Old Mill Power Company

Your Renewable Resource Electric Company
2530 Wyngate Road Charlottesville, VA 22901-8927
Voice: 434-979-WATT(9288) Fax: 434-979-9287
Web Site: www.oldmillpower.com

VIA THE FTC'S WEB-BASED FORM AT:
https://ftcpublic.commentworks.com/ftc/revisedgreenguides

Date: December 10, 2010

To: Federal Trade Commission

Subj: Old Mill Power Company Comments on Renewable Energy Aspects of the *Proposed, Revised Green Guides*, 16 CFR Part 260, Project No. P954501.

Dear Federal Trade Commission

In accordance with instructions published in the Federal Register, Old Mill Power Company ("Old Mill" or the "Company") submits the attached Comments on Renewable Energy Aspects of the *Proposed, Revised Green Guides*.

Old Mill is a Virginia-based corporation, formed in 1996, that sells electricity produced using low environmental impact, renewable, or nondepletable primary energy sources such as energy from the sun, the wind, the earth's heat, falling water, biomass, or waste-to-energy conversions. The Company also sells Renewable Energy Certificates (RECs), was an active member of the stakeholder group that helped PJM Environmental Services, Inc. design the Generation Attribute Tracking System (GATS), and has been an active GATS subscriber and participant in the GATS Subscribers User Group ever since.

Over the years, Old Mill has consistently held the view, and argued in appropriate venues when necessary, that: a) it's deceptive to claim or imply that that RECs are the same as, or equal to, renewable energy; and b) it's deceptive to claim or imply that RECs bundled with conventional energy are the same as, or equal to, renewable energy. The Company's view is based on the fact that, as described in the attached Comments, not all of the benefits of renewable energy convey to a REC purchaser.

Comparing the Company's view of such matters with the renewable energy portion of the *Proposed, Revised Green Guides,* it's obvious that the Company's view conflicts with the Commission's current view on several key points as identified in the Company's Comments.

In explaining its current view, the Commission states that it, "considered whether specific disclosures are necessary for renewable energy claims based on the purchase of RECs, rather than the purchase through contracts" [Federal Register text at 163], and erroneously concluded--partially due to a lack of evidence provided for the record to-date by other commenters, and partially due to a misinterpretation of what evidence had been so-provided: a) that there is no

reason to believe that the difference between contractual purchases and REC purchases "would be material to consumers" [Federal Register text at 164]; and b) that "the Commission does not have a sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs." [*ibid.*]

On the other hand, and to its credit, the Commission left open the possibility that it might be wrong about such matters, specifically requesting "comment on whether specifying the source of renewable energy [e. g., solar or wind] adequately qualifies a "made with renewable energy" claim" [Federal Register text at 162, text in square brackets added.]

The attached Comments are in response to that request and demonstrate that maintaining a clear distinction between certificate-based renewable energy claims and what the Commission refers to as contract-based renewable energy claims is critical to avoiding deception that's material to consumers and to competitors. Based on the evidence and arguments presented in its Comments, Old Mill recommends modification of Guide §260.14 (c) and the two existing examples, and recommends inclusion of three additional Guides and one additional example.

Old Mill thanks the Commission for the opportunity to review the *Proposed, Revised Green Guides*, hopes the Commission finds the Company's Comments to be helpful, looks forward to answering any questions the Commission may have about these matters, and asks to be included in any future workshops, discussions, surveys, or other stakeholder activities on this topic that the Commission may sponsor or conduct.

Respectfully submitted

Michel A. (Mitch) King
President
Office: 1-434-979-WATT(9288)
Email: mitchking@oldmillpower.com

Atch: Comments

Old Mill Power Company Comments on Renewable Energy Aspects of the *Proposed, Revised Green Guides*, 16 CFR Part 260, Project No. P954501

> "It is deceptive to represent, directly or by implication, that electricity is derived from renewable sources when it is not." National Association of Attorneys General.[1]

It's clear from the context in which it appears that the original intent of the above quote--which comes from the National Association of Attorneys General's (NAAG's) *Environmental Marketing Guidelines for Electricity*--was to prevent a marketer from falsely claiming that conventional energy is renewable energy. One of the key issues before the Commission as it considers its *Proposed, Revised Green Guides* is whether the conventional energy component of a product consisting of certificates *bundled* with such energy has been sufficiently transformed from its conventional origins such that it can be marketed as renewable energy without misleading or materially harming a significant number of stakeholders. As the following Problem Description and Analysis amply demonstrate, the answer is clearly, "No," primarily because not all of the important benefits of renewable energy convey to a certificate buyer. In the Recommendations section of these Comments, Old Mill Power Company (Old Mill) proposes modifications and additions to the *Proposed, Revised Green Guides* that address this critical issue while also making the *Proposed, Revised Green Guides* consistent with all aspects of the NAAG's *Environmental Marketing Guidelines for Electricity*, including the quote above.

