

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-1107-PET

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. 21-1109-PET

Petition of Green Mountain Power Corporation for approval to modify service territory pursuant to 30 V.S.A. § 249	
---	--

Order entered: 10/06/2021

ORDER RESOLVING CONSERVATION LAW FOUNDATION'S MOTION TO COMPEL

I. INTRODUCTION

These cases concern GlobalFoundries U.S. 2 LLC's ("GlobalFoundries") petition for a certificate of public good, pursuant to 30 V.S.A. § 231, to operate an independent, self-managed utility beginning October 1, 2022, under *de minimis* regulation appropriate to its function and Green Mountain Power Corporation's ("GMP") petition for approval to modify its service territory, pursuant to 30 V.S.A. § 249.

In today's Order, we grant in part and deny in part a motion to compel discovery responses from GlobalFoundries filed by Conservation Law Foundation ("CLF"). Specifically, we direct GlobalFoundries to respond to interrogatory 2.d and requests for information 2.d, 3, and 16. GlobalFoundries need not respond further to requests for information 8.a. GlobalFoundries shall produce the ordered responses no later than October 12, 2021.

II. PROCEDURAL HISTORY

On April 16, 2021, the Commission set a schedule in this case that was later amended on May 24, 2021. The schedule included discovery requests and responses beginning April 30, 2021, and concluding October 6, 2021. In an Order dated September 30, 2021, the Commission further revised the schedule, and discovery now concludes on November 12, 2021.

GlobalFoundries provided its first response to CLF's May 28 discovery requests on June 11, 2021. Thereafter, GlobalFoundries and CLF engaged in discovery negotiations during which time GlobalFoundries made several supplemental discovery response filings.

On September 17, 2021, CLF filed a motion to compel GlobalFoundries to respond to one Interrogatory and several Requests to Produce included in CLF's initial set of discovery requests issued on May 28, 2021.

On September 21, 2021, CLF and AllEarth Renewables, Inc. ("AllEarth") filed a joint motion for approval of a Protective Agreement executed by all the parties. This motion was approved on September 24, 2021, and the Protective Agreement has been in place since that date.

On September 23, 2021, GlobalFoundries filed an opposition to CLF's motion to compel arguing that the motion is untimely and that the documents and information sought either do not exist or are not proportional to the needs of these cases.

On September 24, 2021, AllEarth filed a response supporting CLF's motion to compel.

On September 29, 2021, CLF filed a reply to GlobalFoundries' opposition.

III. DISCUSSION AND CONCLUSION

The Legal Framework for Resolving the Dispute

Rule 26(b)(1) of the Vermont Rules of Civil Procedure establishes the permissible scope of discovery in civil cases and applies in proceedings before the Commission.¹ Discovery may be had regarding:

any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.²

¹ Commission Rule 2.214(A) specifically incorporates the Vermont Rules of Civil Procedure applicable to discovery procedure.

² V.R.C.P. 26(b)(1).

Interrogatories must be answered separately and fully in writing and under oath, unless objected to, in which case the objection and reasons therefor must be stated in lieu of an answer.³ A response to a request for production of documents must either state that inspection or production is being allowed or object and state whether any responsive materials are being withheld based on that objection.⁴

In Vermont, a motion to compel discovery is filed pursuant to Vermont Rule of Civil Procedure 37, which provides in relevant part:

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . . if . . . a party fails to answer an interrogatory submitted under Rule 33, or if a person, in response to a request for production . . . fails to produce or to permit inspection as requested, the discovering party may move for an order compelling an answer . . . or an order compelling production . . . in accordance with the request.

For purposes of this subdivision, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

Thus, for a motion to compel discovery to be considered properly filed, the motion must satisfy the following predicate elements: (1) reasonable notice to the non-movant that a motion to compel will be filed; and (2) failure of the non-moving party to answer an interrogatory or to respond to a request for production.

