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Via Electronic Submission

The Honorable Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex B)
600 Pennsylvania Avenue, NW.
Washington, DC 20580

Re: Green Guides Regulatory Review, 16 CFR part 260,
Comment, Project No. P954501

Dear Secretary Clark,

On behalf of Exelon Corporation ("Exelon"), Ballard Spahr Andrews and Ingersoll, LLP, hereby submits these comments in response to the request for public comment by the Federal Trade Commission ("FTC") published in the Federal Register on November 27, 2007, 72 Fed. Reg. 66091 (the "Notice"), soliciting comment as part of its systematic review of FTC's "Green Guides" related to environmental marketing claims.

Exelon is a utilities services holding company, located at 10 South Dearborn Street, Chicago, Illinois. Exelon owns Commonwealth Edison Company ("ComEd") and PECO Energy Company ("PECO"). Together ComEd and PECO own transmission and distribution systems and serve over five million retail electric customers in northern Illinois and the Philadelphia area. Exelon also owns Exelon Generation Company, LLC ("ExGen"), which owns or controls approximately 30,000 MW of generating facilities. Exelon Power Team is the wholesale marketing division of ExGen and is a leading power marketer throughout the country. Exelon Power Team trades in renewable energy certificates ("RECs") and will soon start trading in carbon offsets.

Summary of Comments

The Notice identifies a number of specific issues that may be addressed by commenters. Exelon's comments primarily address Specific Issue (1) in the Notice, relating to "renewable energy or carbon offset claims." These comments also address to a limited degree Specific Issue (2) and Specific Issue (3) relating to the use of the terms "sustainable" and "renewable," respectively. Exelon respectfully comments that FTC should not revise the Green Guides to include guidance regarding renewable energy or carbon offset claims at this time. Exelon further comments that FTC lacks sufficient information to develop guidance on the use of the terms "sustainable" and "renewable" for incorporation into the Green Guides, and therefore should not revise the guides to address these terms at this time. These comments are based on the detailed discussion below, but the basis for the comments can be briefly summarized as follows.

1. FTC action at this time would be premature, as multiple models for federal regulation of greenhouse gas ("GHG") emissions are being vigorously discussed in Congress, and states singly and regionally are evaluating and in many cases undertaking legislative and regulatory action to reduce GHG emissions. All of these domestic efforts are taking place against a background of international efforts to address global climate change through the United Nations Framework Convention on Climate Change ("UNFCCC") and the Kyoto Protocol. However, the complexity and implications of GHG regulation are such that no definitive regulatory program has emerged. Carbon offsets are a key element of nearly every state and federal alternative, and the creation, validation and trading of offsets are among the difficult issues with which federal and state agencies having primary authority over GHG emissions are wrestling. If the FTC acts at this time, before a definitive regulatory program emerges, FTC might inadvertently tip the scales in this critical policy debate, though FTC has no jurisdiction over the substance of that debate nor any technical experience in regulating GHG emissions.

2. FTC action at this time would impose practical if not legal limitations on corporate communications concerning policies, goals and achievements related to climate change at a time when the general public's desire for such information is at its highest. Responsible corporate leaders such as Exelon who have acted voluntarily to address climate change are proud to communicate those efforts to the public. Those leaders have developed their own means of validation of carbon offsets based on their own expertise, typically following one of the more widely-used validation methods available. Those methods (*e.g.*, the WRI/WBCSD methodology) are generally consistent, but have subtle differences in technique and outcome. If FTC requires specific validation methodologies for carbon offsets that differ from equally reliable techniques currently employed by market participants, concern over FTC's prescriptive methodologies may lead those corporate leaders to provide *less* public information about their voluntary carbon footprint reduction, if they did not use that chosen methodology in their reduction program.

3. FTC action is not necessary at this time, as the overwhelming volume of transactions in carbon offsets occurs in arms' length transactions between knowledgeable, sophisticated parties in the electric power, petrochemical and other industries that comprise the

wholesale market for these commodities. These parties have the knowledge and the means to conduct due diligence to determine if the carbon offsets purchased are sound, and the individual transactions are large enough to justify the exercise of such due diligence. Should the FTC rulemaking impose additional regulatory burdens on these transactions, this could have a negative impact on the efficiency of carbon offset and REC markets. Exelon's interest is in promoting the development of a legitimate, verifiable, and liquid market for instruments in anticipation of a potential GHG cap and trade market. There is not sufficient participation in the market by individual consumers to justify any FTC action that might inhibit the formation of such markets.

