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November 10, 2011

Catherine Gattone
Docket Clerk
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-3278

RE: Donald and Shirley Nelson v. Green Mountain Power Corporation
Supreme Court Docket No. _____
Superior Court Civil Division Docket No. 256-10-11 Oscv

Dear Cathy:

I am enclosing an original and one copy of the Plaintiffs' Opposition to GMP's Motion to Dismiss Complaint. As authorized, I am also forwarding by email a pdf copy.

Thank you for your courtesies in this matter.

Sincerely,

P. Scott McGee
Smcgee@hcsmlaw.com

PSM/bd
enclosure
cc w/o enclosure: Jeffrey R. Behm, Esq.
Debra L. Bouffard, Esq.
Jon T. Alexander, Esq.
Donald and Shirley Nelson
Penny Carrier, COM

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

DONALD AND SHIRLEY NELSON, **Plaintiffs**	)	**SUPREME COURT Docket # 2011-391**
v.	)	**Superior Court Civil Division** **Docket No. 256-10-11 Oscv**
GREEN MOUNTAIN POWER CORPORATION, **Defendant**	)	

DONALD AND SHIRLEY NELSONS' OPPOSITION TO GREEN MOUNTAIN POWER CORPORATION'S MOTION TO DISMISS

Now come plaintiffs Donald and Shirley Nelson (Nelsons), by and through their attorneys, Hershenson, Carter, Scott and McGee, P.C., and state their opposition to Green Mountain Power Corporation's (GMP) motion to dismiss. GMP's motion mischaracterizes the factual record and misinterprets the law. For the reasons stated below, its motion should be denied, and the Nelsons should be granted the relief they have requested.

1. **The material facts are not disputed.**

The most compelling basis for granting the requested extraordinary relief and denying GMP's Motion to Dismiss is that GMP does not, and cannot dispute these facts:

a. GMP does not have permission from the PSB nor any statutory or regulatory authority to use any portion of the Nelson's land to implement or facilitate its blasting plan on Lowell mountain.

b. GMP is able to conduct its blasting without requiring the use of any portion of the Nelson's property and has known of that ability from the outset of its construction planning.

c. GMP is in violation of its own blasting plan wherein it agreed to abide by all the rules and regulations of the State of Vermont because it is violating the Vermont Fire Safety Rules that require compliance with the following provision: "[f]lyrockl shall not be propelled from the blast site onto property not contracted by the blasting operation or onto property for which the owner has not provided a written waiver to the blasting operation." NFPA 495-39 ' 11.3.2.

d. The only basis that GMP has offered to allow it to violate the constitutionally protected property rights of the Nelsons is that it would be more expedient and cost effective for GMP to avoid violating those rights.

There is no case, statute or policy in Vermont that authorizes a landowner to oust its neighbor from the neighbor's property simply because doing so is less expensive than confining the landowner's commercial activities to its own land.

2. **The Nelsons' use and occupancy of their own land to protest the actions of GMP in invading the Nelsons' property rights cannot, as a matter of law, constitute a nuisance.** The Nelsons have a right to occupy their own land for the purpose of preventing their neighbor, GMP, from the unauthorized use of their (the Nelsons') land for GMP's own purposes. The lawful and peaceful occupancy of one's own land, without more, even if with a purpose of preventing a neighbor from making unauthorized use of the land, cannot constitute a private nuisance. Occupancy of one's own land and the defense of that land from unauthorized trespass is the essence of property ownership. Such right of occupancy is protected by Chapter I, Article 1 of the Vermont Constitution. Where, as here, it is alleged that the occupancy may cause an interference with GMP's construction schedule, such interference is not a legally

cognizable violation of any rights of GMP.

As discussed below, the fact that GMP purposely designed its blasting plan in a way that now requires it to use a portion of the Nelsons' property to carry out that plan does not provide a legal justification to oust the Nelsons from their property, even if only for temporary periods of time. GMP could have designed its blasting plan in a way that would have avoided the need for its self-imposed 1,000 foot safety zone. Blaisdell affidavit, **Exhibit 12**[1]. Its failure to do so cannot subsequently be used to support an argument that the Nelsons' occupancy of their own land is a nuisance.

The superior court's misapplication of the law of nuisance has allowed GMP, by virtue of the court's injunction, to wrongfully expropriate portions of the Nelsons' land for its own commercial purposes. It is undisputed that GMP has no authorization, license or consent to use any of the Nelsons' land. It is undisputed that the Nelsons have occupied their land both to visibly express their opposition to the GMP project and to prevent GMP from using their land. These undisputed facts do not create a nuisance under Vermont law.