Objection That Motion Is Untimely

GlobalFoundries argues that CLF's motion should be considered untimely. In support of the argument that CLF's motion is untimely, GlobalFoundries contends that the "compressed timeline" of this case requires CLF to have filed its motion to compel earlier in the proceeding and characterizes CLF as "sit[ting] on discovery responses for three months and then mov[ing] to compel less than a month before" hearings.⁵ GlobalFoundries argues that CLF was aware of GlobalFoundries' position on the outstanding discovery requests as of July 14, and CLF was

³ V.R.C.P. 33(a).

⁴ V.R.C.P. 34(b).

⁵ GlobalFoundries U.S. 2 LLC's Opposition to Conservation Law Foundation, Inc's Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/23/21) at 2.

obligated to file a motion to compel at that time. CLF, on the other hand, argues that its motion to compel was timely filed during the discovery period, after diligent conferrals under Vermont Rule of Civil Procedure 26(h), and that GlobalFoundries has not incurred any prejudice.

Vermont Rule of Civil Procedure 37 does not designate a period of time to file a motion to compel discovery. “A motion to compel filed during the discovery period would rarely be considered untimely.”⁶ The discovery period in this case now concludes on November 12, 2021.⁷ CLF’s motion was filed before the conclusion of the discovery period and after what appear to be good-faith efforts to negotiate a resolution to the outstanding discovery disputes.⁸ Further, the parties were negotiating a Protective Agreement that was not filed with the Commission until four days after CLF filed its motion to compel. The Protective Agreement could conceivably have removed some of the objections to producing documents in discovery. Finally, GlobalFoundries has not articulated any prejudice or unnecessary burden resulting from CLF’s filing its motion to compel at this time. Based on these reasons, the Commission determines that CLF’s motion to compel is timely.

Objections Based on Claims the Information Sought Is Proprietary or Confidential

GlobalFoundries bases some of its objections in part on the grounds that the information sought is proprietary or confidential.⁹ All such objections are overruled because there is no legal basis in Vermont Rule of Civil Procedure 26(b)(1) on which to sustain them. Rule 26(b)(1) allows discovery of relevant *nonprivileged* information. GlobalFoundries is attempting to argue that information that is confidential and proprietary is also privileged. Protective agreements and protective orders are commonly used in Commission proceedings so that parties can exchange allegedly confidential information in the discovery process. In fact, GlobalFoundries signed such an agreement that was submitted to the Commission and is now in place. Such an approach would adequately address these concerns raised by GlobalFoundries in its memorandum. As a

⁶ *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999).

⁷ The Commission issued a procedural order amending the schedule on September 30, 2021. Even before the amended schedule was issued, the discovery period was set to conclude on October 6, 2021.

⁸ See V.R.C.P. 26(h) (requiring good faith efforts to confer with opposing counsel to eliminate or reduce area of controversy before filing motions).

⁹ See, e.g., GlobalFoundries U.S. 2 LLC’s Opposition to Conservation Law Foundation, Inc’s Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/23/21) at 9.

result, we overrule GlobalFoundries' objections to discovery requests on the basis that the information sought is confidential or proprietary.

Analysis of the Discovery Disputes

Interrogatory 2.d

In Interrogatory 2.d, CLF requested "the annual energy consumption" from 2018 to present of each person or entity, other than GlobalFoundries, "now using any portion of the Essex facility or that will use any portion of the Essex facility on or after October 1, 2022."¹⁰ GlobalFoundries has provided this information for one of its current tenants. GlobalFoundries has otherwise stated that it does not track metering data for the other four tenants. CLF replies that GlobalFoundries has responded by describing in general terms the energy consumption of its other tenants in its opposition and in two other communications that are not signed and sworn to in this case.

We order GlobalFoundries to supplement its response to Interrogatory 2.d with a narrative description, rather than metering data, regarding its tenants' electricity consumption and file this information as a signed or sworn document.¹¹

Request to Produce 3.a through 3.f

CLF requested production of the following information:

Produce all Documents relating to GlobalFoundries' proposal to:

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

CLF has since refined this request to provisions (a) and (b) only.¹²

¹⁰ Conservation Law Foundation's Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/17/21) at 4.

