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October 17, 2011

VIA FAX (802) 334-4429 & U.S. Mail
Penelope Carrier, COM
Vermont Superior Court
Orleans Unit, Civil Division
247 Main Street
Newport, VT 05855

RE: Green Mountain Power Corp. v. Donald and Shirley Nelson

Dear Ms. Carrier:

Enclosed for filing with the court please find the following:

1. Defendant's Emergency Motion to Dissolve TRO and Request for Expedited Hearing on an Emergency Basis;

2. Defendant's Answer to Plaintiff's Complaint;

3. Defendant's Counterclaim;

4. Notice of Appearance.

Thank you.

Sincerely,

P. Scott McGee
Smcgee@hcsmlaw.com

PSM/bd
enclosure
cc: Jeffrey Behm, Esq.
Donald and Shirley Nelson
Susan Hudson, Clerk Public Service Board
Jared M. Margolis, Esq., Attorney for Craftsbury and Albany, VT

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. _____

GREEN MOUNTAIN POWER CORPORATION,	)
Plaintiff,	)
	)
v.	)
	)
DONALD AND SHIRLEY NELSON,	)
Defendants.	)

DEFENDANT'S EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND REQUEST FOR EMERGENCY HEARING

Defendants Shirley and Don Nelson move this Court for an order immediately dissolving the temporary restraining order issued on October 14, 2011 and request a hearing at the earliest time available on an emergency basis because:

1. The TRO was issued on the basis of false and misleading declarations by Plaintiff, Green Mountain Power (GMP);

2. The indisputable facts demonstrate that GMP could have, but did not, advise Defendants that it would be seeking a TRO thus depriving Defendants of their right to advise the Court on October 14th of the erroneous factual assertions upon which GMP relied and violating the standards established by Rule 65(a) of the Vermont Rules of Civil Procedure;

3. The alleged need for immediate relief in the form of either a TRO or a preliminary injunction assert by GMP is based on facts and circumstances wholly within the control of GMP

and the alleged emergency was totally avoidable had GMP acted diligently.

4. GMP's intended actions of blasting in the near vicinity of the defendant's property with the expectation that some blast debris will be projected onto the defendant's property will, if carried out, be a violation of GMP's permit conditions. GMP thus does not come before the court with clean hands and is not entitled to injunctive or other equitable relief.

5. GMP's announced intention to blast in the near vicinity of defendant's property will violate defendants' property rights and will constitute a trespass and a nuisance under settled principles of Vermont law making injunctive relief in GMP's favor unsupported.

ARGUMENT

I. THE TRO SHOULD BE DISSOLVED BECAUSE IT WAS BASED ON FALSE STATEMENTS

A.1 The False Claim

GMP has represented that GMP had the legal authority and right, granted in the Certificate of Public Good (CPG) issued by the Public Service Board, to conduct blasting on its property even though it created a substantial risk that rock and debris would land on Defendants' property. Plaintiff's Pleading and Motion for TRO at 6-7.

A.2 The Truth

The CPG issued to GMP explicitly requires that:

> All blasting will be performed in accordance with any and all applicable laws and regulations, including, but not limited to, U.S. Department of Interior Rules 816.61-68 and 817.61-68 and the Blasting Guidance Manual, Office of Surface Mining, Reclamation and Enforcement, U.S. Department of Interior to limit peak particle velocity and ground vibration to safe levels. Noise and air blast effects shall be limited through application of proper techniques and *blasting mats will be*

used where needed to limit the occurrence of flyrock.

CPG at ¶ 36 (emphasis added)

The U.S. Department of Interior Rule 816.67 (c)) requires that:

> Flyrock. Flyrock traveling in the air or along the ground shall not be cast from the blasting site--
>
> (1) More than one-half the distance to the nearest dwelling or other occupied structure;
> (2) Beyond the area of control required under Section 816.66©); or
> (3) *Beyond the permit boundary.*

Id. (emphasis added)

Thus, GMP's plan to conduct blasting without using the necessary blasting mats to prevent fly rock and debris from landing on Defendants' property, if pursued, will be a direct violation of the provisions of its CPG.