Problem Description and Analysis

Certificates are not the same as, nor equal to, renewable energy, and it's deceptive--and materially adverse to consumers and competitors--to allow marketers to claim or to imply otherwise. Furthermore, it's deceptive and harmful to consumers and competitors to claim or to imply that certificates *bundled* with conventional energy are the same as, or equal to, renewable energy.

The Commission errs when it writes, "...the Commission does not have a sufficient basis to advise marketers to disclose that their renewable energy claims are based on RECs." [Federal Register text at 164]. It's patently obvious that certificates--which have mass--are not energy, which has no mass. It follows that certificates cannot truthfully be called "energy" of any form. Thus the issue the Commission is currently struggling with isn't a question of whether it's deceiving to claim that certificates *are* energy, but only whether that particular deception is material to any of the stakeholders in the marketplace. On that subject, the Commission writes:

> Even assuming that consumers thought renewable energy claims were based on contractual purchases [of energy] (rather than REC purchases) [purchases of certificates], there is *no reason to believe that this fact would be material to consumers*. [Federal Register text at 164, text in square brackets and emphasis added.]

On this issue, the Commission errs on at least the following three counts: Count 1, because it inaccurately claims there is *no reason* to believe that consumers might prefer purchasing *energy*

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[1] *Environmental Marketing Guidelines for Electricity*, National Association of Attorneys General, December 1999, at 10, http://apps3.eere.energy.gov/greenpower/buying/pdfs/naag_0100.pdf.

self-generated or purchased by a marketer as opposed to purchasing *certificates* self-generated or purchased by a marketer, despite having at least three stakeholder comments in the record--prior to the submission of these Comments--claiming, in effect, that the issue of certificates vs. energy is material to them; Count 2, because it's apparently unaware that, at best, certificates represent only *some* of the attributes of renewable energy--specifically, its environmental attributes—and do not represent *all* of the attributes of renewable energy, as described below; and Count 3, because it incorrectly assumes that the only stakeholders who could be materially affected by a marketer that mislabels its certificates as energy are consumers, thereby overlooking the material adverse impact to renewable energy marketers other than the one mislabeling its product.

Count 1
The Commission inaccurately claims there is *no reason* to believe that consumers might prefer to purchase *energy* self-generated or purchased by a marketer as opposed to purchasing *certificates* self-generated or purchased by a marketer.

There is at least one comment in the record from the head of a non-profit consumer group (Ecology Center)[2] and one comment in the record from each of two Ecology Center members[3], claiming, in effect, that the issue of certificates vs. energy is so critical to their purchasing decisions that Ecology Center intervened in a Michigan Public Service Commission proceeding to argue that a local utility should not be allowed to mislabel its certificate product as an energy one. The fact that at least one non-profit consumer group was willing to expend the significant resources it takes to intervene in a state utility commission proceeding to protest the mislabeling of certificates as energy is at least *prima facie* evidence that the issue is material to at least some consumers.

Although the Commission had this evidence in hand in 2008 and erred by not recognizing it as *prima facie* evidence that the issue of certificates vs. energy was material to at least some consumers, it then compounded its error by not including any questions that would shed additional light on this issue in its 2009 consumer perception study. The Commission's finding that there is *no reason* to believe that consumers might prefer to purchase *energy* self-generated or purchased by a seller as opposed to purchasing *certificates* self-generated or purchased by a seller is not only inaccurate, it is the inevitable consequence of overlooking what evidence was at hand, and then--apparently as a result of that oversight--failing to explore the matter further with its consumer perception study.

Speaking for just a moment as one who recently found himself in situation very similar to that of the Ecology Center commenters--in the sense that I personally intervened in a proceeding before my state's (Virginia's) utility commission to protest a regulated utility's mislabeling of certificates as energy--I ask the Commission to add my voice to those calling for a clearly worded Guide prohibiting such mislabeling. The case I intervened in was an application for approval of a certificate-based renewable energy tariff submitted to the Virginia State

[2] Ecology Center, Comment 533254-00020.
[3] Sol Metz, Comment 533254-00023; James Svensson, Comment 533254-00021.

