

BEFORE THE FEDERAL TRADE COMMISSION
Washington, DC 20580

PETITION TO INVESTGATE DECEPTIVE TRADE PRACTICES
OF GREEN MOUNTAIN POWER COMPANY
IN THE MARKETING OF RENEWABLE ENERGY
TO VERMONT CONSUMERS

I. INTRODUCTION

Pursuant to section 5 (a) of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45, Bruce Post, Curt McCormack, Charles Johnson and Kevin Jones (“Petitioners”) request that the Federal Trade Commission (“Commission”) initiate an investigation and take appropriate enforcement action in relation to certain deceptive trade practices by Green Mountain Power Corporation (“GMP”) that, as described more fully below, are misleading and harming Vermont electricity consumers.

GMP is representing to its customers and to the public, through its promotional materials, public statements, and other communications that it is providing its customers with electricity from renewable sources such as commercial wind and solar projects, thereby reducing the customer’s carbon footprint and protecting the environment. In fact, however, GMP is selling substantially all of the Renewable Energy Credits (RECs) generated by these sources to out of state utilities in satisfaction of those utilities legal obligations to meet mandatory Renewable Portfolio Standards (RPS) in nearby states such as Massachusetts and Connecticut. The net result is that Vermont customers are being misled into thinking that they are buying “renewable energy,” when in fact what they are getting is “null” electricity consisting of a mix of fossil fuel, nuclear, gas and other “brown” sources of electricity from the regional grid.

Petitioner seeks a determination that this practice is deceptive. The common-sense rule is that if you sell the credit you cannot claim the credit. The only way that GMP can honestly claim that its electricity is renewable is to retire the RECs.

II. PARTIES

A. Petitioners.

1. Bruce Post, a resident of Essex, Vermont, has worked for U.S. Senator Robert T. Stafford, Congressman Jim Jeffords, U.S. Rep. John B. Anderson, U.S. Senator Hubert H. Humphrey and Vermont's Governor Richard A. Snelling. An accomplished writer and speaker, Mr. Post created and directed *Riding the Winds of Change: A Primer in Political Action*, former winner of the National Education Association's best political action video. Mr. Post currently serves as chair to the State Board of Libraries and is on the board of the Rokeby Museum and Channel 17 community television.
2. Curt McCormack has served in the Vermont legislature for fourteen years. He has chaired the Joint Energy and Natural Resources Committees and has served as the Vice Chair of the National Conference of State Legislatures Environmental Committee. Mr. McCormack also has worked on sustainable energy in the private sector; as the owner of a small business he focused on sustainable energy best practices. After implementing a world-renowned solid waste facility in Senegal with the Peace Corps, Mr. McCormack has continued to do international environmental consulting, working with organizations like USAID, the Peace Corps and other NGOs. Mr. McCormack is a resident of Burlington.

3. Charles W. Johnson is a Doctor of Science who has served for many years as the Vermont State Naturalist. Following his position as a Park Ranger in the North East Kingdom, Mr. Johnson began to publish on the topic of Vermont's environment. Johnson's first book, *The Nature of Vermont: Introduction and Guide to a New England Environment*, gives a picture of the natural environment in each of Vermont's State Parks and how the entire state's natural world emerged. As assistant to the commissioner for the Department of Forests, Parks and Recreation, he has helped protect Vermont's high ecological value areas as well as maintaining important corridors for wildlife.
4. Kevin Jones resides in Chittenden, Vermont. He is Professor of Energy Technology and Policy at Vermont Law School. He also has worked as the Director of Power Market Policy for the Long Island Power Authority, Associate Director in the Energy Practice of Navigant Consulting, and as the Director of Energy Policy for the City of New York. He previously served as the Deputy to former Vermont State Auditor Edward Flanagan, is a former four-term Alderman with the City of Rutland, and began his energy career with Central Vermont Public Service Corporation. The views expressed here are his own.

B. GMP

GMP is a wholly owned subsidiary of Northern New England Energy Corporation, providing retail electricity to approximately 260,000 customers.¹ GMP merged with Central Vermont Public Service Corporation in 2012, becoming Vermont's largest electric utility, and

¹ FERC Form No. 1 - Quarter 3 123.1 (Nov. 29, 2013), available at <http://www.greenmountainpower.com/corporate-info/index/financials/>.

the state's only investor-owned electric utility. Its headquarters are located at 163 Acorn Lane, Colchester, VT 05446.