4. FTC action is not necessary at this time, and would violate principles of federalism, because RECs are created and regulated by state legislation, and their creation, validation and transfer are administered by state public utility authorities. Twenty-eight states and the District of Columbia have renewable portfolio standard ("RPS") laws mandating increased sales of renewable energy. In states in which retail electricity consumers have the option of choosing to purchase electricity generated by renewable sources, that choice (and the generators chosen) is governed by state law, state regulations and state tariffs sufficient to protect electricity consumers.

5. If FTC determines that action is necessary with respect to carbon offsets, it should expressly limit any new discussion in the Green Guides to carbon offsets marketed to individual consumers. Individuals may now purchase offsets from a number of vendors in order to reduce their personal carbon footprints. This is the only context in which a consumer might be exposed to products offered for sale that he lacks the knowledge or experience necessary to evaluate.

6. FTC action at this time would be based on inadequate stakeholder participation in the administrative process. Though FTC conducted a workshop to discuss RECs and carbon offsets, no member of the electric power industry participated in the program. Likewise, FTC has not conducted workshops or other stakeholder participation activities concerning the "sustainable" or "renewable" claims. If FTC is to venture into a market as complex as the one evolving from climate change concerns, it should exhaust every opportunity to consult with all affected stakeholders before taking action, and FTC has not yet done so on these topics.

Background for Comments

Climate Change, Carbon Offsets and Renewable Energy Certificates.

The concept of carbon offsets and RECs has evolved from concern over global climate change and other environmental and energy independence issues. Global climate change is driven by the emission of air pollutants referred to collectively as "greenhouse gases" or "GHGs," which increase the tendency of the earth's atmosphere to trap and to distribute heat from solar radiation. Carbon dioxide ("CO₂") comprises by far the greatest volume of GHG emissions (84% of 2005 US GHG emissions), but proposed GHG regulations to combat global

climate change also target methane, nitrous oxide, sulfur hexafluoride, and the gases in the hydrofluorocarbon and perfluorocarbon families.

Virtually all human activity results directly or indirectly in the production of GHGs. A large percentage of the electricity generated in the United States is generated by the combustion of fossil fuels, and thus any consumption of electricity will result indirectly in the emission of GHGs, depending upon the degree to which the electricity in that market is produced by the combustion of fossil fuels. All motorized travel results directly or indirectly in the production of GHGs. While the motorist driving his car emits GHGs directly from the combustion of gasoline, a passenger in an airplane or train causes the indirect emission of GHGs through the combustion of fuel or consumption of electricity by the airline or rail service provider.

Because of the diverse ways in which human activity results in the production of GHGs, the concept of the "carbon footprint" has developed. Unfortunately, as yet there is no clear consensus as to what that term embraces. The term can be used to describe only direct GHG emissions, such as from a company's fossil fuel combustion. More often, the term is used also to encompass indirect emissions resulting from electricity consumption. Some use the term to include even more remotely indirect emissions, such as emissions from employee commuting, business travel and transport of raw materials to or finished products from a company's facilities.

Many responsible corporations such as Exelon have voluntarily undertaken efforts to calculate and to reduce their carbon footprints. Most employ widely-used protocols to calculate CO₂ emissions, such as the WRI/WBCSD protocol that is used in EPA's Climate Leaders program. These protocols often dictate the types of GHG emissions to be included in the calculation, but the protocols differ in flexibility and in scope.

The available ways in which it is possible to reduce one's carbon footprint are dependent upon the manner in which the footprint is calculated. For example, if one looks only to direct GHG emissions, then the only way to reduce one's carbon footprint is to reduce GHG emissions (*e.g.*, by burning less fuel). If, however, one includes indirect emissions from electricity consumption as well, then one's carbon footprint can be reduced by reducing direct emissions or lowering electricity consumption, or both. In times of production growth, however, there is a limit to the ability to reduce direct GHG emissions and to consume less electricity, while at the same time generating more product. This is particularly true in the electric power industry, in which consumer demand for electricity continues to increase rapidly, even while the need to reduce GHG production becomes more apparent, and legislative mandates requiring such reductions become more imminent.