Corporation Commission (VA SCC) by Appalachian Power Company (APCo)[4], the Virginia subsidiary of American Electric Power (AEP).

Although the Ecology Center commenters do not indicate what the outcome of their organization's utility commission intervention was, it's my pleasure to report to the Commission that the result of my intervention was that the VA SCC properly ruled that "RECs are not 'electric energy'"[5].

More specifically, the VA SCC said:

> Customers, however, are not purchasing electric energy from "Summersville Hydro" under the Rider; rather, these customers are paying for RECs procured from Summersville [Hydro][6]. [Text in square brackets added for clarity.]

Now, returning to my role as the spokesperson for Old Mill:

Lest the Commission get the false impression that the Ecology Center and Old Mill's President are the only ones who consider the difference between certificates and energy to be material enough to their purchasing decisions to warrant an intervention with their respective state's utility commission, Old Mill notes that, at approximately the same time as its President was intervening *pro se* in the APCo proceeding, Robert A. Vanderhye, another Virginian, was intervening for similar reasons, and also *pro se,* in the VA SCC's consideration of a certificate-based renewable energy tariff application filed by Virginia Electric & Power Company (or VEPCo, d. b. a. Dominion Virginia Power). Largely as a result of Mr. Vanderhye's intervention, the VA SCC ruled on the issue now before the Federal Trade Commission identically in the VEPCo case as it did in the APCo case, also stating--as it did in the APCo case--that "RECs are not 'electric energy'"[7], and:

> Moreover, Dominion is not offering electric energy to customers under Rider G; rather, customers choosing Rider G are paying for RECs. Indeed, as set forth in the "Applicability & Availability" section of Rider G, this tariff is for a customer "who contracts with the Company for the purchase and retirement of renewable energy *attributes,*" not for electric energy[8]. [emphasis in the original].

Clearly, not only do the various interveners-with-state-commissions referred to—Ecology Center, me and Mr. Vanderhye—consider the difference between certificates and energy to be material, but the record now reflects that at least one state's public utility commission, the VA SCC, agrees with such interveners on that point. While it can be argued that, strictly speaking, the VA SCC's rulings in these two cases apply only to the two investor-owned Virginia utilities

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[4] *Application of Appalachian Power Company for approval of its Renewable Power Rider*, Commonwealth of Virginia State Corporation Commission Case No. PUE-2008-00057 (the APCo case).

[5] Commonwealth of Virginia State Corporation Commission Order Approving Tariff, December 3, 2008, *Application of Appalachian Power Company for approval of its Renewable Power Rider*, PUE-2008-00057, at 8.

[6] Order Approving Tariff in the APCo case, *ibid.*, at 8.

[7] Commonwealth of Virginia State Corporation Commission Order Approving Tariff, December 3, 2008, *Application of Virginia Electric and Power Company d/b/a Dominion Virginia Power for approval of its Renewable Energy Tariff*, PUE-2008-00044 (the VEPCo case), at 10.

[8] Order Approving Tariff in the VEPCo case, *ibid.*, at 10.

that were the subjects of those rulings, the significance for the *Proposed, Revised Green Guides* as currently written is that a marketer purchasing certificates from APCo or VEPCo under tariffs that have been ruled by the VA SCC to be certificate tariffs and not renewable energy tariffs would be fully compliant with proposed Guide §260-14 (c) as currently proposed if making an unqualified "made with renewable energy" claim, even though, in the eyes of the VA SCC--and as a matter of state law, because VA SCC rulings have the force of state law--no such energy was ever purchased by such marketer.

Such a non-sequitur begs the question, "Why does the difference between certificates and energy matter to at least some consumers and at least one state commission?," which is addressed in Count 2.

Count 2

The Commission is apparently unaware that certificates, at best, represent only *some* of the attributes of renewable energy--specifically, its environmental attributes—and do not represent *all* of the attributes of renewable energy

There are at least three major benefits that convey to a buyer when renewable energy--as opposed to certificates--is purchased: a) the environmental benefit; b) the rate-stabilization benefit; and c) the moral, ethical, spiritual, and religious benefit that Old Mill cannot recall seeing explicitly described anywhere else, but that seems best described as the "Denial of Funds to Non-Renewable Energy Generators" benefit, or "DOFTNREG" benefit (pronounced "dŏf'-tĕn-rĕg" for those who like pronounceable acronyms).

