STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of GlobalFoundries U.S. 2 LLC requesting a certificate of public good, pursuant to 30 V.S.A. § 231, to operate a Self-Managed Utility	)))	Case No. 21-1107-PET

CONSERVATION LAW FOUNDATION'S REPLY IN SUPPORT OF THE MOTION TO CLARIFY THE SCOPE OF THE PUBLIC UTILITY COMMISSION'S ORDER

Conservation Law Foundation ("CLF") hereby replies in support of its Motion to Clarify the Scope of the Public Utility Commission's Order. The opposition briefs filed by the Petitioners and the Department of Public Service ("DPS") do not establish a basis for jurisdiction to allow an electricity customer to extricate itself from Vermont's vertically integrated regulatory regime or to establish a novel regulatory system lacking foundation in statute.

In the February 17, 2022 Order, the Commission observed that the self-managed utility concept is nowhere found in the Vermont Statutes. *See* Order at 6. The Vermont Legislature has not authorized the creation or regulation of any such entity.[1] Vermont's democratically elected Legislature has instead created and maintained a vertically integrated regulatory system,[2] which GF would circumvent by removing itself, Vermont's largest electricity consumer, and other large consumers operating at the Essex facility, from that statutorily mandated system.[3]

The Commission does not have the authority to grant such relief because the Commission is "an agency of the Legislature," *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7

[1] *See, e.g.*, CLF Motion for Summary Judgment at 5–18 (and authorities cited therein).

[2] *See* CLF Response Br. (Nov. 22, 2021) at n.1; CLF Reply Br. (Dec. 8) at 25, 12.

[3] *See* CLF Rule 59(e) Motion at 5 & n.9 (quoting Mr. Rieder, who recently stated that "'In New York, it's actually deregulated, and our plants in New York can purchase power on the open market' . . . . 'So that's really the big difference between the two states.'").

(1941), which "must operate for the purposes and within the bounds authorized by its enabling legislation." *In re Agency of Admin., State Bldgs. Div.*, 141 Vt. 68, 75 (1982). The "Legislature's responsibility" is "totally abandoned" when "the power to reduce, nullify, or change the Legislature's priorities is given over to the total discretion of another branch of government." *Hunter v. State*, 2004 VT 108, ¶ 28 (2004) (citation omitted). GF's proper venue is thus with the Legislature.

GF may not use 30 V.S.A. § 231(a) to circumvent that constitutionally prescribed venue.[4] Section 231(a) limits the Commission's authority by restricting issuance of a CPG to "a business over which the Public Utility Commission has jurisdiction under the provisions of [Chapter 5]." *Id.*[5] As the Commission noted, the "self-managed utility" concept is absent from Chapter 5, *see* Order at 6, and "jurisdiction must be demonstrated as a prerequisite" to § 231(a). *See id.* at n.11. Vermont law forecloses the Commission from awarding a remedy under a statute if that statute provides for no such relief. *See Nordlund v. Van Nostrand*, 2011 VT 79, ¶ 10; *In re Brooks*, 135 Vt. 563, 571 (1977); *see also GMP v. Sprint Commc'ns*, 172 Vt. 416, 423 (2001).

And yet, Green Mountain Power ("GMP") and DPS again assert without valid basis that § 203 establishes subject matter jurisdiction to create and regulate an entity embodying the "self-managed utility" concept. *See* GMP Opp. at 1; DPS Opp. at 1. Section 203 addresses the "Jurisdiction of certain public utilities," and states that the Commission and DPS "shall have jurisdiction over the following described companies . . . ." The words "following described" limit the word "companies" to those expressly enumerated therein, which contain no company

[4] *See, e.g.*, CLF Motion for Summary Judgment at 5–18.

[5] Because § 231(a) appears in Chapter 5 of Title 30, the plain meaning of "this chapter" is Chapter 5.

akin to the proposed "self-managed utility" or to a semiconductor manufacturer that has a corporate division like the proposed "self-managed utility." *See* §§ 203(1)–(6). Moreover, "[e]ach company subject to supervision under this chapter shall be required to furnish reasonably adequate service, accommodation, and facilities to the public," *see* § 219, and to file rate schedules, *see* § 225, both of which GF continues to eschew[6] despite distributing electricity to members of the public operating businesses at the Essex facility.[7]

As the Commission noted, the fact that GF "would undertake some activities that are lawfully regulated by the Commission does not confer on the Commission the authority to release [GF's] SMU from statutorily imposed obligations that by definition are outside the Commission's discretion to waive." *See* Order at 4 (citing, *inter alia*, 30 V.S.A. § 203(2)).

