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 PREHEARING
MOTION FOR SUMMARY JUDGMENT

Conservation Law Foundation ("CLF") moves pursuant to V.R.C.P. 56 for judgment as a matter of law against GlobalFoundries U.S. 2 LLC ("GF"), and incorporates the following memorandum and appended Rule 56(c) statement and exhibits in support of its motion.

MEMORANDUM

GF is asking the Public Utility Commission (the "Commission") to do something the Legislature has not authorized the Commission to do. No Vermont statute authorizes the "self-managed utility" concept. No statute grants the Commission jurisdiction to establish by Order a "self-managed utility" or create and administer a regulatory regime for such an entity. Even assuming the Legislature had delegated some inexact jurisdiction over the "self-managed utility" concept, the Legislature has enacted no standards to guide the Commission's discretion in creating or regulating such an entity. Accordingly, the Commission cannot grant GF's Petition without exceeding its jurisdiction and authority.

The Commission also cannot grant GF's Petition because the Petition is predicated on a factual error: GF's basic assertion that the proposed "self-managed utility" would supply electricity only to itself is false. The "self-managed utility" would transmit, distribute, and sell electricity to members of the public operating businesses in the proposed service territory. The

"self-managed utility" would also sell electricity to GF but for the legal fiction that Vermont's utility formation statutes may be selectively nullified as to the "self-managed utility."

GF seeks relief that first requires a new Act of the Legislature establishing Commission jurisdiction and providing standards to guide the Commission's discretion. Until such a statute is enacted, the Commission must execute the law as it exists today. The Vermont Statutes do not provide for the creation or regulation of a so-called "self-managed utility." While GF "clearly believes that the scheme [it] suggests is superior . . . to that provided by law," GF "would do better to direct [its] comments to the Legislature rather than sow the seeds of interpretive latitude in and around an entirely clear statutory scheme." *See Stoll v. Burlington Elec. Dep't*, 2009 VT 61, ¶ 9. GF's proper venue is with the Legislature. Its Petition should be dismissed.

Issues Presented

1. Whether the Commission has jurisdiction to grant GF's request to operate a "self-managed utility" under what GF refers to as "*de minimis* regulation."

2. Whether GF's tenants are customers such that GF's operations, if it continued to provide power to those tenants, would constitute a public service business.

Short Answers

1. No. The Legislature has not granted the Commission jurisdiction over so-called "self-managed utilities." *See* Section I, *infra*.

2. Yes. The "self-managed utility" would transmit and distribute electricity to others who would compensate it for the value of that electricity. *See* Section II, *infra*.

Requested Relief

CLF respectfully requests that the Commission dismiss GF's Petition for lack of subject matter jurisdiction, lack of legislative standards, because § 231(a) would be rendered unlawful if used as GF requests, and because the Petition is predicated on legal and factual errors.

Standard of Review

The Commission "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); *see Hum. Rts. Def. Ctr. v. Correct Care Sols., LLC*, 2021 VT 63, ¶ 8. When the issue is whether the Commission has subject matter jurisdiction, the review concerns a pure question of law. *Stoll*, 2009 VT 61, ¶ 7; *see Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7, 10 (1941). Statutory construction also raises a question of law. *Hum. Rts. Def. Ctr.*, 2021 VT 63, ¶ 8; *In re Towne*, 2013 VT 90, ¶ 5.

Discussion

I. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO GRANT THE RELIEF GF REQUESTS IN ITS PETITION

GF asks the Commission to establish by Order a novel entity that GF dubs a "self-managed utility," GF Pet. ¶¶ 50-51, to override multiple important statutes as to that entity, *id.* ¶¶ 58-64, and to construct and administer a novel regulatory framework for the entity. *See id.* No statute provides jurisdiction or legislative standards to create or regulate a "self-managed utility." The Commission would exceed its authority if it were to wield 30 V.S.A. § 231 as GF requests.

A. No Act of the Legislature Grants the Commission Jurisdiction to Establish or Regulate a "Self-Managed Utility"

The Commission is "an agency of the Legislature." *Trybulski*, 112 Vt. at 7. An "agency must operate for the purposes and within the bounds authorized by its enabling legislation." *In re Agency of Admin., State Bldgs. Div.*, 141 Vt. 68, 75 (1982). The Commission thus "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the

will of the State as expressed by its legislation." *Trybulski*, 112 Vt. at 7.

Additionally, jurisdiction is not presumed. *Nordlund v. Van Nostrand*, 2011 VT 79, n.1 (noting the "Court does not presume jurisdiction when interpreting statutes of entities that did not exist at common law."); *In re Vill. of Morrisville Water & Light Dep't*, 2008 VT 95, ¶ 6 ("[W]e will presume nothing in favor of the [Commission's] jurisdiction."); *In re Dixon*, 123 Vt. 111, 113 (1962) (the Commission "is a body exercising special powers, solely statutory in nature. Presumption plays no part in aid of its jurisdiction.").

Indeed, the Commission has only that jurisdiction conferred on it by the Legislature. *Trybulski*, 112 Vt. at 7; *see In re Mathez Act 250 LU Permit*, 2018 VT 55, ¶ 13; *In re Club 107*, 152 Vt. 320, 322-23 (1989); *In re Agency of Admin.*, 141 Vt. at 75; *In re Dixon*, 123 Vt. 111; *In re Lake Sadawga Dam*, 121 Vt. 367, 370 (1960). The Commission thus may not award a remedy under a statute if that statute provides for no such relief. *See Nordlund*, 2011 VT 79, ¶ 10; *In re Brooks*, 135 Vt. 563, 571 (1977); *see also GMP v. Sprint Commc'ns*, 172 Vt. 416, 423 (2001) ("30 V.S.A. § 7008(a) does not expressly confer upon the Vermont Public Service Board the authority to" provide the requested relief and the "exercise of jurisdiction can be neither presumed nor implied."). Nor may the Commission award a remedy that would thwart the Legislature's will as expressed in statutes. The "Legislature's responsibility" is "totally abandoned" when "the power to reduce, nullify, or change the Legislature's priorities is given over to the total discretion of another branch of government." *Hunter v. State*, 2004 VT 108, ¶ 28 (2004) (citation omitted) (brackets removed from original); *see In re Vill. of Morrisville Water & Light Dep't*, 2008 VT 95, ¶¶ 5, 8 (finding the Commission lacks jurisdiction when a petitioner claims existing laws *do not* apply to it and thus seeks a remedy outside of the Commission's legislatively delegated authority).

Based on these principles, and as explained below, the Commission lacks jurisdiction to grant the relief GF requests. Simply put, the Commission has "never received the authority from the legislature which [GF] is attempting [it] to exercise." *In re Dixon*, 123 Vt. at 115–16.

1. Section 231 and Chapter 5 of Title 30 Provide No Basis for Jurisdiction

GF's Petition seeks a certificate of public good ("CPG") issued under 30 V.S.A. § 231(a). That statute, however, provides no jurisdictional basis for the creation or regulation of a so-called "self-managed utility." When "construing statutes, our principal goal is to effectuate the intent of the Legislature." *Khamnei*, 2018 VT 19, ¶ 8; *see Hum. Rts. Def. Ctr.*, 2021 VT 63, ¶ 9. "We first look to the language and give effect to the plain meaning of the statutory language used because we presume that it shows the intent of the Legislature." *Khamnei*, 2018 VT 19 (citation omitted); *see Hum. Rts. Def. Ctr.*, 2021 VT 63, ¶ 9; 9; *In re Agency of Admin.*, 141 Vt. at 80. "Where that language is clear and unambiguous, this is also where our inquiry ends: we enforce the enactment according to those terms." *Hum. Rts. Def. Ctr.*, 2021 VT 63, ¶ 9.