3. **The Pennsylvania trial court decision relied on by GMP and cited by the superior court as justification for issuing an injunction does not reflect Vermont law and is inapplicable.** GMP was able to find only one decision across the country that it could cite in support of its novel claim of nuisance. That decision, *Brewster v. Highway Materials, Inc.*, 7 Pa.D. and C. 5th 514, 2009 WL 2055951 (Pa. C.T. C.P. 2009) aff'd, 987 A.2d 231 (Pa. Commw. Ct. 2010), is a trial court decision issued by a single presiding judge. Significantly, though not

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[1] Exhibit number refers to exhibit attached to plaintiff's complaint and is not reattached here.

disclosed by GMP in its filing with the trial court or in its filing with this court, the affirmation of that decision by an intermediate level Pennsylvania appellate court, carried an important caveat which stated: "This unreported opinion of the court shall not be cited in any brief, argument, or opinion, except that any opinion filed in the same case may be cited as representing the law of that case." (Copy of LexisNexis Report of Appellate affirmation and copy of West Law Report citing 987 A.2d 231 (TABLE 2010) attached as **Attachments 3 and 4**).[2] The superior court has, thus, relied on a foreign state trial court decision that may not be cited as precedent in any brief, argument or opinion.

Additionally, the facts in *Brewster* were distinctly different from the facts here. In *Brewster*, the competing parties were a quarry of long-standing operation and a residential landowner who purchased property in a subdivision created long after the quarry operation had been operating as a going concern. The trial court referenced the pre-existing non-conforming operation of the quarry and stated that the quarry had a right to continue its blasting operations because of that protected status.

Part of the quarry's protected status included the quarry's right to continue blasting within 25 feet of the property line. Its right to blast contained no requirement that it contain its blast on its own property; rather, it had the right to continue to blast as it had in the past. That status is dramatically different from GMP's status here. Unlike the quarry operation in *Brewster*, GMP's amended Blasting Plan was approved by the Vermont Public Service Board by order dated 5/31/2011 as confirmed in GMP's Opposition to Defendant's Motion to Dissolve TRO filed with

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[2] Numbering of attachments is a continuation of the numbering of attachments to the complaint.

the superior court on October 19, 2011. The Blasting Plan states that the blasting contractors "will follow all local, state and federal regulations related to ... use of explosives." PSB Order approving Blasting Plan attached as **Exhibit 13**; Blasting Plan at p. 3, attached as **Exhibit 14**. Vermont Fire and Safety Regulations mandate that flyrock from a blast be contained on the project site. Defendant's Supplemental Memorandum in Support of Defendant's Motion to Dissolve TRO, dated 10/19/11 at pp. 1-3, citing relevant state statutes and federal standards adopted by the state. (Attached as **Exhibit 15**). No such permit restriction existed in *Brewster*.

The Arizona case cited by GMP, *Brenteson Wholesale, Inc. v. Arizona Pub. Serv. Co.*, 803 P.2d 930 (Ariz. Ct. App. 1990), in fact supports the Nelsons' claim of trespass against GMP. *Brenteson* provides no support for GMP's claim of nuisance. In *Brenteson* the owner of an airstrip conceded that use of the airstrip created a risk that passing airplanes would fly into transmission lines located on abutting land owned by an Arizona public utility. The court affirmed the trial court's injunction barring further flights based on the admitted risk of trespass (from the planes flying into the utility's transmission lines) and the possibility of serious resulting accidents. Here, the risk of trespass and of serious resulting accidents is a risk GMP is creating on its land by blasting in a way that will cause and has caused blast debris to be projected onto the Nelsons' property. The only relevance of *Brenteson* to this litigation is to undermine the basis of the superior court's denial of the Nelsons' request for their own TRO to protect the Nelsons from GMP's blasting.

4. **GMP can redesign its blast plan to avoid the need for its self-impoased 1,000 foot blast zone that extends onto the Nelsons' property.** GMP conceded when it applied for a TRO from the superior court that it could redesign its blast plan to avoid the need to use the

Nelsons' property, but doing so would take time and cost money. Blaisdell Affidavit, **Exhibit 12**. GMP should not be permitted to use the Nelsons' property simply because doing so is less expensive and more expedient. GMP wrongly assumed that the Nelsons would agree to allow a portion of the Nelsons' property to be used as a blast zone for GMP, (Testimony of Blaisdell at TRO hearing.) but the Nelsons refused to give their consent. In response, GMP went to court, without notice to the Nelsons, and obtained an *ex parte* temporary restraining order that has now been converted into a preliminary injunction. In effect, GMP has utilized the court to secure for itself the license or easement it did not secure by agreement or contract.