III. BACKGROUND

GMP is actively involved in developing wind and solar projects in Vermont. GMP owns Kingdom Community Wind, a 63 MW plant in Lowell, and a 6 MW wind facility in Searsburg. GMP is also engaged in several "community" solar projects in Rutland County.

GMP sells the RECs² from these projects to lower the costs to its customers.³ Data submitted to the Vermont Public Service Board shows that from 2010-12 approximately 90 percent of RECs were sold to utilities in Massachusetts and Connecticut. (**Exhibit 1**). According to company spokespersons, GMP has sold \$22 million in RECs to date.⁴

At the same time, GMP counts these same credits towards meeting the goals of Vermont's Sustainably Priced Energy Enterprise Development (SPEED) law of 2005.⁵ SPEED projects are electric generating projects that produce renewable energy. SPEED is a voluntary program that does not establish mandatory RPS requirements, although utilities not meeting the SPEED goals could trigger an administrative process to set mandatory goals.

Recently this "double counting" has come under fire. On January 1, 2014 the State of Connecticut banned the use of RECs to meet Connecticut's mandatory RPS requirements from renewable generation that also is counted toward another state's renewable goals such as the

² One REC represents the environmental attributes (e.g., avoided emissions) of 1 megawatt-hour (1 MWh) of renewable energy. RECs can be sold separately from the actual electricity produced by a wind farm or other renewable energy facility.

³ *GMP Wind Power Frequently Asked Questions*, Green Mountain Power, <http://www.greenmountainpower.com/innovative/wind/faqs/> (last visited Sept. 5, 2014).

⁴ John Herrick, *Electricity supplier won't buy Vermont renewable energy credits*, VTDigger (May 19, 2014, 7:07 PM), <http://vtdigger.org/2014/05/19/electricity-supplier-wont-buy-vermont-renewable-energy-credits/>.

⁵ See 30 V.S.A. § 8005(d) (establishing SPEED goals and objectives); see also Vermont Public Service Board Rules, Sustainably Priced Energy Enterprise Development Program, 18–1–12 Vt. Code R. §§ 4.301–4.319, available at http://www.state.vt.us/psb/rules/OfficialAdoptedRules/4300_SPEED.pdf.

Vermont SPEED program.⁶ This prompted Next Era Energy, a \$15 billion North American company that purchases and sells RECs, to notify sellers of RECs in the New England Power Pool that it will no longer trade Vermont’s renewable energy credits.⁷ In a letter dated May 14, 2014 NextEra stated: “It is a fundamental principle of all renewable energy market sales that the environmental characteristics associated with the electric energy generated cannot be counted or claimed twice.”⁸ Further, on June 6, 2014 the Connecticut Public Utilities Regularity Authority established a Working Group “to engage in a process to clarify the treatment of Vermont SPEED RECs under the Connecticut RPS and broader application to other potential double-counting situations.”⁹ PURA has opened an electronic docket (No. 14-05-36) calling for public comments on a series of questions including whether the practice of selling RECs to Connecticut utilities while at the same time claiming those credits under the Vermont SPEED program are in compliance with this Commission’s Green Guides.

IV. JURISDICTIONAL STATEMENT

The FTCA empowers and directs the Commission to prevent “persons, partnerships or corporations” from using “unfair or deceptive acts or practices in or affecting commerce.”¹⁰ GMP is a “corporation” engaged in “commerce” as defined by the FTCA and is therefore subject to the Commission’s jurisdiction.¹¹ The FTCA also empowers and directs the Commission “to

⁶ 2013 Conn. Acts Public Act 13-303 An Act Concerning Connecticut’s Clean Energy Goals, 2013 Conn. Legis. Serv. P.A. 13–303 (S.B. 1138) (West) (amending Conn. Gen. Stat. §16–1(a)(26))

⁷ Letter from Lawrence Silverstein, Senior Vice Pres. & Managing Director, NextEra Energy Power Marketing, LLC, to NEPOOL REC Sellers (May 15, 2014), *available at* <http://s3.documentcloud.org/documents/1164899/vtspeedltrtonepoolrecsellers4-15-14.pdf>

⁸ *Id.*

⁹ State of Connecticut Public Utilities Regulatory Authority, Docket No. 14-05-36, Notice of Proceeding and Request for Comments 3 (June 5, 2014), *available at* [http://www.dpuc.state.ct.us/dockcurr.nsf/\(Web+Main+View/All+Dockets\)?OpenView&StartKey=14-05-36](http://www.dpuc.state.ct.us/dockcurr.nsf/(Web+Main+View/All+Dockets)?OpenView&StartKey=14-05-36).