We thus turn first to the operative language of § 231. *See id.* ¶ 10. That section states:

> (a) A person, partnership, unincorporated association, or previously incorporated association that desires to own or operate a business over which the Public Utility Commission has jurisdiction under the provisions of this chapter shall first petition the Commission to determine whether the operation of such business will promote the general good of the State, and shall at that time file a copy of any such petition with the Department. The Department, within 12 days, shall review the petition and file a recommendation regarding the petition in the same manner as is set forth in subsection 225(b) of this title. Such recommendation shall set forth reasons why the petition shall be accepted without hearing or shall request that a hearing on the petition be scheduled. If the Department requests a hearing on the petition, or, if the Commission deems a hearing necessary, it shall appoint a time and place in the county where the proposed corporation is to have its principal office for hearing the petition. At least 12 days before this hearing, notice of the hearing shall be published on the Commission's website and once in a newspaper of general circulation in the county in which the hearing will occur. The website notice shall be maintained through the date of the hearing. The newspaper notice shall include

> an Internet address where more information regarding the petition may be viewed. The Director for Public Advocacy shall represent the public at the hearing. If the Commission finds that the operation of such business will promote the general good of the State, it shall give such person, partnership, unincorporated association, or previously incorporated association a certificate of public good specifying the business and territory to be served by such petitioners. For good cause, after opportunity for hearing, the Commission may amend or revoke any certificate awarded under the provisions of this section. If any such certificate is revoked, the person, partnership, unincorporated association, or previously incorporated association shall no longer have authority to conduct any business which is subject to the jurisdiction of the Commission whether or not regulation thereunder has been reduced or suspended, under section 226a[1] or 227a[2] of this title.
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> (b) A company subject to the general supervision of the Public Utility Commission under section 203 of this title may not abandon or curtail any service subject to the jurisdiction of the Commission or abandon all or any part of its facilities if it would in doing so effect the abandonment, curtailment, or impairment of the service, without first obtaining approval of the Public Utility Commission, after notice and opportunity for hearing, and upon finding by the Commission that the abandonment or curtailment is consistent with the public interest; provided, however, this section shall not apply to disconnection of service pursuant to valid tariffs or to rules adopted under subsections 209(b)[3] and (c)[4] of this title.
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> (c) An energy storage aggregator that operates an energy storage facility is subject to this section only if the aggregator is not a retail electric provider.

30 V.S.A. § 231.

The text of § 231 is clear and the opportunities available to a petitioner under that provision are circumscribed. Section 231 does "not give the Commission open-ended authority."

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[1] 30 V.S.A. § 226a pertains to "[c]ontracts regarding basic exchange telecommunications services," and is inapposite to this Proceeding.

[2] 30 V.S.A. § 227a pertains to "[p]ricing of competitive telecommunications services," and does not weigh upon this Proceeding.

[3] 30 V.S.A. § 209(b) delegates rulemaking authority to the Commission under the now repealed provisions of 3 V.S.A. §§ 803-804 to adopt rules that conform to standards about the extension of utility service to customers or applicants for service, the grounds upon which companies may disconnect or refuse to reconnect service to customers, and disconnecting and reconnecting services and billing to customers thereto. *See* 30 V.S.A. §§ 209(b)(1)-(3). That provision is inapposite to this Proceeding.

[4] 30 V.S.A. § 209(c) provides additional standards to guide the Commission's delegated rulemaking authority under § 209(b), *supra*. It is also inapposite.

See In re Mathez Act 250 LU Permit, 2018 VT 55, ¶ 14. Its three subsections are finite, limited in scope, and do not authorize the Commission to grant the relief GF requests. Section 231(a) is the provision under which GF lodges its Petition. It establishes processes to seek certification of a legislatively authorized type of business by filing a petition with the Commission and the Department of Public Service ("DPS"). § 231(a). Section 231(a) expressly limits the Commission's jurisdiction by restricting issuance of a CPG to "a business over which the Public Utility Commission has jurisdiction under the provisions of [Chapter 5]." *Id.*[5] Importantly, the proposed "self-managed utility" is absent from Chapter 5, as is any other similar type of business. *See* §§ 201-255.[6] The Legislature has not authorized a "self-managed utility" as a business over which the Commission has § 231(a) jurisdiction. GF's Petition should be dismissed on this basis alone.

For a petition that does pertain to a legislatively authorized business, § 231(a) establishes the standards of review for issuance, revocation, and amendment of a CPG. *Id*. Tellingly,

[5] Because § 231(a) appears in Chapter 5 of Title 30, the plain meaning of "this chapter" is Chapter 5.

[6] *See, e.g.*, 30 V.S.A. § 201 (providing a series of "definitions" – including the definition of "[c]ompany" and "companies" – that do not include a "self-managed utility" or anything reasonably similar); § 202a (describing the State's energy policy without describing a "self-managed utility" as being part of that policy); § 202b (describing the State's comprehensive energy plan without a "self-managed utility" being part of that plan); § 203 (enumerating several "described companies" over which the Commission has general supervisory jurisdiction, none of which include a "self-managed utility" or similar such entity); § 209(a) (describing general jurisdiction over matters pertaining to the charter or articles of a corporation without providing for the incorporation or charter of a "self-managed utility"; and referring to "each kind of business subject to supervision" without describing a "self-managed utility"); § 209(b)–(k) (describing many different legislative directives, including "self-managed energy efficiency programs," but omitting any directive as to a "self-managed utility"); § 209c (describing an electricity affordability program that makes no mention of a "self-managed utility" as a means for achieving affordability for any entity); § 248 (permitting electric purchases outside the State but only for a company defined in § 201, which does not define a "self-managed utility" or any other reasonably similar entity); § 249 (granting jurisdiction to establish a service territory but only for "companies subject to [the Commission's] supervision," which, under Chapter 5, do not include "self-managed utilities").

however, GF's Petition concedes that the Commission's own factors used to evaluate issuance of a CPG "do not directly fit the Self-Managed Utility model." GF Pet. ¶ 51. Even GF does not think § 231(a) is a clean fit.[7]

Nor do §§ 231(b) or (c) provide relevant jurisdiction. Section 231(b) establishes procedures necessary for a company subject to Commission jurisdiction to obtain approval prior to abandoning or curtailing services or facilities. That provision has no bearing on GF's request to form and regulate a novel "self-managed utility." Nor does the nascent § 231(c) provide jurisdiction. It was recently added to § 231 pursuant to Vt. Laws No. 54, H.431 (2021), and authorizes the Commission to issue an Order under § 231(a) as to an "energy storage aggregator that operates an energy storage facility" only if such entity is "not a retail electricity provider." § 231(c). The plain terms of that provision do not encompass a "self-managed utility."

In sum, the provision upon which GF predicates its Petition, § 231(a), does not endow the Commission with jurisdiction to create and regulate a novel "self-managed utility." Nor do §§ 231(b) or (c) provide such jurisdiction. The Commission thus lacks jurisdiction to grant the relief GF requests. The Commission also lacks incidental jurisdiction to grant such relief. Incidental powers are vehicles for effectuating express powers. Without express jurisdiction there is no incidental jurisdiction. "Something cannot be incidental to nothing." *In re Agency of Admin.*, 141 Vt. 68, 80 (1982); *see also In re Vill. of Morrisville Water & Light Dep't*, 2008 VT 95, ¶ 7. GF's request to create and regulate a novel "self-managed utility" from whole cloth is

[7] GF's Petition also refers to 30 V.S.A. § 218e. *See, e.g.*, GF Pet. ¶ 44. As GF notes, that provision pertains to the State's energy policy. *See id*. It does not establish the "self-managed utility" concept, grant jurisdiction to the Commission to create such an entity, or provide any legislative standards to guide the Commission's discretion in regulating any such entity. *Id.* To hold otherwise would be to read the "self-managed utility" concept into § 218e and construe that provision in a manner that exceeds the Commission's authority. *See also* Section I.B, *infra*.

not incidental to any express jurisdiction found in § 231 or Chapter 5. *See* §§ 201–255. Nor is GF's request "incidental to the general supervisory power of the Commission." *Trybulski,* 112 Vt. at 10. GF's Petition should be dismissed for lack of subject matter jurisdiction.