B.1 The False Claim

GMP asserted that unless it was granted a TRO on October 14, 2011 it would suffer irreparable harm by not being able to complete construction of the project by a December 31, 2012 deadline to qualify for the currently available federal production tax credits for wind turbines. Plaintiff's Pleading at 20-21.

B.2 The Truth

The Public Service Board found, based on testimony offered by GMP, that the only way it could meet its December 31, 2012 deadline was if construction began on August 1, 2011.

> 50. The proposed project must be in service by December 31, 2012, in order to take advantage of the federal production tax credit. In order to meet that deadline, project construction *must* commence by the beginning of August, 2011. Tr. 2/3/11 at 93, 99, 120 (Pughe).

PSB Order (5/31/11) at 21 (emphasis added). GMP reaffirmed this finding in post-CPG briefs,

stating that "[t]he Order further indicates that GMP must begin construction by the beginning of August, 2011 in order to secure the PTC, and generally imposes requirements that would facilitate construction by then." GMP's Reply to the Towns' Opposition to GMP's Motion for Reconsideration at 2. In addition, GMP sought and obtained modifications to the CPG by elimination of certain pre-construction conditions imposed by the Board, based on GMP's continued assertion that unless it could begin construction by August 1, 2011 it would lose the federal production tax credits. PSB Order (7/21/11) at ("In the instant case, GMP has pointed out that, despite its efforts, it will be unable to complete the acquisition of the fragmentation-connectivity easements prior to August 1, 2011, meaning that construction will be delayed and the PTCs will be at risk.")

However, GMP did not begin construction of this project on August 1, 2011 and in fact construction did not begin until September 6, 2011, according to GMP's Press Release of that date. In addition, although in its Press Release, GMP bragged about its strong environmental ethic and claimed "GMP made an extraordinary effort in the design to avoid stream and wetland impacts", less than one month later its construction was shutdown by Vermont's Department of Environmental Conservation which found that:

> the Agency has determined that discharges and potential discharges from construction activities at the site present a current and potential threat of harm to the environment. The observed non-compliance included but was not limited to the failure by the permittees to construct the necessary permanent stormwater dry ponds, wet ponds, and/or level lip spreaders to serve as temporary sedimentation traps and/or basins in order to manage stormwater runoff from contributing earth disturbance, as specified in the approved erosion prevention and sediment control (EPSC) plan. The permittees are hereby directed to immediately cease all construction activity at the site, except for work necessary to bring the site back into compliance with the approved erosion prevention and sediment control (EPSC) plan.

In the Matter Of: Kingdom Community Wind (KCW) Lowell Mountain Wind Farm Construction Site Lowell, Vermont Construction Stormwater Discharge Permit No. 6216-INDC NPDES No: VTS0000108,) October 5, 2011 at p. 1. It took GMP a week to fix the problem and restart construction. *See* http://www.reformer.com/latestnews/ci_19096452 in which a GMP spokeswoman, Dorothy Schnure, indicates that construction will resume on October 13th.

Thus, if its earlier representations, made to the PSB on at least two occasions and on which the PSB relied in granting a CPG to GMP and in relaxing pre-construction conditions, are to be taken at face value - at a minimum they are admissions of a party - GMP misled the Court when it stated that unless the blasting scheduled to begin on October 17, 2011 were allowed to proceed as planned, it would miss its December 31, 2012 deadline. By its own reckoning it has already missed that deadline by six weeks - five weeks of delay in starting construction and one week delay as a result of its violation of its stormwater permit. What is apparent is that GMP uses the December 31, 2012 "deadline" argument whenever it needs something from a government agency to which it is not otherwise entitled, including this Court, regardless of the truth of the assertions it is making.

C.1 The False Claim

GMP represented that it had a rigid schedule that required it to conduct blasting on the areas immediately adjacent to Defendants' property starting on October 17th and that there were no alternatives that could be pursued that would avoid disrupting the final schedule. Plaintiff's Pleading at 10-11.

