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

BRIEF OF ALLEARTH RENEWABLES, INC. IN SUPPORT OF ITS MOTION TO DISMISS AND IN RESPONSE TO ORDER OF SEPTEMBER 30, 2021

AllEarth Renewables, LLC ("AllEarth") offers this brief in support of the Motion to Dismiss it has filed in these cases, and in response to the questions posed by the Commission in its September 30, 2021 *Order Granting the Agency of Natural Resources Intervention and Amending the Schedule* ("the September 30th Order").

I. THE COMMISSION DOES NOT HAVE JURISDICTION TO GRANT WHAT GLOBAL FOUNDRIES ("GF") SEEKS, AND THE CASES MUST BE DISMISSED

The Commission has asked that the parties brief whether the Commission "has jurisdiction to grant GlobalFoundries' request to operate as a self-managed utility under *de minimis* regulation." September 30th Order at 5. AllEarth respectfully submits that the answer is no, and that these cases must thus be dismissed as requested in the Motion to Dismiss that accompanies this brief.

In what may well be the most cited utility regulation-related Vermont Supreme Court case, the Court recognized decades ago that the Commission is a creature of statute, having "only such powers as are expressly conferred on it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted." *Trybulski v. Bellows Falls Hydro-Electric Corporation*, 112 Vt. 1, 7, 20 A.2d 117 (1941). This limitation of the Commission's authority is rooted in the separation of powers provision of the Vermont Constitution, which provides that "[t]he Legislative, Executive, and Judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the others." Vermont Constitution, Chap II, Sec. 5, cited in *Trybulski*, *supra*. Cases since *Trybulski* have recognized that the Commission does not have the power to adjudicate

constitutional questions,[1] could not add a fuel adjustment clause to the utility ratemaking construct set forth in statute,[2] and was not given legislative authority to adjudicate common law negligence in the context of underground excavation activities.[3] In the latter case the Court, quoting from *Trybulski*, reiterated the well-established principle that the Commission "is a body exercising special and statutory powers, not according to the course of the common law, as to which *nothing will be presumed in favor of its jurisdiction*." 172 Vt. at 419 (emphasis added).

Application of this precedent here compels the conclusion that, while a "self-managed utility" concept may be an appropriate subject for public discussion and legislative debate, it is well beyond the Commission's present statutory authority to allow. Neither the term "self-managed utility" nor language embodying the concept appears anywhere in Title 30. On the contrary, Vermont electric utility franchising and regulation has long been built upon a structure of vertically integrated electric utilities subject to comprehensive rate regulation, with some modest lessening of regulation relative to municipal and cooperative utilities,[4] and the legislature has not enacted laws that confer the "retail electricity choice" that comprises a large part of what GF seeks here.

The absence of any legislative authorization for an SMU is particularly striking when contrasted with Vermont's history of taking legislative action when its elected representatives do decide to expand, modify or limit the power of the Commission. The legislative record is filled with specific actions such as:

- Authorizing and directing the Commission to implement PURPA[5]
- Authorizing the Commission to appoint independent efficiency utilities[6]
- Allowing the Commission to approve all-requirements contracts between Vermont Public Power Supply Authority and its member systems, subject to certain voting requirements[7]
- Authorizing the Commission to approve qualified cost mitigation charge orders to implement potential "buy-down" settlements of Rule 4.100 renewable energy contracts[8]
- An extensive history surrounding net metering in ways that both expanded and limited Commission authority[9]

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[1] *Westover v. Barton Elec. Dep't*, 149 Vt 356 (1988).
[2] *In re Allied power & Light Co*., 132 Vt. 354 (1974).
[3] *Green Mountain Power Corp. v. Sprint Communications*, 172 Vt. 416 (2001).
[4] See 30 V.S.A. §§225-226 (rate schedule and hearing procedures, with municipals and cooperative utilities exempted from suspension).
[5] 30 V.S.A. §209(a)(8).
[6] 30 V.S.A. §209(d)(2).
[7] See 30 V.S.A. §§4002, 4002a and 5012; 1991 Vt. H. 742.
[8] See 30 V.S.A. §209a; 2001, No. 145 (Adj. Session), §3. While this section and the Vermont Qualifying Facility Contract Mitigation Authority created under this law were not put to use before sunsetting, their enactment followed a determination by the Commission (then Board) that it lacked the authority to fully implement contract securitization under existing statute. See *Petition of VEPP Inc. for a declaratory ruling regarding the legal authority of the Vermont Public Service Board to issue voluntary securitization orders*, Docket 6396, Consolidated opinion of August 1, 2001.
[9] The exercise of this authority has included establishing and modifying net metering caps, creating and expanding the registration process for small net metering projects, requiring that adders be calculated using a specific

- Creating a carefully detailed structure for alternative regulation of electric and natural gas companies.[10]

The latter of these is especially telling here, for it indicates the extent to which the legislature has (and has not) been willing to modify the core system of electric utility regulation. The Commission must make specific findings prior to approving an alternative regulation plan; those findings cover a variety of topics including providing just and reasonable rates, encouraging innovations in service and offering incentives for actions that encourage state energy policy.[11] Municipal and cooperative utility alternative regulation proposals require consideration of additional factors focused on consistency with existing financial obligations and future access to capital.[12] Nothing in this comprehensive statute – or anywhere else- remotely suggests legislative authorization of a self-managed utility concept as an available alternative.

