STATE OF VERMONT

SUPERIOR COURT **Orleans Unit**	)	**CIVIL DIVISION** **Docket No.** 242-10-11-0scv
GREEN MOUNTAIN POWER CORPORATION, **Plaintiff**	)	
v.	)	
DONALD AND SHIRLEY NELSON, **Defendants**	)	

FILED
OCT 14 2011
VERMONT SUPERIOR COURT
ORLEANS UNIT

TEMPORARY RESTRAINING ORDER

This matter having come before the Court on the Plaintiff's Motion for a Temporary Restraining Order ("TRO") and a Preliminary Injunction and the Court having considered said Motion, the Supporting Memorandum of Fact and Law with attached affidavits of Charles Pughe and Stephen Blaisdell and exhibits, *ex parte* GRANTS the requested TRO as follows:

The Court finds based on the affidavits, exhibits and points of law submitted by Plaintiff, that it will sustain irreparable injury, loss or damage before the Defendants can be notified and heard in opposition. Based on the evidence presented by Plaintiff, the Court finds that Defendants Donald and Shirley Nelson themselves, and with other persons acting in concert and participation with them, will be, as of October 17, 2011, improperly interfering with Plaintiff's development of a wind generation project in Lowell, Vermont, known as the Kingdom Community Wind Project (the "Project"). Specifically, the material submitted by Plaintiff shows the Nelsons and those acting in concert and participation with them are intentionally occupying the northwesterly boundary of the Nelsons' property adjoining the Project in close proximity to blasting planned by Plaintiff to start on October 17 on GMP property where the Project is being

constructed. The purpose of Defendants and those acting in concert and participation with them is to 1) place themselves far inside a 1,000 foot safety zone in order to create a risk to human safety that will prevent the blasting from taking place, and thereby 2) cause irreparable injury, loss and damage to GMP and the public. The Court finds that based on the material submitted by Plaintiff it is likely to succeed on the merits of its nuisance and contract interference claims, and that issuing the below order will impose no or little cost on Defendants.

Pursuant to V.R.C.P. 65(a), this TRO will expire on October 26, 2011 unless for good cause shown, the Court orders the term of the TRO to be extended. The Court will hold a hearing on Plaintiff's Motion for Preliminary Injunction on October 20, 2011, commencing at 1:45 ~~a.m.~~/p.m. and as set forth in the attached Notice of Hearing.

IT IS HEREBY ORDERED:

Pursuant to V.R.C.P. 65(d), that Defendant Donald Nelson, Defendant Shirley Nelson, and any and all of their agents, employees, attorneys, invitees, licensees, permitees and all and any other persons acting in concert and/or in participation with Defendant Donald Nelson and/or Defendant Shirley Nelson are ENJOINED, PROHIBITED and RESTRAINED FROM ENGAGING IN ANY AND ALL OF THE FOLLOWING:

1. **Being present within 1,000 feet of the northwesterly boundary of Defendants Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land during and within one hour before and one hour after blasting from the date of this Order, October 17, 2011 through October 26, unless for good cause shown the term of this Order is extended beyond October 26 by further Order of the Court; and**

2. Inviting, encouraging or permitting other individuals to be present within 1,000 feet of the northwesterly boundary of Defendants Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land during and within one hour before and one hour after blasting from October 17, 2011 through October 26, unless for good cause shown the term of this Order is extended beyond October 26 by further Order of the Court.

IT IS FURTHER ORDERED, the blasting covered by this Order shall be performed between October 17 and November 23, 2011, and will occur only during the hours between 9 a.m. and 5 p.m. Monday through Friday, excepting no blasting shall occur on Vermont State holidays. Each morning GMP will contact the Nelson Defendants by telephone and provide a two hour period of time that day when the actual blasting will occur. Five minutes prior to the blast a whistle audible to a distance of one half mile will be sounded three times in quick succession; one minute prior to the blast a whistle will be sounded twice in quick succession. After blasting has been completed, a continuous whistle will sound once for five continuous seconds indicating the blasting has concluded and giving the all clear.

IT IS FURTHER ORDERED, that Donald and Shirley Nelson permit GMP to post signs warning of the blasting and giving notice of this Order on their property on access routes to the above described northwesterly boundary area and at visible locations in that boundary area.

Pursuant to V.R.C.P. 65(c) the Court waives any security requirement. A wrongful issuance of an order will pose little or no cost or burden on Defendants, and as well, Plaintiff has resources to pay for any such minimal costs.

Dated at St Albans, Vermont, this 14th day of October 2011.

Hon. ~~Robert Bent~~ Martin Maley
Presiding Judge
Vermont Superior Court – Orleans Unit

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STATE OF VERMONT

SUPERIOR COURT **Orleans Unit**	)	**CIVIL DIVISION** **Docket No.** 256-10-11 OSCV
GREEN MOUNTAIN POWER CORPORATION, **Plaintiff**	)	
v.	)	
DONALD AND SHIRLEY NELSON, **Defendants**	)	

NOTICE OF HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TO: **Donald and Shirley Nelson**
365 Bayley Hazen Road
Albany, VT 05820

Green Mountain Power Corporation
R. Jeffrey Behm
Debra L. Bouffard
SHEEHEY FURLONG & BEHM P.C.
30 Main Street
P.O. Box 66
Burlington, VT 05402

This Notice is to notify you that this Court will hold a hearing on Plaintiff's Motion for Preliminary Injunction on October 20 **, 2011, at** 1:45 pm **.**

Dated at Newport, Vermont, this 14th day of October 2011.

Hon. Robert Behm
Presiding Judge

Penelope Carrier
Court Operations Manager
Vermont Superior Court – Orleans Unit

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STATE OF VERMONT

SUPERIOR COURT **Orleans Unit**	)	**CIVIL DIVISION** **Docket No. _____**
GREEN MOUNTAIN POWER CORPORATION, **Plaintiff**	)	
v.	)	
DONALD AND SHIRLEY NELSON, **Defendants**	)	

COMPLAINT

Plaintiff, Green Mountain Power Corporation ("GMP"), by and through counsel, complains against Defendants, Donald and Shirley Nelson, as follows:

PARTIES, JURISDICTION, VENUE

1. This is an action brought for nuisance and intentional interference with contract and seeking declaratory and injunctive relief and damages.

2. GMP is a Vermont corporation with its principal place of business in Colchester, Vermont. Its business includes the generation, purchasing, distribution, and sale of electricity to approximately 95,000 customers in Vermont.

3. GMP is an electric public utility whose services and rates are subject to regulation by the Vermont Public Service ("PSB").