Purchasing carbon offsets can allow an entity to reduce its carbon footprint without reducing its actual GHG emissions. A carbon offset represents one ton CO₂e of GHG emissions that have been eliminated or avoided absent any legally compulsory requirement to do so. Alternatively, carbon offsets can reflect the sequestration (*i.e.*, storage) of one ton CO₂e of GHGs from the atmosphere or directly from a process that would otherwise emit GHGs into the atmosphere. Carbon offsets are generally established by documented reductions in emissions

from a measured baseline or a projected emission level. Carbon offsets are transferable, so that those facilities able to reduce GHG emissions most cost-effectively will have an opportunity to do so and reap a benefit by selling those offsets to an entity who is unable to do so, or whose growing operations prevent it from doing so.

RECs represent a related but different concept from carbon offsets, but are also used by some in efforts to reduce their carbon footprints. Each REC represents a unit of “renewable energy,” usually defined as one megawatt-hour of electricity generated by a source deemed “renewable” under state law. As discussed in greater detail below, RECs are created and controlled under the numerous state “renewable portfolio standard” (“RPS”) laws requiring electric utilities to raise the percentage of energy sold within their systems that is generated from “renewable” sources. Many state definitions of what constitutes “renewable energy” differ. In most cases, energy sources designated as “renewable” or “alternative” produce low or no GHG emissions, wind and solar being the most popular examples. On the other hand, some low or no GHG generation sources, such as nuclear energy, are not typically deemed “renewable” in RPS programs. It is therefore incorrect to view “renewable” and “low or no GHG” as synonymous terms.

RECs are a means of attributing from a particular renewable energy generation source to a particular end user ownership of the electricity generated by that renewable source, though that electricity is distributed across an electricity grid shared by all users in which renewable and conventional energy is commingled. The grid itself is administered by entities known as “independent system operators,” who may provide a basis to account for the transfer of RECs between generators and end users. For example, PJM Interconnection, the ISO serving all or part of 13 eastern states and the District of Columbia, has developed a program for tracking RECs known as the “Generation Attributes Tracking System” or “GATS.” Under GATS, PJM tracks the generation source (together with other attributes) of each megawatt-hour of electricity distributed across its grid, allowing RECs to be distributed reliably throughout the system.

An end user who wishes to purchase only renewable energy would simply purchase, in addition to electricity, a number of RECs equal to the number of megawatt-hours used. If the end user intends to use RECs to offset its GHG emissions, an additional calculation would be required. The amount of GHG emissions avoided by use of a given megawatt-hour of renewable energy is a product of the average GHG emissions generated per megawatt-hour across the grid at the time of generation.

Emerging Federal and State GHG Regulation

It is now a virtual certainty that compulsory GHG regulation will be adopted in the United States. Federal regulation has been inevitable since the United States Supreme Court’s landmark decision in *Massachusetts v. Environmental Protection Agency* in 2007. Although this regulation may take place under the existing provisions of the federal Clean Air Act, more likely federal GHG regulation will ultimately take shape under new legislation adopted to deal specifically with the climate change threat. The precise parameters of such legislation cannot be predicted at this time. There are many parameters that remain to be

determined, such as whether GHG regulation will be economy-wide, or limited to certain sectors, whether mobile GHG sources (*e.g.*, automobiles) will be regulated directly (*e.g.*, through emissions standards), indirectly (*e.g.*, through the petroleum marketing industry) or both, and how federal and state GHG regulatory programs will interact.

Eleven federal bills are currently pending in Congress, though only a few bills are currently receiving significant attention. All of the leading climate change bills impose some variation of a national cap on GHG emissions. The bills vary in terms of the industries covered and the amount of trading or offsets that may be used to comply with the limits. Although legislative momentum appears to be coalescing behind the Lieberman-Warner bill (S.2191), it is still early in the legislative process, and the details and timing of any climate change bill are still uncertain. However, the bills reflect part of the diverse range of options being considered.

