UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

# Response to the National Association of Attorneys General Request for Comments on Discussion Draft of Proposed Green Guidelines for Electricity

## Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission(1)

## August 10, 1998

### Introduction and Summary

The staff of the Bureau of Consumer Protection of the Federal Trade Commission (FTC) appreciates this opportunity to comment on the Discussion Draft Green Guidelines for Electricity (Draft Guidelines), prepared by Michael Stoddard and submitted to the Environmental Marketing Subcommittee of the National Association of Attorneys General (NAAG) Energy Deregulation Working Group. NAAG has been instrumental in developing guidelines for the use of environmental marketing claims for consumer products.

The FTC is an independent administrative agency responsible for safeguarding the interests of consumers and maintaining competition. The staff of the FTC has a longstanding interest in regulation of and competition in energy markets, and has submitted comments to the Federal Energy Regulatory Commission (FERC), as well as several state and regional regulatory bodies.(2) The staff actively monitors industry and legislative developments in the electric industry at the state and federal levels that will affect consumers' interests. The FTC's mission in this area includes attempting to ensure truth in advertising, to prevent and remedy unfair or deceptive trade acts or practices.

This comment first presents background information on the transmission and distribution of electricity, followed by an overview of the staff's general approach to drafting advertising and marketing guidelines. The comment stresses the advantages of maintaining flexibility in the guidelines by using general principles, with examples, as opposed to specific standards. The comment generally supports the Draft Guides' use of the FTC's Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (FTC Green Guides), as the starting point for developing guidelines tailored to electricity. The comment also suggests that research regarding consumer understanding of environmental claims for electricity would be helpful.

The comment then addresses the seven general issues relating to environmental marketing claims for electricity that are outlined in the May 27, 1998 letter soliciting comments on the Draft Guidelines from The Honorable Hardy Myers, Attorney General of Oregon, and Elliot Burg, Assistant Attorney General of Vermont. These issues are: (1) making general environmental benefit claims; (2) substantiating environmental claims; (3) using the terms "green" and "clean"; (4) using the term "renewable"; (5) making and substantiating claims about fuel sources; (6) making and substantiating claims about emissions; and (7) advertising prices for power marketed as having an environmental benefit.

In brief, this comment observes:

- there is little need to depart from the FTC Green Guides on the issues of making general environmental benefit claims (issue 1) and substantiating environmental claims (issue 2) concerning electricity;
- absent research on how consumers interpret the terms "green" and "clean," these terms should probably be treated as general environmental benefit claims (issue 3);
- the term "renewable" should probably not be treated as a general environmental benefit claim (issue 4);
- both historical data and future projections should be permitted for making and substantiating claims about fuel sources and emissions, and no specific substantiation methods should be prescribed (issues 5 and 6); and
- it is unnecessary and counterproductive to set standards for price advertising for power marketed as having an environmental benefit (issue 7)

## Overview of General Principles for Drafting Industry Guidelines

### A. Background on the Electric IndustryTm [(t)2(he t)2.96 - (t)2(he tpu)13(e 7)o5(t)21r)4(ojw5

Guidelines published as a model for all states should accommodate advertising in accordance with various state disclosure requirements. For example, some states may mandate that certain information be provided in all advertising in a prescribed format or label. Federal legislation has been proposed that would include mandatory disclosure of environmental information.(6) Conflicting guidance from NAAG may increase costs and uncertainty for marketers, which could discourage suppliers from highlighting the environmental benefits of their products.(7)

We recognize the difficulty of drafting environmental guides for electricity advertising at this early stage in the restructuring of the electricity market. One difficulty is the paucity of knowledge about consumer attitudes towards electricity issues or consumer interpretation of electricity claims to guide interpretation of advertising. Therefore, the staff anticipates that substantial consumer research will be necessary before determining what specific guidance should be given on many issues. For instance, consumers' knowledge and attitudes may differ regionally about large- and small-scale hydroelectric power generation. These attitudes could influence what constitutes a misleading claim about renewable resources, or about environmentally preferable products. Furthermore, consumers' opinions may change fairly quickly with their growing knowledge about, and experience with, competition. Even in California, where retail competition now exists, few competitors have actually vied for customers. Much of the advertising has been oriented towards image building or consumer awareness, and has not been product-specific.

### Issue 1, General Environmental Benefit Claims

NAAG requests comment on the standards that should guide the making of general claims of environmental benefit for electricity, and whether these claims should be avoided entirely or should be qualified. The FTC has taken the position in its Green Guides that claims of general environmental benefit should not be prohibited per se, but should be avoided or qualified as to a specific attribute, unless the marketer can substantiate all the implications of the broad claim. The staff sees no reason to treat general environmental claims for electricity differently, and recommends the same approach for NAAG's Draft Guidelines. Similar to the FTC Green Guides approach, examples can illustrate the general principles in the specific context of electricity sales, as the Draft Guidelines have done in Section 5(a) on general environmental benefits claims.