2. The Legislature Would Have Granted Clear Jurisdiction Had It Intended the Commission to Create and Regulate "Self-Managed Utilities"

When the Legislature intends the Commission to create and regulate of a novel type of entity, the Legislature expressly grants such authority. It did not do so here. For example, when considering the merits of the "self-managed energy efficiency program" ("SMEEP"), the Legislature created a pilot program under the Commission's § 209 jurisdiction. *See* Vt. Laws No. 45, H.446, Sec. 14 (2009), *previously codified as* 30 V.S.A. § 209(h), *repealed*. When the Legislature then created SMEEP in 2013, it expressly granted the Commission jurisdiction under § 209. *See* Vt. Laws No. 89, H.520, Sec. 2 (2013) *codified as* 30 V.S.A. §§ 209(a) & 209(j). Specifically, the Legislature stated that "the Commission shall have jurisdiction . . . in all matters respecting" the "self-managed energy efficiency program." *Id.* The Legislature established that jurisdiction on express findings, *see id.* Sec. 1(1) & (8),[8] and there was no doubt that SMEEP extended to the Essex facility. *See id.* Sec. 2, *codified as* 30 V.S.A. § 209(j)(4)(A).[9] In fact, § 209(j)(4)(A) was amended and § 209(j)(5) was added to Title 30 in a manner accommodating GF's acquisition of that facility. Vt. Laws, No. 56, H.40, Sec. 15 & 15a (2015).

GF has stated that its "model for a 'virtual utility' might be built off the Self-Managed

[8] The Legislature found that the "primary driver of climate change in Vermont and elsewhere is the increase of atmospheric carbon dioxide (CO_2) from the burning of fossil fuels" and that the "State must encourage the efficient use of energy." Vt. Laws No. 89, H.520, Sec. 1(1) & (8). GF argues that its "self-managed utility" should be exempt from SMEEP. *See* GF Pet. at 22.

[9] "SMEEP has historically only been available to the state's largest electricity user – Global Foundries of Essex Junction." *See* Press Release of the Office of Governor Phil Scott, *New Energy Efficiency Programs Will Reduce Cost of Doing Business in Vermont* (June 10, 2018).

Energy Efficiency Program (30 V.S.A. §209(j))," and that GF understands a "virtual utility" would require a "permanent policy change" in Vermont. *See* REPORT REGARDING COLLABORATIVE PROCESS, Case No. 18-3160, at 27 (Dec. 30, 2019). GF should heed the approach used to create SMEEP: When establishing "self-managed" entities that require permanent policy changes, go to the Legislature where jurisdiction may be created.

Had the Legislature intended to confer the Commission with jurisdiction to create and regulate a "self-managed utility" pursuant to § 231(a), the Legislature would have done so expressly in § 231(a) or in another appropriate provision of Chapter 5. It has not done so. *See* 30 V.S.A. §§ 201–255. The unambiguous absence of jurisdiction is fatal to GF's Petition.

3. Granting GF the Relief it Requests Would Require Reading the Proposed "Self-Managed Utility" Into the Vermont Statutes

Grants of jurisdiction to create and regulate a "self-managed utility" "do not appear in the statute—in other words, they were inserted by [GF], not the Legislature." *See Hum. Rts. Def. Ctr.*, 2021 VT 63 n.3. GF's Petition, if granted, would have the Commission do the same by reading the proposed "self-managed utility" concept and regulatory regime into the Vermont Statutes. Under Vermont law, however, "[c]ourts supply words to a statute under very limited circumstances including where necessary to avoid repugnancy or inconsistency with legislative intent or where words obviously are omitted." *Khamnei*, 2018 VT 19, ¶ 9 (citation omitted). Those are "narrow exceptions," *id.*, that do not apply in this case.

Reading the "self-managed utility" concept into § 231(a) and Chapter 5 is not "necessary to avoid . . . inconsistency with legislative intent." *See Khamnei*, 2018 VT 19, ¶ 9. The absence of the "self-managed utility" from § 231(a) and Chapter 5 is not inconsistent with the purposes of those provisions – neither of which contemplate any such entity or regulatory regime. *See*

Khamnei, 2018 VT 19, ¶ 9. Indeed, multiple provisions of Chapter 5 are contrary to the proposed "self-managed utility."[10] Reading the "self-managed utility" into Chapter 5 would create, not resolve, inconsistencies.[11]

Further, there is no reasonable indication the Legislature obviously and unintentionally omitted the proposed "self-managed utility" from § 231(a) and Chapter 5. *See Khamnei*, 2018 VT 19, ¶ 9. For example, the Legislature amended § 231 in 2021 by adding § 231(c), *see* Vt. Laws No. 54, H.431 (2021), but did not indicate at that time that it also intended to add the "self-managed utility." *See id.* Nor has the Legislature obviously forgotten to add the "self-managed utility" to the ranks of entities over which the Commission has jurisdiction. When the Legislature has amended the § 201 definition of "companies" over which the Commission has jurisdiction to include a special type of utility, the Legislature does so expressly. For example, the Legislature did so when it defined the Vermont Public Power Supply Authority ("VPPSA") as a "company" under § 201. *See* Vt. Laws, No. 170, H.B. 742 (1992). At that time, the

[10] *See, e.g.*, 30 V.S.A. § 202a (incorporating the greenhouse gas emission reduction requirements of 10 V.S.A. § 578(a), which are antithetical to the "self-managed utility" as GF has proposed it); § 209(j) *as enacted by* Vermont Laws No. 89, H. 520, Sec. 1(8) (2013) (creating the "self-managed energy efficiency program" for the express purpose of "reduc[ing Vermont's] greenhouse gas emissions and consumption of fossil fuels," which GF indicates – on page 22 of its Petition – is inconsistent with the proposed "self-managed utility"); § 255(a) (noting the Legislature's express findings that "increased anthropogenic emissions of greenhouse gases are enhancing the natural greenhouse effect" and that "[c]limate change poses serious potential risks to human health and terrestrial and aquatic ecosystems globally, regionally, and in Vermont"); § 218 (requiring rate setting, which is contrary to the "self-managed utility"); § 218c (requiring least-cost integrated planning, which is contrary to the proposed "self-managed utility"); § 219 (requiring that "[e]ach company subject to supervision under this chapter shall be required to furnish reasonably adequate service, accommodation, and facilities to the public," which is contrary to the proposed "self-managed utility" as described by GF); § 225 (requiring "each company subject to the provisions of [Chapter 5] to file" rate schedules, which is antithetical to the proposed "self-managed utility"); § 255(a) (noting the Legislature's express findings that "increased anthropogenic emissions of greenhouse gases are enhancing the natural greenhouse effect" and that "[c]limate change poses serious potential risks to human health . . . in Vermont.").

[11] *See supra*, note 10.

Legislature also notably enacted additional legislation to provide the § 201 "company" with sufficient clarity, *id.* (establishing 30 V.S.A. §§ 4002, 4002a, 5012), and it enumerated its intent to guide the Commission's discretion. *See id.* Nothing like that has occurred for the "self-managed utility." There is no reasonable indication the Legislature unintentionally forgot to grant the Commission jurisdiction over "self-managed utilities." *See Khamnei*, 2018 VT 19, ¶ 9.

Finally, the absence of the "self-managed utility" concept from § 231(a) and Chapter 5 does not cause a repugnancy necessitating that the "self-managed utility" be read into the Vermont Statutes. *See Khamnei*, 2018 VT 19, ¶ 9. Section 231(a) and Chapter 5 are directed towards the equitable provision of public utility benefits to all Vermont consumers, not the creation of a special utility for the unique benefit of one corporation. *See* §§ 201-255. Reading the "self-managed utility" into § 231(a) and Chapter 5 would manufacture, rather than solve, a repugnancy. *See Khamnei*, 2018 VT 19, ¶ 9.

GF's Petition "fails since its effect would be to enlarge the jurisdiction of the [Commission]" by reading the "self-managed utility" into Chapter 5. *See In re Boocock*, 150 Vt. 422, 426 (1988); *see also Khamnei*, 2018 VT 19 n.2 (noting the "statute was enacted by the Legislature and became law" and "[t]herefore, to read [absent text] into the statute would require this Court to revise the existing language"). "Nor can the Commission create a new procedure in order to address [GF's] concerns." *In re Mathez Act 250 LU Permit*, 2018 VT 55, ¶ 15. GF's additive interpretation of Title 30 should be rejected.