4. Donald and Shirley Nelson own a house located on a 600 acre tract of land located in Lowell, Vermont. The northwesterly boundary of the Nelsons' land is contiguous to and shared with land GMP possesses pursuant to long-term leases (49.5 years) it entered to construct and operate the Kingdom Community Wind Project (the "Project").

5. The Vermont Superior Court Civil Division has jurisdiction over this matter pursuant to 4 V.S.A. §§ 30, 31.

6. Venue is proper because the property that is the subject of this action is located in Orleans County, Vermont and the Defendants reside there.

FACTS

The Public Service Board's Approval Of The Kingdom Community Wind Project

7. In May 2010, GMP and several other entities petitioned the Vermont Public Service PSB ("PSB") for a certificate of public good ("CPG"), pursuant to 30 V.S.A. § 248, to construct a wind powered electric generation facility on Lowell Mountain in Lowell, Vermont.

8. The Project will have generation capacity up to 63 megawatts and will include 21 wind turbines and associated transmission and interconnection facilities.

9. The turbines will be sited along approximately 3 miles of a ridge in Lowell.

10. The Nelsons' house is located approximately 4,500 feet from location of the Project.

11. The Nelsons were, along with others, permitted to intervene in the PSB proceedings.

12. The Nelsons actively participated in the PSB proceedings and opposed the Project.

13. On May 31, 2011, the PSB entered its "Findings and Order" granting a CPG approving the construction and operation of the Project, subject to certain conditions.

14. In its May 31, 2011 Findings and Order, the PSB concluded that, "the benefits of constructing and operating the proposed project outweigh its impacts and will promote the general good of the state."

15. At the time the CPG was granted, the cost of the Project to GMP was $136 million.

The Project's 2012 Completion Deadline To Obtain Tax Credits

16. A key benefit and component of the Project is that it will be eligible for federal Production Tax Credits ("PTCs") of approximately $48 million over the first ten years of operation if it satisfies the condition of being operational by December 31, 2012.

17. Construction of the Project began on September 1, 2011.

18. Under GMP's already tight construction schedule, it is estimated that the Project will be operational in early December 2012.

19. Failure to achieve operation of the Project by December 31, 2012, means the Project will not qualify for the PTCs and the economic viability of the Project will be placed at risk.

The PSB-Approved Blasting Plan For The Project

20. Construction for the Project includes blasting at points along a three mile crane path on the ridge where the turbines will be located.

21. A portion of the blasting, scheduled to commence on October 17, 2011, will occur on GMP land in an area located within 50 to 900 feet of the northwesterly border of the Nelsons' 600 acre property.

22. Maine Drilling & Blasting, Inc. ("MDB"), a subcontractor of J.A. MacDonald, is obligated under the contract to perform the blasting for the Project. J.A. MacDonald is the site work and earth moving subcontractor to Reed & Reed, Inc., GMP's general contractor responsible for constructing the entire Project. J.A. MacDonald is contractually obligated to Reed & Reed, Inc. to perform all specified site work, including blasting, and Reed & Reed, Inc.

is contractually obligated to GMP to construct the Project, including the site work and the blasting.

23. MDB developed a blasting plan approved by the PSB on July 29, 2011 ("Blasting Plan").

24. Among other things, the Blasting Plan, limits blasting to between 9 a.m. and 5 p.m. on non-holiday, week days, requires that persons with land one-half mile from the blasting be notified each day by phone of the location and estimated time of the blasting, and provides for MDB to perform a security check of the blasting area to ensure no persons are present in the area during blasting.

25. The blasting is scheduled to occur once or twice (generally in the afternoon) daily along this boundary for about two weeks. Prior to the blasting, warning whistles audible within a range of one-half mile will include: (1) 3 whistles at 5 minutes prior to blast, (2) 2 whistles at 1 minute prior to blast, and (3) all clear.

26. The Nelsons and other persons with property located within one half mile of the Project were notified by certified mail of informational meetings scheduled for August 4 and August 18, 2011, to address blasting safety.

27. The Nelsons attended at least one of those meetings, where participants were provided information about the blasting and warned to stay out of the blasting safety zone.

28. Pursuant to its own and recognized safety protocols for blasting, MDB will establish a 1,000 foot safety zone, free of people, around the blasting site to guarantee human safety.

29. Donald and Shirley Nelson know that persons must stay out of the safety zone or it will prevent or impede blasting.

The Nelsons' Invitation To Camp On The Property Line And Within The Immediate Vicinity Of The Blasting Sites

30. The Nelsons are opposed to and wish to stop the construction of the Project.

31. In a letter to GMP's President and Chief Executive Officer, dated September 28, 2011, Donald and Shirley Nelson wrote that their "guests" would be camping on the ridgeline on the northwesterly border of their property adjoining GMP's Project for the foreseeable future.

32. The Nelsons requested GMP send written confirmation that no flyrock from blasting will trespass or intrude on their property and that no one will be endangered.

33. On or about September 28, 2011, the Nelsons told a news reporter they had invited campers to pitch tents on their property near the boundary with GMP's Project land and within the safety zone surrounding the blast sites.

34. Shirley Nelson stated, "Friends and neighbors have decided that it's time that somebody just said something....We couldn't think of any other way to do it."

35. Persons unidentified to GMP erected tents and have been camping near the northwesterly boundary of the Defendants' 600 acre property since on or about October 1, 2011.

36. These tents are located nearly one mile and a 40-60 minute hike from the Defendants' house, but only about 100-200 feet from a blast site on GMP's land.

37. On October 5, 2011, Defendant Donald Nelson and the Nelsons' unidentified "guests" told another news reporter that the purpose of the campsite is to stop the blasting, and "the hope is that the campsite is so close to the project that contractors won't be able to safely detonate the high explosives necessary to build a wide crane path" that must be built to erect the turbines.

38. Donald Nelson, who was present at the campsite, told the reporter that "high explosives require a 750 foot safety zone, free of people, before they can be set off [and] the camp site is well within that limit."

39. The reporter identified the campers in his article as a group of Sterling College students and a Craftsbury resident named Ann Morse.

40. On or about September 28, 2011, in a filmed Channel 44 television news interview inside the Nelsons' house, an unidentified woman said that she and others would be camping at the site for the entire winter and would stay put through any blasting.

The Presence Of Persons Along The Nelson Boundary Will Delay Completion Of The Blasting By Approximately Six Weeks, Greatly Increase The Costs Of Construction And Place The Economic Viability Of The Project At Risk

41. Some blasting points along the crane road will be located significantly less than 1,000 feet from points along the Nelsons' northwesterly property line.

42. If persons are present along the Nelsons' property line, substantial additional safety precautions will be required if the blasting is to proceed.

