

**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 RESPONSE IN
SUPPORT OF, AND INCORPORATING, ALLEARTH RENEWABLES, INC.’s
MOTION TO AMEND THE SCHEDULE**

Conservation Law Foundation (“CLF”) supports and incorporates the AllEarth Renewables, Inc. (“AER”) Motion to Amend the Schedule (the “Motion”). The Motion was filed on September 20, 2021, and requests that the Public Utility Commission (the “Commission”) revise the Schedule to allow for dispositive motions on threshold jurisdictional issues prior to the evidentiary hearing now schedule for October 14 and 15. *See* Motion ¶ 3 (citing *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1 (1941)). CLF incorporates the Motion and supports it for the following reasons. CLF also proposes dates with which the Schedule could be amended.

Memorandum

The Vermont Rules of Civil Procedure govern the request to amend the Schedule. *See* Commission Rule 2.103. V.R.C.P. 16.2 empowers the Commission to modify a scheduling order for good cause, to provide litigants with reasonable accommodations, or to prevent manifest injustice to those litigants. *See also* Commission Rule 2.207 (adopting V.R.C.P. 6(b), which allows extensions of time for good cause). Rule 16.2 is satisfied under the circumstances before the Commission, and CLF respectfully requests that the Commission grant AER’s Motion.

Good cause exists to revise the Schedule because discovery has not resolved jurisdictional questions. The Parties have engaged in discovery that probed the legal bases for the proposed self-managed utility (“SMU”). That process has not affirmatively answered the fundamental questions of whether the proposed SMU could be implemented without violating multiple statutes duly enacted by the Legislature, whether the Commission has authority to intercede into those statutes’ core purposes, whether Global Foundries U.S. 2 LLC’s (“GF”) Petition seeks relief beyond the Commission’s legislatively delegated jurisdiction, or whether GF’s Petition would disrupt core powers established in and protected by the Vermont Constitution. Good cause exists to allow dispositive motions prior to the hearing. *See* V.R.C.P. 16.2.

Developments this week raise new and additional jurisdictional and constitutional concerns that provide independent bases to amend the Schedule for good cause and to prevent manifest injustice. *See id.* On the afternoon of September 22, 2021, GF filed a Letter of Intent dated September 17, 2021 (“LOI”) that had been executed by GF, the Department of Public Service (“DPS”), and the Agency of Natural Resources (“ANR”). The LOI raises for the first time several new and important jurisdictional and constitutional issues that have not previously been presented on the record in these Proceedings. *See, e.g.*, LOI ¶ 1 (incorporating the terms and conditions of Schedule A); Schedule A at 1-3; LOI ¶ 3. It is not clear that the Commission has jurisdiction to approve the terms described in the LOI or in Schedule A. Nor is it clear that the Commission will have jurisdiction to approve terms that may appear in the still unreleased Memorandum of Understanding (“MOU”). *See* LOI ¶ 2 (noting the MOU is being negotiated and may not be completed until October 29, 2021); *see also, e.g., Trybulski*, 112 Vt. 1; *Braun v. Greenblatt*, 2007 VT 53, ¶ 10 (2007) (brackets removed from original) (“Subject matter

jurisdiction cannot be conferred by agreement or consent of the parties when it is not given by law.”). Nor is it clear that the Executive Branch has the authority to agree to the terms of the LOI, Schedule A, or the unreleased MOU because doing so may unconstitutionally bind the hands of future Executive Branch officials and prevent them from regulating as may be mandated by the Vermont electorate in future elections. *See, e.g.*, Schedule A at 1 & 3. Good cause exists to timely address through dispositive motions the jurisdictional and constitutional issues raised for the first time on September 22, 2021 in the LOI and Schedule A, and those that will be raised for the first time on or before October 29, 2021, in the MOU.

Moreover, the legal and factual issues presented in the LOI, Schedule A, and the still unreleased MOU have not been vetted through discovery or expert analysis. Under the current Schedule, CLF, the other Intervenors, and the Commission no longer have the opportunity to make discovery requests on GF. *See* Order of May 24, 2021 (setting an August 20, 2021 deadline for the second round of discovery on GF). CLF and the other Intervenors no longer have an opportunity to submit prefiled expert testimony. *See id.* (setting a September 23, 2021 deadline for surrebuttal testimony). An unamended Schedule would disallow CLF, other Parties, the public, and the Commission any opportunity to build the record on issues raised for the first time by the LOI, Schedule A, and an MOU that would apparently be filed after the hearing had concluded. CLF has not had a minimally adequate opportunity to engage in the type of reasoned scrutiny necessary to prepare for an evidentiary hearing that will address the LOI, Schedule A, and the MOU.

The way the LOI has been executed to exclude CLF and others from reviewing information central to the LOI, Schedule A, and the unreleased MOU, *see* LOI ¶ 4, creates an evidentiary imbalance that favors GF, ANR, and DPS to the prejudice of others and to the public

interest. GF, ANR, and DPS have access to that information as it exists now and as it will dynamically evolve before, during, and after the hearing until the MOU is ultimately filed on or before October 29, 2021. *See, e.g., id.* CLF will be prejudiced if required to prepare for the hearing, litigate that hearing, and research and write post-hearing briefs without evidence and knowledge central to the case that GF, ANR, and DPS all possess and use as they prepare for the hearing, litigate the hearing, and research and draft the post-hearing briefs. CLF would be proceeding with one eye blind and one hand tied behind its back. At a bare minimum, the hearing should be rescheduled until sometime after the MOU has been filed.

