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

CLF'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL

CLF timely replies in support of its Motion. CLF also submits a Revised Certificate detailing V.R.C.P. 26(h) conferrals that occurred after CLF filed its Motion. *See* Exhibit 1. A redlined version is attached as Exhibit 2. Those conferrals somewhat narrowed the Parties' dispute as to Interrogatory 2.d. GF argues CLF's Motion is untimely, that some requested information does not exist and that some is not proportional. Opp. at 1. GF is mistaken. Other objections made by GF during V.R.C.P. 26(h) conferrals were not asserted and are thus waived.[1]

I. CLF'S MOTION IS TIMELY BECAUSE IT WAS FILED DURING THE DISCOVERY PERIOD, AFTER DILIGENT RULE 26(h) CONFERRALS, AND GF HAS NOT INCURRED PREJUDICE

CLF's Motion was timely filed during the discovery period. GF has provided no authority to the contrary. Opp. at 3.[2] Having reviewed extensive caselaw, CLF concludes it is

[1] GF makes two passing references to relevance, Opp. at 4 & 7, but does not substantiate a relevance objection in any meaningful way. *See Petition of VELCO*, No. 7752, 2011 WL 6009015, at *2 (Nov. 22, 2011) (Tierney, H.O.) ("[C]ounsel . . . interposed a cursory objection consisting of a single word: 'relevance.' This answer conveys no 'reasons' for the objection.")

[2] GF provides no authority stating a motion to compel filed within the discovery period is untimely. GF makes a "*cf.*" citation to *Audi AG v. D'Amato*, 469 F.3d 538 (6th Cir. 2016). The portion of that federal trademark case GF quotes pertains to a party's *implicit* request for additional time for discovery made "in the form of a notice of deposition" made after business hours on the last day of discovery and then reasserted in a F.R.C.P. 56(f) affidavit after discovery closed. *Id.* at 541. The case does not address the timeliness of a motion to compel, *id.*, and, tellingly, GF did not mention that the *Audi AG* court said that a request for additional discovery "*is appropriate when a party files it before discovery,* but here, [the party] filed it after discovery." *Id.* (emphasis added). GF's reliance on *Rossetto v. Pabst Brewing Inc.*, 217 F.3d 539 (2000) is also misplaced. The portion of that federal class collective bargaining case GF cites pertains to an unspecified type of "discovery motion" that was "filed two months after the date set by the court for the completion of discovery" without excuse for its "tardiness." *See id.* To the extent

exceedingly rare for a party to oppose a motion to compel as untimely when the motion is filed in the discovery period. The dearth of such objections is telling: "A motion to compel filed during the discovery period would rarely be considered untimely." *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999) (citing *Kendrick v. Heckler*, 778 F.2d 253, 258 (1985) (vacating lower decision and finding motion to compel timely because it "was filed within the discovery cut-off fixed by the district court"); *Byrnes v. Janet Corp.*, 111 F.R.D. 68, 71, (M.D.N.C. 1986) (finding motion timely because "[d]iscovery is evidently still continuing")).

CLF's Motion was filed on September 17. Discovery was then ongoing and remains so today. GF's third supplemental response and production to CLF was filed by GF on September 22, after CLF's Motion. CLF's surrebuttal testimony was due September 23. GF filed its fourth supplemental response and production on September 27. GF's deadline to seek additional discovery from CLF was September 28. That same date was CLF's deadline to seek additional discovery from the Department of Public Service ("DPS"). Responses are then due by October 6, 2021. CLF did not miss a motion deadline and discovery remains open. The Motion is timely. *See Kendrick*, 778 F.2d at 258; *Byrnes*, 111 F.R.D. at 71.