¹¹ We do not order GlobalFoundries to memorialize Mr. Whiting's sworn recollection of the discussion that the parties had on the phone regarding the tenants.

¹² Conservation Law Foundation's Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/17/21) at 8.

GlobalFoundries has not produced any responsive documents to this request and, throughout the discovery process, has objected to providing this information on the following grounds: the request is overbroad and unduly burdensome, calls for the production of proprietary and sensitive documents, is not proportional to the needs of the case, and seeks disclosure of documents subject to attorney-client privilege, the work product doctrine, or the common interest doctrine.¹³ In its opposition, GlobalFoundries relies exclusively on attorney-client privilege and work product doctrine as the basis for its objection.¹⁴

Vermont Rule of Civil Procedure 26(b)(6) requires:

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.

GlobalFoundries has not satisfied the Rule 26(b)(6) requirement to “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.”¹⁵

The Commission also finds it difficult to understand whether there are some documents that might be responsive and nonprivileged because GlobalFoundries’ earlier objections included an assertion that the materials are proprietary, an objection that would not justify withholding documents because a protective agreement and order are now in place. While the nature of CLF’s request would likely generate a response that includes attorney-client privileged materials, GlobalFoundries’ response has not provided enough context to understand the nature of the documents that would be responsive but are privileged. Thus, the Commission orders GlobalFoundries to produce any nonprivileged responsive documents and describe the nature of the documents that would be produced if they were not privileged, pursuant to Rule 26(b)(6).

¹³ See e.g., GlobalFoundries U.S. 2 LLC’s Responses to Conservation Law Foundation, Inc’s Initial Set of Requests to Admit, Interrogatories, and Requests to Produce (6/11/21) at 36.

¹⁴ GlobalFoundries U.S. 2 LLC’s Opposition to Conservation Law Foundation, Inc’s Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/23/21) at 6-7.

¹⁵ The use of a privilege log, specifically, is not required by Vermont Rule of Civil Procedure 26(b)(6); however, a description of the documents is required.

Request to Produce 8.a

CLF requested that GlobalFoundries “[p]roduce 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 [y]our East Fishkill facility from January 1, 2015 to the present.”¹⁶

GlobalFoundries has not produced any responsive documents to this request and, throughout the discovery process, has objected to providing this information on the following grounds: the request is overbroad and unduly burdensome, calls for the production of proprietary and sensitive documents, is not proportional to the needs of the case, and seeks disclosure of documents subject to attorney-client privilege, the work product doctrine, or the common interest doctrine.¹⁷ In its opposition, GlobalFoundries objects that the information sought is not relevant or proportional to the needs of the case.¹⁸

The factors used to determine whether the information sought is proportional to the needs of the case are listed in Vermont Rule of Civil Procedure 26(b)(1): “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” We agree with CLF that GlobalFoundries has exclusive access to the information and is well resourced. However, this information is unnecessary to resolve the substantive issue in question. How GlobalFoundries sources its power at its Malta and East Fishkill facilities does not weigh into the Commission’s determination of what power supply requirements would be imposed on GlobalFoundries should its request to operate as a self-managed utility be granted.¹⁹ CLF does

¹⁶ Conservation Law Foundation’s Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/17/21) at 9-10.

¹⁷ *See e.g.*, GlobalFoundries U.S. 2 LLC’s Responses to Conservation Law Foundation, Inc’s Initial Set of Requests to Admit, Interrogatories, and Requests to Produce (6/11/21) at 38.

¹⁸ GlobalFoundries U.S. 2 LLC’s Opposition to Conservation Law Foundation, Inc’s Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/23/21) at 7.