Based on the above, and absent any recognized legal theory to support the injunction, the court's preliminary injunction constitutes a clear abuse of discretion for which there is no adequate remedy by appeal or other proceedings in the superior court.[3]

5. **The court's injunction is a continuous violation of the Nelsons' First Amendment Rights.** GMP misstates the law when it claims that prohibiting the Nelsons from being present with others on the Nelsons' own land for the purpose of protesting GMP's project does not implicate First Amendment constitutional rights. The United States Supreme Court has long held that a broad range of conduct is entitled to protection under the First Amendment provided that it contain some expressive purpose. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1993) (performing music); *Barnes v. Glen Theatre, Inc.*, 501 U.S.

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[3] Contrary to GMP's claim that the Nelsons have not supported their Complaint by verified affidavit, the Nelsons' attorney filed an affidavit in support of the complaint that verified the facts relevant to the Nelsons' complaint. The material facts are not in dispute. Further, while it is true that the Nelsons have filed motions for reconsideration and for permission to appeal with the superior court, the court has not acted on them, and every new day brings a continuing and further violation of the Nelsons' constitutional rights for which they have no adequate remedy apart from the relief requested in the complaint filed with this court.

560, 565-566 (1991) (nude dancing); *Texas v. Johnson*, 491 U.S. 397, 406 (1983) (flag burning); *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 505 (1969) (silently wearing black armbands). Notably, "a narrow, succinctly articulable message is not a condition of constitutional protection," because the First Amendment's guarantee of free expression "looks beyond written or spoken words as mediums of expression," and restricting its protection to expression with a narrow, identifiable meaning would "never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

Here, the protestors who have been using the Nelsons' land with the Nelsons' permission to occupy the land near the border to prevent its use by GMP as a blast safety zone were undisputedly, by their presence and conduct, expressing their opposition to the GMP project. GMP filed news articles with the court affirming such conduct. That conduct is protected by the First Amendment and by Chapter I, Articles 13 and 20 of the Vermont Constitution.

GMP also wrongly identifies the standard at issue in adjudging the injunction as whether the order regulates the time, place and manner of the demonstration on the Nelsons' land. Injunctions, are held to a higher standard than generally applicable statutes or ordinances, because they "carry greater risk of censorship and discriminatory application." *Madsen v. Women's Health Center*, 512 U.S. 753, 765 (1994). When scrutinizing an injunction, the "standard time, place and manner analysis is not sufficiently rigorous"; instead, a court "must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.*

No such substantial government interest is at stake here. Simply put, the government has no interest in forbidding peaceable demonstration from occurring on land that the demonstrators are otherwise legally entitled to occupy. The individuals on the Nelsons' portion of the Lowell Mountain ridgeline pose no threat to the public, are not trespassing upon the GMP project in order to halt construction, are not impeding traffic on a public roadway, and are not invading the privacy of anyone's home or office with hurled insults or projectiles.

The issuance of the injunction under these facts constitutes a clear abuse of discretion because it lacks any arguable basis. Because the injunction is violating First Amendment rights of the Nelsons and the protestors to be present on the Nelsons' land in protest of the GMP project and because it is permitting GMP to make an unauthorized ongoing use of the Nelsons' property, it must be set aside.[4]

Dated at Hartford, Vermont this 10th day of November, 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

[4] GMP argues that the Nelsons did not raise their First Amendment argument. That is not the case. From the outset of the case the Nelsons made clear that they were opposed to the GMP project and that they were permitting others who shared their view to camp on their property near the boundary line in opposition to the project and to prevent GMP from using their property. This constitutes conduct that is protected under the First Amendment Chapter I and Articles 13 and 20 of the Vermont Constitution and it is properly before the court. It was raised below in the Nelsons' Emergency Request for a Decision on Defendant's Motion to Dissolve the TRO as GMP acknowledges at p. 12 of GMP's motion.

