

**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,) Case No. 21-1107-PET
to operate a Self-Managed Utility)

Petition of Green Mountain Power Corporation for)
approval to modify service territory pursuant to) Case No. 21-1109-PET
30 V.S.A. § 249)

**CONSERVATION LAW FOUNDATION’S MOTION TO
COMPEL GLOBALFOUNDRIES U.S. 2 LLC TO
RESPOND TO INITIAL DISCOVERY REQUESTS**

Conservation Law Foundation (“CLF”) timely moves pursuant to Public Utility Commission (the “Commission”) Rule 2.214, V.R.C.P. 26(h), and V.R.C.P. 37(a)(2) to compel GlobalFoundries U.S. 2 LLC (“GF”) to respond to one Interrogatory and several Requests to Produce contained in CLF’s initial set of discovery requests. Pursuant to V.R.C.P. 26(h), CLF also submits the Certificate of Chase S. Whiting, Esq. (the “Certificate”). CLF incorporates the following memorandum in support of its Motion.

MEMORANDUM

Nature of the Case

GF asks the Commission to authorize what GF is calling a “self-managed utility” (the proposed “SMU”), which is an entity without precedent or provision in Vermont law. GF asks the Commission to allow Green Mountain Power Corporation (“GMP”) to cede a portion of GMP’s service territory to the proposed SMU, which would then acquire electricity from the ISO-NE wholesale market for the proposed SMU’s purported sole use.¹ GF says it would know

¹ The proposed SMU would also provide electricity to several members of the public: Ask-IntTag, IBM, Marvell, Garnett EMS, and New England Federal Credit Union.

how to source the proposed SMU's electricity because GF already does so for its Malta and East Fishkill facilities. GF says that it should be exempt from myriad requirements imposed by the Legislature – including but not limited to Vermont's renewable energy standard (“RES”) and corporate formation requirements – because it will purportedly source energy only for itself. CLF intervened to protect its members' substantial interests in, among other things, the wise use of renewable energies and the reduction of greenhouse gas (“GHG”) pollution.

Requested Relief

CLF respectfully requests the Commission to compel GF to supplement its response to Interrogatory 2.d, and its productions to Requests to Produce 3.a through 3.f, 8.a, and 16.

Background

GF filed its Petition on March 17, 2021. The Commission allowed CLF's Motion to Intervene by Order dated May 19, 2021. The Commission entered a revised Scheduling Order on May 24, 2021. Pursuant to that Schedule, discovery remains open until at least October 6, 2021, at which time responses are due to Petitioner's surrebuttal discovery requests. CLF's present Motion is well within the discovery period.

CLF served its first set of discovery requests on GF on May 28, 2021. GF initially responded on June 11, 2021. As described in the appended Certificate, between June 25 and July 6, 2021, Mr. Whiting, corresponded via email and conferred via telephone with Mr. Smith and Mr. Barnard about outstanding discovery and the need for a Protective Agreement. On June 29, 2021, CLF also provided GF with a letter summarizing CLF's discovery concerns. On July 14, 2021, GF provided CLF with a letter responding to some of CLF's discovery concerns. On July 20, 2021, GF provided a limited supplemental response through ePUC. On August 2, 2021, Mr. Burke shared a copy of a Protective Agreement Template with Mr. Smith and counsel for the

other Parties. On August 6, 2021, GF provided another limited supplemental response through ePUC. GF did not sign or meaningfully address the Protective Agreement.

Mr. Whiting and Mr. Smith exchanged several emails and spoke on the phone between August 18 and August 24, 2021. On August 26, 2021, CLF provided GF with a letter summarizing its remaining discovery concerns. On September 2, 2021, Mr. Mullett reshared the Protective Agreement Template with counsel for GF and the other Parties. On September 7, Mr. Whiting emailed Mr. Smith and Mr. Barnard about outstanding discovery issues because he had not heard back after sending the August 26 letter. Those three attorneys spoke on September 8, 2021. Mr. Smith and Mr. Barnard said that GF would not respond further to discovery absent an Order from the Commission directing GF to do so. However, they said that they would again raise the Protective Agreement with GF.