CLF's Motion is also timely because it was filed after diligent V.R.C.P. 26(h) conferrals that resolved and narrowed multiple disputes, Rev. Cert. ¶¶ 2.c, 2.j, 2.m, reduced the number of issues in CLF's Motion, *id.*; *see also* Protective Agreement, and allowed for supplemental responses. *See* GF Supp. Resp's (July 20, Aug. 6, Sept. 22 & 27). Notably, all but GF's third supplement contained information that was weeks, months, or years old – it was not newly

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Rossetto even addressed a motion to compel, which is not clear, it is inapplicable here because CLF filed its Motion within the discovery period. The section of Wright & Miller GF cites states that "timeliness is an important consideration" because of the "district court's responsibility to impose a discovery cutoff under Rule 16(b)." *See* WRIGHT & MILLER, *Fed. Prac. & Proc.* § 2285. Here, the Rule 16(b) discovery cutoff is currently scheduled for October 6, 2021. CLF's motion is timely. *See* Commission Rule 2.206.

discovered information but had instead been withheld after GF's initial response.

Rules 26(h) and 37(a)(2) require good faith conferrals. Motions filed after good faith conferrals are therefore timely.[3] *See Kendrick*, 778 F.2d at 258 (noting the motion to compel was timely because it was filed after the parties had "engaged in negotiations regarding voluntary disclosure"); *Byrnes*, 111 F.R.D. at 71 (finding "the delay is partially excused by plaintiff's attempt to resolve the dispute out of court" as required); *see also Lurie v. Mid-Atl. Permanente Med. Grp., P.C.*, 262 F.R.D. 29, 31 (D.D.C. 2009) (emphasis added) ("[C]ourts routinely consider motions related to discovery, even though they are *filed outside the discovery period*, especially where the time of filing of such a motion is attributable, as it is here, to the parties' attempted settlement of the discovery dispute."). CLF has described the scope of the V.R.C.P. 26(h) conferrals in the Background section of its Motion and the Revised Certificate.

CLF's diligent conferrals were necessary in large part because GF's objections and responses shifted over time. For example, GF initially responded to Interrogatory 2.d with only general objections: GF "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." A.CLF.GF.2.d. CLF's first Rule 26(h) Letter, Exhibit 3, noted that general objections constitute waivers of any such objection and that confidentiality issues could be solved by a V.R.C.P. 26(c) agreement. *Id.* at 2. GF then responded that it "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." Supp. Resp. (July 20). Later, GF responded: "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

[3] Conferrals are also important because notice must be provided. *See Petition of VELCO*, No. 7752 at *2.

half of 2021 (through June 30, 2021)." Supp. Resp. (Aug. 6). But GF withheld everything about IBM, Marvell, Garnett EMS, and New England Federal Credit Union on general objections. *Id*.[4]

On August 18, CLF again contacted GF's counsel about outstanding discovery. Rev. Cert ¶ 2.i. Two days later, GF informed the Commission, without raising any objection, that "New England Federal Credit Union, Garnet EMS, Marvell, and IBM—are provided electricity by [GF] under their leases with no additional charge." PUC.RFI.2.2.b. Counsel then conferred on the phone on August 24. Rev. Cert. ¶ 2.i. After CLF sent its second Rule 26(h) Letter to GF on August 26, Exhibit 4, counsel exchanged emails and then spoke on September 8. Rev. Cert. ¶ 2.l. During that conferral, Mr. Whiting understood GF's counsel to say that electricity is one of several overhead costs, such as mortgage costs, that GF rolls up into rental charges. *See id*.[5] Mr. Whiting told GF's counsel he would not file a motion to compel as to Interrogatory 2.d if GF supplemented its response accordingly. *Id.* GF did not. The Motion followed. Then, on September 20, Mr. Barnard wrote to CLF, saying "electricity is one of many general, facility-wide costs that are defrayed by rental income." *Id*. ¶ 2.o. Mr. Whiting emailed GF's counsel that same day, saying if GF supplemented its discovery response accordingly CLF would

[4] *Moore v. Napolitano*, 00-953RWRDAR, 2009 WL 2450280, at *4 (D.D.C. Aug. 7, 2009) (emphasis added) (finding motion to compel three months *after discovery ended* timely in part because "[w]hen a responding party asserts a conclusory overbreadth or undue burden objection and then continues to produce documents in response to a request, the opposing party is left 'wondering what documents are being produced and what are being withheld.'").