¹⁹ We understand that CLF would like this information to make an argument that GlobalFoundries, if left to its own devices, would source its power in the New York market in a certain way that is, perhaps, less clean than the power currently sourced by GMP. That assumption is embedded in the Department’s analysis in surrebuttal testimony. Without substantiating that assumption, CLF is nonetheless able to argue that GlobalFoundries’ power supply should be subject to any number of requirements.

not need this information to offer any number of arguments about the standards that should apply to GlobalFoundries' power supply should it be allowed to operate as a self-managed utility. The burden and expense of producing these documents outweigh the minimal value they would have in resolving the issues in this case. Thus, we sustain GlobalFoundries' objection and do not require that it produce the documents in this request.²⁰

Request to Produce 16

For each person or entity identified in Interrogatory 2, CLF seeks "all lease, rental, or use agreements; and all invoices, statements, or other Documents related to each Person or entity's electricity usage."²¹

GlobalFoundries has produced responsive documents for one of its five tenants. Throughout the discovery process, GlobalFoundries has objected to providing information about its other four tenants on the following grounds: the request is overbroad and unduly burdensome, calls for the production of proprietary, nonpublic, and commercially sensitive documents, and is not proportional to the needs of the case.²² In its opposition, GlobalFoundries objects that the information sought is not proportional to the needs of the case.²³

The factors for determining proportionality are listed above.²⁴ We again agree with CLF that GlobalFoundries has exclusive access to the information and is well resourced. We additionally concur that the benefit of the discovery sought outweighs the burden of producing it. Whether the tenants would be customers of the proposed self-managed utility is a critical, predicate legal issue that must be resolved to determine whether GlobalFoundries' proposal can even be considered by the Commission as proposed. The lease, rental, or other use agreements could shed additional light on that question and, thus, should be produced. However, we are not convinced that there exist any invoices, statements, or other documents related to the tenants'

²⁰ Because we sustain GlobalFoundries' proportionality objection, we need not consider its contention that the material is not relevant.

²¹ Conservation Law Foundation's Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/17/21) at 11.

²² See e.g., GlobalFoundries U.S. 2 LLC's Responses to Conservation Law Foundation, Inc's Initial Set of Requests to Admit, Interrogatories, and Requests to Produce (6/11/21) at 41.

²³ GlobalFoundries U.S. 2 LLC's Opposition to Conservation Law Foundation, Inc's Motion to Compel GlobalFoundries U.S. 2 LLC to Respond to Initial Discovery Requests (9/23/21) at 10.

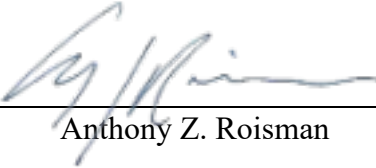
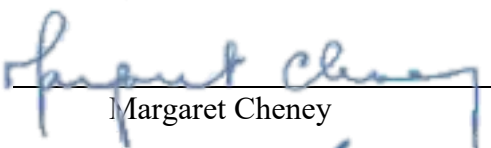

²⁴ In the section of this order addressing Request to Produce 8.a.

electricity usage as discussed in the section on Interrogatory 2.d. If responsive documents exist, the Commission orders GlobalFoundries to produce them.²⁵

SO ORDERED.

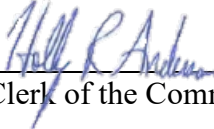
²⁵ See V.R.C.P. 26(e).

Dated at Montpelier, Vermont, this 6th day of October, 2021.

 _____)) PUBLIC UTILITY)) COMMISSION) OF VERMONT
Anthony Z. Roisman)	
_____)	
 _____)) PUBLIC UTILITY)) COMMISSION) OF VERMONT
Margaret Cheney)	
_____)	
 _____)) PUBLIC UTILITY)) COMMISSION) OF VERMONT
Sarah Hofmann)	
_____)	

OFFICE OF THE CLERK

Filed: October 6, 2021

Attest: 
_____)
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case Nos. 21-1107-PET & 21-1109-PET - JOINT SERVICE LIST

Parties:

Justin B Barnard (for GLOBALFOUNDRIES U.S. 2 LLC)
Dinse P.C.
209 Battery Street
Burlington, VT 05401
jbarnard@dinse.com

^John Beling, Esq. (for Vermont Agency of Natural Resources)
Vermont Agency of Natural Resources
1 National Life Drive
Davis 2
Montpelier, VT 05602
John.Beling@vermont.gov