C.2 The Truth

On several occasions, a spokeswoman for GMP, Dorothy Schnure, has made public statements indicating that blasting in the area near the Defendants' property was not going to occur until much later in the Fall or perhaps early winter. David Gram, a AP Reporter provided the following information, obtained from Ms. Schnure, in an article published in Bloomsburg Business Week on September 29, 2011:

> GMP spokeswoman Dorothy Schnure said blasting had begun on the other side of the mountain and was not expected to near the Nelsons' property until late fall or early winter.
>
> ***
>
> "If they're still there later this winter when we need to do the work, we'll address it then," Schnure said. "But there's certainly time between now and then to work it out."

In addition, there is nothing in the blasting plan or other permit documents or conditions that requires a specific schedule for when blasting will occur at any given location and the plan contains substantial flexibility to modify the schedule to account for changing events. For example:

> Furthermore, it is expected that the OPSC and EPSC Specialist may modify the Construction and Stabilization Sequence and associated EPSC measures provided on the EPSC Plan, as needed, throughout the construction of the project. Modifications will be made in response to actual construction conditions and/or limitations encountered. It is the responsibility of the OPSC and EPSC Specialist to report significant plan modifications and to review those modifications and any updates of the Construction and Stabilization Sequence with VT DEC throughout the construction of the Project, as required, and as such modifications and updates occur.

EPSC Plan Narrative at 6 and Construction plan sheet C-134 under Phasing Plan Notes.

Thus, GMP falsely asserted that the only possible way for it to proceed with construction was to begin blasting adjacent to the Defendants' property on October 17th.

II. THE TEMPORARY RESTRAINING ORDER SHOULD BE DISSOLVED BECAUSE THE APPLICATION FOR THE ORDER VIOLATED RULE 65(a) OF THE VERMONT RULES OF CIVIL PROCEDURE

Rule 65(a) of the Vermont Rules of Civil Procedure provides:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney *only if* it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition.

Id. (emphasis added). GMP makes no allegation, and could not make an allegation, that it was unable to notify Defendants of its plan to seek a TRO at a time sufficiently in advance of October 14th to allow Defendants to appear and present their opposition to the proposed TRO. As the previous discussion demonstrates, it appears GMP was fully aware that if it allowed Defendants a chance to "be heard in opposition" the TRO would never have been granted. In fact, GMP had been in direct contact with Defendants in the days preceding the TRO filing and even had its attorneys send Defendants a letter threatening them with legal action if they did not remove all persons from the 1000 foot safety zone defined by GMP. Nonetheless, at no time did GMP advise Defendants that it would be filing a TRO or that it would do so at the end of the work week preceding the date on which they intended to begin blasting next to Defendants' property. In fact the GMP spokeswoman, as noted above, was sending out quite a different message apparently designed to deflect Defendants from any thought that legal action was imminent.

GMP concedes that Defendants made them aware of the fact that guests would be camping on Defendants' property adjacent to where GMP planned to blast as early as September 28, 2011. Motion for TRO at p. 9. GMP concedes that at least by October 5, 2011 it came to believe that the campers intended to stay near the blasting area for the indefinite future. *Id.* at 9-

10. Accepting for the sake of this argument that GMP had a plan that required it to begin blasting adjacent to Defendants' property on October 17th, it had ample opportunity to advise Defendants that, unless the persons were removed, it would be filing a TRO request and to identify the time and location where it would make the filing to enable Defendants to "be heard in opposition". Clearly that was not GMP's plan. Rather, it was their plan to file the TRO request, without any notice to Defendants, such that there was no time before the objectionable blasting would be authorized to commence, for Defendants to appear before this Court to provide a rebuttal to the GMP's falsehoods and to seek to dissolve the TRO.