EXHIBIT 13

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc. for a certificate of public good, pursuant to 30 V.S.A. Section 248, to construct up to a 63 MW wind electric generation facility and associated facilities on Lowell Mountain in Lowell, Vermont, and the installation or upgrade of approximately 16.9 miles of transmission line and associated substations in Lowell, Westfield and Jay, Vermont)

Order entered: 7/29/2011

ORDER RE AMENDED BLASTING PLAN

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "Order") and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility. Among other things, the Order required the Petitioners to make a number of post-certification compliance filings. On June 6, 2011, the Petitioners submitted their first set of compliance materials for party comment and Board review. Among the materials filed on June 6, 2011, was the Petitioners' proposed Final Blasting Plan.

On July 19, 2011, the Board issued its Order on the Petitioners' first round of compliance filings, including the proposed Final Blasting Plan. After considering comments on the proposed plan that were filed by the Agency of Natural Resources ("ANR") and Lowell Mountains Group on June 21 and 30, 2011, respectively, as well as a letter from Green Mountain Power Corporation ("GMP") responding to ANR's comments, filed on July 12, 2011, the Board directed the Petitioners to file an amended blasting plan that incorporated a number of specific revisions to address concerns identified by the Board's review of the proposed plan.

Exhibit 13

On July 27, 2011, GMP filed its proposed Amended Blasting Plan with the Board. We have reviewed the Amended Blasting Plan and conclude that GMP has incorporated all of the amendments required by our July 19, 2011 Order. Accordingly, the Amended Blasting Plan is approved.

SO ORDERED.

Dated at Montpelier, Vermont, this 29th day of July, 2011.

s/James Volz)
)
) PUBLIC SERVICE
)
s/David C. Coen) BOARD
)
) OF VERMONT
s/John D. Burke)

A TRUE COPY
OFFICE OF THE CLERK

FILED: July 29, 2011

ATTEST: _____
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

EXHIBIT 14

Blasting Plan

for

Kingdom Community Wind

Meek Road, Lowell, VT

Date: 20 May 2011

Revised: 26 July 2011

Prepared By: Maine Drilling & Blasting, Inc
Western - VT Division
69 Pitman Road

Websterville, VT 05641
Telephone: 802-479-3341
Fax: 802-479-0165

David M Weaver Jr.
Name

Division Manager
Title

Exhibit 14

Table Of Contents

General

Maine Drilling & Blasting, Inc (" MD & B")considers safety as the priority during all phases of blasting operations. We are knowledgeable of and will follow all local, state and federal regulations related to transportation and use of explosives. The project specifications and conditions have been reviewed. Details of procedures for pre-blast surveys, explosives use, blast security, monitoring and documentation are enclosed.

Public Information Sessions; Pre- and Post-Blast Testing

Green Mountain Power Corporation ("GMP") will arrange for a public information session with surrounding landowners to address concerns related to blasting. In the event surrounding landowners express concern regarding the impacts of blasting on wells or other structures on their property, GMP shall perform evaluations to determine if any damage has occurred as a result of blasting activities and, if so, remediate any such damage.

Pre-Blast Surveys / Notifications

Pre-blast surveys will be offered of property and structures of all property owners within one-half mile radius of the Project site. At a minimum, MD & B and GMP will send a certified letter, return receipt requested to each property owner within one-half mile of the Project that explains why pre- and post-blast surveys and well monitoring are being offered. MD & B will ask all occupants within the one-half mile to describe the location on their property of structures and of water sources, agricultural or residential. The letter will also announce the date and time of a public information session to address the blasting process and answer questions, as well as provide contact information for the MD & B representative who is able to answer questions that property owners may have about either the letter or the surveys. Copies of the letter return receipt will be filed with the Vermont Public Service Board. Appointments will be arranged for those owners who desire a survey, which will be conducted by an MD & B representative. Results of those surveys will be documented through video or still photographs and appropriate narration or written reports.

Blast Monitoring

All blasts will be monitored by a representative of Maine Drilling & Blasting, Inc who has been properly trained in the setup and use of seismic monitoring equipment. At least one seismograph will be in use at all times. Placement of monitoring equipment will be at the nearest structure to the blast site. Maine Drilling & Blasting, Inc monitoring equipment will consist of Instantel type seismographs. Details are enclosed. Results of blast monitoring will typically be available before the next blast, usually immediately following a blast. Results can be reviewed and modifications can be made to the blast design for the next blast if necessary.

Sequence of Blasting

All blasting operations will be strictly coordinated with Green Mountain Power Corp. and General Contractor. Emphasis will be on the safe and efficient removal of the rock existing on this project without impact to surrounding structures. Blasts will be developed so as to create adequate relief which will minimize ground vibrations and offer the greatest protection possible to the surrounding structures.

Blasting Procedures

1. Blasting operations shall commence after 9:00 AM and cease before 5:00 PM, Monday through Friday, with exception of state holidays.