[5] Mr. Barnard states in his Affidavit that he and Mr. Smith do not recall making that statement, which he describes as inaccurate. Barnard Affidavit ¶ 11. Pursuant to V.R.C.P. 26(h), counsel conferred about the topic via email and phone on September 20 and 21. Mr. Whiting's Certificate was revised to include those conferrals. Rev. Cert ¶¶ 2.o & 2.p. The undersigned again reviewed the notes he took during the September 8 conferral and he took all other steps available to corroborate the accuracy of his Certificate. On September 21 Mr. Whiting asked Mr. Barnard and Mr. Smith if they have any specific information they can provide to show the notes Mr. Whiting took during the September 8 conferral are inaccurate. They both said they do not. Having now taken all possible steps available to him, the undersigned is confident the Certificate accurately reflects his understanding of what was said on September 8.

consider withdrawing that portion of its Motion. *Id.* GF did not. Then GF's Opposition stated, "electricity is one of a number of general, facility-wide costs (including property taxes, etc.) that rent helps defray." Opp. n.2. The V.R.C.P. 26(h) conferrals were diligent, in good faith, and continuous. They simply haven't produced a response from GF.

Moreover, CLF's Motion was timely because GF had been withholding information based on alleged confidentiality, *see, e.g.*, Supp. Prod. (Aug. 6), reasserted that objection in August and September, Rev. Cert. ¶¶ 2.i–m, continues to withhold information based on confidentiality today, Opp. at 9 (raising confidentiality as to RTP 16), but chose not to execute a Protective Agreement until September 14. *See* Protective Agreement at 10 (GF signature dated Sept. 14, 2021). CLF began requesting a Protective Agreement in June, *see* Ex. 3, and continued thereafter on the phone and in writing. *See* Rev. Cert. ¶¶ 2.i–m; *see also* Ex. 4. CLF, AllEarth Renewables, Inc., and DPS each presented GF with draft Protective Agreements at different times in August and September. *See* Rev. Cert. ¶¶ 2.g, j-k. By resolving that issue through V.R.C.P. 26(h) conferrals that continued until September 14, CLF avoided a motion to compel GF to execute a V.R.C.P. 26(c) agreement. CLF acted diligently and in good faith, as required by V.R.C.P. 26(h). CLF cannot control when GF choses to respond.

CLF's Motion was also timely because GF has not articulated any reasonable prejudice. *See Kendrick*, 778 F.2d at 258 (noting the opposing party "failed to indicate any prejudice or unnecessary burden which resulted from the delay"); *Byrnes*, 111 F.R.D. at 71 (finding the opposing party "has not pointed to any prejudice or hardship it will suffer as a result of the delay"). CLF's Motion is now fully briefed prior to the close of discovery. If GF were to produce the requested information promptly, no deadline in the current Schedule would be impacted by CLF's Motion. Exhibits could be marked in time for the hearing.

II. THE INFORMATION AT ISSUE IS PROPORTIONAL AND LIKELY EXISTS

A. Interrogatory 2.d

GF says insufficient information exists to respond to Interrogatory 2.d. Opp. at 5-6. GF does not raise proportionality or other objections. *Id.* GF's arguments are without merit.