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The Commission enforces statutes according to the terms enacted by the Legislature. *See Hum. Rts. Def. Ctr.*, 2021 VT 63, ¶ 9. Unless and until the Legislature authorizes the

Commission to provide the relief GF requests, the Commission may not do so.[12] The Legislature is the only branch of government that can expand the Commission's jurisdiction. *See In re Dixon*, 123 Vt. at 115–16 ("[W]e are convinced that this is a matter solely for the Legislature to determine and that we cannot extend the jurisdiction of public service board by decision."). The Legislature is the proper venue for GF to achieve its goals. GF's Petition should be dismissed.

B. GF's Petition Asks the Commission to Wield Unlawful Powers

GF's Petition, if granted, would require the Commission to exceed limits imposed by the Vermont Constitution. Under "our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government." *In re Agency of Admin.*, 141 Vt. at 75. The Constitution provides that the "Supreme Legislative power shall be exercised by a Senate and a House of Representatives," VT. CONST. ch. II § 2, and that the "Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." VT. CONST. ch. II § 5. "It is one of the fundamental principles of the American constitutional system that the governmental powers are divided among the three departments of government, the legislative, executive, and judicial, and that each of these is separated from the others." *Vill. of Waterbury v. Melendy*, 109 Vt. 441, 447 (1938). Because of practical realities of governance, however, the "constitution does not require a rigid analytical classification in which every conceivable activity of government is assigned once for all exclusively to one of the three departments." *Trybulski*, 112 Vt. at 6–7. The Commission may, and as a practical matter must, exercise discretion when

[12] *Compare NH-Vt. Physician Serv. v. Comm'r, Dep't of Banking & Ins.*, 132 Vt. 592, 596 (1974) (concluding Commissioner exceeded statutory authority), *with In re Vt. Health Serv. Corp.*, 155 Vt. 457, 464 (1990) (finding the Legislature "enacted 8 V.S.A. §§ 4513(c) and 4584(c) to overrule *New Hampshire-Vermont Physician Service*," *supra*, by expressly granting the authority previously absent).

"carrying into effect the will of the State as expressed by its legislation." *Id.* at 7. That said, the Commission's discretion is circumscribed by lines that granting GF's Petition would cross.

1. GF Seeks Relief That Would Encroach a Pure Legislative Function

GF's Petition seeks relief that if granted would impinge the core lawmaking function of the Legislature. This is because GF's Petition would require the Commission to unilaterally authorize, create, and regulate a type of entity that is nowhere found in Title 30. *See* 30 V.S.A. §§ 1–8105. The "commission, in order to act, must say what the law shall be" as to "self-managed utilities" and thereby encroach a pure legislative function. *See Vill. of Waterbury*, 109 Vt. at 453.

However, an agency may "not encroach upon the strictly legislative functions of the Legislature" because the "functions of the Legislature, which are purely and strictly legislative, cannot be delegated, but must be exercised by it alone." *Id.* at 448, 450. The Commission plainly has discretion to execute existing laws. *Trybulski*, 112 Vt. at 7. But the "power to *enact laws* is inherently legislative and nontransferable." *Mass. Mun. Wholesale Elec. Co. v. State*, 161 Vt. 346, 358 (1994) (emphasis added).

The key "distinction [that] is consequently drawn [is] between" (1) "a delegation of *the power to make the law which necessarily includes a discretion as to what it shall be* and" (2) "the conferring of authority or *discretion as to its execution*." *Vill. of Waterbury*, 109 Vt. at 451 (emphasis added). "The first cannot be done" by the Commission. *Id.* Only the Legislature has discretion to say what the law shall be. *Id.*; *see also* VT. CONST. ch. II § 2. And the second is not at issue in this Proceeding because no provision of Title 30 contains any existing "self-managed utility" law for the Commission to execute. *See* §§ 1–8105.

Granting GF's Petition in the absence of a statute stating what the law shall be as to "self-

managed utilities" would require the Commission to fill a legal void with a § 231(a) Order saying for the first time what "self-managed utility" law shall be in Vermont. This cannot be done. *See Vill. of Waterbury*, 109 Vt. at 451. No general authority allows,[13] nor can it allow,[14] the Commission to have discretion to use § 231(a) to cut Vermont's "self-managed utility" law from whole cloth. *See also Trybulski*, 112 Vt. at 10 ("To give the statute the meaning claimed by the petitioners would be to render it unconstitutional").

2. No Legislative Standards Exist to Guide the Commission's Discretion

Even assuming for the sake of argument that 30 V.S.A. § 231(a) or another provision of Title 30 authorized the "self-managed utility" concept in some general way, no statute has established any standard to guide the Commission's discretion in executing the Legislature's will over that concept. The lack of any guiding standard is critical. "When legislative power is delegated to administrative officials it is constitutionally required that adequate guides and standards be established by the delegating legislative body so that the administrative officials, appointed by the executive and not elected by the people, will not legislate, but will find and apply facts in a particular case in accordance with the policy established by the legislative body." *In re Handy*, 171 Vt. 336, 346 (2000) (citation omitted).

As noted, the Commission is charged by the Legislature with "carrying into effect the will of the State as expressed by its legislation." *Trybulski*, 112 Vt. at 7. The Commission's "powers and duties are [thus] to be prescribed in terms definite enough to serve as a guide to those [at the Commission] who have the duty imposed upon them." *See Taconic Racing &*

[13] 30 V.S.A. §§ 1–8105.

[14] VT. CONST. ch. II § 2; *Vill. of Waterbury*, 109 Vt. at 448.

Breeding Ass'n, Inc. v. Vt. Dep't of Pub. Safety, 130 Vt. 388, 391 (1972) (citation omitted). Here, the Legislature has created no such standards in § 231(a) or any other provision of Title 30 as to the creation or regulation of "self-managed utilities." *See* §§ 1-8105.

This is gravely problematic for GF's Petition because "[a]ny law which authorizes . . . administrative functions . . . without being controlled or guided by any definite rule or specified conditions to which all similarly situated may conform, is unconstitutional and void." *Vill. of Waterbury*, 109 Vt. at 451–52. Because the Legislature has created no standards to guide the Commission's discretion as to the "self-managed utility" concept, *see* §§ 1–8105, the Commission would exceed its authority by wielding Title 30 in the manner GF requests. *Vill. of Waterbury*, 109 Vt. at 451–52.

When the Legislature has intended the Commission to create and regulate a novel type of "self-managed" entity, the Legislature has established clear guiding principles. It did so when it authorized SMEEP entities generally, 30 V.S.A. § 209(j)(1), and when it specifically authorized the "Commission, by order [to] enact [that] class of programs," § 209(j)(2), exempted that class from otherwise applicable legal requirements, § 209(j)(3), and defined clear standards that "shall apply to [the] class of programs under this subsection." § 209(j)(4). The Legislature then listed and plainly described multiple standards that guide the Commission's discretion over the creation and regulation of SMEEP entities. *See* §§ 209(j)(4)(A)–(N).[15]

[15] The standards include guidance as to program eligibility, § 209(j)(4)(A), administration fees, § 209(j)(4)(B), applicant reporting requirements, § 209(j)(4)(C), minimum average annual investments, § 209(j)(4)(D), a penalty for failure to comply with the investment requirements, § 209(j)(4)(N), other programmatic requirements, § 209(j)(4)(E), participant accounting requirements and Commission auditing powers, § 209(j)(4)(F), annual Commission reports to the Legislature, § 209(j)(4)(G), application requirements, § 209(j)(4)(H), a guiding standard to terminate participation in the program and regulate subsequent consequences, §§ 209(j)(4)(I)(i)–(iii), data confidentiality standards and countervailing production and public records requirements, §§ 209(j)(4)(J)–(K), and standards for certain interactions

"The principal difference between schemes that have been upheld and those that have been struck down is whether there are any standards for the exercise of discretion." *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 13 (citation omitted); *see also In re Handy*, 171 Vt. at 346; *Taconic Racing & Breeding Ass'n, Inc.*, 130 Vt. at 391; *Vill. of Waterbury*, 109 Vt. at 451–52. Here, there are none. The Legislature has provided no standards whatsoever for a "self-managed utility." *See* §§ 1-8105.