As described below, when a renewable energy generator unbundles and sells its certificates separately, thereby leaving such generator with an inventory of undifferentiated energy--which the Commission calls "conventional energy"--of these three renewable energy benefits just described, only the environmental benefit conveys to a certificate buyer. The rate stabilization benefit, if it conveys at all, conveys to the buyer of the undifferentiated energy that's created by the certificate sale, and the DOFTNREG benefit simply ceases to exist.

The environmental benefit of a renewable energy purchase has been well documented by various commenters to-date, so there's no need for Old Mill to describe it further. Old Mill accepts the notion that the environmental benefit of renewable energy conveys to a certificate buyer. Note, however, that calling such a certificate a "renewable energy certificate" when only the environmental benefit of renewable energy is what conveys to the buyer is what can lead consumers, and apparently led the Commission, to erroneously believe that there's no material difference between the benefits acquired when one purchases a renewable energy certificate and the benefits acquired when one purchases renewable energy. Simply stated, the term "renewable energy certificate" as currently used in the marketplace overstates what's actually being conveyed in a transaction; the term "environmental certificate" is more accurate.

The rate stabilization benefit of renewable energy derives from the fact that the energy that powers renewable energy generators is: a) often free-for-the-harvesting--as in solar energy, wind energy, hydraulic energy, and geothermal energy; b) may actually be a revenue source for the generator, as in a generator fueled by Municipal Solid Waste (MSW) for which the generator

operator receives a "tipping fee" in return for accepting MSW as fuel for the generator; c) is often relatively low-cost per BTU when compared to fossil fuels--as in biomass that's derived from various kinds of agricultural and forestry waste that would have little value, if any; were a biomass-to-energy facility not located nearby; and d) in all cases that Old Mill is aware of, is much less subject to price volatility than fossil fuels. Thus, once a renewable energy generator has been built, while the value of its output may vary significantly over such generator's useful service life as a function of the market price of other forms of electricity, its actual cost of operation is relatively stable compared to the cost of operation of a fossil-fueled generator.

When a consumer buys renewable energy—as opposed to certificates—under a multi-year contract from a generator that's either obligated by law to sell its electricity on a cost-plus-allowed-margin basis--as is the case for a regulated utility--or that otherwise voluntarily chooses to sell its electricity on such a basis--as might be the case for a municipal utility or an electric cooperative—such a consumer receives the rate stabilization benefit associated with its renewable energy purchase. But when a consumer buys certificates bundled with conventional energy under a multi-year contract from a supplier who sells such a product, the price of the energy portion of such a purchase must, in any sustainable business scheme, be based on the cost of the conventional energy that powers the consumer's home or business. So the rate stabilization benefit does not convey to a certificate buyer because that buyer needs to pay for conventional energy as well as the certificate in order to power his or her home or business.

Recognizing the connection between contracted-for renewable energy and rate stabilization, the VA SCC, in both price-regulated utility cases previously cited, wrote:

> If the Company wanted to offer electric energy provided 100 percent from renewable energy under the current language of §§ 56-576 and 577 A 5 of the Code [of Virginia], it could, for example, *contract for power from a renewable facility and allocate such power to retail customers purchasing under a specific rider priced for that purpose*. The proposed Rider G, in contrast, is not a tariff to sell electric energy from a renewable facility to retail customers [because it is a tariff to sell certificates][9]. [Emphasis and text in square brackets added.]

When properly charged for the cost of renewable energy--rather than for the cost of certificates plus conventional energy deceptively labeled renewable energy--purchasers of renewable energy are rightfully exempt from any charges for fossil fuel and nuclear fuels that weren't attributable to such customer's renewable energy purchase. NREL notes the relatively keen interest among consumers for the 100% renewable energy products sold by utilities such as Austin Energy, Xcel Energy, and others—products which exempt subscribers from paying for unrelated fossil fuel and nuclear fuel charges[10].

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[9] Order Approving Tariff in the VEPCo case, *ibid.*, at 10. Order Approving Tariff in the APCo case, *ibid.*, at 8. The quoted text is the text used by the state commission in the VEPCo case, *verbatim*. The text used by the state commission in the APCo case is identical except that the state commission wrote, "Rider" instead of "Rider G" as only VEPCo referred to its proposed rider as "Rider G".

