

**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,) Case No. 21-1107-PET
to operate a Self-Managed Utility)

**CONSERVATION LAW FOUNDATION’S MOTION TO CLARIFY
THE SCOPE OF THE PUBLIC UTILITY COMMISSION’S ORDER**

Conservation Law Foundation (“CLF”) timely moves pursuant to Public Utility Commission (“Commission”) Rules 2.206 and 2.103 and V.R.C.P. 59(e) for clarification of the February 17, 2022, Order Determining GlobalFoundries’ Request to be Exempt from the Renewable Energy Standard is Outside the Commission’s Statutory Authority (the “Order”). CLF incorporates the following Memorandum in support of its Motion.

MEMORANDUM

Background

GlobalFoundries U.S. 2 LLC (“GF”) filed its Petition on March 17, 2021, seeking to establish what GF refers to as a “self-managed utility” (“SMU”), a novel entity without basis in Vermont law. After discovery probing the jurisdictional grounds for that entity, CLF filed a V.R.C.P. 56(a) Motion for Summary Judgment that answered two issues raised by the Commission. First, whether the Commission has jurisdiction to grant GF’s request to operate as a “self-managed utility” under *de minimis* regulation. Second, whether GF’s tenants are customers such that GF’s operations, if continued, would constitute a public service business.¹ Based on the now established record, the first issue raises a pure question of law² that cannot

¹ See Commission Order (Sept. 30, 2021) at 5.

² See CLF Motion for Summary Judgment at 3 (and authorities cited).

reasonably be disputed: the Commission does not have subject matter jurisdiction to create and regulate an entity outside the bounds of the Vermont Statutes and Constitution.³ The second issue involves undisputed questions of fact,⁴ and questions of law that cannot reasonably be disputed.⁵ The Parties fully briefed the two issues, making them ripe for determination. *See also* V.R.C.P. 56(b).

In its briefing, GF stated that its Petition would not be viable if GF were required to comply with Vermont’s Renewable Energy Standard (“RES”).⁶ On April 17, 2022, the Commission issued an Order in which it stated, among other things, that “the Commission lacks statutory authority to grant the relief that GlobalFoundries has requested in its petition: to authorize the creation of an SMU that would be exempt from the Renewable Energy Standard.” *See* Order at 9. Based on GF’s prior statement, it seemed GF would withdraw its Petition.

On March 8, 2022, however, GF’s counsel informed the undersigned that GF plans to move forward with its Petition to establish a “self-managed utility” subject to *de minimis* regulation. A jurisdictional basis for doing so was not made clear. In a recent statement, GF indicated that it believes the Commission’s Order “ruled that [the Commission] *does* have the authority to let GlobalFoundries become its own power provider and purchase electricity on the wholesale power market.”⁷ That statement appears to be at odds with the Order. CLF now files

³ *See, e.g.*, Motion for Summary Judgment at 3-18; CLF Response Brief at 3-17; CLF Reply Brief at 4-20.

⁴ *See, e.g.*, GF Reply Brief (Nov. 22, 2021) at 12 (“[T]he essential facts are established and undisputed.”); *see also* CLF Motion for Summary Judgment at 18-35 (and exhibits and authorities cited therein).

⁵ *See, e.g.*, CLF Reply Brief at 22 (and authorities cited therein).

⁶ *See* GF Initial Brief (Nov. 8, 2021) at 1.

⁷ *See, e.g.*, Kevin McCallum, *Despite Regulator’s Ruling, GlobalFoundries to Move Ahead with Power Plan*, SEVEN DAYS (Feb. 21, 2022) (emphasis in original) (describing a statement made by GF General Manager Ken McAvey).

this Motion to clarify the scope of the Commission's Order.

Relief Requested

CLF respectfully requests that the Commission clarify the scope of the Order to prevent an unjust record and unnecessary additional litigation about matters beyond the Commission's subject matter jurisdiction, contrary to the Vermont Statutes and Constitution, and that have already been briefed.

Discussion

Vermont Rule of Civil Procedure 59(e) applies to Commission judgments. *See, e.g., In re Green Mountain Power Corp.*, 2012 VT 89, ¶ 52; *see also* Commission Rule 2.103. Rule 59(e) states that a "motion to alter or amend the judgment shall be filed not later than 28 days after entry of the judgment." CLF's Motion was thus timely filed in relation to the February 17 Order. CLF's Motion is also warranted. A Rule 59(e) motion "allows the [Commission] to revise its initial judgment if necessary to relieve a party against the unjust operation of a record." *Osborn v. Osborn*, 147 Vt. 432, 433 (1986). It also "provides a party with an opportunity to take advantage of the [Commission's] power to correct a judgment in order to avoid an appeal and its attendant delay." *Id.*

Here, clarification of the Order is needed because GF apparently plans to continue seeking formation of an entity and regulatory regime lacking bases in Vermont statute. GF's purported plan also seems to contradict the Commission's February 17 Order, which appears to have answered in the negative "[t]he larger question before us," *i.e.* "whether the Commission has the statutory authority to grant GlobalFoundries' request to be removed from GMP's service territory so that GlobalFoundries can purchase power wholesale as a self-managed utility ('SMU') subject to *de minimis* regulation." *See* Order at 2.