Interrogatories must be answered fully, in writing, and under oath. *See* V.R.C.P. 33(a). GF has not responded to Interrogatory 2.d as to IBM, Marvel, Garnet EMS, or New England Federal Credit Union. Objections in lieu of an answer must provide their reasons. *See Petition of VELCO*, No. 7752 at *2. GF's stated reason is that it does not track metering data for those entities and thus refuses to answer Interrogatory 2.d. Opp. at 5-6. But that objection attacks a strawman. The motion to compel does *not* ask GF to describe metering data and Interrogatory 2.d does *not* request information pertaining only to metering data. Counsel have discussed this multiple times. GF's "use of such a straw-man argument to avoid the requested discovery is unavailing." *Cliffstar Corp. v. Sunsweet Growers, Inc.*, 218 F.R.D. 65, 70 (W.D.N.Y. 2003).

Interrogatory 2.d asks GF to "identify and describe . . . the annual energy consumption by [IBM, Marvel, Garnet EMS, and New England Federal Credit Union] from 2018 to present." One can reasonably describe energy consumption with plain language and without tracking metering data. CLF understood GF's counsel to do so on September 8 when, according to Mr. Whiting's contemporaneous notes, he understood GF's counsel to describe electricity as one of several overhead costs, including mortgage costs and others, that GF rolls up into the rent it charges IBM, Marvell, New England Federal Credit Union, and Garnet EMS. Rev. Cert. ¶ 2.o.[6] CLF also understood GF's counsel to do so on September 20 when Mr. Barnard wrote that "electricity is one of many general, facility-wide costs that are defrayed by rental income." *Id.*

[6] *See supra* note 5.

CLF again understands GF to do so in its Opposition, when it said that "electricity is one of a number of general, facility-wide costs (including property taxes, etc.) that rent helps defray." Opp. n.2. CLF has told GF that it does not see a meaningful difference between electricity costs being *defrayed* by rent payments or *rolled into* rent payments.

In any event, those three descriptions of electricity consumption may not be complete and certainly are not signed or sworn, V.R.C.P. 33(a), but they are responsive. *See* Q.CLF.GF.2.d. Any of those three descriptions would provide *some* responsive information to Interrogatory 2.d without GF tracking metering data. The record is clear that members of the public consumer electricity through GF's distribution network. Interrogatory 2.d merely asks GF to describe how.

B. Request to Produce 3

In its Motion, CLF said it is willing to limit this requests to (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; and (2) GF's proposal to be exempt from the RES. *See* Motion at 8-9. GF's Opposition does not specifically address those limited requests. Nor does GF raise proportionality or other objections. GF raises a general argument that responsive information does not exist. GF also appears to assert privilege but does not do so expressly. *See* Opp. at 6. Indeed, GF has never raised privilege in a manner that complies with V.R.C.P. 26(b)(6). That Rule requires that:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

GF first baldly "Object[ed] to the extent this request seeks disclosure of documents subject to attorney-client privilege, the work product doctrine, or the common interest doctrine" without clarifying whether a privilege in fact applied and, if so, which of the three it listed was

applicable. A.CLF.GF.3. GF later raised another bald objection on "privilege grounds" but then shifted that objection by saying "Our first, threshold objection to these requests is on relevance and proportionality grounds, hence we do not intend to produce a privilege log." Exhibit A to Opp. at 3. Of course, GF has now dropped that "threshold objection," Opp. at 6-7, but has still not claimed a privilege as required by V.R.C.P. 26(b)(6). *See* Opp. at 6-7.

The Opposition now points to attorney-client and work product privileges but offers no explanation of the nature of the materials being withheld under those privileges. Opp. at 7. To the extent *all* the requested information is privileged, GF has flouted its assertion of such privilege. *See* V.R.C.P. 26(b)(6). Because GF has not provided a description of the nature of the allegedly privileged materials, V.R.C.P. 26(b)(6), CLF remains in the dark.