Despite the absence of a federal response and, in part, because of it, some state and local governments have developed aggressive programs for reducing GHG emissions. These have entailed a number of regional initiatives that have built upon a series of climate change initiatives by individual states. At least 26 states have initiated ambitious climate change planning efforts. These efforts have generated a variety of policy initiatives implemented through a variety of mechanisms, including traditional codes and standards (*e.g.*, emissions standards for facilities and vehicles, land use, building codes, RPS, fuel content, product energy efficiency), market based programs such as cap and trade programs and taxes, requirements for reporting and GHG emissions registries, financial incentives, voluntary agreements, and programs for providing technical assistance, information and education.

The interstate regulatory program that has advanced the farthest is that being undertaken by the Northeast Regional Greenhouse Gas Initiative (“RGGI”). RGGI, which consists of ten eastern states, has developed a Model Rule and Memorandum of Understanding governing cap and trade in the utility sector. Under the RGGI program, carbon offsets may be created from certain types of projects and sold to the power plants that are subject to the emissions cap and emissions reduction obligation. The offset projects are currently limited to landfill methane capture and destruction, reductions in sulfur hexafluoride emissions, sequestration of carbon from afforestation, reduction or avoidance of CO₂ emissions from natural gas, oil, or propane end-use combustion due to end-use energy efficiency, and avoided methane emissions from agricultural manure management operations.

Six western states and two Canadian provinces participate in the Western Climate Initiative (“WCI”) to adopt a regional emissions cap for multiple economic sectors and a cap and trade system. An additional six western states, three Canadian provinces and one Mexican state are WCI observers. The participating governors have established a regional goal of reducing GHG emissions to 15% below 2005 levels by 2020.

Six midwestern states, one Canadian province and three observer states have adopted the Midwestern Greenhouse Gas Reduction Accord, and agreed to establish GHG reduction targets and a market-based, multi-sector cap and trade mechanism to achieve those targets, to “join The Climate Registry to enable tracking, management and crediting for entities

that reduce GHG emissions” and to “develop and implement other associated mechanisms and policies as needed to achieve the GHG reduction targets, such as a low-carbon fuel standard and regional incentives and funding mechanisms.” The cap and trade mechanism is intended to link to other regional systems and provide for future integration into a federal program.

Perhaps more notably than any single regional initiative, 39 states, seven Canadian provinces, two Mexican states, the District of Columbia, and several Indian tribes have joined in The Climate Registry, a voluntary effort to standardize reporting and verification. On February 1, 2008, The Climate Registry issued a response to comments on its General Reporting Protocol For the Voluntary Reporting Program (Oct. 29, 2007) and solicited public comments on its General Verification Protocol (Draft 4, February 1, 2008). The General Reporting Protocol incorporates standards culled from a wide variety of well-respected voluntary reporting guidelines. Even so, while the General Reporting Protocol provides considerable guidance on how to measure emissions at several levels, it leaves considerable discretion with the reporter.

Although the Climate Registry’s protocol is a voluntary reporting protocol, many of the 39 participating states intend to rely on it in their developing regulatory programs. As noted above, there are many such evolving regulatory programs. The states participating in RGGI have prepared an initial draft cap and trade rule for electric utilities with a limited list of offsets, but intend to cover more sectors of the economy. California is developing an economy-wide cap and trade program, and is also participating in the WCI to develop a regional, international cap and trade program. The Midwestern Accord states are considering the development of yet another such program and there are any number of bills before Congress creating very different visions for a future federal regulatory program.

Even where there are existing regulatory standards, those standards are evolving and improving. This is particularly the case with carbon sequestration. For example, under the UNFCCC’s Clean Development Mechanism (“CDM”), afforestation has generally been recognized as a sequestration method that produces offsets. At the Conference of the Parties in Bali last December, the parties to the UNFCCC directed that methodologies be developed to determine how to include forest conservation (prevention of deforestation) in CDM projects. Many afforestation, reforestation and forest soils improvement projects can be used to sequester CO₂, and although many states count these reductions in their official climate planning efforts, there are no generally accepted procedures for officially calculating such reductions.