On September 14, 2021, Mr. Barnard emailed an executed copy of the Protective Agreement to CLF and the other Parties. Mr. Barnard informed the Parties that GF's joinder was contingent on all Parties signing the Protective Agreement. The last Party signed the Protective Agreement on September 16, 2021. CLF understands that the Protective Agreement will soon be filed with the Commission. This Motion was filed on September 17, 2021.

Discussion

The Vermont Rules of Civil Procedure apply in proceedings before the Commission. *See* Commission Rule 2.214 (incorporating expressly V.R.C.P. 26, 33, 34, and 37). The undersigned has made multiple good faith efforts to confer in detail with GF, to resolve or reduce all discovery differences, and to avoid filing the present Motion. *See* V.R.C.P. 26(h). The undersigned has reduced the area of controversy but has been unable to eliminate all outstanding discovery issues. *See id.* This Motion addresses that limited subset of issues.

I. INTERROGATORY 2.D

Under Vermont Rule of Civil Procedure 33, “[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.” *See* V.R.C.P. 33(a). Those interrogatories “may relate to any matters which can be inquired into under Rule 26(b).” *See* V.R.C.P. 33(b). CLF thus “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” *See* V.R.C.P. 26(b)(1). GF has improperly withheld discoverable information.

Interrogatory 2.d is presented below verbatim. For context, 2.a is also presented.

Q.CLF.GF.2. Please identify and describe:

a. each Person and entity other than GLOBALFOUNDRIES U.S. 2 LLC (e.g., tenant, renter, lessee, occupant, business partner, sister company, subsidiary, etc.) now using any portion of the Essex facility or that will use any portion of the Essex facility on or after October 1, 2022;

...

d. the annual energy consumption by each such Person or entity from 2018 to present;

GF initially responded as follows: “GLOBALFOUNDRIES U.S. 2 LLC objects on the ground that the request seeks confidential and proprietary information concerning third parties that is neither relevant nor proportional to the needs of the case.” GF reiterated that general objection on July 20 and August 6, 2021, but supplemented its response as follows:

- On July 20, GF provide this “Supplemental Response: Without waiving the foregoing objection, GLOBALFOUNDRIES U.S. 2 LLC responds as follows: GLOBALFOUNDRIES U.S. 2 LLC will provide ASK-IntTag’s electricity usage data with ASK-IntTag’s consent to disclosure or, if ASK-IntTag does not agree to public disclosure, pursuant to the terms of a protective order sufficient to maintain the data’s confidentiality. GLOBALFOUNDRIES U.S. 2 LLC has not been able to confirm ASK-

IntTag's position at this time.”

- On August 6, GF provided this “Supplemental Response: Without waiving the foregoing objection, GLOBALFOUNDRIES U.S. 2 LLC responds as follows: ASK-IntTag's electricity usage was 439,226 kWh for 2018, 525,334 kWh for 2019, 437,842 for 2020, and 206,667 for the first half of 2021 (through June 30, 2021).”

GF's initial and supplemental responses withheld *all* information pertaining to four of the five entities currently operating at the Essex facility: IBM, Marvell, Garnet EMS, and New England Federal Credit Union. That non-privileged information is relevant and proportional, and thus discoverable. *See* V.R.C.P. 26(b)(1).

The information requested in Interrogatory 2.d is relevant and proportional to the plain content of GF's Petition, its legal and factual assertions, and to Mr. Rieder's testimony. GF claims in its Petition that the proposed “Self-Managed Utility will supply only GLOBALFOUNDRIES U.S. 2 LLC.” *See* GF Petition ¶ 26. Mr. Gregory Rieder states in his prefiled direct testimony that “GLOBALFOUNDRIES U.S. 2 LLC will procure and provide electricity only to itself.” *See* Rieder Direct at 23:13-14. GF remakes the assertion as the *first* argument in its analysis of the Certificate of Public Good legal standard. *See id.* at ¶ 51 (emphasis added) (stating that the § 231 “criteria reflect a regulatory concern with ensuring quality and continuity of service by traditional utilities that serve the public; as such, the criteria do not directly fit the *Self-Managed Utility model wherein GLOBALFOUNDRIES will serve only itself.*”). GF also makes the assertion as a central premise to the very concept of the proposed SMU. *See id.* at ¶ 5 (emphasis added) (“In order to better manage its power costs and preserve the ongoing viability and competitiveness of its Vermont operations, GLOBALFOUNDRIES seeks to operate an independent, self-managed utility . . . *that would serve only its own distribution network and supply only its own load.*”).