¹⁰ 15 U.S.C. § 45(a).

¹¹ “Corporation” is broadly defined to include “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest.” The term “commerce” means “commerce among the states or with foreign nations.” 15 U.S.C. § 44.

gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce [except banks]”¹² Further, the Act provides: “Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any *** unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.”¹³ Petitioners request that the Commission exercise this authority for the following reasons.

V. GMP’s MARKETING PRACTICES VIOLATE THE FTCA BECAUSE THEY ARE LIKELY TO MISLEAD CONSUMERS ACTING REASONABLY UNDER THE CIRCUMSTANCES AND CAUSE MATERIAL HARM TO THE CONSUMER.

In evaluating claims of deception the Commission follows its 1983 *Policy Statement on Deception*,¹⁴ (“Deception Policy”) which sets forth a three-part test for deception.¹⁵ First, there must be a representation, omission or practice that is likely to mislead the consumer.¹⁶ A misrepresentation is an express or implied statement contrary to fact. In some circumstances the failure to qualify statements or practices can be misleading. In determining whether such an omission is deceptive the Commission will examine the overall impression created by the

¹² 15 U.S.C. § 46.

¹³ *Id.* § 45(b).

¹⁴ John D. Dingell, Federal Trade Commission, *FTC Policy Statement on Deception 1* (October 14, 1983), available at http://www.ftc.gov/sites/default/files/attachments/training-materials/policy_deception.pdf.

¹⁵ *Cliffdale Associates*, 103 F.T.C. 110 (1984) (“the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”).

¹⁶ Dingell, *supra* note 13, at 1.

practice, claim or representation.¹⁷ Omissions may also be deceptive where the representations made are not literally misleading but create a reasonable expectation or belief among consumers which is misleading absent the qualifying statements.

Second, the act or practice must be considered from the perspective of the reasonable consumer. The test is whether the consumer's interpretation or reaction is reasonable.¹⁸ In evaluating a particular practice the Commission considers the totality of the practice—"the entire mosaic rather than each tile separately"¹⁹—in determining how reasonable consumers are likely to respond. When a company's representation conveys more than one meaning to a reasonable consumer, one of which is false, the seller is liable for the misleading interpretation.²⁰ An interpretation is presumed reasonable if it is the one the seller intended to convey.

Third, the representation, omission or practice must be "material." A material misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product or service. In cases of express claims materiality is presumed. As the Supreme Court has said, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."²¹ As the Deception Policy states: "Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect."²²

Each of these tests is discussed in turn.

¹⁷ *Id.* at 8 n.4; *see also ITT Continental Baking Co. Inc.* 83 F.T.C. 865, 965 (1976).

¹⁸ A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

¹⁹ *Fed. Trade Comm'n v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

²⁰ *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

²¹ *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 567 (1980).

²² Dingell, *supra* note 13, at 7.

- A. GMP is misleading Vermont consumers through both affirmative misrepresentations of the source of the electricity it sells and its failure to disclose that by selling RECs it is stripping the electricity of any environmental attributes.

In 2012 the Commission updated the *Guides for the Use of Environmental Marketing Claims* (“Green Guides” or “Guides”) and added a specific provision dealing with renewable energy claims.²³ The Guides do not confer any rights on any person and do not operate to bind the Commission or the public.²⁴ However, the Commission may take action under the FTCA if a marketer makes an environmental claim inconsistent with the Guides.²⁵ In short, the Guides provide substantive principles and specific examples of practices that are considered deceptive as well as non-deceptive.

The Green Guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals.²⁶ The Guides are based on marketing to a general audience.²⁷ However, when a marketer targets a particular segment of consumers, the Commission will examine how reasonable members of that group interpret the advertisement.²⁸ This is relevant to this petition because GMP is directing its renewable energy marketing messages to Vermont customers who are most concerned about the environmental impacts of their energy usage and, in particular, the climate change implications of relying on fossil fuels to generate electricity. GMP’s marketing strategy targets Vermonters who are concerned about their carbon footprint. This becomes important in considering the effect that GMP’s claims about its renewable energy service have upon this informed and concerned segment of its customer base.

