that the utility's remaining customers will not incur higher rates or lower service quality as a result."

While the language varies from that in the current application of GlobalFoundries, the legal force is the same: the bill creates a novel entity with the ability to purchase its own power outside of current law. Although the Vermont House did not ultimately act on this Senate bill, its existence and the Senate's passage of the bill clearly indicate that the Legislative branch regarded such action, or its virtual equivalent as expressed in Case No. 21-1107-PET, as its prerogative.

The GlobalFoundries application here attempts to achieve the virtual equivalent of S.280 by making its application to the PUC. Regardless of whether or not GF's predecessor, IBM, was successful in its effort to obtain the legal ability to make independent power purchases, there is an established a record of jurisdiction and action by the Legislature in this matter.

III. The Self-Managed Energy Efficiency Program (SMEEP), 30 VSA 209(j)

The prior owners of the facility, IBM, and its successor, GlobalFoundries, has had the goal of gaining individualized treatment at variance with current law before.

When this facility wished to operate outside of the requirements of the Energy Efficiency Charge (EEC) of 30 V.S.A. § 209, IBM petitioned the Legislature to gain exemption from the program and explicit statutory authority to operate a "Self-Managed Energy Efficiency Program (SMEEP)" (30 V.S.A. § 209(j)).[1] This action is an acknowledgment on the part of both operators of this facility that permission to operate at variance—in terms of policy and program—from then-current law requires a deliberate statutory change, namely, the creation of a "self-managed energy efficiency program."

The very name of GlobalFoundries' proposed new entity, a "self-managed utility," recapitulates the earlier petition for creation of a "self-managed energy efficiency program," which the operators appropriately—legally—made through the Legislative branch.

Now, in a remarkably similarly initiative, the operators of this plant seek once again to operate at variance from current law, in terms of policy and program, but rather than petition the Legislature for the needed statutory change, they are asking the PUC to act with the same legal effect as the Legislature itself: first, create a novel program, and second, further grant specific exemptions to other areas of standing law. The applicant requests that the PUC trespass twice over into the legal territory of the Legislative branch.

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[1] Both IBM and GlobalFoundries have returned to the Legislature to make further changes to the SMEEP program, and the Legislature has been responsive in issuing a curing amendment.

In short, by through creation of the novel entity and in defining exemptions for it, the PUC would be co-opting the creative powers of the Legislature defined in the Vermont Constitution as its exclusive prerogative, violating the separation of powers doctrine. Vt. Const. Ch. II, § 2 and Ch. II, § 5.

IV. Vermont's record on retail electric choice

In the 1990's, Vermont engaged in an extensive debate on the merits of deregulating its electric system and offering retail electric choice. The record is vast, and the analysis and discussions involved the Department of Public Service, the (then) Public Service Board, and the Legislature. It is well-settled law that we do not allow retail electric choice.

Case No. 21-1107-PET is a request to authorize the applicant to engage in retail electric choice. Granting the applicant consideration of its request is contrary to long-standing policy and practice in Vermont.

V. Conclusion

For these reasons, I ask that the Commission determine the application to be inappropriate and reject the application. The appropriate venue, as demonstrated by the record, is at the Legislature, which has been responsive to similar requests from this applicant and others seeking special provisions relating to electrical energy.

Thank you for your consideration.

Respectfully submitted,

Christopher A. Bray