Moreover, GF's Petition becomes yet more problematic because it also asks the Commission to deviate from factors the Commission uses when evaluating a legislatively authorized business under § 231(a). *See* GF Pet. ¶ 51. The implication of that request is made plain by GF itself, which states that the Commission's factors "do not directly fit the Self-Managed Utility model." *Id*. According to GF, those factors "reflect a regulatory concern with ensuring quality and continuity of service by traditional utilities," *id.*, not GF's novel "self-managed utility." GF thus asks the Commission to apply the factors "only to the extent they make sense based on the structure proposed" by GF. *Id.* However, non-legislative factors used to evaluate an unauthorized type of business only "to the extent they make sense based on the structure proposed" provide no standard at all. The factors could change for each different "self-managed utility" depending on the "structure proposed" by a petitioner. The Legislature has not authorized any standards to guide the creation and regulation of a "self-managed utility." Nor has it authorized deviation from any such standards when doing so "make[s] sense."

*

GF's Petition asks the Commission to create what amounts to new law and then execute

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with ISO-NE and other governments' funding programs. *See* §§ 209(j)(4)(L)(i)–(ii), (M).

that law without legislative standards to guide its discretion. Doing so would exceed constitutional limits. In construing § 231(a), "we will assume that the Legislature did not overlook the provisions of the Constitution and did not intend to transfer the jurisdiction of the [Legislature] in this respect to the Public [Utility] Commission." *Trybulski*, 112 Vt. at 10 (citation omitted). Section 231(a) "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *See State v. Auclair*, 110 Vt. 147, 4 (1939). As such, GF's Petition should be dismissed.

II. THE "SELF-MANAGED UTILITY" WOULD SERVE MEMBERS OF THE PUBLIC

The material facts are not genuinely disputed. The documents speak for themselves. The Parties dispute only how Title 30 operates upon those facts, which is a question of law. GF's Petition revolves around a central claim that the proposed "self-managed utility" would not be a public service business because it would serve only itself. *See* Section II.A, *infra*. That claim is predicated on a factual error: the "self-managed utility" would transmit and distribute electricity to multiple members of the public. *Id.* The "self-managed utility" also would be compensated by those members of the public for the value of the electricity they use. *See* Section II.B, *infra*. GF's central claim is also predicated on a legal fiction: the proposed "self-managed utility" would sell electricity to GF itself but for the selective nullification of statutes requiring utility formation. *See* Section II.C, *infra*. GF's Petition should be denied on these bases. In the alternative, if GF is permitted to acquire electricity and transmit and distribute that electricity to members of the public, then GF should adhere to all applicable existing statutes without exemption. *See, e.g.*, 30 V.S.A. ch's 3 & 89; 30 V.S.A. § 202a(3) (incorporating 10 V.S.A. § 578(a)); 30 V.S.A. §§ 22(a)(1)(A) & (a)(2)(A), *et cetera*.

A. GF's Petition Relies on A False Claim That the Proposed "Self-Managed Utility" Would Transmit and Distribute Electricity Only to Itself

The term "public service business" is not defined in Title 30. *See* §§ 1-8105.[16] However, lengthy analysis about that definition is not required. An entity that acquires, transmits, and distributes electricity to members of the public is functionally a public service business and should be accountable as one.

However, GF's Petition asks the Commission to construe the proposed "self-managed utility" as something other than a "public service business" because the "the Self-Managed Utility will not engage in a 'public service business.'" GF Pet. ¶ 60. That circular reasoning relies on a lynchpin premise that the proposed "self-managed utility" would "not *distribute or sell electricity* to the public." GF Pet. at 22 ¶ 3.e (emphasis added). GF's Petition presumes that an entity that distributes *or* sells electricity to the public is a public service business. *Id.* GF therefore goes out of its way to claim that the "self-managed utility" would serve only itself.

For example, GF states in its Petition that the proposed "Self-Managed Utility will supply only GLOBALFOUNDRIES U.S. 2 LLC." GF Pet. ¶ 26. Mr. Gregory Rieder avers that "GLOBALFOUNDRIES U.S. 2 LLC will procure and provide electricity only to itself." *See* Rieder Direct at 23:13-14. GF realleges that assertion as its first argument supporting its analysis under the § 231(a) CPG standard. GF Pet. ¶ 51 (emphasis added) (stating that the § 231 "criteria do not directly fit the Self-Managed Utility model *wherein GLOBALFOUNDRIES will serve only itself*."). GF also makes the claim to explain its desire for a "self-managed utility." *Id.* at ¶

[16] That undefined term does not provide jurisdiction to create or regulate the proposed "self-managed utility." Nor does it provide legislative standards to guide the Commission's discretion as to the creation or regulation of "self-managed utilities." As described in Section I, *supra*, the Legislature has not authorized relevant jurisdiction nor created standards to guide the Commission's discretion.

5 (emphasis added) ("In order to better manage its power costs and preserve the ongoing viability and competitiveness of its Vermont operations, GLOBALFOUNDRIES seeks to operate an independent, self-managed utility . . . that would serve only its own distribution network and *supply only its own load*."). GF's core premise was adopted in testimony filed by DPS[17] and Green Mountain Power ("GMP"),[18] and was adopted in GMP's Petition.[19]

However, GF's central claim is false. GF would both distribute and sell electricity to members of the public. GF currently transmits and distributes electricity to at least five members of the Public operating their businesses in the proposed service territory: Ask-intTag LLC ("Ask-intTag"), International Business Machines Corporation ("IBM"), Garnett EMS,[20] New England Federal Credit Union ("NE Credit Union"), and Marvell Semiconductor, Inc. ("Marvell"). *See* GF Responses to CLF Discovery appended hereto as Exhibit 1 (A.CLF.GF.2.a). Those members of the public compensate GF for the electricity they consume under the terms of lease agreements. Section II.B, *infra.* GF plans to continue transmitting and distributing electricity to them if it operates the so-called "self-managed utility." *See* GF Responses to Commission RFI appended hereto as Exhibit 2 (A.GF.PUC.2nd RFI.2.a-2.c). Those members of the public would thus operate their businesses in the proposed "self-managed

[17] *See* McNamara Direct at 7:10 ("It is also important to recognize that GF's only end-use customer would be itself.")

[18] *See* Castonguay Direct at 38:5 (accepting that "GF [would be] operating as a utility that supplies only itself."); Castonguay Rebuttal at 4:18-19 (noting that GMP's ratepayer impacts analysis is predicated on an assumption that "GF becomes its own utility, serving only itself").

[19] *See* GMP Pet. at p. 2 ¶ 3 ("GF is requesting approval to become its own utility serving only itself.").

[20] In response to Q.CLF.GF.2.a, *see* Exhibit 1, GF identified one of the members of the public now operating at the Essex facility as Garnet EMS. However, GF did not produce any lease bearing a party named "Garnet EMS." GF produced a lease bearing the name Vermont Emergency Medical Services, LLC. *See* Exhibit 8. Because GF uses the name Garnet EMS, CLF also uses that name.

utility" service territory, *see* "Exhibit MOU-2" appended hereto as Exhibit 3, which contains undeveloped areas that could accommodate additional members of the public who would become electricity customers of GF. *Id.* Moreover, GF's proposed "self-managed utility" would sell surplus electricity back into the market, *see* GF Responses to DPS Discovery appended hereto as Exhibit 4 (A.PSD.GF.4); Ex. 1 (A.CLF.GF.10.b), which GF acknowledges would constitute a "wholesale sale of power." Ex. 1 (A.CLF.GF.10.c). That wholesale electricity would ultimately be consumed by the public.

As explained in more detail below, GF's claim that the proposed "self-managed utility" would serve only itself is predicated on a factual error and a legal fiction.