²³ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122, 62,124 (Oct. 11, 2012) (codified at 16 C.F.R. § 260.15) [hereinafter “Green Guides”].

²⁴ *Id.* at 62,124.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

The Green Guides contain a new provision dealing specifically with “Renewable Energy Claims.” In relevant part it states:

If a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.²⁹

To illustrate how this principle should be applied the Guides cite the following example of a manufacturer using solar panels:

A toy manufacturer places solar panels on the roof of its plant to generate power, and advertises that its plant is ‘100% solar-powered.’ The manufacturer, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the manufacturer uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, transferred the right to characterize that electricity as renewable. The manufacturer’s claim is therefore deceptive.³⁰

During the comment period on the proposed Guides, questions were raised about how this principle would be applied in the case of generation claims by power producers who, like GMP, generate renewable energy as a substantial portion of their business. In the *Statement of Basis and Purpose*³¹ accompanying publication of the final Green Guides, the Commission declined to provide specific guidance because it lacked “consumer perception data” regarding such claims. However the Commission provided this additional clarification:

[P]ower providers that sell null electricity to their customers, but sell RECs based on that electricity to another party, should keep in mind that their customers may mistakenly believe the electricity they purchase is renewable. Accordingly, the Commission advises such generators to exercise caution and qualify claims about their generation by disclosing that their electricity is not renewable.³²

²⁹ 16 C.F.R. § 260.15(d).

³⁰ *Id.* The example goes on to explain: “[i]t also would be deceptive for this manufacturer to advertise that it ‘hosts’ a renewable power facility because reasonable consumers likely interpret this claim to mean that the manufacturer uses renewable energy. It would not be deceptive, however, for the manufacturer to advertise, ‘We generate renewable energy, but sell all of it to others.’” This advice applies with equal force to GMP in its representations to its customers.

³¹ Fed. Trade Comm’n, *The Green Guides: Statement of Basis and Purpose* (2012), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf>.

³² *Id.* at 224–25.

This example captures exactly what GMP is doing. GMP is claiming to provide renewable energy to its customers without disclosing the fact that it is selling substantially all of the RECs thereby stripping the electricity of its green environmental attributes.³³ The only way that GMP could claim to be providing renewable energy would be to retire the RECs. By not being straight with its customers, GMP is denying them the opportunity to look for other genuine sources of renewable energy or, alternatively, to purchase cheaper energy with similar environmental attributes to what GMP is actually selling them. This is discussed further below.

- B. GMP's representations and omissions are likely to mislead consumers acting reasonably under the circumstances because they are intended to attract environmentally conscious consumers who think they are getting something they are not.

An interpretation is reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers.³⁴ In the case of express claims, the representation itself establishes the meaning. In the case of implied claims and deception by omission, the meaning may be determined from the representation itself, including evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.³⁵

This is not a case of an isolated statement or an inadvertent slip of the tongue. GMP is aware of what it is doing, as indicated by this testimony regarding the Kingdom Community Wind project before the Public Service Board in 2010:

I observe that the current SPEED construct of selling RECs (thereby minimizing retail electric rates) is in tension with other Vermont goals regarding air emissions

³³ In testimony before the Vermont Public Service Board GMP's witness stated: "GMP expects that absent a change in Vermont law, it will sell most or all of the 17 Projects' RECs to entities in neighboring states that will ultimately retire them for compliance with RPS requirements. For context, GMP presently sells most of the RECs associated with its premium renewable sources in this manner." Prefiled direct testimony of Douglas C. Smith on behalf of Green Mountain Power Company, redacted version (May 21, 2010). See **Exhibit 2**.

³⁴ *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

³⁵ Dingell, *supra* note 13, at 4.

and reduction of greenhouse gas emissions. Specifically, to the extent that Vermont utilities sell the RECs associated with renewable sources like the Project [Kingdom Community Wind], **they are no longer able to claim those sources' renewable content and their low/zero emission profile.**³⁶

Despite this candid acknowledgement under oath, GMP is in fact marketing electricity from the Kingdom Wind Project and others as “renewable energy” with “low/zero emissions.”

The following thirteen statements provide a detailed picture of how Vermont consumers are misled by GMP's express and implied representations as well as by its omission of clarifying information regarding the true character of the “renewable energy” it is selling.