Debra L. Bouffard, Esq. (for Vermont Electric Power Company, Inc.)
Sheehey Furlong & Behm
30 Main Street, 6th Floor
P.O. Box 66
Burlington, VT 05402-0066
dbouffard@sheeheyvt.com

Debra L. Bouffard, Esq. (for Vermont Transco LLC)
Sheehey Furlong & Behm
30 Main Street, 6th Floor
P.O. Box 66
Burlington, VT 05402-0066
dbouffard@sheeheyvt.com

Daniel C. Burke, Esq. (for Vermont Department of Public Service)
Vermont Department of Public Service
112 State Street
Third Floor
Montpelier, VT 05620-2601
dan.burke@vermont.gov

Olivia Campbell Andersen (for Renewable Energy Vermont)
Renewable Energy Vermont
33 Court St.
Montpelier, VT 05602
olivia@revermont.org

William F. Ellis
McNeil, Leddy & Sheahan
271 South Union Street
Burlington, VT 05401
wellis@mcneilvt.com

(for Vermont Public Power Supply Authority)

William F. Ellis
McNeil, Leddy & Sheahan
271 South Union Street
Burlington, VT 05401
wellis@mcneilvt.com

(for City of Burlington Electric Department)

Edward B. French, Jr., Esq.
Stackpole & French
PO Box 819
Stowe, VT 05672-0819
efrench@stackpolefrench.com

(for Town of Stowe Electric Department)

James Gibbons
City of Burlington Electric Department
585 Pine Street
Burlington, VT 05401
jgibbons@burlingtonelectric.com

(for City of Burlington Electric Department)

**Michael J. Hall
Stackpole & French Law Offices
PO Box 819
Stowe, VT 05672
mhall@stackpolefrench.com

(for Town of Stowe Electric Department)

Geoffrey Hand, Esq.
Dunkiel Saunders Elliot Raubvogel & Hand,
PLLC
91 College Street
PO Box 545
Burlington, VT 05402
ghand@dunkielsaunders.com

(for Green Mountain Power Corporation)

John W Kessler
National Life Bldg, 6th Floor
Montpelier, VT 05620
john.kessler@vermont.gov

(for Agency of Commerce and Community
Development)

David Mullett
AllEarth Renewables.com
94 Harvest Lane
Williston, VT 05495
dmullett@allearthrenewables.com

(for ALLEARTH RENEWABLES, INC.)

Ken Nolan
Vermont Public Power Supply Authority
P.O. Box 126
Waterbury Center, VT 05677
knolan@vppsa.com

(for Vermont Public Power Supply Authority)

^Megan O'Toole
Vermont Agency of Natural Resources
Dept. of Environmental Conservation
1 National Life Drive, Davis 3
Montpelier, VT 05620-3901
megan.otoole@vermont.gov

(for Vermont Agency of Natural Resources)

S Mark Sciarrotta
Vermont Electric Power Company, Inc.
366 Pinnacle Ridge Road
Rutland, VT 05701
msciarrotta@velco.com

(for Vermont Electric Power Company, Inc.)

S Mark Sciarrotta
Vermont Electric Power Company, Inc.
366 Pinnacle Ridge Road
Rutland, VT 05701
msciarrotta@velco.com

(for Vermont Transco LLC)

Shapleigh Smith, Jr.
Dinse P.C.
209 Battery Street
Burlington, VT 05401
ssmith@dinse.com

(for GLOBALFOUNDRIES U.S. 2 LLC)

Victoria M. Westgate, Esq.
Dunkiel Saunders Elliott Raubvogel & Hand,
PLLC
91 College Street
P.O. Box 545
Burlington, VT 05402-0545
vwestgate@dunkielsaunders.com

(for Green Mountain Power Corporation)

Chase Whiting, Esq.
Conservation Law Foundation
CLF 15 East State Street, Suite 4
Montpelier, VT 05602
cwhiting@clf.org

(for Conservation Law Foundation)