



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 Industry

NAAG is considering green guides for electricity marketing and advertising claims to assist states in their efforts to remodel the industry's regulatory structure to allow competition in the electricity generation function. Electricity transmission (at high voltage between power producers at the wholesale level) will continue to be regulated by the Federal Energy Regulatory Commission. Distribution (at lower voltage to individual retail consumers) will continue to be provided by incumbent utilities that are regulated by the states.

The Draft Guidelines explain the nature of the electricity transmission and distribution function, which we repeat here to provide a framework for our comments.⁽³⁾ The vast majority of electricity customers do not have power lines connecting them exclusively to their power supplier.⁽⁴⁾ Rather, customers receive electricity from power lines that are attached to a "grid" into which numerous generators, using a wide variety of fuel sources and generation systems, transmit their electricity. Once on the grid, all electricity is mixed together and its origins become indistinguishable. When a customer has a demand ("load") for electricity -- for example, to turn on lights -- the amount needed to meet the load is, in effect, drained off the grid. The electricity passing through the circuit nearest to that customer's line goes to the customer's meter and meets the load.

In that situation, it is impossible to claim that electricity used by a particular customer came directly and exclusively from that customer's supplier or to verify the precise sources of the electrons used by the customer. It is possible, however, to track the financial transactions that occur as power is supplied to the grid and then to the customer. A customer's usage is measured at the customer's meter. The customer is billed for that usage, and the proceeds go to the retail supplier. The supplier must in turn pay the middlemen who provided the power, and the middlemen must pay the generators whose power they bought to service the supplier. In this way, the customer's usage is linked, through the financial process, to identifiable generation plants and the characteristics (e.g., fuel type, emissions, etc.) associated with those plants.⁽⁵⁾ Thus, it can reasonably be said that the customer's power purchase did result in electricity, possessing the characteristics advertised by the supplier, being generated and placed on the grid.

B. General Principles for Drafting Guidelines

The staff believes that several general principles should be considered in developing industry guidelines for electricity advertising claims, based on the Commission's experience with drafting the FTC Green Guides, as well as other industry guides. An industry guide of this nature should be flexible because it will cover a wide variety of applications and circumstances. Further, the evolving nature of the newly deregulated electricity marketplace means that not all practices or situations can be anticipated, so an explanation of general principles and concepts may be helpful to electricity marketers. In addition, unnecessary prescriptive standards may, among other things, unintentionally discourage or limit otherwise legitimate practices.

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.

Issue 2, Substantiation of Environmental Claims

The FTC has issued a Policy Statement on Advertising Substantiation,⁽⁸⁾ and the FTC Green Guides reiterate those advertising substantiation principles in the context of environmental claims. The Draft Guidelines raise the issue of whether and how the FTC's substantiation principles should apply to the electricity industry.

In developing guidelines for substantiation of electricity claims, the general principles stated in the FTC Green Guides provide an appropriate framework. The Draft Guidelines present optional language that details specific types of substantiation needed for electricity claims about content and quality, such as fuel source and emissions claims. Such detail may be premature because the types of substantiation available to marketers may change over time and across states, along with changes in market structure, regulatory requirements, and technological developments. In addition, specifying required substantiation could result in inconsistencies with state regulations. One intermediate approach would be to list examples of substantiation types that might be acceptable depending on circumstances.

This approach applies as well to the question of setting acceptable tolerances for variance between claims made in advertising and actual performance. There may be legitimate variances, for example, between claims about fuel source and emissions characteristics of electricity, and the actual characteristics of electricity delivered to the grid by that producer. These could occur, for example, when sellers use projected figures that were reasonable when made, but later prove inaccurate, or when unanticipated conditions like weather or plant shutdowns arise, or when sellers use reasonable estimates that are by definition inexact. Under these circumstances, variances may be reasonably acceptable, depending on the nature of the claims, the type of advertiser making them, the context in which they are made, the type of substantiation offered, and the alternative substantiation that could have been used. The benchmark of reasonableness, although it is necessarily inexact, provides the best guidance for advertisers without unduly restricting claims or creating potential inconsistencies.

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 sources of the electrons used by the customer. Therefore, misrepresenting the means of transmission or distribution of electricity to a consumer can simply be prohibited without the need for substantiation rules. Absent any claims about the transmission or distribution system, however, it should not generally be considered deceptive to make claims regarding fuel source, emission, or other environmental attributes. At the same time, affirmative disclosures that the consumer's home will not receive the electricity from the source(s) the seller advertises are probably not necessary to prevent deception.