The first three statements were made jointly by GMP and its partner the Vermont Electric Cooperative and concern electricity generated by the Kingdom Community Wind (“KCW”) Project, a 21-turbine project which first came on-line in 2012. Each statement falsely implies that all of the electricity provided to the customers from the project is renewable when in fact substantially all of the RECs from this project will be sold out of state.

(1) “Where does the power go? All of the energy is used by GMP and VEC customers.”³⁷

Analysis: False. Electricity generated by the KCW project, like any other generation facility, goes into an integrated regional grid and is dispatched to various load centers based on operational criteria set by ISO New England. It is a pool of electrons that flow in many directions at different times of the day, month, and year. There is no way to trace these electrons to a specific end user. The only legitimate way to claim that energy from this wind project is “renewable” would be for GMP to retire the RECs for each of the MWhs generated. Instead, as GMP has acknowledged in the regulatory process, it sells substantially all of the RECs from premium renewables such as KCW.

³⁶ Douglas C. Smith, Pre-filed Testimony before the Vermont Public Service Board 26 (May 21, 2010) (emphasis added). See **Exhibit 2**.

³⁷ Green Mountain Power & Vermont Electric Cooperative, *Kingdom Community Wind Fact Sheet* (Sept. 2013). See **Exhibit 3**.

- (2) “Will the power stay in Vermont? YES! Every single kilowatt hour of electricity will be used by Green Mountain Power and Vermont Electric Cooperative customers. Refer to page 4 to learn about the Renewable Energy Credits (REC).”³⁸

Analysis: False as explained above.

- (3) “One thing we know is important to nearby residents is that every kWh of energy produced by Kingdom Community Wind is used by members of Vermont Electric Coop and Green Mountain Power customers.”³⁹

Analysis: False as discussed above.

The following ten statements were made about electricity generated from wind projects Kingdom Community Wind and Searsburg Wind, as well as solar projects in the cities of Rutland and Berlin. All are expressly or impliedly misleading.

- (4) “A maximum of 21 turbines will be installed, generating enough electricity for approximately 20,000 Vermont residents. All the power generated will stay in Vermont for the benefit of Vermont Electric Co-op members and Green Mountain Power customers.”⁴⁰

Analysis: False as discussed above with the addition of the misleading claim that the project is “low carbon.” This letter to the editor published in a statewide newspaper fails to explain that, due to the sale of the RECs, the power will not be low-carbon for Vermont customers. In fact the sale of the RECs means that Vermont’s carbon footprint

³⁸ Green Mountain Power & Vermont Electric Cooperative, *Answers to Commonly Asked Questions about Kingdom Community Wind 1* (Feb. 2013), available at

http://www.greenmountainpower.com/upload/photos/236KCW_QA_Feb_2013_FINAL.pdf. See **Exhibit 4**.

³⁹ Letter from Mary Powell, Green Mountain Power, & Dave Hallquist, Vermont Electric Cooperative, to neighbors of Kingdom Community Wind Project (Feb. 2013). See **Exhibit 5**.

⁴⁰ Robert Dostis, Director of External Affairs & Customer Relations with Green Mountain Power, *Wind Project Low Cost, Low Carbon*, Sunday Rutland Herald and Times Argus (Jan. 9, 2011). See **Exhibit 6**.

will increase because with the sale of the RECs it is effectively importing “brown” power from the regional grid which contains large amounts of fossil fuel.⁴¹

- (5) “Kingdom Community Wind means clean renewable energy built in Vermont for Vermonters.”⁴²

Analysis: Explicitly misleading, given the sale of the RECs.

- (6) “GMP is committed to encouraging the development of new renewable energy sources. As part of that goal, GMP has made a serious investment in developing wind power as a component of its energy supply. Two examples of that investment can be seen in our Searsburg Wind Facility, and the Kingdom Community Wind project in Lowell, Vermont.”⁴³

Analysis: This statement misleads by failing to explain that the “renewable” attributes of the project have been sold and Vermonters are actually getting nonrenewable, high carbon attributes associated with the “residual mix” of electricity on the New England grid.

- (7) “GMP customers consistently tell us they expect clean, green, cost-effective energy. We are so proud to be able to deliver on that and at the same time keep costs down, maintain world-class customer service, and provide ongoing support to these five towns.”⁴⁴

Analysis: Underscores the point that GMP is targeting environmentally conscious customers and misleading them by claiming the electricity they are getting is renewable, when in fact that electricity is not renewable because the RECs have been sold.