[10] "Austin Energy's green pricing program has led the nation in terms of green power sales since 2001 and its program represented about 15% of all green pricing sales nationally in 2006" and "Utilities that offer some form of fuel price protection to their green power customers have been ranked among the top 10 U. S. green pricing programs in recent years with respect to green power sales or participation, including Xcel Energy, Edmond

The DOFTNREG benefit is the moral, ethical, spiritual, and religious satisfaction that a renewable energy buyer receives from the knowledge that he or she has minimized, through his or her carefully-chosen energy purchases, the amount of money that flows from his or her personal account to the accounts of non-renewable energy generators. Old Mill could have dubbed this benefit the "Economic Boycott" benefit, referring to a consumer's desire to boycott, to the maximum extent practicable, non-renewable energy generators such as fossil-fueled and nuclear-fueled generators, but the boycott moniker suggests only the "how" of this particular benefit, not the "why". Using the DOFTNREG moniker helps emphasize the seriousness of the deception that has occurred when a consumer seeking the DOFTNREG benefit, and typically paying a premium for it, discovers that a supplier claiming to be selling that consumer renewable energy has actually been self-generating, or contracting for, conventional energy to power that unsuspecting consumer's home or business.

In terms of the potential value of the DOFTNREG benefit to a consumer, Old Mill offers the following cash flow analysis of a product offering recently submitted by a Virginia utility to that state's State Corporation Commission for regulatory approval. The analysis is both instructive and compelling.

The Applicant in this example is Mecklenburg Electric Cooperative (Mecklenburg)[11]. Being a regulated utility, Mecklenburg is prohibited by law from pricing its products in such a way that one customer class is subsidizing another—such as non-renewable energy customers subsidizing renewable energy customers, or vice versa—and being a cooperative, Mecklenburg is a not-for-profit entity prohibited by law from earning a profit, so the potential value of the DOFTNREG benefit demonstrated by this example is free of any complications that might be introduced by cross-subsidization or profit-taking. Based on Old Mill's analysis of Mecklenburg's most recent filings with Virginia's state commission, the amount of money that's likely to flow from a typical 1,000 kiloWatt hour-per-month residential consumer of electricity to a renewable energy generator were Mecklenburg to sell such consumer renewable energy is approximately 5 times greater--6 cents per kiloWatt hour more, or $60 per month more--than the amount of money that would flow from that same consumer to a renewable energy generator if Mecklenburg were to sell such consumer a product consisting of certificates plus conventional energy. By any contemporary electricity industry standard, 6 cents per kiloWatt hour--or $60 per month for a 1,000 kiloWatt hour per month consumer--is a material difference in what a consumer looking for the DOFTNREG benefit would receive.[12].

Electric, Holy Cross, Oklahoma Gas & Electric (OG&E), and We Energies." *Green Power Marketing in the United States: A Status Report* (11th Edition), National Renewable Energy Laboratory, NREL/TP-6A2-44094, October 2008, at 21, http://www.nrel.gov/docs/fy09osti/44094.pdf.

[11] *Application of Mecklenburg Electric Cooperative for Approval of a 100% Renewable Energy Tariff;* Commonwealth of Virginia State Corporation Commission Case No. PUE-2010-00066.

[12] Mecklenburg's renewable energy tariff contemplates a surcharge of 1.5 cents per kiloWatt hour (kWh) for the certificate portion of its product. Based on Mecklenburg's most commonly used residential tariff, the "Price to Compare" for conventional energy--the total tariff rate less fixed customer charges and charges for distribution service--for a residential customer using 1,000 kiloWatt hours (kWh) in October, 2010 was 7.5 cents per kWh. Thus a Mecklenburg residential customer using 1,000 kWh in October, 2010 would have transferred at least 7.5 cents per kWh to a renewable energy generator if purchasing renewable energy from the cooperative versus transferring no more than 1.5 cents per kWh to such generator if purchasing certificates-only sourced from that same generator but sold by the cooperative and bundled with the cooperative's conventional energy. Thus such a customer would

While, of necessity, the specific numerical results of this analysis apply only to the supplier that was the subject of the analysis, the example is representative of all such surcharge-based certificate products.

While some might argue that a generator's net profit when selling renewable energy may, or may not, be the same as its net profit from "unbundling" its certificates from its energy and selling each separately, and therefore, the amount of money flowing from a specific consumer to that generator should be immaterial to such generator, it's beyond dispute that, *from a consumer's perspective*, buying renewable energy as described in this example results in a transfer of approximately 5 times as much money--$60 per month more--from the consumer to the renewable energy generator than purchasing certificates only, a feature of purchasing renewable energy versus certificates--the DOFTNREG benefit: a) that's material; b) that many consumers find preferable; and c) that doesn't exist when consumers are sold certificates mislabeled as energy or bundled with conventional energy.

