

**SHEEHEY FURLONG & BEHM**

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

DAVID T. AUSTIN\*  
R. JEFFREY BEHM  
DEBRA L. BOUFFARD  
IAN P. CARLETON  
ARLINE P. DUFFY  
MICHAEL G. FURLONG  
KEVIN A. LUMPKIN  
DIANE M. MCCARTHY  
OWEN J. McCLAIN  
ERIC S. MILLER  
JAMES W. SPINK\*  
PETER H. ZAMORE

GATEWAY SQUARE  
30 MAIN STREET  
POST OFFICE BOX 66  
BURLINGTON, VERMONT 05402  
TELEPHONE (802) 864-9891  
FACSIMILE (802) 864-6815  
www.sheeheyvt.com

PAUL D. SHEEHEY (1919-2004)  
\*OF COUNSEL

**VIA FED EX**

October 14, 2014

James Kohm  
Associate Director of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Washington, D.C. 20580

Dear Mr. Kohm:

I write on behalf of Green Mountain Power Corporation ("GMP") in response to a September 15, 2014 petition (the "Petition") from four Vermont citizens ("Petitioners") urging the Federal Trade Commission ("Commission") to investigate certain statements made by GMP. GMP encourages the Commission to reject the Petition as meritless. The Petitioners' real complaint is with Vermont's energy laws and policies, and the attempt to recast their disagreement with those laws as a consumer fraud claim misunderstands the purpose and proper application of Section 5 of the Federal Trade Commission Act ("FTC Act"). The Petitioners' request is founded upon mischaracterizations of 13 specific GMP statements that were made in the context of the public debate about developing and operating wind and solar electric generation facilities in Vermont. The GMP statements challenged in the Petition were accurate, were made pursuant to GMP's general responsibilities as a regulated Vermont public utility, and are consistent with GMP's obligations under Vermont's energy and environmental laws. The Petition should accordingly be rejected.

The balance of this submission is organized as follows: first, GMP presents brief but important background information that is missing from the Petition; and second, GMP addresses the specific shortcomings of Petitioners' allegations.

**I. Factual Background.**

**A. GMP And The Regulated Electric Power Industry In Vermont**

While GMP is a small electric utility by national standards, it is Vermont's largest electric utility and serves approximately 265,000 retail customers. GMP is an integrated public utility and manages its own electric power supply pursuant to an Integrated Resource Plan approved by the Vermont Public Service Board ("PSB"). GMP supplies electricity to customers in its service territory through a combination of utility-owned generation sources, long term power purchase agreements, and market-based purchases of power through the ISO-New England regional power market.<sup>1</sup>

GMP and other electric utilities in Vermont operate under a comprehensive, cost-based regulatory model. Thus, the electricity rates GMP charges its customers are based upon the costs it incurs in serving them and are set through a regulatory process overseen by the PSB. Rates must be approved by the PSB before they become effective, and the utility must demonstrate to the PSB that its costs are just and reasonable before incorporating them into customers' rates. *In re Green Mountain Power*, 142 Vt. 381, 455 (1994). PSB approval, in the form of a certificate of public good ("CPG"), is also necessary before a public electric utility can construct any major power generation or distribution facility. In determining whether to issue a CPG for the construction of an electric generation facility, the PSB considers, among other factors, whether the project is consistent with state energy policy and whether it will provide economic benefit to GMP customers and the State as a whole. 30 V.S.A. § 248(b).

There is no competition in Vermont's retail electricity market. Customers must purchase electricity from the utility authorized to provide service in the territory where the customer is located. The public utility must charge, and the customer must pay, the price for the electricity and service prescribed by tariffs approved by the PSB.

The Vermont Department of Public Service ("DPS") is a governmental department independent of the PSB that supervises and directs the execution of all laws relating to public service corporations, including GMP. The Director of Public Advocacy is a statutory position within the DPS. The Public Advocate represents the interests of Vermont customers in all hearings before the PSB.

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<sup>1</sup> The energy and capacity from GMP-owned renewable generation sources and renewable power purchases offset GMP's purchases from the regional power market, thereby benefitting GMP's retail electricity customers – whether the associated renewable attributes are retired or sold.