[redacted]

The FTC has issued a Policy Statement on Advertising Substantiation,(8) The Draft Guidelines raise the issue of sellers' representations about the nature of electricity transmission and distribution from generator to customer over the power grid. As discussed above, it is impossible to determine whether electricity used by a particular customer came directly from that customer's supplier or to identify the precise disincentive seems contrary to the original impetus for deregulation, which included a desire to foster products that are better for the environment.

Because of the ambiguity of these terms and the uncertainty of how they will be used, the best approach for governing their use -- absent consumer research -- may be simply to rely on the approach taken for general environmental benefit claims in the FTC Green Guides. Under that approach, advertisers would be responsible both for determining what claims the terms they use convey, and for having substantiation for those claims. As with claims sources, such as wind or solar power; temporary plant shut downs or other operational problems beyond the generators' control may occur; new plants expected to go on line may be delayed; and some marketers may not contract in advance as a low-price purchasing strategy. Clearly, certain types of projected claims would be unsubstantiated at the time they are made (for example, a generator who claims to be selling 100% hydroelectric power, but owns only coal-fired plants and has no supply contracts, or reasonable prospects, for purchasing power consumers and producers about the cost of producing products and the value of those products to consumers. If consumers value electricity products that are relatively better for the environment, that will be reflected in their willingness to pay higher prices for those environmentally superior products. If they are willing to pay even more for the product than is accounted for by the higher cost of production, this will act as a signal to producers to invest more in environmentally superior electricity generation, thus increasing supply. As the supply of this power increases, one would expect prices to fall.(12)

If utilities are not allowed to charge market prices for environmentally superior products unless justified by specific environmental benefits, prices will be lower than the market would otherwise bear. That situation would lead to a shortage of such products because firms would have little or no incentive to supply them. This outcome would thwart the development of renewable energy sources and pollution reductions -- a result exactly the opposite of what many proponents of restructuring would like to achieve. For the Draft Guidelines to become involved in pricing decisions would be counter to the functioning of a competitive market.

## Conclusion

The key concepts that the staff believes NAAG should apply in developing Draft Guidelines are maintaining flexibility by stating general principles that advertisers can apply on a case-by-case basis, and providing guidance to marketers through examples rather than fixed standards. The aim of applying these concepts is to develop guidelines that provide guidance specific enough to be useful to advertisers in new electricity markets, but general enough to avoid stifling innovation and competition. The staff applauds NAAG's efforts in this direction, and looks forward to further participation as the process moves forward.

Respectfully submitted,

_________________________

Joan Z. Bernstein, Director
Mary K. Engle, Asst. Director, Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
August 10, 1998

1. This comment represents the views of the staff of the FTC's Bureau of Consumer Protection. They are not necessarily the views of the FTC or of any individual Commissioner. Inquiries regarding this comment should be

[redacted]
(V980016)."

3. Draft Guidelines, Section 3(b), p. 4, n.3.

Competition and the Electricity Industry, January 1998 (available through the Regulatory Assistance Project's website at "www.rapmaine.org/nccei/altindex.html").

6. E.g., S. 2287, 105th Cong., 2d Sess. § 103 (1998).

7. Accordingly, the guidelines should probably treat any disclosures that comply with state or federal mandatory disclosure laws as not being false or misleading, by so stating either expressly or by implication through the use of examples. The guidelines would be directed toward advertisements making claims beyond the strict parameters of state disclosure and labeling laws and regulations. The FTC Green Guides adopt this view, for example, in their treatment of batteries labeled in accordance with the Mercury-Containing and Rechargeable Battery Management Act, 42 U.S.C. § 14,322(b). See 16 C.F.R. § 260.7(d), n.4.

8. FTC Policy Statement on Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). This Policy Statement discusses the factors to be considered when determining the sufficiency of proffered substantiation, which the Draft Guidelines incorporate in the first paragraph of Section 3(b).

9. To conclude that these terms are inherently misleading would mean they effectively would be banned, a drastic and probably unnecessary step.

10. See, e.g., 42 U.S.C. § 7135(j)(3) (Energy Information Administration Act, definition of "renewable energy resources"); 10 C.F.R. § 451.2 (Department of Energy, Renewable Energy Production Incentives, definition of "renewable energy source").

11. This assumes that firms would not be penalized if they understated, but would be penalized for overstating, the amount of environmentally superior fuel sources.

12.