2. Blasting cannot be conducted at times different from those announced in the blasting schedule except in emergency situations, such as electrical storms or public safety required unscheduled detonation.

3. Warning and all-clear signals of different character that are audible within a range of one-half mile from the point of the blast shall be given. All persons within the permit area shall be notified of the meaning of the signals through appropriate instructions and signs posted.

4. Access to blasting area shall be regulated to protect the public from the effects of blasting. Access to the blasting area shall be controlled to prevent unauthorized entry before each blast and until the perimeter's authorized representative has determined that no unusual circumstances exist after the blast. Access to and travel in or through the area can then safely resume.

5. Areas in which charged holes are awaiting firing shall be guarded, barricaded and posted, or flagged against unauthorized entry.

6. All blasts shall be made in the direction of the stress relieved face previously marked out or previously blasted.

7. All stemming shall be minimum as specified using clean, dry 3/8" crushed stone.

8. Blasting mats shall be used as necessary to cover blasts.

9. The Blasting Contractor shall insure that extra safety and judgment is exercised by his blaster to prevent the simultaneous blasting of numerous holes.

Blasting Mats

Blasting mats and backfill will be used to control excessive amounts of rock movement when blasting in close proximity to structures. Placement and number of mats are typically determined by the blaster. Mats will be placed so as to protect all people and structures on, or surrounding the blast site and property. Rubber tire type blasting mats will be utilized on this project and will be approximately 12' x 12' in size; Rubber mat @ 12' x 12' 38 lbs./s.f. = 5,472 lbs./ea.

Blast Security and Warning Whistles

Each blast will be preceded by a security check of the affected area and then a series of warning whistles. Communications will be made with job site supervisors and local officials as required to ensure the safest possible operation. All personnel in the vicinity closest to the blast area will be warned. The warning whistles will follow the following sequence:

3 Whistles - 5 Minutes to Blast

2 Whistles - 1 Minute to Blast

1 Whistle - All Clear

The blast site will be examined by the blaster prior to the all clear signal to determine that it is safe to resume work. No blast will be fired until the area has been secured and determined safe.

Explosives

All explosives will be stored in approved magazines when not in use. Overnight storage will be in an licensed secure magazine site.

Enclosed are Technical Data and MSDS sheets for the explosive products proposed for use on this project. Any one of, or a combination of these products may be in use at any one time on the site.

Blaster Qualifications

All Maine Drilling & Blasting, Inc blasters on this job will be licensed in the State of Vermont and have received various amounts of training in the safe use and handling of explosives. Additionally, Maine Drilling & Blasting, Inc blasters are familiar with all OSHA Regulations, State Regulations, and Federal Regulations regarding construction site safety, including transportation, use, and handling of explosive materials. Weekly safety meetings are to be held on site by the Maine Drilling & Blasting, Inc job foreman, with a record of that meeting returned to the Maine Drilling & Blasting, Inc office.

Blasting Personnel

All blasting operations shall be conducted by experienced, trained and competent persons who understand the hazards involved. Persons working with explosive materials shall:

1. Have demonstrated a knowledge of, and a willingness to comply with, safety and security requirements.

2. Be capable of using mature judgment in all situations.

3. Be of good physical condition and not addicted to intoxicants, narcotics, or other similar type of drugs.

4. The person(s) responsible for the explosives shall possess current knowledge of the local, State and Federal laws and regulations applicable to his work.

5. The person(s) responsible for the explosives shall have obtained a Certificate of Competency or a license as required by State law.

Licenses and Permits

Maine Drilling & Blasting, Inc is fully licensed and insured for the transportation, use, and handling of explosives. Evidence of insurance is available. Blasting permits will be applied for as required from the local authorities by the Maine Drilling & Blasting, Inc Blaster/Foreman when blasting is about to begin.

Blast Vibration

Blast vibration will be monitored at the blast site, typically at the structure(s) closet to the blast site. Vibration limits will closely follow limits described in the project specifications and the State Regulations. Blast designs will be modified as required to stay within the guidelines and meet project schedules as well. Blasting operations will be modified accordingly when approaching buildings and utilities. Enclosed are preliminary vibration calculations based on known distances to the structures of concern and anticipated initial blast designs.

Ground vibration peak particle velocity limits shall not exceed:

* Up to 30 Hertz: 0.5 inches per second
* Thirty-one to 40 hertz: 1.0 inches per second
* More than 40 Hertz: 2.0 inches per second

Airblast overpressure level not to exceed 133 peak dB (linear) two Hertz high -pass system.