43. The safety precautions that will be necessitated by the presence of the Nelsons and their "guests" on the boundary line will delay completion of blasting by nearly six weeks, more than doubling the current estimated time it will take to complete that blasting (from 5.5 weeks to 11.5 weeks), and add estimated costs well over $1 million. Such additional time and costs places the economic viability of the Project at risk.

COUNT I

(Nuisance)

44. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 43 above as if set forth in full herein.

45. Defendants' wrongful conduct, acting with each other and in concert and participation with their unidentified "guests" to cause persons to be present well within 1,000 feet of the safety zone for blasting on GMP's property will unreasonably and substantially interfere with Plaintiff's use and enjoyment of its property rights by preventing or impeding the blasting and construction of the Project.

46. The Defendants' purpose and intention in encouraging, inciting, and causing persons and themselves to be present on the northwesterly boundary during scheduled blasting at the Project is to create a safety risk that would stop the blasting and construction of the Project.

47. As a direct and proximate cause of Defendants' conduct, Plaintiff will suffer both irreparable harm and damages to its business and the public will suffer irreparable harm.

COUNT II

(Intentional Interference with Contract)

48. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 above as if set forth in full herein.

49. Defendants' actions will interfere with the performance of GMP's contractors' contractual duties to conduct blasting and timely construct the Project.

50. The Defendants' acts of intentional interference are improper and wrongful and done with the purpose of destroying the Project by interfering with the performance of GMP's contractors' performance of their contractual duties.

51. Specifically, Defendants have themselves been present, as well as invited, incited, encouraged, and caused others to be present along the northwesterly border of the Nelsons' property and within the several hundred feet of certain blasting sites for the purpose of stopping blasting and construction, and intend to continue to do so for the foreseeable future.

52. The Defendants' purpose in encouraging, inciting, and causing persons and themselves to be present on the northwesterly boundary during scheduled blasting at the Project is to create a safety risk that would stop the blasting and construction of the Project.

53. Defendants' wrongful actions have been undertaken with the intended purpose of interfering with the blasting to be performed by MDB pursuant to its contract and for the overall purpose of stopping construction of the Project.

54. As a direct and proximate cause of Defendants' conduct, the Plaintiff will likely suffer both irreparable harm and damages to its business and the public will suffer irreparable harm.

COUNT III

(Request for Declaratory Judgment)

55. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 54 above as if set forth in full herein.

56. The Defendants, acting in concert with others, have encouraged, incited and caused themselves to be present and allowed others to be present on their northwesterly boundary at the Project for the purpose of interfering with Plaintiff's use and enjoyment by impeding or preventing the blasting and construction of the Project.

57. Plaintiff is entitled to a declaratory judgment, pursuant to 12 V.S.A. § 4711, that these actions of Defendants constitute a nuisance.

58. The Defendants, acting in concert with others, have encouraged, incited and caused themselves to be present and allowed others to be present on their northwesterly boundary, well within 1,000 feet of GMP's blasting site at the Project for the purpose of

interfering with Plaintiff's contractual rights to performance of the blasting necessary for the construction of the Project.

59. Plaintiff is entitled to a declaratory judgment, pursuant to 12 V.S.A. § 4711, that Defendants' actions in inviting and allowing others to use and remain on the northwesterly boundary of their property, adjacent to Plaintiff's Project land and within the blasting safety zone, for the purpose of interfering with Plaintiff's contractual rights for the performance of the blasting and the timely construction of the Project, constitute nuisance, intentional interference with contract, and entitle Plaintiff to injunctive relief and damages as requested below.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court to grant the following relief:

A. Enter judgment declaring that Defendants' conduct will constitute private nuisance and interference with contract causing GMP irreparable harm and injury and entitling Plaintiff to damages and injunctive relief;

B. Grant Plaintiff the immediate preliminary injunctive relief it has requested;

C. Award judgment in Plaintiff's favor and against Defendants on each Count;

D. Award declaratory judgment in Plaintiff's favor and against Defendants;

E. On all Counts: Award Plaintiff compensatory and consequential damages;

F. On Counts I and II: Award Plaintiff punitive damages;

G. Award Plaintiff prejudgment interest, attorneys' fees, expenses and costs of court; and

H. Grant such other relief as this Court deems just and appropriate.

Dated at Burlington, Vermont this 13th day of October 2011.

Green Mountain Power Corporation

By: _____

R. Jeffrey Behm
Debra L. Bouffard
SHEEHEY FURLONG & BEHM P.C.
30 Main Street
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(802) 864-9891

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STATE OF VERMONT

SUPERIOR COURT **Orleans Unit**	)	**CIVIL DIVISION** **Docket No. _____**
GREEN MOUNTAIN POWER CORPORATION, **Plaintiff**	)	
v.	)	
DONALD AND SHIRLEY NELSON, **Defendants**	)	

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF FACT AND LAW

Plaintiff, Green Mountain Power Corporation ("GMP"), by and through its attorney, Sheehey Furlong & Behm P.C., hereby moves pursuant to V.R.C.P. 65(a) and (b) for a temporary restraining order and preliminary injunction to enjoin the Defendants and their unidentified co-conspirators from improperly interfering with GMP's development of a $136 million wind generation project in Lowell Vermont known as the Kingdom Community Wind Project (the "Project" or "KCW"). The Defendants, having failed in their attempts to stop the Project through legal means,[1] are now attempting to destroy the Project by improper conduct that violates GMP's legally protected rights, subverts the State's legal processes and creates an imminent risk of irreparable harm to GMP and the public interest. Specifically, they are inviting

[1] The Defendants were parties and witnesses in the Vermont Public Service Board approval proceedings under 30 V.S.A. § 248. They are continuing to challenge the KCW Project in appeals to the Public Service Board of water quality permits issued by the Agency of Natural Resources and an appeal (as a member of the Lowell Mountains Group) to the Supreme Court of the Public Service Board's grant of a Section 248 Certificate of Public Good for the Project.

and assisting persons to occupy their land adjoining the Project to create a safety risk that will halt construction blasting on GMP's land essential to the timely completion of the Project.

On May 31, 2011, the Vermont Public Service Board ("PSB"), after holding public and contested case hearings, considering extensive evidence and pleadings submitted by numerous parties, including the Defendants, found that the Project, as conditioned, would promote the general good. It accordingly granted a Certificate of Public Good ("CPG") for GMP's development of the Project. A key benefit and component of the Project is that it will be eligible for federal Production Tax Credits ("PTCs") of approximately $48 million over the first ten years of operation **if** it becomes operational by December 31, 2012. Construction of KCW started on September 1, 2011. Under GMP's already tight construction schedule, it is estimated the Project will be operational in early December, 2012.

