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

CONSERVATION LAW FOUNDATION'S RESPONSE TO THE AGENCY OF NATURAL RESOURCES' MOTION TO INTERVENE

Conservation Law Foundation ("CLF") responds to the Agency of Natural Resources' ("ANR") Motion to Intervene (the "Motion"), which ANR filed on September 23, 2021 in Case No. 21-1107-PET. It does not appear ANR filed its Motion in the companion docket. *See* 21-1109-PET. ANR requests several modifications to the Scheduling Order without specifying dates or addressing the V.R.C.P. 16.2 standard that controls such modifications. ANR's Motion would cause manifest injustices unsupported by Rule 16.2. ANR's Motion would also cause prejudice under Vermont Public Utility Commission ("Commission") Rule 2.209(B)(3). It also appears ANR may believe it has an alternative means to protect its interests. *See* Commission Rule 2.209(B)(2). Those objections are described in greater detail below.

CLF is willing waive its objections to ANR's Motion if modifications are made to the Scheduling Order capable of curing the harms that would result from the Motion. Otherwise, CLF respectfully raises and preserves those objections.

Suggested Scheduling Order Changes to Include ANR

The suggested changes CLF outlined in its Response Supporting, and Incorporating, AllEarth Renewables, Inc's Motion to Amend the Schedule would be adequate if adopted and

amended to include ANR. Those suggestions are outlined immediately below using track changes to incorporate ANR into the proposed revised Schedule:

- Adding one round of Commission Information Requests and Intervenor Discovery to assess the LOI, ~~and~~ Schedule A, and ANR Prefiled Testimony 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 as to the LOI and Schedule A (*e.g.*, ~~October 1, 2021~~1 week after a revised Schedule is issued, or thereabouts). Discovery on ANR's Prefiled Testimony Could begin one week after ANR files that testimony.
- 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 ANR Prefiled Testimony, 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.

Rule 16.2 Objections

ANR's Motion requests several modifications of the May 24, 2021 Scheduling Order that, without alterations, would cause manifest injustice and fail to accommodate litigants. *See* V.R.C.P. 16.2. ANR notes that the Scheduling Order deadline for motions to intervene has passed, *see* Order of May 24, 2021 (setting May 3 as the deadline), and thus implicitly requests to modify the Scheduling Order to allow its late intervention. *See* ANR Motion at 1. ANR more specifically "requests the Commission [to] enlarge the amount of time for the instant motion to allow ANR to present additional testimony on the potential environmental impacts of the petition." *See id.*

Because the deadlines for prefiled testimony have also passed, *see* Order of May 24, 2021 (setting June 25 as the direct testimony deadline and September 23 as the surrebuttal testimony deadline), ANR is also requesting a modification of the Scheduling Order for new prefiled testimony.

Modification of the Scheduling Order is controlled by V.R.C.P. 16.2, which allows for modifications upon a "motion and a showing of good cause." The "terms of a scheduling order shall be determined with reasonable accommodation to litigants and their counsel and shall be modified where necessary to prevent manifest injustice." *Id.*; *see also* Commission Rule 2.103.

ANR does not address the Rule 16.2 standard of review in its Motion. *See* ANR Motion.

The modifications of the Scheduling Order ANR seeks would cause manifest injustice and fail to reasonably accommodate litigants. *See* V.R.C.P. 16.2. If granted, ANR's request to present testimony about issues central to these Proceedings and to Vermont's energy policy[1] *after* discovery and expert deadlines have passed for other Intervenors will cause manifest injustice and prevent accommodation of litigants' ability to meaningfully review ANR's testimony through discovery and expert analysis. *See id.*

CLF's members have substantial interests in meaningful GHG reductions. The Letter of Intent ("LOI") and Schedule A submitted with ANR's Motion present concerning evidence that GF's GHG emissions plan would allow GF to *increase* its emissions relative to the Essex facility's 2020 levels and still achieve its "Aspirational" 2025 target. *See* LOI at 1-2. Even quick math bears this out. Given GF's higher emissions in 2005 (~382,730 MTCO2e) relative to today (~289,000 MTCO2e), a 26% "reduction" in absolute emissions pegged to the 2005 levels amounts to a mere ~1.9% reduction below 2020 levels (*e.g.*, only a 5,779.8 MTCO2e reduction).

[1] *See* ANR Motion at 1-2; *see also* 30 V.S.A. § 202a (incorporating the requirements of 10 V.S.A. § 578(a), which pegs Vermont's GHG reduction requirements to 10 V.S.A. § 582).