B. The Proposed "Self-Managed Utility" Is Predicated on a Factual Error

Contrary to GF's claim that the "self-managed utility" would serve only itself, the record is clear that it would transmit and distribute electricity to members of the public operating businesses inside the proposed service territory. *See* Section II.A, *supra*. As described below, GF also structures different electricity rate classes for Ask-intTag, IBM, Garnet EMS, NE Credit Union, and Marvell in the plain terms of lease agreements. Those members of the public pay for the electricity they consume pursuant to those lease agreements, in which electricity charges are masked with labels like "base rent," "additional rent," "additional required services," "license fee," "electric space rate," "invoice" and other terms. Regardless of the term used in a given lease, it is undisputable that electricity is transmitted and distributed from GF to members of the public. Each lease also provides terms for how a member of the public compensates GF for the electricity it consumes. And each lease contains provisions that allow GF to adjust rent when a tenant's electricity uses increase. In these ways, GF passes through each tenant's pro rata share of the Essex facility's electricity costs. GF's claim that its "tenants do not pay for electricity,"

see Ex. 2 (A.GF.PUC.2nd RFI.2.d), is not accurate. Payments occur through lease agreements.

1. GF Transmits, Distributes, and Sells Electricity to Ask-intTag

GF produced Ask-intTag lease materials. *See* Redacted Ask-intTag Lease appended hereto as Exhibit 5. According to those materials, GF provides Ask-intTag electricity "twenty-four (24) hours/day and 7 days/week," Ex. 5 at 250, and Ask-intTag acquires all its electricity from GF. *Id.* at 172. GF maintains "an accurate accounting system" of all electricity charges and allows Ask-intTag to access that information to verify the invoices GF issues. *Id.* at 170.

a. GF Uses "Base" and "Additional Rent" to Charge Ask-intTag for the Electricity Ask-intTag Consumes

The Ask-intTag lease provides for Base Rent and Additional Rent. Each is described below, as relevant. Under the lease, GF "shall be the only provider" of Base Rent services. Ex. 5 at 171. Those services include transmission of electricity through GF's distribution system, *id.* at 247, 250, which under GF's Petition would be operated by the "self-managed utility" in its new service territory. Additional Rent is distinct from Base Rent. *Id.* at 169, 172. GF uses Additional Rent to charge Ask-intTag two electricity rate classes: (i) a "manufacturing" or "non-office" rate class, and (ii) an "office" rate class. Each is described below.

i. The "Manufacturing" or "Non-Office" Electricity Rate Class

The larger of the two rate classes applies to "manufacturing" or "non-office" electricity consumption. *See* Ex. 5 at 172-173. The "[c]alculation of Electrical Costs for non-office space shall be based on the consumption and demand charges per kilowatt hour set forth in the invoice of the [Essex facility's] electricity utility service provider" (*i.e.*, GMP), *id.* at 172; *see also id.* at 250, which under GF's Petition would be the proposed "self-managed utility." The "measurement of consumption shall be determined by meters" and "verified in writing by [GF's]

meter reader." *Id.* at 172-173; *see* Ex. 1 (A.CLF.GF.2.d). Ask-intTag "shall pay the actual . . . costs of electricity consumed by [it] at the Leased Premises." Ex. 5 at 172; *see id.* at 312-314.

ii. The "Office" Electricity Rate Class

The second rate class applies to the electricity consumed by Ask-intTag in its office spaces. *See* Ex. 5 at 173, 250, 316.[21] GF charges a "fee based on projected electricity needs for office space," *id.* at 173, that Ask-intTag then pays monthly. *Id.* at 250, 310. The 2021 and 2022 base "Office Electricity" rate is $741.52 per month. *Id.* at 316. The projected 2023 "Office Electricity" rate is $786.01 per month. *Id.*

b. GF Uses a Complex Procedure to Invoice Ask-intTag

For many years, Ask-intTag paid GF for electricity using the following procedure: "Within thirty (30) days after the close of each . . . month . . . , [GF] shall send [Ask-intTag] a statement and supporting documentation which sets forth the Electrical Costs incurred during such month, and [Ask-intTag] shall pay [GF] the Electrical Costs as Additional Rent within thirty (30) days." Ex. 5 at 172.

Under a January 1, 2021 lease amendment, however, the payment procedure became more complicated and now uses the following process: Ask-intTag "shall make monthly estimated payments . . . on the first (1st) day of each month," *id.* at 312, and then:

> Not more than ninety (90) days after the end of each Lease Year . . . , [GF] shall furnish to [Ask-intTag] an itemized statement setting forth in reasonable detail [GF's] calculation of the amount of actual Additional Required Services Costs [*i.e.*, actual electricity costs] for such prior Lease Year. Within thirty (30) days of [Ask-intTag's] receipt of such statement, [Ask-intTag] shall pay to [GF] the difference, if any, between the total of estimated payments of Additional Required Services Costs made by [Ask-intTag] for the prior Lease Year, and the Additional Required Services Costs actually incurred, but only if the Additional Required Services Costs

[21] Ask-intTag's "office" electricity rate class is similar in concept to the base rate classes GF uses with Garnet EMS, NE Credit Union, and Marvell. *See infra*.

> actually incurred exceed by 5% or more [Ask-intTag's] total payments of estimated Additional Required Services Costs for the prior Lease Year. If [Ask-intTag's] payment of estimated Additional Required Services Costs for the prior Lease Year exceeds the Additional Required Services Costs actually incurred, the excess shall be credited against [Ask-intTag's] obligation to pay Rent for the following month of the then-current Lease Year . . . . [However,] In the event [Ask-intTag] does object to [GF's] year-end statement, [GF] shall pay such refund, if applicable, following final resolution of the Additional Required Services Costs [pursuant to a defined mediation process].

Id. at 313.

Ask-intTag is afforded two mechanisms to ensure it accurately pays a fair market rate for electricity: First, Ask-intTag "shall be entitled . . . to inspect and examine and/or . . . audit the books and records of [GF] relating to the determination of Additional Required Services Costs," Ex. 5 at 313-314, which include electricity. "If the audit discloses that the amount of Additional Required Services Costs billed to [Ask-intTag] was incorrect, the appropriate party shall pay to the other party the deficiency or overpayment." *Id.* at 314. Second, "[u]pon request by [Ask-intTag] . . . , [GF] shall furnish . . . an itemized statement setting forth in reasonable detail [GF's] current calculation of the amount of actual Additional Required Services Costs." *Id.*

2. GF Transmits, Distributes, and Sells Electricity to IBM

GF produced redacted and unredacted IBM lease materials. *See* Redacted IBM Lease appended hereto as Exhibit 6 and Unredacted IBM Lease appended hereto as Exhibit 7. Under the terms of that contract, GF "will procure all electricity" for IBM, *see* Ex. 6 at 521, provide "electricity for [IBM's] manufacturing operations," *id.* at 518, and also for IBM's office and warehouse operations. *See id.* at 566. "The demarcation for electrical services between [GF] and [IBM] is defined as the first customer equipment disconnect/A-box switch/breaker." *Id.* at 517. Infrastructure before the customer equipment point would be the proposed "self-managed utility's" transmission and distribution system. Everything after the customer equipment point

would be IBM's facility within the proposed service territory.

a. GF Charges IBM Based on Six Different Electricity Rate Classes

GF measures IBM's electricity consumption, bills IBM based on that consumption, Ex. 6 at 566,[22] and maintains meters. *Id.* at 515. IBM's "estimated cost of electricity" is assessed "at the Base Electrical Rate" of "$0.0094/kWh" and charged on a "per square foot" basis. *Id.* at 566. The Base Electrical Rate is then adjusted to account for six different types of electricity uses in six "Space Types."[23] *Id*. These are referred to as "Electric Space Rates," and are listed in the table below. *Id*. In sum, GF charges IBM six different "Electric Space Rates" that are assessed based on dollars per kWh per square foot of rented space:

Space Type	**Electric Space Rate** (per square foot)
Office	$1.00
Warehouse	$0.50
FFLT	$1.90
FFHV	$2.10
Raised Floor	$2.30
Clean Room	$2.50

Id. Those electricity rates get baked into the larger base rent fee, *see* note 22, *supra*, but the electricity rates are specifically and separately calculated. *See* Ex. 6 at 566. IBM is responsible for paying both [redacted].