⁴¹ During summer peak demand, 85% of the electricity in New England comes from gas, coal, oil and nuclear plants. ISO New England, *2014 Regional Energy Outlook* 14 (2014), available at http://www.iso-ne.com/aboutiso/fin/annl_reports/2000/2014_reo.pdf.

⁴² Dostis, *supra* note 39. See **Exhibit 6**.

⁴³ *About Wind Power*, Green Mountain Power, <http://www.greenmountainpower.com/innovative/wind/> (last visited Sept. 8, 2014). See **Exhibit 7**.

⁴⁴ *Kingdom Community Wind Delivers for Vermont*, Green Mountain Power (January 23, 2014) (statement of GMP President Mary Powell), available at <http://news.greenmountainpower.com/press-releases/kingdom-community-wind-delivers-for-vermonters-1084265?feed=d51ec270-a483-4f6c-a55e-8e5fbe2238c2>. See **Exhibit 8**.

- (8) “Upon merging with CVPS, GMP Solar Power added a significant amount of solar power generation to its resources. Included in that addition is the 264-panel array along one of Vermont’s busiest highways, Route 7 in Rutland Town. Combined with our Berlin Solar Plant, this array doesn’t just help to cleanly power Vermont, but serves as a working classroom for students and others interested in homegrown, emissions-free energy.”⁴⁵

Analysis: Impliedly misleads by stating that the project will “cleanly power Vermont” when the RECs are sold out of state for the benefit of utility customers in those states.

- (9) “The project is part of GMP’s plan to create and inspire construction of enough solar to provide Rutland with the highest solar reliance per capita of any city in the northeast.”⁴⁶

Analysis: This statement is expressly misleading because with the sale of RECs from this project, Rutland customers do not purchase the solar energy. By suggesting that Rutland will have the “highest solar reliance per capita” GMP implies that its Rutland customers are consuming this renewable energy when in fact that is not the case.

- (10) “We have always believed that this wind resource would provide a clean, cost-effective energy resource for Vermonters, and this upgrade is helping us achieve that goal.”⁴⁷

Analysis: Cost effective, maybe; “clean,” no. The clean attributes have been sold.

- (11) “At six cents per kilowatt hour, GMP Searsburg wind has been a cost-effective way for us to provide our customers with renewable energy.”⁴⁸

⁴⁵ *About Solar Power*, Green Mountain Power, <http://www.greenmountainpower.com/innovative/solar/> (last visited Sept. 8, 2014) See **Exhibit 9**.

⁴⁶ *Creek Path Solar Farm*, Green Mountain Power, http://www.greenmountainpower.com/innovative/solar_capital/creek-path-solar-farm-/ (last visited Sept. 8, 2014) See **Exhibit 10**.

⁴⁷ *Power Line Upgrade Leads to Dramatic Increase in Cost-Effective Energy from GMP’s Kingdom Community Wind Facility*, Green Mountain Power (Sept. 20, 2013) (comment by GMP spokesperson Dorothy Schnure), <http://news.greenmountainpower.com/manual-releases/2013/POWER-LINE-UPGRADE-LEADS-TO-DRAMATIC-INCREASE-IN-C?feed=d51ec270-a483-4f6c-a55e-8e5fbe2238c2>. See **Exhibit 11**.

Analysis: Same as above.

- (12) “This project [KCW] is an important part of Green Mountain Power’s strategy to provide its customers with long-term, stably priced renewable energy.”⁴⁹

Analysis: Again, KCW is not providing Vermonters with “renewable energy” due to sale of the RECs.

- (13) “If approved, Kingdom Community Wind will be the largest permitted project in Vermont and generate enough electricity for 20,000 Vermont homes.”⁵⁰

Analysis: This opinion piece by GMP’s President and CEO was published in a statewide newspaper and is misleading for the reasons already discussed.

C. GMP’s deceptive practices are material and harmful to Vermont consumers.

As the Deception Policy states: “Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.”⁵¹ Such is the case with GMP’s practices. The honest representation of a product or service becomes all the more important when the product or service cannot be differentiated at the point of its consumption. Green claims in general are difficult for consumers to verify because consumers are largely incapable of testing them.⁵²

⁴⁸ *GMP Searsburg Wind Plant Has Banner Year*, Green Mountain Power (Mar. 10, 2011) (statement of Mary Powell, GMP CEO), <http://news.greenmountainpower.com/press-releases/GMP-Searsburg-Wind-Plant-Has-Banner-Year-0731148>. See **Exhibit 12**.