Vermont Courts have been particularly reluctant to grant a TRO unless there has been full compliance with the requirements of Rule 65. *See e.g. Vt. Democratic Party v. Republican Governors Ass'n,* 2004 Vt. Super. LEXIS 93, 2-3 (Vt. Super. Ct. Oct. 26, 2004) ("Our Supreme Court has advised trial court judges that injunctive relief is an extraordinary remedy not routinely granted unless the right to relief is clear. *Committee to Save the Bishop's House v. Medical Hospital of Vermont*, 136 Vt. 213, 218, 388 A.2d 827 (1978). A temporary restraining order will only be granted "if it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition." V.R.C. P. 65.)

Since GMP did not clearly demonstrate that irreparable injury would have resulted if it had advised Defendants of its plan to file a TRO, it has failed to comply with Rule 65 and the TRO should be dissolved.

III. THE FACTS ALLEGED BY GMP IN SUPPORT OF THE NEED FOR EMERGENCY ACTION ARE NOTHING BUT A CONTRIVED SCENARIO CREATED BY GMP

As noted above, GMP was obligated under the terms of the CPG to develop the details of its blasting plan such that fly rock would not leave the area for which it possessed a permit, which area does not and can not include Defendants property. The CPG also required GMP to use blasting mats to prevent fly rock from leaving the permitted property. Obviously GMP knew that blasting in the area immediately adjacent to Defendants' property would involve the substantial risk of fly rock landing on Defendants' property, which would violate the terms of the CPG and create an actionable trespass on Defendants' property. *See State v. Preseault*, 163 Vt. 38, 43 (Vt. 1994) ("We are also unpersuaded that one instance of encroachment does not equal a continuing trespass. Vermont law is clear that even the threat of continuous trespass entitles a party to injunctive relief. *See, e.g., Barrell v. Renehan*, 114 Vt. 23, 25, 39 A.2d 330, 332 (1944) (permanent injunction appropriate if trespass is threatened); *Kasuba v. Graves*, 109 Vt. 191, 199, 194 A. 455, 458 (1937) (equity will not refuse relief where a trespass is likely to be continued under a claim of right).") It may be expensive to use the blasting mats required by the CPG and may take longer to complete the blasting, but that is a price imposed on GMP by the CPG. It has had months since the CPG was issued to make arrangements to schedule blasting to accommodate the additional time needed and supplies required to meet the CPG conditions. It did nothing. Thus, when it appeared before this Court on October 14th seeking a TRO, the emergency it alleged required that action be taken without Defendants being present and in order to meet an October 17th scheduling deadline, was an emergency created by its own failure to act prudently and timely in response to the CPG requirements. Like the child who, after killing his

parents pleads for mercy because he is an orphan, GMP pleads for emergency relief to absolve it of its own negligence in planning the blasting. Its failure to act in a prudent manner is not justification for the relief it seeks, particularly since, on the merits, it is not entitled to any relief nor is it entitled to commit a trespass on Defendants' property in order to advance its own economic goals.

IV. THE TRO SHOULD BE DISSOLVED BECAUSE GMP'S INTENDED ACTIONS AS DESCRIBED IN ITS TRO APPLICATION WILL VIOLATED GMP'S BLASTING PERMIT

An additional ground for dissolving the TRO is that the actions GMP has told the court it intends to pursue if the TRO is granted will, if carried out, be a violation of clear and express terms of GMP's Certificate of Public Good (CPG) permit and the conditions governing blasting contained therein. Specifically, the CPG requires GMP to abide by federal blasting standards which are set forth at 30 C.F.R. Section 816.67. Those standards mandate that any blasting be conducted in a manner to ensure that no blast debris be cast beyond the permit boundary. The permit boundary for this project ends at the Nelson's property line. GMP is not permitted to conduct blasting that will put at risk the Nelsons' person or property or the use and enjoyment of their property. GMP failed to disclose this permit condition to the court when it applied for and obtained its permit. This failure could not have been inadvertent. Regardless of motive, the permit condition precludes the very actions GMP intends to carry out by virtue of the protection provided by the TRO. This is a manipulation of the court by GMP's failure to disclose facts material to its requested TRO. GMP's actions are in bad faith and are alone sufficient grounds to cause the dissolution of the TRO.