Unable to point to a specific statutory basis for allowing an SMU, GF relies heavily on the broad language of sections 203 and 231 of Title 30. These arguments are not persuasive. Section 203, as conceded by GF, provides that "jurisdiction shall be exercised by the Commission…so far as may be necessary to enable [it] *to perform the duties and exercise the powers conferred on [it] by law*."[13] It is well settled that a tribunal construing a statute is to presume that the plain, ordinary meaning of the statutory language is intended.[14] Acceptance of GF's interpretation here would write the latter part of section 203 out of existence, and wrongly use the statute as a vehicle for adding substantive powers rather than for carrying out the ones that have been legislatively conferred upon the Commission. This reasoning turns *Trybulski* and its progeny upside down.

GF's reliance on section 231 is similarly unavailing. While issuance of a Certificate of Public Good ("CPG") requires a Commission determination that a business will promote the general good of the State, this authority is constrained by its application only to an entity that "desires to own or operate a business over which the …Commission has jurisdiction under the provisions of this chapter."[15] A restaurant, health club or any number of other businesses may well promote the general good of the state, yet few would argue that their benefits bring them within the purview of Commission jurisdiction for purposes of section 231. This does not diminish the significance of GF as a Vermont business; the point is simply that section 231 does not make distinctions based on the size or economic significance of a business, but does make one based upon the boundaries of Commission jurisdiction as set by legislative enactments. The request to approve an SMU falls outside of those boundaries, irrespective of who makes the request.

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number, and a myriad of other things. See 30 V.S.A. §8010 et seq. (current version); 30 V.S.A. §219a and amendments thereto (repealed 2013, No. 99 (Adj. Sess.) (prior version).

[10] 30 V.S.A. §218d

[11] 30 V.S.A. §218d(a)(1) through (8).

[12] 30 V.S.A. §218d(k) and (l).

[13] 30 V.S.A. §203 (emphasis added); GF Petition at par. 59.

[14] *In re Snowstone LLC Stormwater Discharge Authorization,* 2021 VT 36, 256 A.3d 62.

[15] 30 V.S.A. §231(a)

Moreover, GF's arguments for *de minimis* regulation under the requested CPG unintentionally but persuasively underscore the absence of nexus between what statute allows and what is sought by GF here. Under GF's own reasoning, three of the eight factors the Commission weighs in section 231 CPG decisions (adequate service, balance between customers and shareholders, and relationship with customers) "have no application to the petitioner here;" and two others (financial stability and the company's ability to obtain finance) are "not implicated by the proposed Self-Managed Utility."[16] The majority of the CPG issuance factors considered by the Commission are inapplicable because the SMU concept does not fit within the law, and it would be an ironic and inappropriate outcome if lack of jurisdiction could be bootstrapped into a modified version of exercising it.

Lastly with respect to the jurisdictional issue, GF appears to rely on the fact that it is the only GMP customer taking electricity directly from the grid at 115kV, and that it owns the equipment that underlies that connection.[17] Nothing about this, however, establishes any basis for jurisdiction as opposed to reasons to potentially tilt discretion toward allowing an SMU *if* jurisdiction exists. Burlington Electric Department and VPPSA aptly recognize the challenges inherent in asserting that the Commission's jurisdiction is simultaneously broad enough to create a whole new species of utility and narrow enough that only one entity can be allowed to seek approval to be a member of that species.[18] While the concern is understandable from the point of distribution utilities, there is no basis upon which to make a jurisdictional distinction between GF and any industrial customer, ski area or perhaps any customer at all who believes that a Commission-authorized divorce from their utility may serve their interests, and there is certainly no procedural basis for shutting the door on future SMU requests from those not party to the cases being considered here. Fortunately, the Commission does not need to resolve these policy issues here, for the jurisdictional door is not open in the first place.

II. GLOBAL FOUNDRIES' RELATIONSHIP WITH ITS TENANTS

In the September 30th Order, the Commission has asked the parties to brief "whether GlobalFoundries tenants are such that Global Foundries' operations, if it continued to provide power to those tenants, would constitute a public service business." Order at 5. AllEarth submits that the answer is affirmative, though the Commission need not reach this issue given the compelling case for outright dismissal.