Discovery has revealed that the proposed SMU would in fact supply electricity to five members of the public who are independent of GF, *see* A.CLF.GF.2.a, all of which would be within the proposed SMU's service territory. It has also become known that GF intends to continue providing electricity to those members of the public, and would not disallow members of the public from acquiring electricity from the proposed SMU (so long as they are operating as "tenants" within the proposed SMU's service territory). *See* A.GF.PUC.2nd RFI.2.a, 2.b. If GF's proposed utility will provide electricity to members of the public, as seems to be the case, GF should identify and describe in its discovery response how electricity will be consumed by members of the public. Interrogatory 2.d requests just that type of information.

Such information likely exists. During the telephone call between counsel for CLF and GF on September 8, 2021, CLF's counsel understood GF's counsel to say that electricity is one of several costs, including mortgage costs and other costs, that GF rolls-up into the overall rent it charges IBM, Marvell, New England Federal Credit Union, and Garnet EMS. CLF asked GF's counsel to please supplement Interrogatory 2.d to say that.

The requested information is relevant and proportional and no privilege has been claimed. *See* V.R.C.P. 26(b)(1). To the extent the information requested is confidential, GF may produce it pursuant to the Protective Agreement it has executed, *see* V.R.C.P. 26(c), and which CLF understands will be filed with the Commission shortly. CLF respectfully requests the Commission to compel GF to amend Interrogatory 2.d accordingly.

II. REQUESTS TO PRODUCE

Pursuant to Vermont Rule of Civil Procedure 34, a "party may serve on any other party a request to produce . . . any designated documents or electronically stored information . . . within

the scope of Rule 26(b) and which are in the possession, custody or control of the party.” *See* V.R.C.P. 34(a)(1). As noted, V.R.C.P. 26(b)(1) makes discoverable all non-privileged, relevant, and proportional materials. Any objection must “state with specificity the grounds for objecting to the request, including the reasons” and “whether any responsive materials are being withheld on the basis of that objection.” V.R.C.P. 34(b). And “[i]f objection is made to part of an item or category, the objection must specify the part and permit inspection of the rest.” *Id.* GF has not met its obligations as to Requests to Produce 3.a through 3.f, 8.a, or 16.

Requests to Produce 3.a through 3.f: Requests to Produce 3.a through 3.f (hereinafter, “Request to Produce 3”) state verbatim:

REQUEST TO PRODUCE NO. 3: Produce all Documents relating to:

- a. Your proposal to locate the proposed self-managed utility in a division of GF rather than establishing the self-managed utility as a separate entity;
- b. Your proposal to be exempt from the provisions of 30 V.S.A. §§ 101-104 and 204;
- c. Your proposal to be exempt from the provisions of 30 V.S.A. § 209;
- d. Your proposal to be exempt from the provisions of 30 V.S.A. § 8002(23);
- e. Your proposal to be exempt from the provisions of 30 V.S.A. ch. 89; and
- f. Your proposal to be exempt from Commission Rule 5.200.

GF objected “on the ground that this request is overbroad and unduly burdensome and calls for the production of proprietary and sensitive documents that are not proportional to the needs of the case.” GF also objected “to the extent this request seeks disclosure of documents subject to attorney-client privilege, the work product doctrine, or the common interest doctrine.” GF did not produce any documents. Nor did GF raise adequate objections under the Vermont Rules of Civil Procedure. GF did not specify the nature of the privilege claimed, *see* V.R.C.P.

26(b)(6)(A) (explaining GF's burden to demonstrate privileged), or the reasons for its objections. *See* V.R.C.P. 34(b) (explaining GF's burden for objections).