The DOFTNREG benefit ceases to exist when certificates are sold separately from energy because: a) a certificate buyer still has to buy energy to power his or her home or business; and--unless the energy purchased for that purpose is renewable energy, in which case the certificate buyer's certificate purchase would have been redundant, if not pointless—the energy bought to power a certificate buyer's home or business is typically conventional energy, which, by definition, has little, if any, DOFTNREG benefit; and b) the energy a generator is left with after the certificate associated with that energy has been sold separately is undifferentiated energy, which, by definition, does not possess the DOFTNREG benefit.

At this point, if it hasn't already done so, a reader might ask, "Why wasn't the Commission made aware of these additional benefits of renewable energy--the rate stabilization benefit and the DOFTNREG benefit—via the Carbon Offset Workshop, its consumer perception study, or the other opportunities it offered for public comment on these matters?"

At the risk of speculating on why other parties think, act, and speak the way they do, Old Mill points out that the environmental benefits of renewable energy are arguably "macroeconomic" benefits of renewable energy that are enjoyed more or less equally by everyone in society, so nothing is lost when a claim for creating those benefits is transferred by certificate, whereas the rate stabilization and DOFTNREG benefits of renewable energy are "microeconomic" benefits of renewable energy that do not convey to certificate purchasers or to society-at-large and can only accrue to--and can therefore only be claimed by--those who purchase renewable energy. Those likely to attend a Carbon Offset Workshop can reasonably be expected to be interested in the macroeconomic environmental benefits of renewable energy, but may, or may not, have had a strong enough interest in microeconomic consumer matters to bring the rate stabilization and DOFTNREG benefits of renewable energy to the Commission's attention. It follows that the Commission could not reasonably be expected to include questions about the rate stabilization and DOFTNREG benefits in its consumer perception study if it wasn't even aware of the existence of such benefits.

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transfer at least 7.5/1.5 = 4.99 times as much money—or 7.5 cents/kWh – 1.5 cents/kWh = 6 cents/kWh more, or $60 per month more-- to the renewable energy generator when purchasing renewable energy from Mecklenburg as opposed to purchasing certificates from Mecklenburg ultimately sourced from that same generator.

On the other hand, state commissions like Virginia's State Corporation Commission are duty-bound to ensure that the utilities they regulate deliver the products they claim to be delivering, and do not charge consumers for benefits that such consumers do not receive. As a result of that duty, it's not surprising that some state commissions might be the first venues in which the certificates vs. energy controversy is likely to be heard.

For whatever reason, the Commission seems to have overlooked the significance of the comments submitted by the three Ecology Center commenters describing the Center's intervention in a certificate vs. energy controversy argued before the Michigan Public Service Commission—comments that Old Mill interprets as being motivated by the expectation that the Ecology Center's members would not be able to receive the rate stabilization and DOFTNREG benefits of renewable energy if their local utility had been permitted to offer certificates in lieu of renewable energy. Hopefully, Old Mill's Comments go a long way toward bridging the Commission's knowledge gap about these matters.

As to how many other consumers could be materially affected by such an oversight, Old Mill points out that, whether they realize it or not, all electricity consumers have a material interest in the rate stabilization benefit of renewable energy. Whether they're willing to pay for such a benefit, and if so, how much they're willing to pay for it, are open questions that the Commission need not address in its revised *Green Guides*. Nevertheless, it's important that the revised *Green Guides* protect consumers from claims that imply that a product conveys the rate stabilization benefit of renewable energy when it does not.

As for consumers who could be materially affected by misleading claims about whether a product conveys the DOFTNREG benefit, Old Mill notes that many, if not most, mainstream religious denominations now have significant groups of congregants who believe they have a moral, ethical, spiritual, and/or religious obligation to be "good stewards" of the environment. For such people, that sensibility often translates into an interest in purchasing, when feasible, certain products, such as renewable energy, that are preferable, for various reasons, to other types of energy, such as coal-fired and nuclear-powered energy. Implicit in the various reasons such people prefer renewable energy over coal-fired and nuclear-powered energy is the DOFTNREG benefit.

Faith-based groups and programs with a demonstrated interest in receiving the benefits of renewable energy include among others, the Episcopal Church's Stewardship of Creation Committee, the Unitarian Universalist Association's Green Sanctuary Program, the Jewish Climate Change Campaign and Interfaith Power and Light. There is no reason for the Commission to believe that these groups value any one of the three major benefits of renewable energy--including the DOFTNREG benefit--any more, or any less, than the others.