Blast Reports

Enclosed is a sample of a Maine Drilling & Blasting, Inc Blast Report. This report will be filled out for each blast and copies supplied as needed.

Typical Blast Design

Enclosed are what would be considered typical blast designs for this project. Hole sizes, depths, spacing and loading information is provided. These designs are to be considered a good starting point. Modifications are usually made, if necessary, following the first blasts to meet control and seismic considerations.

EXHIBIT 15

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.

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE TRO GRANTED TO GREEN MOUNTAIN POWER CO

1. **GMP has failed to comply with safety standards for blasting that are mandated by law and as a part of its Certificate of Public Good**

GMP has a clear and mandated obligation to conduct its blasting activities to prevent flyrock from leaving the permitted site. In the Amended Blasting Plan GMP filed with the PSB and with which it is required to be in compliance, GMP's blaster provides the following assurance: "We are knowledgeable of and will follow all local, state and federal regulations related to transportation and use of explosives." Amended Blasting Plan at 3. Vermont has adopted the National Fire Protection Association (NFPA) Uniform Fire Code (NFPA 1) within the Vermont Fire & Building Safety Code. Pursuant to NFPA 1, the use of explosive material shall comply with NFPA 495 - Explosive Materials Code. See NFPA 1-330 § 65.9.1. The Vermont Division of Fire Safety website confirms that "Regulations on the safety, storage and use of explosive materials are contained in the National Fire Protection Association (NFPA) Standard 495, Explosives Material Code, 2006 edition, adopted under the Vermont Fire &

Exhibit 15

Building Safety Code." Pursuant to NFPA 495, "[f]lyrock[1] shall not be propelled from the blast site onto property not contracted by the blasting operation or onto property for which the owner has not provided a written waiver to the blasting operation." NFPA 495-39 §.11.3.2. *See also* NFPA 495 11.3.1 ("flyrock travelling through the air or along the ground shall not be cast from the blast site in an uncontrolled manner that could result in personal injury or property damage.")

The Amended Blasting Plan also includes the following commitments:

1. "Mats will be placed so as to protect all people and structures on, or surrounding the blast site and property." Amended Blasting Plan at 4.

2. The Plan Attaches Material Safety Data Sheets for the materials to be used during blasting, several of which require the user of that material to "COMPLY WITH THE SAFETY LIBRARY PUBLICATION NO.4 "WARNINGS AND INSTRUCTIONS" AS ADOPTED BY INSTITUTE OF MAKERS OF EXPLOSIVES". *See e.g.* Amended Blasting Plan, MSDS No. B-3 for AUS ITN ITE WR SERIES at 2; MSDS No. C-3 for SHOCK*STAR (TM) SHOCK TUBING at 2; MSDS MDB-1 for MDB BLEND 1966 at 2. Safety Library Publication No. 4 of the Institute of Makers of Explosives includes the requirement that the blaster should "ALWAYS use a blasting mat or other protective means when blasting close to residences or other occupied buildings or other locations where injury to persons or damage to property could occur as a result of flyrock."

GMP possesses a Certificate of Public Good (CPG) from the Vermont Public Service Board (PSB) which, *inter alia*, requires that:

1. "All blasting will be performed in accordance with any and all applicable laws

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[1] Flyrock is a term used to describe solid blast debris created by a blast.

and regulations" including the requirements of Office of Surface Mining Reclamation and Enforcement (OSM) Blasting Performance Standards contained in 30 C.F.R. §§ 816.61-816.68 and 817.61-817.68. (These standards prohibit any blasting that will cause "fly rock" to be cast "beyond the permit boundary" (30 C.F.R. §§ 816.67 (c)(3) and 817.67(c)(3)). CPG at Paragraph 36)

2. The CPG also mandates that blasting mats be used to control "limit the occurrence of flyrock". *Id.*

3. The base of all towers for turbines must be at least 60 meters from the nearest property line. CPG at Paragraph 23.

GMP's current and planned blasting activities do not comply with the cited provisions of its Amended Blasting Plan, the relevant regulations and industry standards or its CPG and its current blasting activities, to the extent they involve the possible casting of debris and flyrock on to property owned by defendants, where individually are lawfully camping.