Request to Produce 3 seeks documents about a limited subset of the laws GF asks to be exempt from. *See, e.g.*, GF Petition ¶¶ 62-63. Each requested exemption is a request for relief at issue in GF's Petition. *See id.* Discovery about the relief GF requests in its Petition is proportional to the scope of this proceeding as GF defined that scope in its Petition. *See* V.R.C.P. 26(b)(1). That information is plainly relevant. *See id.* CLF does not seek any responsive documents – including communications – that are privileged. *See* V.R.C.P. 26(b)(1) (excluding from discovery privileged information); *see also* V.R.C.P. 26(b)(6)(A) (explaining GF's burden to demonstrate whether requested information is in fact privileged). CLF only seeks non-privileged documents that are in GF's possession, custody, or control that respond to Request to Produce 3. *See* V.R.C.P. 34(a).

Request to Produce 3 is limited and finite. CLF tailored its request to a subset of the many provisions GF has asked to be exempted from. GF is not significantly burdened by producing a finite set of documents central to its Petition – especially given that those materials would have been created during a finite duration of time preceding and during this action by a finite set of GF employees and agents. Litigants routinely produce documents relevant to the relief they request. GF should not be permitted to excuse itself from that routine discovery obligation. *See* V.R.C.P. 34(a) and V.R.C.P. 26(b)(1).

Moreover, CLF is willing to further limit the scope of Request to Produce 3 in the interest of expeditious resolution. CLF is willing to refine Request to Produce 3 to the following:

1. GF's proposal to locate the proposed SMU in a division of GF and be exempt from 30 V.S.A. §§ 101-103 and 204, which would otherwise require corporate formation.

As noted, these requested materials are relevant and proportional to the relief GF specifically requests in its Petition. *See* GF Petition ¶ 62. They are further relevant and proportional because they illuminate key issues central to the proposed SMU and an accurate evaluation of the general good of the State. If the proposed SMU were required to incorporate – as other utilities are required to do – it would be an independent entity and the transmission of electricity from it to GF would presumably be a retail and taxable event. But GF has requested the Commission to allow GF to house the proposed SMU in a division of GF. By grace of that request, the proposed SMU would avoid taxable retail sales. Materials pertaining to such topics are highly relevant and proportional to determining the general good of the State.

2. GF's proposal to be exempt from the RES.

Such materials are relevant and proportional to the type and scope of the relief at issue in this proceeding. *See* GF Petition ¶ 63. They are also relevant to Vermont's energy policy, which requires the wise use of renewable resources and the reduction of GHG emissions in accordance with 10 V.S.A. § 578(a). *See* 30 V.S.A. § 202a. They are further relevant to a determination of the general good of the State, which in practical terms depends on a habitable climate.

To the extent any of the requested information is confidential, GF may disclose it pursuant to the Protective Agreement it has executed. *See* V.R.C.P. 26(c). CLF respectfully requests that the Commission compel GF to supplement Request to Produce 3 accordingly.

Request to Produce 8.a: Request to Produce 8.a states verbatim:

REQUEST TO PRODUCE NO. 8: In response to Q.PSD.GF.7, You state that GF is responsible for acquiring its own power at the Malta facility and East Fishkill facility, and that GF currently acquires that power from NRG (formerly known as Direct Energy).

- a. Produce all Documents identifying or describing the source(s) of electricity generation (*e.g.*, natural gas, coal, nuclear, wind, solar,

hydropower, etc.) and the generators(s) of that electricity (*e.g.*, NRG, Direct Energy, or another entity) used at your Malta facility and Your East Fishkill facility from January 1, 2015 to the present.

GF objected “on the ground that this request is overbroad and unduly burdensome and calls for the production of proprietary and sensitive documents that are not proportional to the needs of the case.” GF also objected “to the extent this request seeks disclosure of documents subject to attorney-client privilege, the work product doctrine, or the common interest doctrine.” GF produced no materials. Nor did GF raise adequate objections under the Vermont Rules of Civil Procedure. GF did not specify the nature of the privilege claimed, V.R.C.P. 26(b)(6)(A), or the reasons for its objections, *see* V.R.C.P. 34(b), both of which are required.