⁴⁹ *Lowell Hearings End*, Caledonian-Record (March 4, 2011) (comment by GMP spokesperson Dorothy Schnure). See **Exhibit 13**.

⁵⁰ Mary Powell, *Low-Cost, Low-Carbon, Reliable*, Sunday Rutland Herald Times Argus (Dec. 26, 2010) See **Exhibit 14**.

⁵¹ Dingell, *supra* note 13, at 7.

⁵² See Kelly Crandall, *Trust and the Green Consumer: The Fight for Accountability in Renewable Energy Credits*, 81 U. Colo. L. Rev. 893, 905, 940 (2010).

Green products are essentially “credence goods” about which consumers must rely on the marketers’ own claims when deciding whether to purchase the product.⁵³

The nature of electricity complicates this problem: once generated, the electrons flow into a common pool resource that cannot be traced to its end use, and consumers cannot tell when they turn on the light where the electricity comes from. Therefore, the presence of generator attribute tracking systems, as exist in New England and other regions, and the appropriate retirement of RECs, in support of regulatory mandates or green claims, is essential to maintaining consumer confidence in their energy purchasing decisions.

When presented with the statement, “I care about use of renewable energy sources,” forty-five percent of consumers in the Northeast agreed completely with that statement and eighty-two percent of consumers in the Northeast agreed with it completely or somewhat.⁵⁴ If given the choice many Vermont customers would choose to pay more for renewable energy that actually reduced carbon emissions. Consumer research supports this conclusion. Twenty five percent (25%) of consumers surveyed in the Northeast would pay five to twenty dollars extra each month to have some power for their home come from a renewable source.⁵⁵

GMP’s customers have choices when it comes to buying energy. First, customers concerned about the environmental effects of electric generation have the option to conserve rather than consume electricity if they believe that the consumption of electricity is harmful to the environment. Clearly GMP’s public representation about the source and environmental attributes of its energy purchases is intended to make GMP customers feel positive about the environmental attributes of its generation resources. A more positive feeling about the

⁵³ John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 Minn. L. Rev. 245, 273–74 (1994).

⁵⁴ Natural Marketing Institute, *Consumer Attitudes About Renewable Energy: Trends and Regional Differences* 6 (April 2011), available at <http://apps3.eere.energy.gov/greenpower/pdfs/50988.pdf>. See **Exhibit 15**.

⁵⁵ *Id.* at 19.

environmental impacts associated with the source of electricity generation will over time lead more customers to choose increased electricity consumption over conservation.

Similarly, customers have the option to generate some or all of their own energy from net-metered grid-connected options for solar and wind as well as off-the-grid alternatives. GMP's misleading claims that it is providing customers with renewable energy has the effect of discouraging them from making their own investment in net-metered or off-grid sources of renewable energy.

Additionally, GMP competes with other more traditional sources of fuels across Vermont such as wood, propane, and petroleum products. Vermonters in choosing their fuel source for home heating or transportation are likely to factor in both cost and environmental impact. When GMP makes statements about its supply resources implying that they are more renewable and lower carbon than they are in fact, it is reasonable to expect that some customers will respond to these misleading claims by choosing to use more electricity rather than choosing wood or fossil fuels.

Recently GMP has begun promoting the environmental benefits of using electric cold climate heat pumps for space and water heating.⁵⁶ This is further evidence that GMP understands the value of labeling its energy system "green." It provides a competitive advantage in GMP's service area.

GMP directly benefits from these misrepresentations by encouraging their customers to consume more electricity than they would if clearly presented with the facts about its source and environmental attributes. Vermont customers are harmed when they are denied accurate information about the renewable or low carbon nature of GMP's electric supply resources. With

⁵⁶ *Cold Climate Heat Pump Rental Program*, Green Mountain Power, [http://www.greenmountainpower.com/customers/heat-pump-rental/cold-climate-heat-pump-rental-program-/](http://www.greenmountainpower.com/customers/heat-pump-rental/cold-climate-heat-pump-rental-program/) (last visited Sept. 8, 2014).

accurate information they may choose to invest in energy efficiency, more cost effective traditional fuels like wood or propane, or even in their own renewable generation under Vermont's net metering program.⁵⁷