The persons who are camped on defendants' property are lawfully on that property and are within the zone of people for whom the use of "all necessary precautions" is required. They are entitled to the protections assured by Amended Blasting Plan and required by the CPG and the MSDS for the materials being used in the blasting. Nothing in the relevant law of Vermont would force defendants to restrict the use of their property for a lawful purpose just to allow GMP to avoid the cost of complying with obligations which it assumed when it sought and obtained a CPG for its wind turbines.

2. GMP has already caused delay that has jeopardized its opportunity to obtain a federal production tax credit (PTC)

Furthermore, while GMP has claimed that any delay would cause increased costs to its ratepayers from the loss of PTCs, this is clearly not the case. As discussed above, GMP can no longer qualify for the PTCs. Additionally, the Public Service Board recently ruled that the PTCs

are not related to the economic benefits of the Project, and therefore do not implicate any criteria under 30 V.S.A. §248. Order Re Motions for Reconsideration and Revocation at 7-9 (Oct. 3, 2011). The Board stated that the PTCs only pertain to the economic viability of the Project, not the economic benefits to the public, and that "economic viability for this project refers to whether it makes economic sense from GMP's perspective to construct the project...." *Id.* at 8-9. The Board found that the risk of moving forward without the PTCs was on GMP, and that any attempts to pass on additional costs from the loss of the PTCs to the ratepayers would be subject to challenge. *Id.* This contradicts the claims made by GMP regarding the impacts to the public of further delay in the construction of the Project.

GMP is apparently attempting to move forward as quickly as possible in order to try to get the Project constructed prior to the deadline for the PTCs, and in doing so has violated its construction stormwater permits, and now its CPG, which as discussed above requires GMP to prevent flyrock from intruding on adjacent properties. GMP should not be allowed to flagrantly flaunt well established law of trespass, nuisance and property rights, as well as their permits, in order to secure tax credits that are no longer available pursuant to its own testimony and arguments before the Public Service Board. GMP's campaign of fear mongering against the Nelson's is unsupported by logic and law, and their attempts to prevent the Nelson's and their guests from peaceably using their own property is untenable. While GMP has been granted, based on half-truths and misinformation, an injunction preventing the Nelson's from occupying their own land so that GMP can violate established law and the permits for the Project, it is GMP that must be kept from continuing to violate the law, their permits, and the Nelson's well established property rights.

3. The Defendants' have a right to occupy their land to monitor GMP's activities

The Nelsons have a vantage point on their land that provides a view of the construction activities being conducted on the Project site, especially the area where the Nelson's believe GMP intends to construct portions of two turbine pads and over 300 feet of crane path on their property. As the Court is aware, people have been camping in this area, at the invitation of the Nelson's, in order to observe the construction activities. The Nelsons have every right to monitor the activities of GMP on the adjoining property it has leased for its wind turbine project, and the Nelsons have a right to encourage and invite others to assist them with this task. GMP has filed plans indicating that it intends to blast land owned by the Nelsons. The Nelsons have a right to document each and every trespass that is now occurring, including the clear cutting of the fragile, mountain ridge land owned by the Nelsons.

Moreover, GMP has a documented record of ignoring its permit obligations and ignoring the rights of its neighbors and being less than forthcoming with the PSB and the Court, and the Nelsons are justified in wanting to monitor GMP's actions on the ridge. Indeed as recently as Monday, October 17, GMP ignored the requirements of the TRO that mandate that it notify the Nelsons on the morning of any intended blasting. Instead, ignoring its court-ordered obligations, GMP gave the Nelsons less than a half hour notice on the afternoon of October 17 that it was going to begin blasting that day. This provided inadequate time to warn those people on the ridgeline that blasting was imminent and they might be in danger. Other instances of GMP misconduct are:

- In its June 14, 2011 Motion for Reconsideration of the Board's Order in Docket 7628, GMP argued that reconsideration of certain permit conditions was appropriate since no

other party had requested those conditions and they were therefore unforeseen – this was entirely incorrect and misleading.

- On June 24, 2011, GMP provided a letter to the Board admitting that its statement in its Motion for Reconsideration was "erroneous."

- In its August 9, 2011 Opposition to Craftsbury and Albany's Motion for Stay Pending Appeal, GMP argued that the timing to obtain certain easements set forth in an MOU reflected the priority of those easements and did not suggest that GMP had knowledge of the potential for delay from altering the timing to secure those easements.

  - On August 11, 2011, GMP provided a letter to the Board stating that pursuant to a request from ANR, GMP was altering its argument, and that the timing to obtain the easements was actually by GMP's request, which was based on its concerns regarding delay of the project, completely contradicting their prior argument.