For example, the Order notes that the Commission has authority to create a public service company and to regulate the parts of that public service company’s business. *See* Order at 3-4 & n.11 (citing 30 V.S.A. §§ 203, 209, 219, 231). The Order also observes, however, that “GlobalFoundries is not seeking to operate as a public service company.” *Id.* at 4 & n.13 (citing GF Petition ¶ 60). As the Commission stated, “jurisdiction must be demonstrated as a prerequisite” to a § 231(a) certificate of public good. *See id.* at n.11. And the Order does not identify a jurisdictional basis to establish and regulate the requested non-public service company. Put differently,

GlobalFoundries’ exit from GMP’s service territory would either make GlobalFoundries a public service company—fully subject to all required statutes, such as the Renewable Energy Standard—or an entity that is not currently authorized under Vermont law. *There is no statutorily authorized third option for what GlobalFoundries seeks: to operate with some of the functions of a public service company but without the statutory obligations of a public service company.*

See id. at 4 (emphasis added) (citations omitted). The Commission thus found that it “Has Statutory Authority to Authorize a Public Service Company, But Not to Create a Self-Managed Utility as Defined and Described in This Case.” *See id.* at 3 (subheading).

Moreover, in another part of the Order, the Commission goes on to state that “GlobalFoundries has created and defined the term ‘self-managed utility’ because there is no such term or concept in Vermont statute.” *See id.* at 6. And “as in [the Commission’s] discussion about ‘public service companies’ above,” the Commission found that it “lack[s] the statutory authority to approve such an entity.” *Id.*; *see also id.* at 3 & n.10 (citing *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7 (1941)).

However, GF has now indicated that it plans to continue litigation pursuing a “self-managed utility” subject to *de minimis* regulation because GF believes that the Commission’s

Order authorizes it to do so. The Order appears to counsel otherwise. Indeed, GF's purported ongoing effort to establish a "self-managed utility" appears to flout the Commission's Order.

The Vermont Statutes and Constitution also foreclose GF's apparent course of action. Among the issues that have been fully briefed and remain ripe for determination on the record before the Commission are the following: GF's Petition should be dismissed for lack of subject matter jurisdiction, lack of legislative standards, because § 231(a) would be rendered unlawful if used as GF requests, because the Petition is predicated on legal and factual errors, and because there is no lawful basis to contravene the Legislature's repeated decisions to maintain a regulated energy market.^{8,9}

CLF filed a V.R.C.P. 56(a) Motion for Summary Judgment, which "shall apply in proceedings before the Commission." *See* Commission Rule 2.219. Rule 56 provides that 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). It also provides that the Commission "should state on the record the reasons for granting or denying the motion." *Id.* As noted, the record contains no dispute of material fact and no reasonable dispute of material law as to the two questions asked by the Commission.¹⁰

And yet, GF appears to continue to seek the same type of unlawful relief that has already been fully briefed by the parties, that remains beyond the Commission's subject matter

⁸ *See, e.g.*, CLF Motion for Summary Judgment; CLF Response Brief; CLF Reply Brief.

⁹ Mr. Gregory Rieder recently stated that "In New York, it's actually deregulated, and our plants in New York can purchase power on the open market' 'So that's really the big difference between the two states.'" *See* Emma Cotton, *As a 'self-managed utility,' GlobalFoundries would plan to meet Vermont's energy laws with credits and solar*, VTDIGGER (Feb. 22, 2022) (quoting Mr. Rieder).

¹⁰ *See, e.g.*, notes 2-5, *supra*.


jurisdiction, and that appears to be invalid under the Commission's Order. Clarifying the Order will conserve Commission and party resources and avoid another round of dispositive motions on most of the same issues already briefed. Under these circumstances, clarification would thus avoid an unjust operation of the record, appeal, and delay. *See Osborn*, 147 Vt. at 433; V.R.C.P. 59(e).

Conclusion

CLF respectfully requests that the Commission clarify the scope of the Order to prevent unnecessary additional litigation about already briefed matters that remain ripe for determination.

Dated at Burlington, Vermont, this 10th day of March 2022.

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