V. THE TRO SHOULD BE DISSOLVED BECAUSE THE BLASTING ACTIVITY GMP INTENDS TO CONDUCT WILL CONSTITUTE A TRESPASS AND A NUISANCE IN VIOLATION OF THE DEFENDANTS' PROPERTY RIGHTS UNDER SETTLED VERMONT LAW

A further ground for dissolving the TRO is that the actions intended by GMP will, as described by GMP – casting blast debris onto the defendants' property -- constitute a trespass and a nuisance under settled principles of Vermont law. *Barrell v. Renehan*, 114 Vt. 23, 25, 39 A.2d 330, 332 (1944). GMP, thus, is not entitled to a TRO because it plans to use the TRO to enable it to violate the defendants' rights. Further, several of the blast sites depicted by GMP on its plans are located on the defendants' property. GMP has refused to acknowledge the correct property boundary and has relied on a flawed survey that has been discredited. The defendants had the boundary line in question surveyed when they learned that GMP was planning major changes to the ridgeline area that included the defendants' property. The survey confirmed that the property line asserted by GMP encroaches by a distance of 181 feet onto the land of the defendants. GMP plans to conduct some of its blasting on this area of the defendants' property in reckless and wilful violation of defendants' rights.

The legal underpinnings to GMP's requested TRO are wholly flawed. The law is well established that a person engaging in the ultra-hazardous activity of blasting has the responsibility to ensure that debris from the blasting does not leave the property of the blaster and will present no harm or damage to adjoining landowners.

> [I]n the so-called "blasting" cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris. (citations omitted). And the rule of absolute

> liability for direct injury from blasting has been applied, not only to damage to property, but to the person." (citations omitted).

Exner v Sherman Power Construction Co., 54 F 2d 510, 513 (2d Cir. 1931) "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care. 57A Am Jur 2d § 410 at pp 398-99, citing Restatement Torts, 2d § 519.

In addition to the duties imposed by property and tort law, GMP's own permit requires that the blasting be conducted in such a way as to prevent any debris or "flyrock" from being cast beyond the permit boundary. Here, turning the legal standard on its head, GMP has announced that it is going to engage in blasting and that the blasting will create a clear and present risk that blasting debris will be thrown onto defendant's property, creating a risk of grave and serious injury to defendants and their guests if they remain on their property when the blasting occurs. GMP then argues that by remaining on their own property the defendants are interfering with GMP's use of its land. This is nonsensical. GMP may not create a hazard for its neighbors and then seek injunctive relief to oust the neighbors from parts of the neighbors' property to allow GMP to carry out the hazardous conduct.

CONCLUSION

GMP is fully aware that having chosen to embark on a program of blasting it was placing itself in an position where it would be expected to provide the strictest adherence to the law. In *Dean Thompson v. Green Mountain Power Corporation*, 144 A.2d 786 (1958) the Vermont Supreme Court held that "Yet the law preserves dynamite in the category of highly dangerous

agencies and demands of its use the highest degree of care and caution. *Tinney v. Crosby*, 112 Vt. 95, 104, 22 A.2d 145; *Goupiel v. Grand Trunk R. Co.*, 94 Vt. 337, 342, 111 A. 346. In addition, when engaging in an ultra hazardous activity, such as blasting, GMP is obligated " to take all necessary precautions to avoid foreseeable injury". *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 502 (Vt. 1963). GMP 1) seeks to avoid all necessary precautions, including blasting mats and smaller blasts, even though they are required by its CPG, 2) to use a contrived emergency to obtain a TRO on the very eve of its proposed blasting activities and 3) to thereby turn its callow actions into *fait accomplis*. This Court should not countenance such shenanigans and should promptly dissolve the TRO that was improvidently granted last Friday.

Dated at Hartford, Vermont this 17 day of October, 2011.