The prejudice is sharpened by the untimely date of the proposed MOU. The LOI indicates that the MOU will likely not be released until after the hearing has concluded. *See* LOI ¶ 2 (“The Undersigned parties intend to negotiate a definitive agreement (‘MOU’) reflecting the terms and conditions of Schedule A for execution on or before October 29, 2021.”). As to jurisdictional issues arising because of the MOU, DPS is mistaken that “parties and the Commission will have the opportunity to examine witnesses on issues related to the Commission’s jurisdictional authority.” *See* DPS Response at 2 (Sept. 22, 2021).

The MOU date of October 29, 2021 is two weeks after the hearing. Assuming the MOU is released on Friday, October 29, *see id.*, there will be zero business days to review, analyze, research, and brief the MOU’s jurisdictional issues prior to the Monday, November 1 initial brief deadline. *See* Order of May 24, 2021 (setting a November 1, 2021 initial brief deadline). DPS is therefore also mistaken that jurisdiction could be “adequately and thoroughly addressed through the parties’ post-hearing legal briefs.” *See* DPS Response at 2 (Sept. 22, 2021). And GF is mistaken that jurisdictional issues “can be addressed within the contours of the current schedule.” *See* GF Response (Sept. 21, 2021). CLF would have no business days to research the

MOU and prepare initial briefs about the MOU's jurisdictional and constitutional issues. That would prejudice CLF. Good cause exists to modify the schedule and to prevent manifest injustice. *See* V.R.C.P. 16.2.

Green Mountain Power Corporation ("GMP") states that "intervenors raised jurisdictional questions in motions to intervene in this proceeding four months ago" and did not file a motion to dismiss for lack of subject matter jurisdiction in May. *See* GMP Response at 1 (Sept. 21, 2021). However, "[s]ubject matter jurisdiction cannot be waived," *see Town of Charlotte v. Richmond*, 158 Vt. 354, 358 (1992), and so GMP's concern is misplaced. *See id.* ("It is axiomatic that lack of subject matter jurisdiction of the trial court may be raised for the first time on appeal to [the Vermont Supreme] Court.") (vacating and remanding an order for lack of subject matter jurisdiction). Moreover, CLF's jurisdictional concerns about the LOI, Schedule A, and unreleased MOU could not have been known or addressed previously. The LOI and Schedule A were first released on September 22, 2021. And the MOU remains unreleased.

In the Stipulated-To Motion to Amend the Scheduling Conference Order of May 14, 2021 (the "Stipulated-To Motion"), CLF stipulated that it was agreeing to the Schedule "upon the reservation of its right to seek later amendments to the schedule if reasonable accommodation or manifest injustice so requires." *See* Stipulated-To Motion at 1 (May 14, 2021). GMP and GF are signatories to the Stipulated-To Motion. *See id.* at 3-4. They stipulated to CLF's reservation of rights. *See id.*

To the extent a time crunch exists in these Proceedings, it arises at least in part because the Petition was filed on March 17, 2021. On December 30, 2019, GF had raised the prospect of a "permanent policy change" under which "GF could become an actual, single-customer utility, or instead could become a 'virtual utility.'" *See* Report Regarding Collaborative Process at 27,

Case No. 18-3160 (Dec. 30, 2019). And by September 22, 2020, GF had largely developed the contours of the proposed SMU. *See, e.g.*, GF000135-147, appended hereto as Exhibit 1. All parties have endeavored to maintain the brisk pace of these proceedings. Amending the schedule to review jurisdictional questions is appropriate.

The Commission noted in its Order of May 24, 2021 that the Commission was “not foreclosing the opportunity for parties to file motions when appropriate, pursuant to Commission Rules or the Vermont Rules of Civil Procedure.” *See* Order of May 24, 2021 at 1. Now is an appropriate time for AER's Motion to Amend the Schedule: two rounds of discovery and expert analysis have failed to illuminate adequate jurisdictional bases for GF's Petition; the LOI and Schedule A present new jurisdictional and constitutional issues not previously in the record; the unreleased MOU presumably will present additional such issues on or before October 29, 2021; and the jurisdictional and constitutional issues created by the MOU, LOI, and Schedule A have not been addressed through discovery or expert analysis.

Given the changed circumstances in these Proceedings, CLF respectfully suggests that an Order amending the Schedule should incorporate the following:

- Adding one round of Commission Information Requests and Intervenor Discovery to assess the LOI and Schedule A and thereby establish a record upon which those important documents can be reviewed at the hearing and on appeal, if needed. Such discovery could commence very soon (*e.g.*, October 1, 2021, or thereabouts).
- Adding one round of Commission Information Requests and Intervenor Discovery that should occur at least two weeks from when the MOU is filed (*i.e.*, if the MOU is released on October 29, 2021, the discovery deadline would be November 12, 2021; if the MOU is released sooner, the discovery deadline would occur proportionally sooner).
- After discovery responses have been filed, there should be one round of expert testimony to assess the LOI, Schedule A, and MOU based on those documents and related discovery responses (*i.e.*, November 26, 2021, or thereabout because of Thanksgiving, unless the MOU is filed sooner than planned).
- Setting a date for dispositive pretrial motions to occur at least two weeks after the


- final expert testimony deadline (*i.e.*, December 10, 2021, unless the MOU is filed sooner than planned).
- Setting a hearing date to occur at least two weeks from when the Commission resolves the dispositive motions, unless the Commission rules that it lacks jurisdiction, in which case GF's Petition would be dismissed.
 - Setting initial briefs to occur two weeks after the hearing concludes.
 - Setting response briefs to occur two weeks later.

Conclusion

CLF supports and incorporates AER's Motion. CLF also respectfully suggests that the Commission amend the Schedule in a manner like that described above.

Dated at Burlington, Vermont, this 24th day of September 2021.

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