The legislative absence of any concept like the "self-managed utility" is unambiguous on the face of the plain text of Chapter 5, §§ 201-255, and Title 30, *see* §§ 1-8105, as is any exception to the general requirements of Vermont's vertically integrated regulatory regime.[8] Where, as here, "that language is clear and unambiguous, this is also where our inquiry ends: we enforce the enactment according to those terms." *Hum. Rts. Def. Ctr., LLC v. Correct Care Solutions*, 2021 VT 63, ¶ 9.

This is also where the jurisdictional analysis should end. *See Trybulski*, 112 Vt. at 7. Without any relevant legislative authorization to create or regulate an entity like the one GF

[6] *See* GF's Amended Proposed CPG ¶ 10.

[7] *See generally* CLF Motion for Summary Judgment at 18–35 (and exhibits and authorities cited therein).

[8] *See, e.g.*, CLF Response Br. (Nov. 22, 2021) at n.1; *see also See* Order at 6 ("The fact that the Legislature has explicitly provided for specific regulation for a limited subset of industrial customers outside of other regulatory provisions in Title 30 demonstrates that such regulatory exceptions are permissible in statutorily defined circumstances.").

requests, there is neither express nor implied jurisdiction to do so. *See Trybulski*, 112 Vt. at 7; *Pet. of Vt. Elec. Power Producers, Inc*., 165 Vt. 282, 289 (1996); *In re Vill. of Morrisville Water & Light Dep't*, 2008 VT 95, ¶ 7; *see generally* CLF Reply Br. (Dec. 8, 2021) at 4–20. GF's Petition should be dismissed for lack of subject matter jurisdiction. *See* V.R.C.P. 56(a).

GF previously stated that its entity would not be a public service company. GF now states – without legal basis – that its proposed entity would be a public service business. *See* GF Opp. at 3 (referring to GF's March 24, 2022, response to the Commission's RFI). However, and as explained above, the types of entities authorized under § 231(a) are given their meaning by existing statutes that plainly do not contemplate GF's requested entity. *See, e.g.*, §§ 203, 219, 225; *see also* CLF Reply (Dec. 8, 2021) at 4–20. Merely referring to the proposed "self-managed utility" as a "public service company" does not change the fundamental character of the requested entity, which lacks basis in Vermont law.

As to the distribution of electricity to members of the public operating at the Essex facility, GF treads the same ground as before – though with lighter boots. *See* GF Opp. at 5-7. The underlying facts remain undisputed. V.R.C.P. 56(a). GF distributes electricity to members of the public operating businesses at the Essex facility and receives compensation from those entities for the electricity they consume. *See* CLF Motion for Summary Judgment at 20–33 (and exhibits and authorities cited). The Commission may dismiss GF's Petition by finding that GF's requested entity is predicated on a central but false claim that it would serve only itself. *See* CLF Motion for Summary Judgment at 18-35.

GF again failed to refer to a single authority stating that an entity asking to operate as a utility should not be regulated as a utility merely because the entity chooses to distribute electricity to members of the public pursuant to lease agreements rather than purchase agreements. GF Opp. at 6. Indeed, Vermont law counsels otherwise. *See* CLF Reply (Dec. 8, 2021) at 22.[9] For example, a utility that distributes electricity to members of the public who happen to be the utility's tenants must adhere to ratemaking requirements.[10] If GF wishes to become a public service company, it must be "fully subject to all required statutes," *see* Order at 4, not merely those it finds convenient.

Conclusion

CLF respectfully requests that the Commission clarify the scope of the Order to prevent unnecessary additional litigation about already briefed matters that remain ripe for determination.

Dated at Burlington, Vermont, this 31st day of March 2022.

CONSERVATION LAW FOUNDATION

By: ____________________________

Chase S. Whiting, Staff Attorney
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x. 4013
(802) 223-0060 (fax)
cwhiting@clf.org

[9] Discussing, among other Vermont authorities, *Valcour v. Village of Morrisville*, 110 Vt. 93, 2 A.2d 312, 315 (1938); *Investigation of Tariff Filing of Vt. Marble Power Div. of OMYA, Inc.*, No. 7598, p. 4 ¶¶ 5-6 (Order of Sept. 14, 2010); *Joint Pet. of Vt. Marble Power Div. of Omya, Inc. & Central Vt. Pub. Serv. Corp.*, No. 7660, at p. 8 ¶ 3 (Order of June 10, 2011); 30 V.S.A. § 8002(23).

[10] *See generally* CLF Reply (Dec. 8, 2021) at 22.