[22] Specifically, GF issues a monthly invoice for what is referred to as a "License fee," and is also referred to as an "Aggregate License Fee," for "the use of all of the Licensed Areas in the aggregate." Ex. 6 at 415-416. Those fees are computed "on a square foot basis" using an "Occupancy Model" that is predicated on "a fair market rate" for the underlying costs, which include electricity. *Id.* at 415–416, 566; [redacted]

[23] Under the contract, each such space [redacted]

b. GF Can Adjust IBM's Electricity Charges to Reflect the Fair Market Value of the Electricity IBM Actually Consumes

GF charges IBM "a fixed monthly fee in arears" that is "based on square footage, space type and rates." Ex. 6 at 469. Those charges are measured with "sufficient detail . . . to allow [IBM] to understand the charges." *Id.* GF may then adjust IBM's base electricity rates in several ways.

First, GF can peg IBM's electricity rates to the actual market rate for electricity. *See* Ex. 6 at 566. When the market rate changes, GF can adjust IBM's electricity costs according to the following process: After the close of "each calendar year,"[24] GF may provide IBM "with a statement and supporting documentation which sets forth the actual rates of electricity charged by the utility [*i.e.*, GMP] for each month of the prior year, the average of which shall be the 'Actual Electricity Rate.'" *Id*. Under GF's Petition, that statement and supporting documentation would pertain to electricity charged by the proposed "self-managed utility."

GF may then adjust the electricity rate IBM pays depending on the "Actual Electricity Rate" from the previous year. *See* Ex. 6 at 566 & n.1. Specifically:

> In the event the Actual Electrical Rate . . . is greater than or less than the Base Electrical Rate, [GF] shall promptly refund (if the Actual Electric Rate is less than the Base Electric Rate) or invoice [IBM] (if the Actual Electric Rate is greater than the Base Electric Rate) in an amount equal to the product of the increase per square foot (which is the difference between the Actual Electrical Rate and the Base Electric Rate divided by the Base Electric Rate), the applicable Electric Space Rate, and the total square footage for the Space Type, as set forth on Schedule A.
>
> By way of example for warehouse space, if the Base Electric Rate is 9.4 cents/kWh and the 2019 Actual Electrical Rate is 10.5 cents/kWh, then the additional amount to be paid by [IBM] is (10.5 cents – 9.4 cents/9.4 cents) x $0.50 x 1298 sf = $75.95. Therefore, $75.95 would be the annual electric cost adjustment for all warehouse

[24] For clarification, please note the lease also refers to calendar years as "Escalation Years." Ex. 6 at 566.

space.

Id.[25] GF may then invoice IBM, who must pay the invoice within 60 days. Ex. 6 at 566.

Second, GF can adjust IBM's electricity bills when one of IBM's physical plant spaces consumes more or less electricity than anticipated. GF does so when there is a "Material Change in utility rates and usage," which is "defined as greater than +/- 5% per specified lease area." Ex. 6 at 469-470. The lease provides for a "Quarterly true up for any Material Changes in actual invoiced energy utility (electricity and fuel) rates and/or weather driven consumption." *Id.* Those "true ups" are "based upon records of energy use (Mwh/MmBTU) or utility consumption." *Id*. As IBM uses more or less electricity, its bills may be adjusted accordingly.

Third, an expansion of IBM's physical footprint at the Essex facility, Ex. 6 at 587, may increase IBM's gross electricity payments because of additional square footage. *Id.* at 566 (describing dollars/kWh/square foot); *id.* at 417 (noting in 5(b) that the fee IBM pays will be adjusted in the event of "greater square footage in the applicable Licensed Areas").

3. GF Transmits, Distributes, and Sells Electricity to Garnet EMS

GF produced redacted and unredacted Garnet EMS lease materials. *See* Redacted Garnet EMS Lease appended hereto as Exhibit 8 and Unredacted Garnet EMS Lease appended hereto as Exhibit 9.[26] As explained below, Garnet EMS pays a base electricity rate [redacted] The base rate is paid monthly. The lease provides that additional charges may incur when Garnet EMS uses more electricity.

[25] The same scheme for base rate measurements – adjusted upward and downward depending on use and actual rates paid by GF – also govern GF's sale of natural gas to IBM. *See, e.g.*, Ex. 6 at 566-567 & n.2.

[26] *See* note 20, *supra*.

a. Garnet EMS Pays GF a Base Electricity Rate

Garnet EMS pays "Base Rent" to GF "in monthly installments." *See* Ex. 8 at 362. The "Base Rent includes . . . electricity." *Id.* The base electricity rate[27] is governed by several criteria: (1) Garnet EMS does "not exceed an average of two watts per square foot"; (2) "the electricity so furnished will be at nominal 120 volt single phase"; (3) "no electrical circuit for the supply of electricity will have a current capacity exceeding 15 amperes"; (4) "the electricity will be used only for equipment . . . normal to office usage . . . and other standard machines of similar low electrical consumption"; (5) Garnet EMS does not use electricity outside "Normal Business Hours"; and (6) does not use nonstandard lighting. Ex. 8 at 373.

Garnet EMS may only use the rented space for "[g]eneral business office purposes." Ex. 8 at 359. [redacted] Ex 6. at 566.

b. Garnet EMS May Pay GF Additional Rent If Base Electricity Rate Parameters Are Exceeded

Garnet EMS may pay GF "Additional Rent" when Garnet EMS's electricity uses exceed the base electricity rate criteria or other lease terms. Specifically, when Garnet EMS's "requirements for electricity exceed the criteria" described above, *see* Section II.B.3.a, *supra*, Garnet EMS "shall pay [GF] upon billing for the cost of such excess electricity as Additional Rent." Ex. 8 at 373. For example, "additional rent" may be charged when Garnet EMS uses "electricity for machines such as electronic data processing large systems servers or for special (non-Building standard) lighting fixtures" that consume larger amounts of electricity. *Id.* And if

[27] The base electricity rate is also referred to as "Incidental Uses." Ex. 8 at 373.

Garnet EMS wishes to use electricity "after Normal Business Hours or during Holidays," it may do so only by paying "(as Additional Rent) [GF's] additional expenses resulting therefrom." *Id.* at 374.

Moreover, if Garnet EMS's "electrical usage exceeds normal business office usage levels," GF "reserves the right to separately meter or monitor the utility services provided to the Premises, at [Garnet EMS's] expense, and bill the charges directly to [Garnet EMS] . . . and to make appropriate adjustments to the Operating Expenses based on the meter charges." Ex. 8 at 375. Garnet EMS "shall also pay [GF] as Additional Rent for the cost of installing any additional risers, meters and or other facilities that may be necessary to furnish or measure such excess electricity to the Premises." *Id.* at 373. GF also "reserves the right to require [Garnet EMS] to procure any excess requirements at [Garnet EMS's] expense by arrangement with the local utility furnishing electricity to the Building," *id.*, which under GF's Petition would be the proposed "self-managed utility."

Garnet EMS must also inform GF of "any equipment which exceeds the electrical . . . capacity per square foot" criterium and of "any electrically operated equipment or other machinery . . . in excess of Building standards." Ex. 8 at 367. GF's "consent to such installation or operation may be conditioned upon the payment by [Garnet EMS] of additional compensation for any excess consumption of utilities." *Id.* A current Garnet EMS satellite dish provides an example: Garnet EMS is "responsible for all costs associated with metering the electrical consumption of the Dishes and associated equipment." *Id.* at 406.

4. GF Transmits, Distributes, and Sells Electricity to NE Credit Union

GF produced redacted and unredacted NE Credit Union lease materials. *See* Redacted NE Credit Union Lease appended hereto as Exhibit 10 and Unredacted Lease appended hereto as

Exhibit 11. Under the contract, "base rent" is separate and distinct from "additional rent." *See* Ex. 10 at 707. NE Credit Union pays base rent in monthly instalments, *id.* at 706-707, and pays "additional rent" when billed by GF. *Id.* at 712. As explained below, NE Credit Union pays a base electricity rate as part of its "base rent" and is invoiced for "additional rent" if the base electricity rate criteria are exceeded.

a. NE Credit Union Pays a Base Electricity Rate

NE Credit Union pays as "base rent" a base level of electricity provided by GF. Ex. 10 at 711-712. Similar to Garnet EMS, NE Credit Union's base level of electricity is defined by several criteria: (1) NE Credit Union may not exceed an "average of one watt per square foot"; (2) may not deviate from a "nominal 120 volt single phase"; (3) "no electrical circuit for the supply" of electricity may have "a current capacity exceeding 15 amperes"; (4) NE Credit Union may only use electricity for "equipment and accessories" requiring "low electrical consumption"; (5) may only use standard lighting fixtures; and (6) may only use electricity between 8:00 a.m. and 6:00 p.m., Monday through Friday, but not on holidays. *Id.* at 712.