**B. Vermont Renewable Energy Goals And Renewable Energy Credits**

Vermont's general energy policy, as set forth in 30 V.S.A. 202a(1), is to ensure adequate, reliable, secure and sustainable energy while also assuring affordability, economic vitality, efficient resource use, and cost effective demand-side management that is environmentally sound. Although some New England states have enacted Renewable Portfolio Standards, which require utilities to have specific minimum amounts of renewable energy in their supply portfolio (including through the purchase of renewable energy credits ("RECs")), Vermont has not yet adopted mandatory renewable portfolio standards. Instead, the Vermont Legislature enacted the Sustainably Priced Energy Enterprise Development ("SPEED") program. Among other things, the state's program sets a goal that "20 percent of total statewide electric retail sales during the year commencing January 1, 2017 shall be generated by SPEED resources that constitute new renewable energy." *Id.* § 8005(d)(2). The definition of renewable energy constituting SPEED resources under the program does not depend on "whether or not the environmental attributes are attached." *Id.* § 8002(21). The PSB is expressly authorized under SPEED to maximize the benefit to customers from the sale of tradable RECs or other credits that may be developed in the future. *Id.* § 8005(b)(3).

Like all other Vermont utilities, GMP sells the RECs from a number of its renewable generation resources. The proceeds from the REC sales are applied to reduce the rates charged to GMP's electric customers. The sale of RECs has permitted GMP to charge rates for the electricity it supplies its customers that are approximately five percent lower than they otherwise would be. The practice of selling RECs to lower customer costs is also followed by other electric utilities in Vermont and has been approved by the PSB and DPS. Similarly, the subject of allowing RECs to be sold in connection with renewable generation sources that are also counted toward Vermont's SPEED resource goals has been the subject of testimony and extensive discussion in the PSB, the Legislature and other public forums.

Although GMP and its customers have supported Vermont's renewable energy goals by developing wind and solar generation sources in Vermont (the economic costs and benefits of which all flow through to GMP's Vermont customers), GMP also offers its customers an opportunity to support renewable energy more broadly by purchasing renewable electricity at a premium "green tariff" rate. In other words, GMP retires RECs for electricity sold under its green tariff rate. GMP does not trade all of the RECs from its renewable generation facilities, and it matches electricity purchased under the green tariff with either bundled or unbundled RECs. In this regard, it bears emphasizing that none of the RECs have been sold for GMP's Route 7 solar generation facility, and the Petition's assertion to the contrary in its Statement No. 8 is factually inaccurate. Petition at 14.

**C. GMP's Kingdom Community Wind Project**

Because 10 of the 13 statements in the Petition relate to the Kingdom Community Wind Project ("KCW"), it is important to provide a description of that project. KCW is a 21-turbine wind project, with a maximum production capacity of 63 MW, located on a ridgeline in Lowell, Vermont. It became operational in December 2012 and is the largest wind generation facility in Vermont. KCW was constructed by GMP and is wholly owned by GMP. A portion of the power generated at KCW is sold to the Vermont Electric Cooperative ("VEC"), a public utility that serves Vermont customers in a separate service territory.

Before commencing construction of KCW, GMP was required to obtain a CPG from the PSB. There was strong, widespread public support for the construction of KCW. There was also, however, a small but vocal opposition to the project organized by a group that does not believe the economic and environmental benefits of large scale wind projects outweigh their impacts. Hearings were held before the PSB, which included extensive witness testimony, hundreds of public comments filed with the Board, multiple site visits, and public hearings attended by hundreds of people.

**II. Discussion**

**A. The 13 Statements Challenged By The Petitioners Are Not Deceptive Marketing Statements Made For The Purpose Of Or With The Effect Of Altering The Purchasing Decisions Of Consumers And Do Not Violate Section 5 Of The Federal Trade Commission Act**

Petitioners have cherry-picked 13 specific statements out of context in a failed attempt to demonstrate through a process of "disputatious dissection" that the statements violate Section 5 of the FTC Act (15 U.S.C. §45 et al.). The Petitioners' analysis, however, overlooks the fundamental facts that (1) the statements are not marketing statements likely to alter the decision-making of Vermont electric customers, (2) GMP is acting in furtherance of and in compliance with Vermont's energy laws, and (3) Vermont customers have a right to accurate information regarding the generation facilities their rates support. *See Federal Trade Commission Policy Statement on Deception* (Oct. 14, 1983) (A deceptive practice under Section 5 involves a representation likely to mislead a reasonable consumer and is likely to affect the consumer's conduct or decision with regard to a product or service).

The Petition attacks GMP for "double counting" because the electricity generated at wind and solar facilities it has developed count toward Vermont's voluntary renewable goals while the RECs for much of that power have been traded through NEPOOL GIS. Petition at 4-5. That result, however, is the product of state legislative choice. Specifically, Vermont law encourages

electric utilities to support the development of new renewable generation facilities, and provides that newly developed renewable generation constructed in Vermont will count toward SPEED goals regardless of whether the associated RECs have been sold. Vermont's encouragement of renewable generation and associated economic benefits differs from the policy focus of neighboring states, which require that specified percentages of retail electric consumption be obtained from new renewable generation, as demonstrated through the retirement of RECs. Indeed, Vermont law encourages GMP to sell the RECs in order to lower its customers' rates. Having set Vermont's renewable energy goals, Vermont's Legislature is free to establish how those goals may be met.