Construction on the Project is at a stage requiring explosive blasting to build a 3.2 mile crane path on a remote, uninhabited ridge in Lowell. A portion of the blasting, commencing on October 17 will occur on GMP land in an area located within 50 to 900 feet of the northwesterly boundary of the Defendants' 600 acre property.[2] Maine Drilling and Blasting, Inc. ("MDB"), the blasting sub-contractor on GMP's Project, has taken steps that will likely confine flyrock to GMP's land. In order to guarantee human safety, however, MDB's blasting protocols require a safety zone extending 1000 feet from the blast site to be cleared of people for a short period during blasting.

The Defendants have been attempting to sell their Property for the last four years, assert the Project will diminish its value and wish to stop the Project from being constructed. To accomplish this, they have invited and assisted a number of unidentified persons to occupy their

[2] The facts relating to the blasting and construction details are largely set forth in the Affidavit of Stephen Blaisdell, Vice President of Maine Drilling & Blasting, Inc. ("Blaisdell Aff. ¶___") and Charles Pughe, GMP's Project Manager for the KCW Project ("Pughe Aff. ¶___") attached to this Motion as, respectively, Exhibits 1 and 2.

lands closest to the planned blasting for the purpose of creating a safety risk that will prevent blasting and the construction of the Project. To continue with the blasting in the absence of the requested injunction, MDB must adopt additional costly safety procedures that will delay completion of the blasting by 6 weeks and add well over $1 million in costs to the Project. Moreover, the delay will create an imminent threat that the Project will not be operational in 2012, which places the economic viability of the entire Project at risk due to loss of the PTCs.[3] This constitutes irreparable harm to GMP and the public interest.

The false premise of the Defendants' scheme to destroy the Project is their assumption they can do whatever they please, no matter how injurious to others, so long as they do it entirely on their own land. That misguided belief is wholly incorrect. Vermont law is clear that a landowner cannot create a condition or pursue a use of their land for the purpose of substantially interfering with another's legitimate use of its property. *Trickett v. Ochs*, 2003 Vt. 91, ¶16, 176 Vt. 89. Equally clear is that the Defendants' wrongful and purposeful interference with the performance of the contracts between GMP and its construction contractors violates GMP's protected interests and gives rise to an actionable interference with contract claim. Although the Defendants' wrongful conduct will make them liable for money damages, the damages are inadequate to redress the harm GMP and the public will suffer from the loss of the Project. Furthermore, to the extent some aspects of the harm could be compensated by money damages, the tens of millions of dollars of damages threatened by Defendants' actions cannot be collected from their finite assets. Where a judgment for money damages cannot be collected, money damages are inadequate and the harm is irreparable as a matter of law.

[3] In considering the effects of construction delay due to another cause, the PSB recognized that the loss of the PTCs would place the Project's economic viability at risk. *See* PSB's Order Re Motions For Modification Of Conditions, p. 8 (July 12, 2011).

As set forth below in the incorporated Memorandum of Fact and Law, there is a likelihood that GMP will prevail on both the merits of its nuisance and contract interference claims and, in the absence of the requested injunction, there is an imminent threat that both GMP and the public will be irreparably injured. The injunction is therefore both legally necessary and justified. GMP respectfully submits that this Court should issue the Proposed Order appended to this Motion and supporting Memorandum, and enjoin the Defendants and all persons described in V.R.C.P. 65(d) from being present, or encouraging, permitting or causing others to be present on the Nelsons' lands within 1000 feet of the blasting.

MEMORANDUM OF FACT AND LAW

I. RELEVANT FACTS

A. The Parties

GMP is Vermont's second largest electric public utility. It is engaged in the business of generating and purchasing electric power for distribution and sale to its approximately 90,000 commercial and residential customers in Vermont. As a public utility, its rates and services are regulated by the Vermont Public Service Board ("PSB"). Prior to constructing or developing electric facilities, GMP is required to obtain approval from the PSB in the form of a Certificate of Public Good ("CPG") under criteria set forth in Act 248 (30 V.S.A.§ 248). The PSB granted a CPG for the Project in its "Findings and Order (May 31, 2011)" ("May 31 Order").[4]

The Defendants own a house on a 600 acre tract of land at least partially located in Lowell, Vermont. Their house is located approximately 4,500 feet from the KCW Project. It is listed for sale for $1.2 million and has been on the market for the past four years. The Nelsons were permitted to intervene as parties in the PSB proceedings. They opposed the grant of a CPG for the Project and testified that the Project would diminish the value of their property. The

[4] The May 31 Order is attached as Exhibit 3.

northwesterly boundary of the Nelsons' land is contiguous and shared with land GMP acquired and possesses pursuant to long-term leases (49.5 years) it entered to construct and operate the KCW Project.

B. A Description of the Project

The KCW Project consists of a wind powered electric generation facility with up to 63 Megawatts ("MW") of maximum capacity and associated transmission and interconnection facilities. The generation facilities consist of 21 wind powered turbines that will be situated along 3.2 miles of ridge line in Lowell, Vermont. (May 31 Order at 12). The Project's location was selected because it is a highly favorable site for wind generation of electricity. The wind turbines will be located on support towers 262 to 279 feet high at the nacelle and 459 feet high at the vertical tip of the rotor blade.[5] (May 31 Order at 14, ¶13). The total cost of the project to GMP is estimated to be $136 million. (May 31 Order at 34, ¶89).

An important economic component of the Project is approximately $47-48 million in federal PTCs that the Project will be eligible to earn over the first ten years of its operation, subject to the condition that it be operational by December 31, 2012. (Pughe Aff. ¶5). As the PSB recognized in a July 12, 2011 Order modifying a condition in the CPG, the economic viability of the Project would be placed at risk by the failure of GMP to qualify for the PTCs by achieving operation of the Project by the 2012 deadline. *Id.*

Prior to petitioning the PSB for a CPG, GMP first sought to ensure that the residents of Lowell supported the Project. On March 2, 2010, the Town of Lowell held a vote at which 78 percent of the registered voters participated, and three times as many voters supported the Project as opposed it (342-114).

[5] Another aspect of the Project involves the up-grading of 16.9 miles of transmission line and associated substations.