  - The Board later acknowledged that the August 11 admission by GMP raised "significant concerns" that GMP had provided misleading arguments to the Board. *See* Sep. 6, 2011 Order Re Motions for Stay at 6.

- On July 21, 2011, GMP submitted a letter to the Board indicating that a GMP contractor had cut "approximately 10" trees on the Project site prior to being permitted by GMP and the Board to do so. The letter also indicated that the owner of land being used for habitat mitigation for the Project had cut dozens of trees, widened roads and filled wetlands without a permit and contrary to the expected protection of those parcels pursuant to the CPG for habitat mitigation. This lead to a §1272 Remediation Order from ANR.

  - GMP later admitted that over 80 trees had been cut by its contractor, not 10.

- On October 5, 2011 the Vermont Agency of Natural Resources issued a Stop Work Order for violations of GMP's construction stormwater discharge permit and the Vermont Water Quality Standards.

- GMP continues to claim that any delay will result in a loss of Production Tax Credits and thereby harm ratepayers, even though it is clear from GMP's own arguments and the findings of the Board that the PTCs are no longer available to GMP, and the costs to GMP from the loss of these tax credits cannot be passed on to the consumers.

The Nelsons therefore have good reason to be wary of GMP, whose prior actions would make any neighbor feel the need to keep an eye on the activities on the Project site to ensure that GMP follows the applicable laws, regulations and conditions of its permits. The misleading information provided by GMP to support its motion for a TRO, as discussed herein, is not the first time GMP has made disingenuous arguments regarding this Project. This pattern of deception, along with GMP's attempts to coerce the Nelsons into selling GMP their land through a threatening letter, provide ample reason for the Nelsons to consider GMP to be a bad actor that will ignore the law and do whatever it can, right or wrong, to get what it wants. This track record of violations and disregard for legal obligations provides ample reason for the Nelsons to mistrust GMP, and to want persons to be on site to ensure that GMP follows the law.

Wherefore, for the additional reasons discussed above and as previously requested, the defendants submit that GMP does not come before the court with clean hands and is not entitled to equitable relief. Further, as noted above, GMP will not suffer irreparable harm if the TRO is not granted and is not likely to prevail on the merits. GMP has used the device of a TRO to obtain an easement over the defendants' property to which it has no lawful right. The TRO should be dissolved.

Dated at Hartford, Vermont this 19 day of October, 2011.

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ATTACHMENT 3

Hubert J. Brewster et al. v. Highway Materials, Inc. et al.

2191 CD 08, 2192 CD 08

COMMONWEALTH COURT OF PENNSYLVANIA

987 A.2d 231*; *2010 Pa. Commw. LEXIS 47

January 21, 2010, Decided

NOTICE: THIS UNREPORTED OPINION OF THE COURT SHALL NOT BE CITED IN ANY BRIEF, ARGUMENT OR OPINION, EXCEPT THAT ANY OPINION FILED IN THE SAME CASE MAY BE CITED AS REPRESENTING THE LAW OF THAT CASE.

SUBSEQUENT HISTORY: Reported in full at *Brewster v. Highway Materials, Inc., 2010 Pa. Commw. Unpub. LEXIS 135 (2010)*

PRIOR HISTORY: [*1]

Montgomery County. 08-09940, 08-09353.

Brewster v. Highway Materials, Inc., 2009 Pa. Dist. & Cnty. Dec. LEXIS 54 (2009)

OPINION

Affirmed.

Attachment 3

ATTACHMENT 4

987 A.2d 231 (Table)
(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Commonwealth Court of Pennsylvania Decisions Without Published Opinions." The Commonwealth Court of Pennsylvania publishes a list of decisions regarding appeals from the courts of common pleas that the Commonwealth Court has addressed in unpublished memorandum opinions. Anyone may obtain copies of these unreported memorandum opinions in person from or by writing to the Chief Clerk's Office of the Commonwealth Court in Harrisburg at a cost of $1.00 per page of the opinion. These unreported opinions of the Court shall not be cited in any brief, argument or opinion, except that any opinion filed in the same case may be cited as representing the law of that case. 210 Pa. Code Section 67.55, Pa. Rules of Court, I.O.P. Chapter 4, Section 414.)
Commonwealth Court of Pennsylvania

Hubert J. Brewster et al.

v.

Highway Materials, Inc. et al.

NOS. 2191 CD 08, 2192 CD 08 January 21, 2010

Appeal From: Montgomery County, 08–09940, 08–09353

Opinion

Disposition: Affirmed.

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ATTACHMENT 4