It is unclear how this regulatory overlay and any future federal regulatory overlay will interact with the existing voluntary markets. Offsets are traded on the Chicago Climate Exchange, but this represents just a fraction of offset transactions. Most carbon offsets are transferred directly through bilateral deals between knowledgeable market participants. Many private parties have developed their own protocols for measuring and verifying reductions and sell carbon offsets in arm’s length transactions with sophisticated buyers. Many of these transactions are transparent. Trying to define what is misleading to protect consumers may disrupt this larger, already transparent market.

Finally, the development of new solutions, particularly new market solutions, will not be easily anticipated, such that attempting to define “green” practices in the area of climate change can be particularly problematic. For example, as a result of concerns about GHGs, many who formerly opposed nuclear power now recognize nuclear power as a source of energy with virtually no GHG emissions. Some are examining the possibility of markets for packaging and purchasing nuclear with renewable sources of power as green power, in contrast to many who package gas-fired power (and its GHG emissions) with renewable sources. Attempting to define “renewable”, much less “green,” in this evolving context will be very difficult for the regulated industry, and any attempt by FTC to standardize the concept may undermine critical efforts to reduce GHG emissions.

Existing Communications Regarding GHG Emissions

In spite of the uncertainties surrounding GHG regulation, companies that are leaders in their industries have voluntarily stepped forward to address climate change. These companies have assessed their own GHG emissions and provided information about their carbon footprint to the public through a variety of private and government-sponsored means. These include:

- U.S. Environmental Protection Agency’s Climate Leaders program;
- U.S. Department of Energy’s 1605(b) Registry;
- The U.S. Climate Action Partnership (a group of businesses and leading environmental organizations);
- The Carbon Disclosure Project (a survey of businesses by institutional investors); and
- Ceres (a network of investors, environmental organizations and other public interest groups formed to promote sustainability reporting).

Participation in each of these programs is voluntary, but those who participate must comply in their reporting with the parameters unique to each program.

In addition to these voluntary programs, publicly-traded U.S. corporations are required to comply with reporting obligations prescribed and enforced by the United States Securities Exchange Commission (“SEC”). While SEC has not promulgated specific guidelines for reporting GHG emissions, in September 2007, a group of institutional investors and state attorneys general petitioned SEC to require reporting companies to address in their SEC filings both potential impacts to operations from global climate change and potential impacts of anticipated, but not yet adopted, regulation of GHG emissions. Because SEC reporting is mandatory, if SEC adopts such a position, those affected by the ruling will be required to follow SEC disclosure standards as well as the standards applicable in the voluntary regimes in which they have participated.

As this discussion demonstrates, the regulation of greenhouse gas emissions, carbon offsets and RECs (as carbon footprint reduction tools) is only beginning to take shape, crafted by generally aligned but sometimes competing state and federal initiatives. Until the ultimate regulatory scheme governing GHG emissions and carbon offsets is put in place either federally or least on a basis uniformly applicable across the several regional initiatives taking place, the marketplace for carbon offsets and RECs as carbon reduction tools will remain necessarily fluid. If FTC acts against this background to determine the criteria for declaring a carbon offset or REC to be substantiated or verified as legitimate, FTC's decision will inevitably impact the regulatory environment in a way that usurps from the state and federal bodies with primary regulatory authority over GHG emissions the determination of how those emissions are regulated. The creation, validation and trading of carbon offsets is absolutely central to all of the federal and regional schemes under discussion, because all of those schemes rely on a cap and trade approach to GHG regulation. FTC must wait until the ultimate regulatory scheme is determined before evaluating whether additional FTC guidance would be useful to participants in the markets created by that regulatory scheme.

Comments

Comment in Response to Specific Issue (1)

FTC's Green Guides should not be revised at this time to include guidance regarding renewable energy or carbon offset claims for the reasons set forth below.

1. Climate Change is the top if not the exclusive environmental regulatory initiative under formation in the federal government and in the majority of states. At the state, regional and federal level, the legislative, executive and judicial branches are debating and deciding issues that will determine how GHGs will be regulated and the threat of global climate change turned back. FTC's first principle must be to cause no interference in the resolution of the policy and regulatory measures that are taking shape within the agencies with primary jurisdiction over GHG regulation.