C. The PSB Proceedings And The PSB Findings and Order Granting a CPG For The Project

1. The Proceedings

On May 21, 2010, GMP, Vermont Electric Cooperative, Inc., Vermont Electric Power Company, Inc. and Vermont Transco LLC jointly petitioned the Vermont Public Service Board for a certificate of public good, pursuant to 30 V.S.A. § 248, to construct up to a 63 MW wind electric generation facility and to install or up-grade associated transmission and interconnection facilities. The PSB thereafter granted permissive joinder to a number of environmental groups, adjoining landowners and landowner groups, and the Towns of Lowell, Craftsbury, and Albany. (May 31 Order at 6-7). The Defendants were among those permitted to intervene as a party. The Vermont Department of Public Service was the public's advocate in the proceedings, and the Vermont Agency of Natural Resources represented the State's interest in the environment. The PSB held a public hearing on September 23, 2010; hundreds of persons attended the hearing and 57 persons spoke. (May 31 Order at 10). All of the parties to the proceedings had an opportunity to submit written testimony and exhibits to the PSB. Technical hearings were conducted on February 3-4, 7-10, and 22-24, 2011, and the parties thereafter submitted briefs and reply briefs.

2. The PSB's May 31 Order

On May 31, 2011, the PSB issued its 157 page May 31 Order concluding that the Project, subject to the conditions imposed by the PSB, will promote the general good of the state. It accordingly granted a CPG permitting the Project's construction and operation.

The PSB found that the Project was necessary to meet the need for present and future demand for electric service and would provide GMP and the Vermont Electric Cooperative with a source of long-term stably priced power. Furthermore, it stated that the Project would assist

GMP in meeting the legislatively set goal of satisfying 20 percent of the State's energy demand from renewable resources and would not emit greenhouse gases. (May 31 Order at 3, 26-28).

The PSB also found that the Project would provide a significant economic benefit to the State by, among other things, adding $50 million to the State's total economic output during its development phase, 700 full time equivalent job years during construction (with 80 percent being in Orleans County) and 30 in-state jobs during operation (15 to be in Orleans County). In addition, it would generate initial direct state and local property tax payments of nearly $1 million annually and $2 million in tax revenues for the General and Transportation Funds during construction and more than $13 million over the 25 year life of the Project. (May 31 Order at 32-33,¶84). The net present value of education property taxes and non-tax payments to be made by GMP to Lowell and other Towns is $10.8 million. (May 31 Order at 35, ¶99.

GMP agreed to, and the PSB imposed still more, conditions and restrictions designed to benefit the environment or to mitigate the Project's effects on sound, wildlife, and aesthetics. One PSB imposed condition was there could be no blasting on the Project until it approved a blasting plan to be submitted by GMP, and it required that the blasting contractor use proper techniques and mats where appropriate to limit the occurrence of flyrock. (May 31 Order at 47-49).

D. The Approved Blasting Plan, Information Meetings and The Start of Construction

MDB, GMP's blasting subcontractor,[6] developed a blasting plan approved by the PSB on July 29, 2011. Among other things, the plan limited blasting to between 9 a.m. and 5 p.m. on non-holiday, week days, required that persons with land one-half mile from the blasting be

[6] MDB is a sub-contractor to J.A. McDonald, Inc., which has a contract with Reed & Reed, Inc. to perform earth moving and site work on the Project. Reed & Reed, Inc. is GMP's general contractor for the Project.

notified each day by phone of the location and estimated time of the blasting, and provided for performance of a security check to ensure no persons were present in the area.

The blasting will occur once or twice daily (generally in the afternoon) beginning in the area near the Defendants' boundary on October 17, 2011. Prior to the blasting, a whistle audible for a distance of at least one-half mile will be sounded as follows: three whistles sounded 5 minutes before blasting, two whistles sounded one minute before blasting and one whistle sounded for an "all clear." Signs will be posted in the blasting areas and on access routes to those areas warning of the danger and explaining the meaning of the whistles and the need to keep 1000 feet in distance from the blasting. (Pughe Aff. ¶10-11). MDB will use directional blasting and blasting mats (12 feet by 24 feet rubber & steel cable mats weighing about 11,000 pounds each) where necessary to minimize flyrock. (Blaisdell Aff. ¶¶ 31, 47).

Informational meetings were scheduled for August 4 and 18 in the Lowell Firehouse and notices of the meetings were sent by certified mail to all residents living within one-half mile of the blasting area. The Nelson Defendants attended the meetings. (Pughe Aff. ¶8, 16). MDB provided the above described information and more at the meetings and fielded questions from the attendees.

Construction on the Project began on September 1. The earth moving contractor has completed the access road leading to the ridge line, and it and MDB are scheduled to commence construction and blasting on the 3.2 mile crane road on October 17. (Pughe Aff. ¶6, 15). The construction of the crane road requires a linear approach, as the earth movers and blasting team must build their way along the crane road in order to move their equipment forward. (Blaisdell Aff. ¶¶ 22-24).

E. The Defendants' and Their Co-Conspirators' Actions To Derail Construction Of The Project On GMP's Leasehold Land By Interfering With MDB's Performance of Its Blasting Contract

In a letter dated September 28, 2011 and addressed to Mary Powell, GMP's President and CEO, Defendants wrote that, "our guests will be camping, recreating and hunting in that area [their northwesterly boundary] for the foreseeable future" and "we trust you will be respectful of their presence and particularly their safety."[7] The letter continued, "[w]e would appreciate receiving written confirmation that that no flyrock from your blasting will trespass or intrude on our property and that nobody will be endangered." In a news article published the next day, it was reported that in an interview with Don and Shirley Nelson, they said they had invited campers to pitch tents on their property within the safety zone surrounding where some blasting will occur. Shirley Nelson was quoted as saying: "Friends and neighbors have decided that it's time that somebody just said something. We couldn't think of any other way to do it. We have been ignored through this whole process."[8]

Tents were erected and persons have been camping on the northwesterly edge of the Defendants' 600 acre property for the past week. They are located nearly one mile and a 40-60 minute hike from the Defendants' house, but only about 100 feet from a blast site on GMP's land. In another news article dated October 5, it was reported that Defendants and their co-conspirators said the purpose of the campsite is to stop the blasting, and "the hope is that the campsite is so close to the project that contractors won't be able to safely detonate the high explosives necessary to build a wide crane path" that must be built to erect the turbines.[9] Don Nelson, who appears at the campsite in photographs accompanying the article, is reported as

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[7] The letter was signed by both Nelson Defendants and is attached as Exhibit 4.
[8] Boomberg Business Week (AP), Anti-wind Occupation Begins on Vt. Lowell Mountain, (Sept. 29, 2011). A copy of the article is attached as Exhibit 5.
[9] The Chronical, Campers Hope to Stop Lowell Mountain Blasting, p. 16 (Oct. 5, 2011). A copy of the Article is attached as Exhibit 6.

saying that "high explosives require a 750 foot safety zone, free of people, before they can be set off [and] the camp site is well within that limit." The article reports that the campers were nine Sterling College students and Craftsbury resident, Ann Morse, whose companion, Kevin Gregoire, has accompanied Sterling Students on three winter camping trips as part of a Sterling course/program named, "Expedition." In a Channel 44 television news clip, an unidentified woman was interviewed (apparently inside the Nelson's house) and said that she and others would be camping at the site for the entire winter and would stay through any blasting.