From the perspective of these faith-based groups—as well as from the perspective of anyone else who values the DOFTNREG benefit--if a certificate supplier were a restaurant, selling "renewable energy" that consists of certificates bundled with conventional energy is the ethical equivalent of such restaurant selling, at a premium, a product the restaurant claims to be "kosher", while knowing full well that the product was made mostly of pork.

Count 3
The Commission incorrectly assumes that the only stakeholders who could be materially affected by a marketer that mislabels its certificates as energy are consumers, thereby overlooking the material adverse impact on renewable energy marketers other than the one mislabeling its product

The Commission's *Policy Statement on Deception* recognizes that competitors are adversely impacted by deception, saying:

> The prohibitions of Section 5 [of the FTC Act] are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "lure" [consumers] by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted[13]. [Text in square brackets added for clarity.]

Old Mill, and other entities similarly situated to it, are engaged in the business of selling certificates and renewable energy to certain customers who, for reasons of preference or convenience, wish to buy one or both of these commodities. Old Mill and others similarly situated will be adversely affected if competitors feel free to mislabel certificates as energy on the grounds that the revised *Green Guides* fail to proscribe the practice. The harm is compounded by the fact that, as currently written, the *Proposed, Revised Green Guides* would permit a certificate marketer to falsely claim that, when bundled with its certificates, conventional energy comprised mostly of coal and nuclear energy is "renewable energy".

Recommendations

The crux of the problem that Old Mill's Comments seek to identify, and that its recommendations for the revised *Green Guides* seek to solve, arises because: a) only one of the three major benefits of renewable energy—specifically, the environmental benefit—conveys to a certificate buyer; and b) it is therefore deceptive, and materially adverse to a consumer's decision-making and to a competitor's marketing efforts, to allow a marketer to claim or to imply that all of the benefits of renewable energy convey to a certificate buyer, or to a buyer of certificates bundled with conventional energy.

To remedy this problem, the Commission should: 1) add a Guide clarifying that a certificate cannot be marketed as energy of any type; 2) add a Guide clarifying that a certificate may convey environmental attributes to a certificate buyer, but does not convey all the attributes of renewable energy to such a buyer; 3) add a Guide clarifying that certificates bundled with

[13] FTC *Policy Statement on Deception*, October 14, 1983, http://www.ftc.gov/bcp/policystmt/ad-decept.htm, Footnote 58 at 14.

conventional energy cannot be marketed as renewable energy; 4) modify proposed Guide §260.14 (c) to eliminate the words, "or conventional energy offset by renewable energy certificates"; 5) add two new examples to help illustrate those additional Guides and the modification to Guide §260.14 (c); and 6) modify the two currently proposed examples to further illustrate those additional Guides and the modification to Guide §260.14 (c). More specifically, Old Mill's recommendations call for:

1. Adding a Guide clarifying that a certificate cannot be marketed as energy of any type:

Old Mill recommends that the following new Guide be the first Guide to appear in §260.14, with all subsequent Guides re-numbered accordingly:

(a) With adequate substantiation, a marketer may make a claim that a certificate represents the environmental attributes of renewable energy, or--referring to some specified environmental attribute or list of environmental attributes--is equal to a specified quantity of renewable energy in some specified environmental way, but may not make an unqualified claim, or imply, that a certificate is, is the same as, is equal to, or is similar to, energy.

2. Adding a Guide clarifying that a certificate may convey environmental attributes to a certificate buyer, but does not convey all the attributes of renewable energy to such a buyer:

Old Mill recommends that the following new Guide be the second Guide to appear in §260.14, with all subsequent Guides re-numbered accordingly:

(b) With adequate substantiation, a marketer may make a claim that a certificate conveys the environmental attributes of renewable energy to a certificate buyer, but cannot claim, or imply, that a certificate conveys all the attributes of renewable energy to such a buyer.

3. Adding a Guide clarifying that certificates bundled with conventional energy cannot be marketed as renewable energy:

Old Mill recommends that the following new Guide be the third Guide to appear in §260.14, with all subsequent Guides re-numbered accordingly:

(c) With adequate substantiation, marketers may make a claim that certificates bundled with conventional energy represent specified environmental attributes of renewable energy, or—referring to some specified environmental attribute or list of environmental attributes—is equal to, or similar to, a specified quantity of renewable energy in some specified way, but a marketer may not make an unqualified claim, or imply, that certificates bundled with conventional energy are, are the same as, are equal to, or are similar to, renewable energy.