Of course, GF's plan also considers offsets and other such mechanisms. *See* LOI at 2. After incorporating the 3.3% offsets GF seeks, GF could actually *increase* its emissions by ~1.39% and still be within its plan. Indeed, the LOI specifically states that GF and the Executive Branch will "[d]evelop a mechanism to adjust emissions targets to allow responsible growth above 2020 levels." *See* LOI at 3. Given that GF has also requested to remove approximately 8% of Vermont's total electricity load from the renewable energy standard, it seems likely that GF's overall emissions will significantly exceed 2020 levels if GF is permitted to separate from GMP and implement its plan.

Prefiled testimony from ANR defending that regime would necessitate discovery and additional rebuttal expert review. A modification of the Scheduling Order that does not provide for such discovery and expert review would cause manifest injustice and fail to accommodate litigants. *See* V.R.C.P. 16.2.

ANR has long been aware of the GF's GHG plans and prejudice could have been avoided had ANR intervened sooner. Accordingly, there is not good cause to amend the Schedule in the manner ANR requests. *See* V.R.C.P. 16.2. On April 29, 2021, Commissioner Peter Walke told the Cross Sector Mitigation Subcommittee of the Vermont Climate Council that he had been communicating with GF about its GHG emissions. *See* Exhibit 1. That same day, Mr. Ed McNamara told Commissioner Walke that DPS was "thinking of proposing a mechanism that is focused just on GHG reductions." *Id.* The next day, Commissioner Walke told Mr. McNamara that he had been engaging in "high level conversations with GF" and asked Mr. McNamara to contact ANR employees Collin Smythe and Heidi Hales to discuss further. *See id.* On May 24, 2021, Mr. McNamara informed Ms. Hales and Mr. Smythe that DPS had "been thinking that one approach would be to establish a GHG reduction requirement consistent with GWSA

requirements, rather than focusing on specific renewable power supply requirements. This is based on an assumption that GHG emissions from a GF self-managed utility would come predominantly from its industrial processes." *Id.* On June 4, 2021, Ms. Hales, Mr. Smythe, and ANR employee Mr. Doug Elliot met with Mr. McNamara for an hour to discuss GlobalFoundries' Petition to establish the proposed self-managed utility. *See* Exhibit 2. On June 20, 2021, Mr. McNamara asked Mr. Smythe to contribute to some of the finer details contained in Mr. McNamara's Prefiled Direct Testimony. *See* Exhibit 3; *see also* McNamara Prefiled Direct Testimony at 9:20–10:11. The next day, Mr. Smythe did so. *See id.* On July 20, 2021, Commissioner Walke contacted Mr. McNamara to get an update on these Commission Proceedings and to coordinate ANR's Climate Council recommendations with DPS's involvement in these Proceedings. *See* Exhibit 4.

Whether or not ANR was deeply involved in discussions with GF in April or May, ANR knew about those discussions. And, presumably, ANR was aware of such discussions throughout the time that it became more involved in "August of 2021." *See* ANR Motion at 2. Had ANR moved to intervene sooner, many if not all the direct testimony, expert testimony, and discovery issues created by its Motion could have been avoided. As such, good cause does not exist to amend the Schedule in the manner ANR has requested. *See* V.R.C.P. 16.2.

Commission Rule 2.209 Objections

ANR states that its intervention would not prejudice the interests of any existing party. *See* ANR Motion at 2. ANR is mistaken. For the same reasons ANR's Motion would cause manifest injustice and fail to accommodate litigants, *see supra*, CLF would be prejudiced under Commission Rule 2.209(B)(3) if ANR intervenes in the manner it proposes.

In addition, the LOI indicates that ANR may in fact believe that it has alternative means

by which to protect its interests. *See* Commission Rule 2.209(B)(2). Page 3 of the LOI states that GF's future "reports should obviate the need to include GF in GWSA rulemaking if [the] reduction plan is achieved." It thus appears that ANR believes – whether correctly or incorrectly – that the substance of GF's proposed plans could otherwise be addressed through ANR rulemaking. *See id.* As such, it seems that ANR may believe that it has alternative means by which to protect its interests. *See* Commission Rule 2.209(B)(2).

Conclusion

CLF will waive its objections to ANR's Motion if modifications are made to the Scheduling Order capable of curing the harms caused by ANR's Motion. Otherwise, CLF makes and preserves those objections.

Dated at Burlington, Vermont, this 28th day of September 2021.

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