F. The Presence Of Persons Along The Nelson Boundary Will Delay Completion Of The Blasting By Approximately Six Weeks And Significantly Increase The Costs Of Construction

MDB's present blasting plan involves using directional blasting and blasting mats where necessary to limit flyrock. MDB is the largest blasting contractor in the Northeastern United States and has extensive general experience in controlled blasting and specific experience with wind generation projects. (Blaisdell Aff. ¶¶ 2-13). A blasting mat is a 288 square foot rubber and steel mat weighing about 11,000 pounds. (Blaisdell Aff. ¶47). Directional blasting involves shaping the rock face in a manner that will focus the explosive gases and blast debris in a direction away from an area to be avoided. (Blaisdell Aff. ¶¶30-31). On occasion, an unobservable fissure in the rock, running in a direction not indicated by the rock grain, will permit the explosive gases to vent and expel flyrock in an unexpected direction. (Blaisdell Aff. ¶34). Based upon its examination of the site and extensive experience with blasting, MDB believes the current plan is likely to keep flyrock confined to GMP's property. (Blaisdell Aff. ¶33). However, because human safety is of much greater importance than property damage, MDB requires that all non-blasting personnel be cleared from a safety zone extending 1000 feet from the blast point. (Blaisdell Aff. ¶36).

Areas depicted by the red shading on the diagram attached to the Blaisdell Affidavit, identify blasting points along the crane road that will be located significantly less than 1000 feet from points along the Nelson's westerly property line. Attachment 1 to the Pughe Affidavit shows actual distances between blasting areas on the crane path and the Nelson boundary. In order to guarantee the safety of persons at the properly line, MDB must use substantially more blasting mats in additional areas, reduce its blasting charges, drill more charge holes and rely on a greater number of blasts with smaller charges. (Blaisdell Aff. ¶¶37-52). The degree of precautions that must be taken increases the closer a person is located to the blast, *e.g.*, additional layers of matting and smaller charges. There is an estimated 330,000 cubic feet of rock to be removed by blasting located within 1,000 feet from the Nelson boundary.

Mr. Blaisdell estimates that the presence of the Nelsons and their "guests" on the boundary line will delay completion of blasting on the crane road by nearly six weeks, more than doubling the current time it will take to complete that blasting (from the currently estimated 5.5 weeks to 11.5 weeks). (Blaisdell Aff. ¶¶42-54). MDB will have to purchase 50 additional blast mats and significant additional blasting crew days will be necessary too. Because construction of the crane road must occur before other Project work is performed on the ridge line, a day's delay in blasting necessarily results in a day's delay in the dates the Project becomes operational (Pughe Affid. ¶6). It is estimated that an additional $1.4 million in expenses will be incurred if it is necessary to adopt measures to safeguard person's present along the Nelson boundary during blasting. (Pughe Aff. ¶18).

II. THE STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Preliminary injunctive relief should be granted under V.R.C.P 65(b) if the movant establishes that there is an imminent threat it will suffer an irreparable injury in the absence of

the injunction and that it has a likelihood of success on the merits. *See Campbell Inns v. Banholzer, Turnure & Co.*, 148 Vt. 1, 4, 7-8 (1987); *Vermont Division of State Bldgs. v. Town of Castleton Bd. of Adjustment*, 138 Vt. 250, 256-257 (1980); *see also Rosso-Lino Beverage Distributors, Inc. v. Coca Cola Bottling Co. of NY, Inc.*, 749 F.2d 124, 125 (2d Cir. 1984) (cited with approval by *Campbell Inns*, 148 Vt. at 7). A threat is imminent if it is present now even though the harm may not be felt until much later. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996).

Injunctive relief, in the form of a temporary restraining order ("TRO"), may be granted on a temporary basis without notice to the adverse party where, "it clearly appears from specific facts shown by affidavit or by the verified complaint that irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." V.R.C.P. 65(a).

Generally, "to determine whether an injunction is appropriate, the court must weigh the relative hardships on the parties, looking at . . . the relative injury [including the public interest] to be cured as compared with the hardship of injunctive relief." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000); *accord In re J.G.*, 160 Vt. 250, 255 n.2 (1993) (noting that "the factors considered for issuance of preliminary injunctions are (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest.").

The existence of irreparable harm is often the decisive factor in determining whether preliminary injunctive relief is appropriate. The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction. *Campbell Inns, Inc.*, 148 Vt. at 7. Where the harm suffered is purely economic, irreparable harm will be found if such damages are

"clearly difficult to assess and measure." *Danielson v. Local 275, Laborers Int'l Union of North America*, 479 F.2d 1033, 1037 (2d Cir. 1973); *Ecolab, Inv. v. K.P. Laundry Machinery, Inc.*, 656 F. Supp. 894, 899-900 (S.D.N.Y. 1987) (irreparable harm shown because extent of business loss "may be very difficult to measure to the point that [plaintiff] might not be fairly compensated if left to a damage remedy").

Similarly, economic harm is deemed irreparable if recovery of a monetary damage judgment is likely to be uncollectible. *See, e.g., United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1991) (irreparable harm where principles of sovereign immunity injected doubt into whether monetary damages could be recovered); *see also Zeltser v. Regal V World-Wide Holdings, Inc.*, 111 F.3d 124, 1997 WL 176851, *1 (2d Cir. 1996) (threatened injury may be irreparable if movant would be unable to collect on judgment).

V.R.C.P. 65(d) provides that every TRO and injunction is binding upon the parties, their agents, attorney and all persons in active concert or participation who receive actual notice of the order by service or otherwise. *See Vermont Women's Health Center v. Operation Rescue*, 159 Vt. 141, 146 (1992) (actual notice rather than service necessary to ensure courts can enforce their orders against unnamed parties acting in concert with defendant and violating the rights of others).

III. PLAINTIFF'S MOTION FOR A TRO AND PRELIMINARY INJUNCTION SHOULD BE GRANTED BECAUSE IT HAS DEMONSTRATED: A LIKELIHOOD OF SUCCESS ON THE MERITS, IMMEDIATE AND IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED, A BALANCE OF THE HARDSHIPS FAVORS GRANTING THE RELIEF, AND INJUNCTIVE RELIEF IS CONSISTENT WITH THE PUBLIC INTEREST.