4. Modifying the currently proposed Guide §260.14 (c), including the re-numbering called for above:

For the reasons described above, proposed Guide §260.14 (c) should be modified as indicated by the following change (strikethroughs representing deletions and underlined text representing additions):

> ~~(c)~~(d) It is deceptive to make an unqualified "made with renewable energy" claim unless all or virtually all of the significant manufacturing processes involved in making the product or package are powered with renewable energy ~~or conventional energy offset by renewable energy certificates~~.

5. Adding, or modifying, appropriate examples to illustrate each of the additional or modified Guides:

Old Mill recommends modifying proposed Example 1 as indicated below.

Example 1: A marketer advertises its clothing line as "made with wind power." The marketer buys renewable energy certificates to match ~~only 50%~~ 100% of the energy it uses. The marketer's claim is deceptive because ~~reasonable consumers likely interpret the claim to mean that the power was composed entirely of renewable energy~~ certificates are not energy. If the marketer ~~stated "we purchase~~ purchases wind energy for ~~half of our~~ all of its manufacturing facilities," the claim would not be deceptive.

Old Mill recommends adding the following proposed example after Example 1 and re-numbering subsequent examples accordingly:

Example 2: A marketer purchases wind energy certificates equal to as many kiloWatt hours as its corn chip factory uses and claims that, as a result of such purchase, it has offset 100% of the adverse environmental impact of its factory's electricity usage. The claim is not deceptive because it correctly characterizes the nature and effect of the marketer's certificate purchase. The claim would be deceptive if the marketer were to say that it purchased the renewable attributes of some specified quantity of wind energy because not all of the renewable attributes of wind energy convey to a certificate purchaser.

Old Mill recommends making the following example the third example in the renewable energy Guide:

Example 3: A marketer sells a bundled product consisting of renewable energy certificates plus conventional energy. It's deceptive to make an unqualified claim, or to imply, that this product is renewable energy, is the same as renewable energy, or is equal to renewable energy, or is similar to renewable energy, because not all of the attributes of renewable energy convey to a buyer of certificates or to a buyer of the bundled product. It would not be deceptive for the marketer to claim that the bundled product offsets all of the adverse environmental impact of an equivalent amount of conventional energy.

Old Mill recommends modifying, and re-numbering, proposed Example 2 as indicated below:

Example ~~2~~ 4: A company places solar panels on its store roof to generate power and advertises that its store is "100% solar-powered." The company, however, sells renewable energy

certificates based on the ~~renewable~~ environmental attributes of all the power it generates. Even if the company uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, ~~transferred~~ given up the right to characterize that electricity as renewable. The company's claim is therefore deceptive. It also would be deceptive for this company to advertise, without further qualification, that it "hosts a renewable power facility" because reasonable consumers likely would interpret this claim to mean that the company uses renewable energy. It would not be deceptive for the company to claim that it "hosts a renewable power facility, although it does not receive renewable energy from it" as that claim accurately characterizes the nature of the company's relationship to the roof-top solar facility.

Conclusion

One of the key issues before the Commission as it considers its *Proposed, Revised Green Guides* is whether the conventional energy component of a product consisting of renewable energy certificates bundled with such energy has been sufficiently transformed from its conventional origins such that it can be marketed as renewable energy without materially harming a significant number of stakeholders. As the Problem Description and Analysis section of these Comments have amply demonstrated, the answer is clearly, "No," primarily because not all of the important benefits of renewable energy convey to a certificate buyer. In the Recommendations section of these Comments, Old Mill proposed modifications and additions to the *Proposed, Revised Green Guides* that address this critical issue while also making the *Green Guides* consistent with all aspects of the NAAG's *Environmental Marketing Guidelines for Electricity*. Old Mill urges the Commission to adopt the Recommendations put forth herein, thanks the Commission for the opportunity to participate in its deliberations to revise the *Green Guides*, and looks forward to addressing any questions on these matters that the Commission may have. Old Mill also asks to be included in any additional workshops, discussions, surveys, or other stakeholder activities on this topic that the Commission may sponsor or conduct.

Respectfully submitted,

Old Mill Power Company by

Michel A. (Mitch) King
President
Old Mill Power Company
2530 Wyngate Road
Charlottesville, VA 22901-8927
Office: 1-434-979-WATT(9288)
Email: mitchking@oldmillpower.com