It is no secret that the RECs for certain generation facilities have been traded outside of Vermont where there is a market for such RECs. There has been testimony before both the Vermont Legislature and the PSB regarding the sale of RECs from KCW and other generation facilities, and the sale of the RECs has been generally approved by both the PSB and the DPS. The Petition itself admits there has been substantial publicity as well as the publication of specific data regarding the fact that RECs are sold for specific projects. Petition at 4-5. Simply put, a public utility acting within a state in compliance with and in furtherance of specific policies established by the state's legislature and government regulatory bodies cannot reasonably be accused of deception.

***1. GMP has not made misrepresentations regarding the source of electricity and it has disclosed that it sells RECs to lower electric rates.***

The Petition's core allegation is that, because all of the electrons generated at a particular facility cannot be physically traced to each end user, GMP is misleading its customers when it represents that electric power produced at certain of its wind or solar generation facilities is being used by its Vermont customers. Petition at 11-13. The Petitioners' argument, however, wholly misses the mark by focusing on the physical tracking of electrons. It is a fundamentally and widely accepted principle in the electric industry that the flow and consumption of electricity is tracked by its economic consequences. The FTC has expressly recognized this principle in testimony it has given to Congress, stating that claims regarding the flow of electricity from particular generation sources are permissible so long as they can be substantiated through the associated financial transactions.<sup>2</sup>

It is indisputable that all of the costs and revenues associated with power produced at KCW flow directly through to the customers of GMP and VEC, all of whom are located in Vermont. GMP and VEC receive all of the revenue from the sale of power generated at KCW, as well as revenue from any sale of associated RECs, and those revenues flow directly to the benefit of GMP's and VEC's customers, who also bear the costs of the KCW project in rates. It

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<sup>2</sup> Prepared Statement of the Federal Trade Commission, Presented by Elaine D. Kolish, Assoc. Director for the Division of Enforcement of the Bureau of Consumer Protection, before the Committee on Commerce, Subcommittee on Energy and Power, US House of Representatives (May 26, 1999) at note 9.

is thus entirely correct and appropriate for GMP to represent that all of the power output from KCW is used by Vermonters.

Developing utility-owned, renewable generation resources in Vermont benefits GMP's customers by providing them with a long-term, stably priced source of supply. The RECs associated with such facilities may either be sold to lower electric rates or, if Vermont adopts mandatory renewable portfolio standards, retained to help GMP avoid purchasing RECs at fluctuating market prices. Because the cost-based rates paid by GMP's customers support those generation projects,<sup>3</sup> GMP appropriately communicates the projects' benefits to its customers.

The Petitioners are also wrong in claiming that GMP has not disclosed that it is selling RECs. The fact that Vermont utilities are selling RECs has been the subject of testimony in the Legislature and PSB, as well as news reports to the public. Furthermore, GMP has directly disclosed that RECs from particular projects likely will or have been sold. For example, the second statement identified in the Petition was excerpted from a fact presentation regarding KCW, which reads, directly following the challenged statement: "refer to page 4 to learn about RECs." The discussion of RECs on page 4 of the fact statement, which Petitioners fail to mention, explains that it is likely that the RECs from KCW will be sold to utilities in neighboring states who need RECs in order to meet state government mandated requirements. GMP further explains that if there is a change in Vermont law, which currently creates incentives to sell the RECs in order to lower the customers' cost of electricity, GMP will be able to retain the RECs from KCW (as opposed to being required to buy them at market) to meet any government mandated requirements.

Moreover, as noted in the Petition, many of the challenged statements were located on GMP's website. Also on GMP's website, but not noted in the Petition, are two informative depictions of its power sources.

First, under the link "fuel mix", a pie chart presents GMP's anticipated mix for 2014. [www.greenmountainpower.com/fuel-mix/](http://www.greenmountainpower.com/fuel-mix/). Importantly, this mix depicts GMP's sources after the sale of RECs. For example, the chart shows virtually no wind energy, in spite of the fact that GMP obtains (through ownership and purchase power contracts) over 140 MW of wind power. This is because GMP anticipated selling the associated RECs in 2014, and it would therefore not be appropriate to represent the associated amount of wind energy in 2014 as being part of GMP's fuel mix (even though the plant's energy output does benefit GMP customers by offsetting GMP's purchases in the ISO-NE market).