DONALD NELSON and SHIRLEY NELSON

By: _____

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STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Orleans Unit **Docket No. _____**

GREEN MOUNTAIN POWER CORPORATION,	)
Plaintiff,	)
	)
v.	)
	)
DONALD AND SHIRLEY NELSON,	)
Defendants.	)

ANSWER OF DONALD AND SHIRLEY NELSON TO PLAINTIFF'S COMPLAINT

Defendants Donald and Shirley Nelson answer each separately numbered paragraph of plaintiff's complaint as follows:

1. Paragraph 1 states a legal conclusion for which no response is required and the same is therefore denied.

2. Admitted.

3. Admitted.

4. Denied but defendants admit they own a house on more than 600 acres in Lowell, Vermont and that a portion of their land has a common boundary with land they believe is now being leased by GMP.

5. Admitted.

6. Admitted.

7. Admitted.

8. Defendants lack sufficient information to admit or deny the allegations of

paragraph 8 and the same are therefore denied, but defendants have no reason to doubt the plaintiff's representations in paragraph 8.

9. On information and belief defendants admit paragraph 9.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Defendants lack sufficient information to admit or deny the allegations of paragraph 15 and the same are therefore denied.

16. Defendants lack sufficient information to admit or deny the allegations of paragraph 16 and the same are therefore denied, but defendants have no basis to doubt the representations set forth in paragraph 16.

17. Denied.

18. Defendants lack sufficient information to admit or deny the allegations of paragraph 18 and the same are therefore denied, but defendants have no basis to doubt the representations set forth in paragraph 18.

19. Defendants lack sufficient information to admit or deny the allegations of paragraph 19 and the same are therefore denied.

20. On information and belief defendants believe the allegations in paragraph 20 to be true and the same are therefore admitted.

21. Denied, and defendants assert that a portion of the land that GMP has announced

it intends to blast is land that is owned by the Nelsons, and said blasting, if it proceeds, will cause irreparable harm to that portion of the Nelsons' property.

22. Defendants lack sufficient information to admit or deny the allegations of paragraph 22 and the same are therefore denied.

23. Defendants lack sufficient information to admit or deny the allegations of paragraph 23 and the same are therefore denied.

24. Defendants lack sufficient information to admit or deny the allegations of paragraph 24 and the same are therefore denied in that defendants are aware that plaintiff has amended its blasting plan from time to time and is not aware of the plan that is current in effect.

25. Defendants lack sufficient information to admit or deny the allegations of paragraph 25 and the same are therefore denied.

26. Admitted.

27. Admitted.

28. Defendants lack sufficient information to admit or deny the allegations of paragraph 28 and the same are therefore denied, and defendants assert that plaintiff does not control land within a 1,000 foot perimeter of the blasting zone and therefore will be unable to follow the safety protocol it has outlined.

29. Denied in that defendants believe that plaintiff is required to use blasting mats and devise blasting strategies that will minimize and avoid the creation of fly-rock that will extend beyond the permit boundary and deny that defendants use and occupancy of defendants' property will impede plaintiff's blasting as long as plaintiff complies with the conditions of its permit.

30. Denied, but defendants admit that they are opposed to the GMP project and assert

that they have a right to insist that GMP comply with the conditions of its permit and not interfere with the defendants' use and enjoyment of their lands.

31. Admitted.

32. Admitted.

33. Denied but defendants admit that they are aware that campers have come onto their property to observe and monitor the activities of GMP and to document permit violations.

34. Admitted.

35. Defendants lack sufficient information to admit or deny the allegations of paragraph 35 and the same are therefore denied, but defendants acknowledge that persons have been camping near the northwesterly boundary of defendants' property for a month or more.

36. Defendants lack sufficient information to admit or deny the allegations of paragraph 36 and the same are therefore denied, but defendants acknowledge that the tents are located near the common boundary that defendants share with the land being leased to GMP and that the tent sites are approximately a 40 minute hike from defendants' house and that the blast sites are actually on defendants' land.

37. Denied in that defendant does not recall making the comments attributable to defendant in paragraph 37, but defendant acknowledges that there are persons camping near the boundary line of the GMP power project, but if GMP abides by its permit conditions, the presence of such persons should cause no interference with GMP's project.