A. Plaintiff Is Likely To Succeed On The Merits Of Both Its Nuisance and Intentional Interference With Contract Claims.

1. Nuisance

The Nelson Defendants actions in occupying, and in allowing, encouraging and aiding others to occupy, their lands solely in order to stop MDB's blasting and the construction of the Project clearly constitutes a nuisance.

The tort of nuisance protects a plaintiff's intangible right to use and enjoy its land. Dobbs, The Law of Torts §398 (2001 5th ed.). A private nuisance "is a condition or activity that [substantially] interferes with the possessor's use and enjoyment of her land, typically by incorporeal or non-trespassory invasions." *Id.* at § 399, at 618. In most nuisance cases, the condition or conduct interfering with another's use of property takes place on the interferor's own property. *See generally*, Dobbs, The Law of Torts §398.

In order to prevail upon a claim of nuisance, the Plaintiff must demonstrate that there is a substantial interference with his use and enjoyment of his property and the defendant's activity causing the interference is unreasonable. *Trickett v. Ochs*, 2003 Vt. 91, ¶16 (Determining whether there is a nuisance requires the court to determine the extent of the interference and the reasonableness of the challenged activity). A possessor of land upon which a third person carries on an activity creating an actionable nuisance is subject to liability if: (a) the possessor knows or has reason to know the activity is being carried on and involves an unreasonable risk of causing

the nuisance and (b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance. *Restatement (Second) Torts* § 838.

Determining the Extent of the Interference

The *Restatement (Second) of Torts* ¶827 lists factors courts should consider in determining whether the interference is substantial: "(a) the extent of the harm; (b) the character of the harm; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm. In this case, the Defendants' actions on their own property not only will delay Project operation and cause substantial monetary damage to GMP, it threatens the economic viability and existence of a $136 million Project that the PSB has already determined will promote the public good in a variety of ways. In short, the magnitude and nature of the harm to GMP and the public is huge and affects both private and public interests. Even if the Defendants' unabated nuisance does not stop the Project from being built and operated, the nuisance will have greatly increased the costs to construct it and produce power there. The potential losses, in addition to monetary damages, includes the loss of a renewable source of stably priced electricity whose generation is relatively free of carbon emissions. In addition, public tax revenues and the educational and other services they fund will be lost, and the loss of a significant number of jobs would be placed at risk.

Determining Unreasonableness

The second inquiry in a nuisance case is the reasonableness of the defendant's conduct, which must be assessed "in light of the particular circumstances of the case." *Trickett v. Ochs*, 2003 VT 91, ¶ 37. "Even when engaged in a lawful business use, the owner of the business must act in a reasonable manner so as not to unreasonably interfere with the rights of adjoining

property owners." *Trickett*, 2003 VT 91, ¶ 37. In *Trickett,* the court emphasized that pursuits with clear economic value and social utility must still be conducted in a reasonable "manner, at the place, and under the circumstances in questions." *Id.*

More pertinently to the facts of this matter, however, is the established principle that an activity interfering with the plaintiff's use of its property is unreasonable if either: 1) the harm could be avoided without undue hardship to the interferor/defendant or 2) the interferor's activity is undertaken for the sole purpose of causing harm to the plaintiff. *See Trickett*, 2003 VT 91, ¶37 ("Irrespective of the utility of the land use, the question may come down to whether the activities causing the harm are reasonably avoidable"); Restatement (Second) of Torts ¶ 830 (1979) (A substantial interference is unreasonable if the interferor could "avoid the harm in whole or in part without undue hardship"); *see also Coty v. Ramsey Assoc., Inc.,* 149 Vt. 451, 458 (1988) (defendant's creation of a condition on its land whose sole purpose was to substantially interfere with neighbors use and enjoyment of their land was malicious and not justifiable on social utility grounds).

In the instant matter, the Defendants' actions are motivated solely by their desire to destroy GMP's Project and, just as clearly, the Defendants could easily avoid causing the nuisance by staying a thousand feet from the blasting area for the short duration of the blasting that will occur each day over a period of about two weeks.

In a published Pennsylvania case with facts strikingly similar to those involved here, the court held that a person who takes up a position along his property boundary in order to prevent approved blasting on a neighboring property commits a nuisance that may be preliminarily enjoined. *See Brewster v. Highway Materials Inc.*, 7 Pa. D&C 5th 514, 2009 WL 2055951 (Pa. Ct. C.P. 2009), *aff'd*, 987 A.2d 231 (Pa. Commw. Ct. 2010). (Attached as Exhibit 7). In

Brewster, a quarry operator obtained government approvals to excavate stone from a portion of the quarry adjacent to the defendants' residential property by blasting within twenty-five feet of the boundary with defendants' property. *Id.* at 517-19. Just before the blasting was to start, a defendant positioned himself just inside his property boundary with the quarry in the immediate vicinity of the blasting and refused to move to a safe location. *See id.* at 520. The quarry operator sued the defendants for private nuisance and moved to enjoin them from placing themselves on their own property in a position of personal danger during blasting. *Id.* at 520-21.

The Pennsylvania trial court granted the request for a preliminary injunction and ordered, *inter alia*, that:

> If plaintiff is blasting adjacent to the defendants' property, the defendants, their family or any other third party acting on their behalf, shall remain at a location of at least 300 or more feet from the location where the blast shall occur on plaintiff's property from the time that the explosives on plaintiff's property are wired for detonation until the blast is set off.

Id. at 516 n.2.

In granting the preliminary injunction – a decision affirmed on appeal -- the *Brewster* Court found that:

> Clearly, [plaintiff] established the requirements of private nuisance. [Defendant] deliberately took up positions on his property line with the express intention of preventing [plaintiff] from proceeding with their plans. [Defendants] have intentionally interfered with the lawful use of the adjoining property and with the lawful activities of the property owner.

Id. at 540. The *Brewster* Court continued:

> There could not be a clearer illustration of an individual impairing another's private right of use or enjoyment of land than the [defendants'] intentional actions. Neither is there a clearer demonstration of intentional and unreasonable interference with the quarry's legal use of its land than that of the [defendants] . . . [The Department of Environmental Protection] designated this situation as extreme where [defendant] deliberately exposes himself to potential blasting hazards. The risk that [defendant] represents cannot be ignored.

Id. at 541. The court further found that if the quarry operator were not allowed to blast and mine near the defendants' property, it stood to lose approximately $15 million, the quarry would close, and twenty-five employees would lose their jobs. *Id.* at 542, 543-44. Balanced against this irreparable harm, the court found that the 300 foot safety zone would constitute a "relatively minor" interference with the defendants' use of their property that would not require them to even temporarily vacate their home. *Id.* at 542, 525.