Following the Commission's October 6, 2021 *Order Resolving Conservation Law Foundation's Motion to Compel*, GF on October 13th filed a Fifth Supplemental Production to its discovery responses to CLF. Those and previous discovery responses establish that five

[16] Petition at pars. 53-54. The three remaining factors- technical expertise, facility maintenance and business reputation- are largely general ones that could apply to any enterprise.

[17] See Petition in Case 21-1107-PET at pars. 3, 22.

[18] See prefiled testimony (revised) of James L. Gibbons at 6: "BED and VPPSA wish to emphasize the importance of this proceeding not being used as a precedent by their customers to argue for similar arrangements that would potentially cause significant cost shifts to other customers. In addition, BED and VPPSA are concerned that the concept of the "Self-Managed Utility" not become a mechanism for customers (either GF or any others) to utilize to avoid ongoing requirements/obligations that exist for the VDUs and their other customers."

entities (Ask-intTag LLC, Vermont Emergency Medical Services, IBM, Marvell Semiconductor, Inc. and New England Federal Credit Union) lease from GF and pay GF for electricity under various arrangements embodying such concepts as differentiated charges for different types of usage,[19] provisions tied to wattage per square foot with a GF right to collect extra money for usage beyond incidental uses,"[20] and provisions making clear that GF is the party procuring the electricity.[21] The Ask-intTag lease is especially comprehensive in this regard, containing provisions for base and additional rents, creating rate classes and entailing an invoicing procedure that trues up actual and estimated payments surrounding electricity costs.[22] GF has also left no doubt of its intention to keep these arrangements in place, indicating in its September 9, 2021 response to the Commission's August 20, 2021 Requests for Information that it "intends to continue the existing arrangements with its tenants if the Self-Managed Utility is approved, absent a CPG condition limiting its ability to pass through ASK's pro rata share of the facility electric costs."

Given these facts, the Commission's inquiry as to whether GF's operations would constitute a "public service business" is readily answered in the affirmative. While "public service business" is not defined in Title 30, GF would be a business providing service to members of the public even under the construct it wrongly describes as a self-managed utility. The tenant customers:

- Are within the would-be GF geographic service territory
- Are on the grid
- Would be serviced by the GF utility system and equipment
- Purchase electricity from GF
- Would have no other choice of retail electric service provider under state law

None of this is legally different from the overarching construct in place for an electric ratepayer situated in the service territory of GMP, the Village of Jacksonville or any other of Vermont's electric utilities. Nor should it be lost that GF has made no discernible effort to comply with, or explain noncompliance with, the requirements of sections 101 and 102 of Title 30 relative to formation of public service corporations, perhaps because of the requirement that such entities be formed "*for the sole purpose* of conducting any one or more of the kinds of business, other than a railroad business, which are subject to regulation by the Public Utility Commission."[23] Had GF formed or overseen formation of the requisite separate entity, GF would itself be a customer of that entity, and its objective here defeated by a different but equally clear application of law. While the SMU concept is a worthy subject for discussion, perhaps as part of an overall revisiting of Title 30, our current statutes dictate that GF's requests be made at 115 State Street and not at 112.

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[19] See GF Fifth Supplemental Production to CLF at p. 215 (six different "electric space rates" within IBM lease).
[20] *Id*. at 22 (section 13.1(c) of Vermont Emergency Medical Services lease) and 361 (comparable provision in par. 10(5) of the New England Federal Credit Union lease).
[21] *Id*. at 290 (Marvell lease Exhibit A-3; "Licensor will procure all electricity."
[22] See GF Third Supplemental Production to CLF (redacted version of ASK-inTag lease) at 13-15, 17-18, 95 (page references to pdf).
[23] 30 V.S.A. §101 (emphasis added).

III. CONCLUSION

It is well settled that dismissal under V.R.C.P. 12(b)(1) and (6) is appropriate where no facts or circumstances exist that would entitle a petitioner to relief. *See Baldauf v. State Treasurer*, 2021 VT 29, 255 A.3d 731 (2021); *Wool v. Office of Professional Regulation*, 2020 VT 44, 212 Vt. 305, 310 (2020). While the business issues discussed by GF in its Petition may be worthy ones for legislative discussion and consideration, the incidental powers of the Commission cannot be used as a vehicle for creating new express ones, and Case 21-1107-PET must be dismissed because the Commission cannot grant the relief that GF seeks. Case 21-1109-PET must then be dismissed as moot, since the ceding of service territory requested by GMP in that case is entirely premised on GF's success in the SMU case.

For these reasons, AER respectfully requests that the Commission dismiss Case Nos. 21-1107-PET and 21-1109-PET.

Dated this 8th day of November, 2021.

AllEarth Renewables, Inc.

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