38. Denied in that defendant does not recall specific comments he made to third parties or a court reporter regarding the safety zone required for explosives, but is aware that with the use of blast mats the safety zone can be significantly limited.

39. Defendants lack sufficient information to admit or deny the allegations of paragraph 39 and the same are therefore denied.

40. Defendants lack sufficient information to admit or deny the allegations of paragraph 40 and the same are therefore denied.

41. Admitted in that some of the blast points along the crane road will actually be located on the Nelsons' property.

42. Denied in that if plaintiff complies with its permit conditions and takes the mandatory precautions required by its certificate of public good, adequate safety precautions will be in place for the blasting.

43. Denied in that plaintiff is obligated to comply with the conditions of its permit which require adherence with the performance standards of the Office of Surface Mining, Reclamation and Enforcement, including the express requirement that blasting be conducted in such a fashion to prevent any blast debris or fly-rock from being cast beyond the permit boundary.

44. Defendants incorporate the responses set forth in paragraph 1-43 above as if set forth herein.

45. Denied.

46. Denied.

47. Denied.

48. Defendants incorporate the responses set forth in paragraphs 1-47 above as if set forth herein.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Defendants incorporate the responses set forth in paragraphs 1-54 above as if set forth herein.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

AFFIRMATIVE DEFENSES

1. Lack of Clean Hands

Dated at Hartford, Vermont this 17 day of October, 2011.

DONALD and SHIRLEY NELSON

By: _____

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STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Orleans Unit **Docket No. _____**

GREEN MOUNTAIN POWER CORPORATION,
Plaintiff,

v.

DONALD AND SHIRLEY NELSON,
Defendants.

COUNTERCLAIM OF DONALD AND SHIRLEY NELSON

Donald and Shirley Nelson (Nelsons) hereby state their counterclaim against Green Mountain Power Corporation (GMP) as follows:

1. The Nelsons are the owners of property in Lowell, Vermont which has been in their family for generations.

2. GMP has leased land that abuts the property of the Nelsons along a common boundary. GMP is in the process of constructing 23 wind turbines and related infrastructure along a ridge line that is partially on the land leased by GMP and partially on land owned by the Nelsons.

3. The Nelsons have provided GMP with a survey of their land and have requested that GMP discontinue activities that will violate the Nelsons use and enjoyment of the land and, specifically, that GMP refrain from trespassing upon the land of the Nelsons by continuing with their construction activities, but GMP has ignored and disregarded the Nelsons' requests.

4. GMP intends to conduct blasting activities along the ridge line which includes

land belonging to the Nelsons, and such blasting activities will irreparably change and alter the land and irreparably damage the Nelsons' property.

5. GMP has already used contractors to clear cut a swath of land that is located on the Nelsons' property in violation of the Nelsons' property rights.

6. GMP's intended conduct in blasting along the ridge line will foreseeably and predictably cause blast debris, including fly-rock, to be cast upon defendants' land.

7. Such conduct is in violation of GMP's certificate of public good and of the performance standards for blasting that are incorporated therein and binding upon GMP.

8. GMP's actions in conducting blasting activities along the ridge is interfering with the defendants' use and enjoyment of their land and is a violation of their property rights.

9. In connection with its wind turbine project, GMP has made clear its interest and desire to purchase the Nelsons' land.

10. GMP has engaged in a course of conduct designed to threaten and intimidate the Nelsons to coerce them into selling their land to GMP.

11. If GMP were successful in obtaining title to the Nelsons' land, they would eliminate the trespass that they are committing along the ridge line near the common boundary of the two properties and would eliminate the trespass and nuisance they will be committing when they blast along the ridge line and cast debris and fly-rock onto the defendants' land.

12. If GMP were to buy the Nelsons' property, they would have the ability to use the Nelsons' land as potential mitigation acres in furtherance of their wind turbine project.