It would be premature for the FTC to extend its guidance to include carbon offsets or RECs because, as explained above, (1) these issues are governed by many different federal and state agencies having primary jurisdiction, and standards may vary from state to state; (2) regulations are evolving rapidly, so that there is no generally accepted benchmark; and (3) markets and solutions to reducing greenhouse gases are still evolving such that there is no clear consensus and FTC regulation could be counterproductive to the development of solutions to the problem of global warming.

Furthermore, there are numerous state and federal agencies, such as the SEC, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, the Environmental Protection Agency, state environmental and natural resource agencies and state public utility commissions, which directly or indirectly currently regulate the complex marketplace of tradable energy commodities such as RECs and carbon offsets. While FTC's jurisdiction may, in some instances, be overlapping with these current regulatory regimes, any

actions taken by FTC should be carefully circumscribed in order to avoid inconsistency as well as any undermining impacts on the authority of these other regulatory bodies. Indeed, FTC would raise difficult issues of federalism having constitutional implications if, for example, it favored one state's definition of "renewable energy" and rejected another's. More analysis by FTC of the existing regulatory regime environment is appropriate before it offers any specific revisions to the "safe harbor" guidance contained in the Green Guides.

2. Responsible corporations such as Exelon are engaged in active, voluntary efforts to reduce their GHG emissions or their "carbon footprint," through programs overseen by the US EPA (Climate Leaders), World Wildlife Federation and Environmental Defense, among others, using agreed upon third party protocols such as WRI/WBCSD, and are proud to make the general public aware of those efforts. In any guidance it produces, FTC must make explicitly clear that the guidance does not extend to corporate communications concerning the policies, goals or achievements of the corporation with respect to GHG emission or carbon footprint reduction. For example, if FTC adopts a set of requirements that must be met in order for a seller to offer a carbon credit for sale, the buyer of such a credit must not be compelled to meet those requirements in order to report to the public or to any agency that it has reduced its carbon footprint by virtue of purchasing that offset.

Since the 1980s, the United States Supreme Court has articulated several arguably inconsistent tests for identifying "commercial speech," creating substantial uncertainty and confusion regarding the boundaries of such communications. Cases like *Nike v. Kasky*, 27 Cal. 4th 939 (2002), cert. granted, 123 S. Ct. 817, and cert. dismissed, 123 S. Ct. 2254 (2003), where the California Supreme Court broadly defined commercial speech to cover essentially everything said by anyone "engaged in commerce," 27 Cal. 4th at 960, have caused many businesses to be very concerned about whether simply engaging in the public debate over sustainability would be somehow considered commercial speech subject to regulation. Against this background, it is especially important that FTC not exacerbate this chilling effect by taking any action that places practical, if not legal, limitations on general corporate communications on a subject so vital as climate change, including reputational pronouncements on company websites, letterhead, and other documents concerning corporate policies, goals and achievements in the area.

3. FTC must explicitly exclude from any guidance it issues the sale of offsets or RECs among participants in the wholesale market, for example, electric utilities. In the wholesale market, buyers and sellers alike engage in arms' length transactions between sophisticated parties with an equal basis of knowledge. These transactions, which make up the overwhelming majority of sales of these products, typically involve sufficiently large sums of money that the parties can be expected to engage in their own due diligence. For parties participating in registries, information on the source of the offsets will be recorded there. There is no reason to supplement the individual due diligence of sophisticated and economically capable market participants with an FTC-mandated regime more properly addressed to individual consumers.

4. If FTC determines that guidance is necessary to protect the small number of individuals who purchase carbon offsets, FTC should explicitly limit any such guidance to

statements and practices surrounding the sale of carbon offsets directly to consumers in markets where those commodities are not regulated. RECs are a component of the electricity market. Electricity markets are regulated by public utility commissions in all states. A number of states allow even retail consumers to designate the source of the power they wish to purchase, and many customers exercise that choice by selecting power generated by means they deem more environmentally benign, such as wind power. In some cases, electricity consumers may become *sellers* of RECs, where state law permits end-users with their own renewable sources (e.g., solar panels) to sell renewable electricity back to their utilities in times of surplus. These consumer choices, and the companies authorized to provide electric power, are regulated by state public utility commissions applying state tariffs authorized by state law. It would be a usurpation by FTC of state prerogatives to add additional requirements concerning RECS to those determined by the state public utility commissions.