2. Intentional Interference with Contract

Vermont's courts recognize the tort of intentional interference with contract as set forth in the Restatement (Second) of Torts §766 (1965):

> One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

William v. Chittenden Trust Co., 145 Vt. 76, 80 (1984) (*quoting Section 766*); *accord Gifford v. Sun Data, Inc.*, 165 Vt. 611, 612 (1996).

The element of intent can be shown by proof that the defendant desired the interference or knew that interference was substantially certain to occur even if the defendant also acts for some other purpose. *Williams*, 145 Vt. at 81. There are no specific requirements as to the means of interference; it may be accomplished by force, threats, depriving the contractor of the ability to perform, promises, or other inducements. *See* Restatement §766, cmt k.

Prevailing on a contract interference claim requires proof that the interference was improper, which requires courts to consider the factors set forth in Restatement §767. These include: a) the nature of the actor's conduct; b) the actor's motive; c) the interests of the plaintiff; d) the interests sought to be advanced by the actor; e) the social interests in protecting

the actor's freedom of action and the contractual interests of the plaintiff; f) the proximity or remoteness of the actor's conduct to the interference; and g) the relations between the parties. "An actor has no legal right to invade the contractual relation of others solely to promote his own financial interests." *Sun Data*, 165 Vt. at 612.[10]

In this matter, the Defendants have undertaken their conduct solely for the purpose of interfering with the performance by GMP's construction contractors of their contractual obligations to use blasting and construct the Project. It is an illegitimate, extra-legal act designed to circumvent the Vermont PSB's grant of a CPG. It is clearly wrongful for the Defendants and their cohorts to resort to vigilantism to interfere with and destroy GMP's valuable and lawfully created contract rights because they disagree with the PSB's grant of a CPG or believe available legal processes are inadequate.[11] Nor do the Nelsons, as stated in *Sun Data*, have a right to intentionally interfere with GMP's contract rights in order to further their own economic interests. Defendants may not arrogate to themselves decisional authority over whether GMP's Project can be built, especially when that authority has already been committed to Vermont's courts and administrative agencies.

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[10] Vermont courts also recognize the tort of intentional interference with prospective business, economic or contractual relations. To prevail on such a claim, the plaintiff must show:

> the existence of a valid business relationship or expectancy; 2) knowledge by the interferor of the relationship or expectancy; (3) an intentional act of interference on the part of the interferor; 4) damage to the party whose relationship or expectancy was disrupted; and 5; proof that interference caused the harm sustained.

J.A. Morrissey, Inc. v. Smejkal, 2010 VT 245, ¶21 (citing *Sun Data).*

[11] The Nelsons are currently appellants in appeals to the Supreme Court challenging the PSB's decision to grant a CPG for the Project.

B. There Is An Imminent Threat Of Irreparable Harm If A Temporary Restraining Order And A Preliminary Injunction Is Not Granted.

There is an imminent threat that the Defendants' conduct will result in irreparable harm to GMP and the public interest in the absence of the requested injunctive relief. GMP's contractors are scheduled to begin blasting within 1,000 feet of the Nelson camp on October 17, and harm (delay and added costs) will begin to be felt that day. (Pughe Aff. ¶¶6-7). Because GMP will begin to suffer that harm on October 17 when the blasting is to begin, it requests that a TRO be issued without notice until the Court can conduct a hearing on the preliminary injunction motion.

A delay in the construction of the Project will place the economic viability of the entire Project at risk by threatening that the Project will not be operational by 2012 and qualify for the PTCs. (Pughe Aff. ¶5). The injury that will be inflicted upon both GMP and the public is not compensable in money damages. From GMP's standpoint, the total loss of a large wind generating facility planned to operate for at least 25 years is the same in nature as the entire loss of an inn business, which the court in *Cambell Inns*, 148 Vt. at 4, 7-8, found constituted irreparable harm. Additionally the loss of a substantial power source (63 MW) fueled by a non-polluting, CO_2 free source will undermine the legislatively set goals and GMP's own goals of increasing the share of its power supply provided by renewable energy and new renewable energy sources. Losing those sources may result in a range of legal consequences for GMP not subject to redress by damages. (30 V.S.A. §§8001, 8004-05).

GMP's money damages from losing a stable power source of "new renewable power" expected to operate for at least 25 years would be virtually impossible to calculate with the certainty necessary to support a damages judgment, which constitutes irreparable harm. *See Danielson*, 479 F.2d at 1037; *Ecolab*, 656 F.Supp. at 899-900. Money damages that are

uncollectible are inadequate and constitute irreparable harm. *Zeltser*, 111 F.3d 124; *US v. New York*, 708F.2d at 93. Thus, even if the Project can be operated economically without the PTCs, the loss of $48 million in PTCs and added construction and development costs almost certainly will be too great to be satisfied from Defendants assets.

The loss of the Project will also inflict irreparable harm upon the public, as evidenced by the PSB's finding that the Project will benefit the general public good. Among other things, the jobs that will be created by the Project will be lost, the millions of dollars in taxes paid into the State's general and transportation fund and its educational fund will be lost, the State's interest in increasing use of renewable energy sources and those that do not emit greenhouse gases will be frustrated, and the benefits to the public of securing a needed and long-term source of stably priced power will be jeopardized. None of those losses can be adequately compensated by money damages and therefore constitute irreparable harm.

C. **A Balancing Of The Hardships Favors Granting The Requested Injunction.**

"[T]o determine whether an injunction is appropriate, the court must weigh the relative hardships on the parties, looking at . . . the relative injury [including the public interest] to be cured as compared with the hardship of injunctive relief." *Okemo Mountain, Inc.*, 171 Vt. at 212

In this case, the harm to GMP and the public that will occur in the absence of the requested injunction is manifestly severe; issuing the injunction will at most require only that Defendants leave the portion of their property located in the 1,000 safety zone for the short period two hours or less each day during the few weeks when there will be blasting in that area. (Pughe Aff. ¶¶9, 15). Indeed, but for their desire to destroy the Project, Defendants and their "guests" would likely not even be present in this remote, difficult to access portion of Defendants' land. In weighing the delay and increased costs caused by the Defendants' presence

on the boundary against the de minimus or non-existent burden the TRO will impose on Defendants, it is clear that the balance should be struck in favor of issuing the requested injunctive relief.

D. <u>The Requested Injunction Is Consistent With The Public Interest.</u>

The loss of a Project that the PSB has found promotes the public good is inimical to the public's interest.

IV. CONCLUSION

For all of the above reasons, it is respectfully submitted that this Court should issue a temporary restraining order and preliminary injunction as set forth in the attached proposed TRO and Preliminary Injunction Order.

Dated at Burlington, Vermont this 13th day of October 2011.

Green Mountain Power Corporation

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