NE Credit Union is also restricted to using its office spaces for "office" and "ATM operations." Ex. 10 at 705. [redacted] *See* Ex. 6 at 566.

b. GF Can Charge NE Credit Union Additional Rent If NE Credit Union Exceeds the Base Electricity Rate Criteria

NE Credit Union may pay "additional rent" to GF when NE Credit Union exceeds its base electricity rate criteria. Ex. 10 at 712-713 (NE Credit "shall pay [GF] as additional rent, a

price for providing such service"). Specifically, NE Credit Union must pay GF "for the cost of such excess electricity as additional rent" if NE Credit Union's electricity usage exceeds an average of one watt per square foot of the premises, is outside the nominal 120 volt single phase, requires an electrical circuit with a current capacity exceeding 15 amperes, uses equipment that require more than low electrical consumption, uses nonstandard lighting fixtures, and/or uses electricity after normal business hours, on weekends, or on holidays. *Id.* at 712.

NE Credit Union "shall also pay [GF] for the cost of installing any additional risers or other facilities that may be necessary to furnish or measure such excess electricity." Ex. 10 at 712. GF also "reserves the right to require [NE Credit Union] to procure any excess requirements at the arrangement with the local utility furnishing electricity to the Building," *id.*, which under GF's Petition would be the proposed "self-managed utility."

5. GF Transmits, Distributes, and Sells Electricity to Marvell

GF produced redacted and unredacted Marvell lease materials. *See* Redacted Marvell Lease appended hereto as Exhibit 12 and Unredacted Lease appended hereto as Exhibit 13. Under that contract, GF provides "all electricity" to Marvell, *see* Ex. 12 at 641,[28] using GF's distribution and transmission systems. *Id.* at 634, 636. GF also maintains meters. *Id.* at 635. As with IBM, Ex. 6 at 517, the "demarcation for electrical services between" GF and Marvell "is defined as the first customer equipment disconnect." Ex. 12 at 637. "All electrical systems up to" the customer disconnect, *id.* at 637 & 634, would be the proposed "self-managed utility's" transmission and distribution systems. The systems after the customer disconnect would be Marvell's facility within the proposed service territory. *Id.*

[28] GF also provides "all natural gas" to Marvell. Ex. 12 at 641.

a. GF Charges Marvell for Electricity in Base and Additional Rent

Marvell pays "Base Rent" in "monthly installments" and "Additional Rent" "when invoiced" by GF. Ex. 12 at 596. Base Rent includes the cost of electricity GF provides Marvell, *id.* at 641, the maintenance of meters and, when required, electricity from emergency power systems. *Id.* at 634-635; *see id.* at 596, 617 (stating Base Rent includes Attachment 1, [redacted], and Attachment 2, which pertains to utilities and energy). Base rent also includes the service of transmitting electricity to Marvell through GF's electricity distribution systems, *id.* at 634-635, and several capped electricity services. *Id.* at 677-678.

Marvell's payment of Base Rent is considered "payment in full" for such electricity "services," [redacted], and GF may discontinue electricity services if Marvell fails to pay Base Rent: "In no event shall [GF] be required to provide any services or utilities [to Marvell] during any period that [Marvell] has not paid the rent in full." Ex. 12 at 597.

[redacted]

Like IBM, Marvell rents [redacted] – that are restricted to specific uses that require different amounts of electricity. Ex. 12 at 621-622; [redacted] *compare* Ex. 6 at 566 (describing different "Electric Space Rates" for IBM's office and manufacturing spaces). Only "[o]ffice and related uses" may occur in the [redacted], only "[l]ab, testing and related uses" may occur in the [redacted] and only "[d]ata center and related uses" may occur in the [redacted]. Ex. 12 at 621-622; [redacted]. Because of these restrictions, the underlying electricity uses in those spaces remain relatively predictable. *See, e.g.*, Ex. 6 at 566.

Like IBM, [redacted] For "office space," GF provides what it refers to as "comparable . . . electricity . . . to that received by [GF] in its own office space" after stepping it down to 208/120 nominal volts. Ex. 12 at 638. [redacted] GF also provides electricity that is stepped-down to 480/270 nominal volts for Marvell's "manufacturing operations." Ex. 12 at 638. GF charges Marvell [redacted] In this way, the Base Rent rates account for Marvell's different electricity uses in office and manufacturing spaces.

c. GF Can Invoice Marvell when Marvell's Electricity Use Increases

Marvell pays "Additional Rent" "when invoiced" by GF, Ex. 12 at 596, which will occur if electricity uses increase. *Id.* at 598. Accordingly, Marvell "shall promptly furnish information regarding increase in the use of utilities . . . , which the parties agree will be the basis for additional rent to be charged." *Id.* Marvell must also report changes to its manufacturing operations, such as new tools, that may impact electricity use. *Id.* at 642-643 (index 3.2 and 3.3).

C. The Proposed "Self-Managed Utility" Is Also Predicated on a Legal Fiction

GF's claim that the proposed "self-managed utility" would serve only itself cannot be

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[redacted] *See* Ex. 6 at 566.

true unless statutes requiring utility formation are selectively negated as to the "self-managed utility." GF Pet. at 22 ¶ 3.e (requesting exemption from 30 V.S.A. ch. 3). Those statutes contain no provision allowing exemption. *See* 30 V.S.A. §§ 101-103, 204. If incorporated, the "self-managed utility" would be a distinct entity from GF and the transmission of electricity from the "self-managed utility" to GF would be a sale from a utility to a member of the public. GF's claim that the "self-managed utility" would serve only itself is thus founded on a legal fiction that assumes duly enacted corporate formation statutes do not apply.

Vermont law is clear that any new utility must adhere to formation requirements. Those statutes pull the lynchpin from GF's Petition. A "corporation may be formed pursuant to the provisions of the general corporation law for the sole purpose of conducting any one or more of the kinds of business . . . which are subject to regulation by the Public Utility Commission." § 101. However, "[b]efore the articles of incorporation are transmitted to the Secretary of State, the incorporators shall petition the Public Utility Commission" and "file a copy of any such petition with the Department." § 102(a). A hearing may then follow. *Id.* Only upon a finding by the Commission will would-be incorporators receive a Certificate permitting formation. § 102(b). "The articles of incorporation, the certificate of the Public Utility Commission, and the organization fee shall [then] be transmitted to the Secretary of State." § 103. "When such articles are recorded, such certificate shall be recorded therewith." *Id.* "Immediately upon the transmission of its articles of association, a corporation subject to supervision under this chapter shall file with the Department of Public Service a copy of such articles, and a copy of its certificate of paid up capital stock if any." § 204.

If the "self-managed utility" adhered to 30 V.S.A. §§ 101-103 & 204, like other would-be utilities must, it would be a legal entity separate and apart from GF. It would therefore transmit

and distribute electricity to GF in a manner equivalent to a taxable sale: One independent legal entity (the "self-managed utility") would transfer something of value (electricity) to another independent legal entity (GF). *See also* 30 V.S.A. §§ 22(a)(1)(A), (a)(2)(A). GF's claim that the "self-managed utility" would serve only itself is predicated on a legal fiction. When the façade is lifted, it is apparent that the "self-managed utility" would in fact sell electricity to GF.

Conclusion

CLF respectfully requests that the Commission dismiss GF's Petition for lack of subject matter jurisdiction, lack of legislative standards, because § 231(a) would be rendered unlawful if used as GF requests, and because the Petition is predicated on legal and factual errors.

Dated at Burlington, Vermont, this 8th day of November 2021.

CONSERVATION LAW FOUNDATION

By: 

Chase S. Whiting, Staff Attorney
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x. 4013
(802) 223-0060 (fax)
cwhiting@clf.org