Although FTC should clearly seek to protect consumers, as is its mission, it must do so recognizing that the primary “consumers” in the sustainability marketplace (especially as it concerns tradable energy commodities such as RECs or carbon offsets) are more sophisticated than the average end-user consumer. Establishing regulatory “safe harbors” aimed at the lowest common denominator would not only be an oversimplification, but also raises the dangerous specter of FTC inadvertently and inappropriately creating polices or *de facto* regulation that may limit existing marketplace commerce. In other words, a “one-size-fits-all” approach is not appropriate or advisable and, therefore, we strongly recommend that FTC consider any possible Green Guide revisions with this in mind. FTC should take no action that could jeopardize the development of a legitimate, verifiable, liquid market for carbon offsets and RECs.

5. Given the high level of public awareness of global climate change, and the proliferation of privately-sponsored products targeted at that awareness, it is not unreasonable that FTC might determine that some regulation of the marketing of carbon credits directly to the individual consumers is appropriate. Individuals are offered the opportunity today to purchase carbon credits to offset GHGs from air travel, from automobile purchases, or even from all of one’s personal activities combined. Members of the public do not engage in transactions sufficiently large to warrant individual due diligence, nor do they typically possess the expertise to evaluate marketing claims made by providers of carbon credits. These factors distinguish individual consumers from participants in the wholesale market. If FTC determines that individual consumers may be exposed to unscrupulous or unsubstantiated claims regarding carbon credits offered for sale, the FTC should act *only* with respect to sales to individuals, and only with respect to carbon offsets. Unlike carbon offsets, RECs are specifically creatures of the highly-regulated electricity market. In that market, state public utility authorities regulate and screen the choices offered to consumers. These state law protections more than compensate for consumers’ assumed lack of knowledge, and additional restrictions by FTC would be unnecessary. Accordingly, FTC should not revise the Green Guides to address “renewable energy” claims.

6. FTC did not engage a sufficiently broad range of stakeholders at the workshop. Specifically, FTC did not arrange for any representative from an electric power

utility or generation project developer to participate on the workshop panel. Given that these stakeholders dominate the wholesale market for carbon offsets and RECs, this omission leaves FTC ill-equipped to form a balanced assessment of the impact of any FTC action on the electric utility sector in particular, or the wholesale market in general.

Comment in Response to Specific Issues (2) and (3)

FTC's Green Guides should not be revised to include guidance regarding "sustainable" claims or "renewable" claims at this time for the reasons set forth below.

1. FTC's information collection process with respect to these claims has thus far been insufficient to provide FTC with an adequate basis of knowledge to address "sustainable" or "renewable" claims in the Green Guides. Although the Notice raised these types of claims as a subject for public comment, FTC has not conducted a workshop or public meeting at which stakeholders may raise concerns regarding FTC's regulation of these terms. The workshop conducted by FTC in January was described in the Notice as relating to "Carbon Offsets and Renewable Energy Certificates," leading readers to believe that the workshop would address only Specific Issue (1) from the Notice, and no other specific issue raised therein. The Notice suggests that FTC would hold other workshops in the future, inviting the inference that the other specific issues identified in the Notice would be addressed in subsequent workshops. The limited discussion of the terms "sustainable" and "renewable" that took place at the January workshop is insufficient for informed administrative action. Therefore, before FTC is able thoroughly to consider changes to the Green Guides addressing "sustainable" and "renewable" claims, FTC should conduct one or more workshops on these issues, and encourage stakeholders from the electric power industry to participate.

2. As explained above, when used in the context of electricity, the term "renewable" has a meaning that is defined, but defined with subtle differences among the 28 states that have adopted RPS. With respect to claims concerning "renewable energy," states have occupied this field, which is thoroughly regulated by state public utility commissions. Any attempt by FTC to impose criteria on what may be marketed as "renewable energy" would likely be viewed as attempt to regulate indirectly the distribution of electricity, treading on the traditional prerogative of the states.

Exelon thanks FTC for its careful consideration of these comments.

Respectfully submitted,

~~Brendan K. Collins~~
~~Robert B. McKinstry, Jr.~~
Perry D. Robinson