13. In furtherance of their plan and desire to acquire the Nelsons' land, GMP engaged in deceptive and duplicitous conduct by attempting to use a Vermont non-profit land trust to

serve as the front party to acquire the property from the Nelsons without disclosing to the Nelsons that the non-profit was acting in concert with and at the behest of GMP.

14. The details of this plan were disclosed by the non-profit to the Nelsons in the interest of full disclosure before any acquisition was completed, and the planned purchase fell through.

15. GMP has continued to pursue its efforts to force the Nelsons to sell GMP their land, and has made a purchase offer to the Nelsons which reflects the diminished value of the Nelsons' property due to the presence of the GMP wind turbine project next door.

16. GMP made their purchase offer to the Nelsons at a time when the Nelsons were actively opposing the granting of the permit to GMP and objecting to GMP's conduct on the project site.

17. On October 11, 2011, in a further effort to coerce the Nelsons to sell GMP their property, GMP, acting through its counsel, wrote a letter to the Nelsons in which it warned the Nelsons that the Nelsons' conduct as alleged by GMP constituted the tortious interference with GMP's contract with its blasting contractor and would constitute a nuisance which had the potential to cost GMP more than a million dollars in damages for which the Nelsons would be liable.

18. This letter was extremely upsetting and alarming to the Nelsons and has caused the Nelsons enormous anxiety and emotional, physical and psychological distress.

19. The Nelsons reached the point where they felt their only option was to sell their property to GMP to avoid the enormous liability exposure that GMP was threatening against them, but they were deeply offended by the wrongful conduct of GMP and decided to challenge

GMP's actions rather than capitulate to the pressure.

COUNT I – TRESPASS AND NUISANCE:

20. The allegations of Paragraphs 1-19 of this counterclaim are incorporated herein by reference.

21. GMP's conduct constitutes a knowing, wilful and intentional trespass on the lands and property of the Nelsons and creates a nuisance.

COUNT II – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS:

22. The allegations of Paragraphs 1-21 of this counterclaim are incorporated herein by reference.

23. GMP's conduct in threatening the Nelsons with more than a million dollars of liability damages in an effort to coerce the Nelsons into selling GMP their property and to dissuade the Nelsons from exercising their rights as landowners to use, enjoy and occupy their property, constitutes the intentional infliction of emotional distress for which GMP is liable for compensatory and punitive damages.

COUNT 3 INJUNCTIVE AND DECLARATORY RELIEF

24. The allegations of Paragraphs 1-23 of this counterclaim are incorporated herein by reference.

25. The Nelsons are entitled to injunctive and declaratory relief establishing their common boundary with the owner of the land now being leased by GMP and prohibiting GMP from trespassing on the Nelsons' land either directly or by casting blast debris upon it.

WHEREFORE the Nelsons request declaratory and injunctive relief and damages against GMP, including compensation and punitive damages and attorneys fees.

Dated at Hartford, Vermont this 17 day of October, 2011.

DONALD NELSON and SHIRLEY NELSON

By: _____

P. Scott McGee, Esquire
Hershenson, Carter, Scott and McGee, P.C.
P.O. Box 909, Norwich, VT 05055
(802) 295-2800

JURY DEMAND

The Nelsons demand trial by jury of all issues triable by a jury.

DONALD NELSON and SHIRLEY NELSON

By: _____

P. Scott McGee, Esquire
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P.O. Box 909, Norwich, VT 05055
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STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Orleans Unit **Docket No. _____**

GREEN MOUNTAIN POWER CORPORATION,	)
Plaintiff,	)
	)
v.	)
	)
DONALD AND SHIRLEY NELSON,	)
Defendants.	)

NOTICE OF APPEARANCE

P. Scott McGee and C. Daniel Hershenson of the law firm of Hershenson, Carter, Scott and McGee, P.C. and Anthony Z. Roisman of National Legal Scholars Law Firm, PC hereby enter their appearance as co-counsel for the defendants in the above-entitled action.

P. Scott McGee, Esq.

C. Daniel Hershenson, Esq.

Anthony Z. Roisman, Esq.