Request to Produce 8.a seeks documents relevant and proportional to the manner GF proposes to source electricity for the Essex facility. In its Petition, GF asks the Commission to permit the proposed SMU to source its own electricity, *see* GF Petition ¶ 5, as GF currently does for its Malta and East Fishkill facilities. *See* A.PSD.GF.7. GF has indicated that both the “Procurement Program Manager and Legal Program Manager will be located in Malta, New York,” GF’s headquarters. *See* A.PSD.GF.1.b. The “Procurement Program Manager will be an employee in GLOBALFOUNDRIES’ Global Supply Management group,” A.PSD.GF.2, and “[p]rimary responsibility for power supply purchase will fall to [the] Procurement Program Manager.” *See* Rieder Direct at 24:1-2. The “Legal Program Manager will be one of GLOBALFOUNDRIES’ inhouse counsel.” A.PSD.GF.2. That person will be “charged with ensuring regulatory compliance and reporting to . . . the State of Vermont.” *See* Rieder Direct at 24:5-6.

Because GF’s Malta and East Fishkill facilities currently source their own electricity, Malta executives will be instrumental in the Essex facility’s energy procurements, and the

proposed SMU would be the first of its kind in Vermont to do so, the New York facilities provide the best examples of (i) the manner in which GF would source its electricity here, and (ii) the energy sources from which GF would acquire the Essex facility's electricity. The types of energy GF sources directly and proximately cause GF's electricity-based GHGs. The Malta and East Fishkill facilities provide the best available electricity-based GHG information about the proposed SMU.

Request to Produce 8.a is not overly broad or burdensome. CLF identified the materials at issue with particularity. *See* V.R.C.P. 34(b). The materials requested are also limited temporally to include only those from January 1, 2015 to the present. The materials are limited to GF's East Fishkill and Malta facilities and are thus finite in scope. Moreover, CLF only seeks materials in GF's possession, custody, or control. *See* V.R.C.P. 34(b). And because GF likely has the requested materials on file, CLF's request could likely be met by attaching the existing materials to an email and sending them to CLF, as litigants routinely do. Request to Produce 8.a is not overly broad or burdensome. It is reasonable and finite.

CLF does not seek privileged materials. *See* V.R.C.P. 26(b)(1); *see also* V.R.C.P. 26(b)(6)(A) (explaining GF's burden to demonstrate privilege). To the extent any of the requested information is confidential, GF may disclose it pursuant to the Protective Agreement it has executed. *See* V.R.C.P. 26(c). CLF respectfully requests that the Commission compel GF to supplement Request to Produce 8.a accordingly.

Request to Produce 16: Request to Produce 16 states verbatim:

REQUEST TO PRODUCE NO. 16: For each Person or entity identified in Interrogatory No. 2, please produce all lease, rental, or use agreements; and all invoices, statements, or other Documents related to each Person or entity's electricity usage.

GF objected that CLF's "request is overbroad and unduly burdensome and calls for the production of proprietary, nonpublic, and commercially sensitive documents that are not proportional to the needs of the case." As above, GF did not raise adequate objections under the Vermont Rules of Civil Procedure because GF did not specify the reasons for its objections. *See* V.R.C.P. 34(b). On July 20, 2021, GF supplemented its discovery by stating that it will provide a copy of its lease with Ask-IntTag LLC. On August 6, 2021, GF produced that lease. GF has withheld all requested materials pertaining to the other members of the public now operating at the site of the proposed SMU service territory: IBM, Marvell, Garnet EMS, and New England Federal Credit Union. CLF respectfully requests the Commission to compel GF to produce the withheld materials for the same reasons CLF articulated as to Interrogatory 2.d.

Conclusion

CLF respectfully requests the Commission to compel GF to supplement its response to Interrogatory 2.d, and its productions to Requests to Produce 3.a through 3.f, 8.a, and 16.

Dated at Burlington, Vermont, this 17th day of September 2021.

CONSERVATION LAW FOUNDATION

By: _____



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