Second, under the link "Renewable Energy Credits (RECs)" is a description of GMP's fuel mix before REC sales, and a statement that GMP sells RECs from certain of its renewable

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<sup>3</sup> By contrast, electricity consumers in New York and the rest of New England have retail access (choice) for supply of electric generation, and the great majority of these customers are served by utilities who own no integrated generation facilities and whose rates are market-based, not cost-based.

generation sources, such as KCW, in order to lower its consumer's rates. [www.greenmountainpower.com/fuel-mix/index/renewable-energy-credits/](http://www.greenmountainpower.com/fuel-mix/index/renewable-energy-credits/). The narrative also emphasizes that "[o]nce the RECs are sold, GMP can no longer claim the environmental attributes of the source and it is considered market power for our customers." The website further explains that there is a possibility, if the legal and regulatory environment in Vermont changes and a new renewable energy mandate is adopted, GMP could choose to retire rather than sell the RECs. Together, these pages of GMP's website where GMP customers would logically look to assess where their power comes from contradict Petitioners' claims that GMP misrepresents its sources of electricity.<sup>4</sup>

**2. *The Petition wrongly alleges that GMP's statements are intended to attract environmentally conscious consumers and will mislead reasonable consumers.***

The Petition ignores the reality of the regulated electric market in Vermont in arguing that GMP's representations are aimed at attracting environmentally conscious consumers and will likely mislead them. Electric customers in Vermont have very little choice as to their electricity supplier. They can either purchase electric from the utility serving the area where they live or they can generate their own electricity. Consequently, as a practical matter, an electric utility in Vermont has no incentive to make misrepresentations regarding the nature of its electricity, and GMP does not misrepresent it. Vermont customers make supply choices through the PSB and DPS, who approve utilities' long-term power purchases and construction of generation facilities. And those governmental regulatory agencies indisputably have full and accurate information regarding the environmental attributes of the power GMP sells its customers. Furthermore, GMP does disclose to its customers that it sells the RECs for certain generation facilities and it affords its customers the alternative of purchasing renewably generated power with RECs attached at a premium green tariff rate.

The fact is that the statements identified in the Petition, although true, were not advertising statements made to influence customers' purchasing decisions. Rather, they were made to support the construction and continuing operation of renewable generation facilities in Vermont.<sup>5</sup> For example, opponents of KCW had claimed that Vermont ridgelines were being developed in order to supply electricity to consumers located outside of the state. Most, if not all, of the statements identified in the Petition, were made as part of the public debate regarding the development of large wind generation projects in Vermont. The fourth and fifth statements challenged by the Petitioners are illustrative: they were made in an Op Ed newspaper article

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<sup>4</sup> GMP's most recent IRP is another place where customers and other stakeholders might look for context as to GMP's power sources. The IRP from the executive summary to later chapters specifically explains that selling RECs from particular generating sources would preclude GMP from claiming the renewable attributes associated with those generating sources. The IRP explicitly explains that under current policy, premium RECs will continue to be sold in order to reduce rates.

<sup>5</sup> Notably, many of the statements cited by Petitioners were made by GMP before KCW was even approved, built, or producing energy. These statements could not have been deceptive because, at the time, it was not clear whether there would even be a commercial market for RECs at the time the project became operational.

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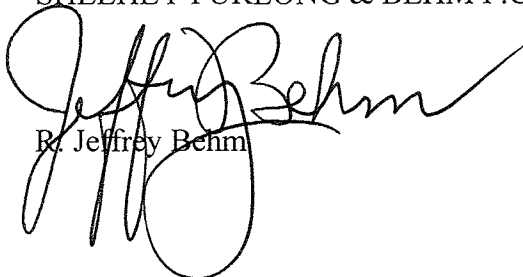
written by GMP's external relations director nine months before construction on KCW began and which was a direct response to specific issues raised by a KCW opponent. Similarly, challenged statements 12 and 13 are contained in newspaper articles written in general support of the project when its construction was still not a certainty. The remaining statements are generally of the same nature, in that they are meant to ensure that Vermont consumers are equally aware of the benefits of constructing the generation facility.

Finally, the Green Guides (16 C.F.R. § 260.15), which Petitioners extensively rely upon, expressly apply to marketing claims designed to sell products and, as such, would not apply to the statements challenged by the Petitioners. Moreover, the Green Guides also expressly declined to offer formal guidance to power producers who generate electricity as a substantial portion of their business. It further noted that, although it lacked consumer perception data on the issue, it was possible that consumers were less likely to be confused when a firm simply sells power and no other product. Here, the highly regulated nature of the electricity market in Vermont, and GMP's compliance with Vermont's particular energy laws and policy, are additional reasons that would make the application of the Green Guides to the instant matter problematic. Of course, if they were applied, GMP believes the challenged statements, along with qualifying explanations, would pass muster under the Green Guides.

In conclusion, GMP believes that the Petition to the FTC to open an investigation should be denied. GMP is nevertheless willing to provide the FTC with information or any cooperation it may request.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.



R. Jeffrey Behm

RJB/srr