In any event, it seems likely that requested information exists in nonprivileged forms. As to RES materials, the Report Regarding Collaborative Process, 18-3160-PET (Dec. 30, 2019) ("Report"), describes how GF retained energy consultants from Northbridge Group to advise GF during conversations about the RES in general and Tiers 1 and 2 in particular. *Id.* at 2, 11-15. "Given the magnitude of net metering and Standard Offer costs in GMP's portfolio, these resources became a considerable focus in the work." *Id.* at 15. "GF expressed concern about . . . net metering cost shift and the potential that it would continue to grow after the Term Contract expires." *Id.* at 16. Those same conversations with consultants included GF becoming "an actual, single-customer utility." *Id.* at 27. Presumably materials pertaining to that deep analysis and the analyses that followed are nonprivileged and within GF's possession.

As to materials pertaining to GF's request to be exempt from 30 V.S.A. §§ 101-103, 204 and house the proposed SMU in one of GF's divisions, GF's Petition and Mr. Rieder both address the proposed "GF Power Division." GF Petition ¶ 25; Rieder Direct at 23 ("The Self-

Managed Utility will be a division of [GF] named 'GF Power Division,' with [GF] as its sole 'customer.'"). It also seems that GF's consultants assessed the subject. *See* Report at 27 (describing a "single customer utility" model in which the "site would be owned and controlled by the utility"). It seems unlikely there are no business records or other nonprivileged materials. Surely a GF employee or consultant created a document or communication.

CLF seeks such materials to understand the reasons why GF asks the Commission to exempt the proposed SMU from 30 V.S.A. §§ 101-103 and 204, to understand the effects of such exemptions on State revenues and other taxpayers' relative burdens, and to assess the relevant mandates of the Secretary of State. Such things are proportional to the general good of the State.

C. Request to Produce 8.a

GF summarily describes the request as a "fishing expedition" without substantiating that claim. Opp. at 7. It then summarizes V.R.C.P. 26(b)(1) without analyzing any of that Rule's proportionality factors. *Id*. GF also makes a passing reference to relevance but does not substantiate that word, *id.*, which is not a viable objection. *Petition of VELCO*, No. 7752 at *2; *see also* Motion at 10-11 (addressing relevance). GF's arguments are unavailing. The requested information is important to resolving this case under Vermont law, GF has exclusive access to the information, GF is well resourced, and GF would not be burdened by attaching copies of the requested information to an email and then sending them to CLF. *See* V.R.C.P. 26(b)(1).

The information is also reasonable in scope and proportion. *See* Motion at 9-11. It seeks information about the energy sources used to generate electricity for GF's Malta and East Fishkill facilities. Q.CLF.GF.8.a. The underlying inquiry is whether those facilities source their electricity from fossil fuels or low GHG renewables. Responsive information is proportional because GF's other facilities will shed the most relevant light available on the way GF's Essex

facility would source electricity and how its scope 2 emissions would change. *See* GF Petition ¶¶ 5, 30 (requesting the proposed SMU be permitted to acquire its own electricity outside the requirements of 30 V.S.A ch. 89); A.PSD.GF.7; PSD.GF.1.b; A.PSD.GF.2; Rieder Direct at 24. The request is also germane because Vermont's energy policy is grounded in a desire to predicate policy decisions on such information. *See* 30 V.S.A. § 202a (requiring the wise use of renewables, an environmentally sound energy supply, and achieving GHG reduction requirements of 10 V.S.A. § 578(a)). The distinction GF tries to make between ISO-NE and NYISO, Opp. at 8, misses the point. CLF wants to know if GF sources electricity from fossil fuels or renewables, both of which are available in both of those regions.

The fact that GF's Malta and East Fishkill facilities are in a neighboring state does not render otherwise relevant, proportional, and non-privileged information undiscoverable, as GF seems to claim. Opp. at 7; *see* V.R.C.P. 26(b) & 34(a). GF chose to put those facilities' electricity data and acquisition practices at issue by making those things central to its Petition and Prefiled Testimony. *See, e.g.*, Rieder Direct at 4 & 24; GF Petition ¶ 10. GF has already produced other information about those facilities' electricity. *See, e.g.*, A.PSD.GF.1.b; A.PSD.GF.2. CLF respectfully suggests that it would be improper for GF to selectively disclose information about its Malta and East Fishkill facilities that supports its Petition, GF Petition ¶ 10, but withhold information about those facilities that may weaken its Petition. A.CLF.GF.8.a.