VI. GMP'S ARGUMENT THAT IT IS NOT SUBJECT TO FTC JURISDICTION AND IS NOT OBLIGATED TO COMPLY WITH THE DECEPTION POLICY OR GREEN GUIDES IS WRONG AS A MATTER OF LAW AND TROUBLING AS A MATTER OF POLICY

In December 2102 the Vermont Public Service Board convened a workshop to take comments on its draft "Further Analysis and Report on Renewable Energy Requirements." The draft report had found that "the current SPEED program is not conducive to developing viable markets for renewable energy because the program allows for the sale of RECs." GMP disagreed with this finding and filed comments stating that it "does not believe a Renewable Portfolio Standard ("RPS") is necessary for Vermont at this time."⁵⁸ The workshop also posed a series of questions, one of which was: "Are representations made by a Vermont utility in print or on a web site considered marketing under the FTC Guidelines?"

In response, GMP stated: "GMP's view is that utility consumer information materials do not directly fit within the scope of the FTC guidelines." GMP rationalized this rather stunning conclusion as follows:

In Vermont, utilities provide a regulated service to customers at prices set by the Public Service Board within specified monopoly service areas subject to a comprehensive regulatory scheme. In this way, utilities do not generally "market" their services and the information provided does not generally affect consumers' decision-making in the way that marketing communications do in more competitive markets.⁵⁹

⁵⁷ See *Net Metering*, Vermont Public Service Department, http://publicservice.vermont.gov/topics/renewable_energy/net_metering (last visited Sept. 8, 2014) ("Net metering makes it easier and more cost-effective for Vermonters to generate their own electricity").

⁵⁸ Letter dated December 12, 2012 from Douglas C. Smith, Director of Power Supply, to Susan Hudson, Clerk of the PSB. See **Exhibit 16**

⁵⁹ *Id.* at 4.

In other words, GMP appears to believe that it is not required to tell its customers the truth about what it is doing because it has been granted a “monopoly” and Vermonters have no choice in deciding whether to purchase its electricity. As a matter of law there is no “monopoly” exception from FTC’s rules, policies or guides. Deception is deception whether practiced by a monopoly or any other seller of products or services. Many utilities across the country are regulated monopolies. GMP’s interpretation would carve a huge hole in the FTC’s effort to provide consumers with honest information in the marketing of renewable energy.

GMP also suggests that it is not really engaged in “marketing;” that it is simply complying with requirements to submit annual reports, integrated resource plans, public education materials and other documents to state regulators. However, as documented above, GMP is engaged in all kinds of communications with the public—letters to the editor, opinion pieces, press releases, statements at public meetings—that are plainly designed to convince Vermonters that they are getting renewable energy when in fact that is not the case. As defined by the American Marketing Association: “Marketing is the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large.”⁶⁰ That is what GMP is doing.

Finally, as we have shown, above Vermonters do in fact have a choice. They do not have to keep buying GMP’s non-renewable electricity. The most obvious alternative is to reduce their energy usage by buying more efficient appliances, installing solar hot water heaters, using smart meters better insulation and many other techniques. But unless they get accurate information about the nature of the power they are getting from GMP they are not in a position to evaluate these options and make an informed choice.

⁶⁰ American Marketing Association website: <https://www.ama.org/AboutAMA/Pages/Definition-of-Marketing.aspx>.

VII. REQUEST FOR RELIEF

In conclusion, Petitioners request that the Commission initiate a full investigation of GMP's marketing practices for its renewable energy program. Should such investigation confirm that GMP is in fact engaged in deceptive practices, Petitioner requests that the Commission initiate an enforcement action under section 5 of the FTCA by filing a complaint seeking a cease and desist order, corrective statements and such other remedies as may be appropriate.⁶¹

Respectfully submitted this 15th day of September, 2014.

BY: _____

Patrick A. Parenteau
Douglas A. Ruley
Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, VT 05068
(802) 831-1630
druley@vermontlaw.edu
pparenteau@vermontlaw.edu
Counsel for Petitioners

⁶¹ Given the sustained and repeated nature of the deceptions, a mere cessation of the deceptive practices will not be sufficient to bring customers to a clear understanding of the nature of the electricity purchased from the Utilities. Accordingly, Petitioners ask that the Commission require GMP to clarify the nature of its product through corrective statements pursuant to *Warner-Lambert Co. v. Fed. Trade Comm'n*, 562 F.2d 749 770–71 (D.C. Cir. 1977).