The lack of detail in GF's stated plan to later disclose a power supply plan, Opp. at 8, does not respond to Request 8.a and does not fulfil GF's obligation to produce materials under V.R.C.P. 34(a). *See also* McNamara Direct at 3:19-21 (noting that GF's proposal "lacks specificity with respect to GHG emissions and associated environmental protections"). A proposed future plan does not provide adequate information now. CLF is not requesting GF to

produce information that cannot be obtained for another 5 years, as GF seems to assert. Opp. at 8. CLF is requesting information now in GF's possession, custody, or control. V.R.C.P. 34(a).

D. Request to Produce 16

GF has not produced any materials under V.R.C.P. 34(a) about four of the five members of the public who would receive electricity from the proposed SMU. GF's apparent assertions to the contrary are misleading. Opp. at 9-10. GF objects that the requested leases are confidential and not proportional. *Id.* at 9. GF's confidentiality objection is without merit[7] and is moot. The proportionality objection is also without merit. GF's claim that the proposed SMU "will supply only GLOBALFOUNDRIES U.S. 2 LLC," GF Petition ¶ 26, is central to its Petition, *id.* at ¶¶ 5, 51, and GF's testimony. Rieder Direct at 23:13-14. Leases that may describe how members of the public would consume electricity from the proposed SMU are highly proportional and relevant. *See* V.R.C.P. 26(b)(1). They should be produced.

GF states that "per CLF's Motion, it seeks copies of the leases in support of its argument that the provision of electricity to tenants constitutes the sale of electricity." Opp. at 9. The Motion does not say that. CLF is requesting information that will help it assess the ways members of the public would receive electricity from the proposed SMU. The way AskInt-Tag would receive electricity from the proposed SMU appears functionally equivalent to the sale of electricity. CLF knows this because GF responded to Interrogatory 2.d and Request 16 as to AskInt-Tag. GF has refused to respond to those requests as to the other four members of the public who would receive electricity from the proposed SMU. CLF thus has insufficient information to determine the financial nature of the way the proposed SMU would provide

[7] *Pet. Golden Solar, LLC re Cert. of Pub. Good*, No. 18-4163-PET, 2019 WL 1732071, at *8–9 (Apr. 10, 2019); *see also* V.R.C.P. 26(c).

electricity to those members of the public. That lack of information is why CLF filed its Motion to Compel as to Interrogatory 2.d and Request to Produce 16. *See* V.R.C.P. 26(b), 33(a), 34(a), 37(a)(2). GF may not withhold information merely because that information could harm its case. Relevant, proportional, and non-privileged information is discoverable. V.R.C.P. 26(b).

For the first time, GF says it is withholding the information so that it may later brief a jurisdictional argument. Opp. at 9 (citing *Pet. of Darlene Beaupre et al: re alleged diversion of service*, No. 5898 (Aug. 27, 1997)).[8] Withholding factual information relevant to a legal argument GF will make is not permissible under V.R.C.P. 26(e) or 37(c).

Conclusion

CLF respectfully requests the Commission to grant the Motion.

Dated at Burlington, Vermont, this 29th day of September 2021.

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[8] That one page Order stated, "we must make it clear that this Order applies narrowly to the circumstances of this case." The Board found it did not have "personal jurisdiction over landlords" or the "authority to order utility companies onto non-company property, over the objection of the property owner, to conduct inspection of wiring to resolve monetary disputes between landlords and tenants." *Id.* That authority belonged to the Department of Labor and Industry. *Id.* (citing 26 V.S.A. §§ 881 *et seq.*). As such, the petitioner lacked venue with the Board. *Id.* If GF lacks venue, its Petition should be dismissed.