A consideration here is the extent to which such claims are material to consumers' purchasing decisions. If consumers consider it immaterial that electricity is delivered to the grid rather than directly to their homes, it may not be deceptive to claim, for example, "now you can use electricity produced by windmills, a renewable source of power." There may be instances, however, when such a claim might create an overall impression that is materially misleading. For example, if consumers wanted to support power generation that did not create air emissions in their region, they might be willing to pay more if the windmills were located in their area, but not if located elsewhere in the country. In that event, if consumers understood the claim to mean that the windmills were located in their region, then the claim would likely be deceptive. Accordingly, the Guidelines should consider the context and materiality of representations regarding the transmission or distribution of electricity.

Issue 3, Use of the Terms "Green" and "Clean" in Electricity Claims

NAAG's request for comment raised a number of questions concerning the meaning of the terms "green" and "clean," including whether each term should be defined in the electricity context, and whether these terms should be considered claims of general environmental benefit, and whether the use of these terms is inherently misleading.

The staff is not aware of any research into how consumers interpret the terms "green" and "clean" as they relate to electricity. Although there is little experience with the use of these terms in actual advertising contexts, it seems unlikely that "green" or "clean" claims are inherently misleading.⁽⁹⁾ The term "green" in reference to a specific product (for example, "we make green electricity") may imply a claim of general environmental benefit, and should be treated the same as other claims of that type. Such claims may be made non-deceptively if appropriately qualified, for example, where an advertisement prominently explains the term's meaning ("go green by buying our power -- 20% lower emissions than coal-generated electricity"), assuming that the claim is substantiated.

It is less clear how consumers interpret the term "clean." The interpretation suggested by the Draft Guidelines, that "clean" refers to the absence of harmful emissions or pollutants, may well be supported by research into consumers' attitudes. It also is possible that consumers interpret the term "clean" to mean generally beneficial to the environment. In addition, consumer interpretations of both "clean" and "green" may vary regionally.

By contrast, defining minimum performance levels for use of the term "green" in relation to electricity, which the Draft Guidelines propose as an option, may be unnecessary or premature. For example, there is no obvious reason that consumers would interpret a "green" electricity claim differently than a "green" claim for any other product. Specifying a definition would entail speculation about how advertisers might use the word, as well as difficult value judgments about the use of the term in the context of various advertisements. Furthermore, because the term does not yet seem to have acquired a generally accepted meaning, different advertisers may wish to use the term in different contexts to mean varying things. There seems to be no reason to prohibit such variety, so long as no deception results.

Finally, creating a standard definition of the term "green" for all electricity advertisements could discourage companies who want to advertise better environmental performance or characteristics than the standards established by the guidelines. Companies would have little incentive to provide products that outperform the defined standard for the term "green" when sellers of products that do not perform as well can use the term just as easily. Such a

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 like "environmentally friendly," the likelihood is that interpretations of a term like "green" will be so broad that few unqualified claims could be made. If actual marketplace conditions proved otherwise, however, the guidelines should allow such claims.

Issue 4, Renewable Energy Claims

Many of the same considerations discussed above for the terms "green" and "clean" also apply to the term "renewable." The meaning of this term is not clear on its face. It is reasonable to assume that consumers might interpret the term to refer to fuel sources, such as hydroelectric or biomass sources. Again, consumer interpretations and attitudes may vary regionally, or change over time.

The staff advises against assuming consumers would interpret the term "renewable" to be an overall general environmental benefit claim. Rather, the term should be treated in a manner similar to the FTC Green Guides' treatment of specific terms such as "biodegradable," "recycled," and "recyclable." The FTC Green Guides do not assume that such terms imply a general environmental benefit claim. For example, marketers who advertise a product as "recyclable" do not have to substantiate that no pollution results from the product's manufacturing process. Likewise, claims that an electricity product is produced from a "renewable" source should probably not be interpreted as a claim that the generation of this electricity produces no emissions. Otherwise, even specific claims would be practically impossible to substantiate, and, therefore, effectively banned from use.

Moreover, as the Draft Guidelines mention, California's restructuring legislation defines renewable sources to include small-scale but not large-scale hydroelectric power, and does not mention fuel cells. Massachusetts defines it to include any hydroelectric power, and also includes fuel cell technologies. Some federal laws and regulations mention neither hydroelectric nor fuel cell sources.⁽¹⁰⁾ Therefore, defining the term "renewable" could create unneeded conflicts with varying laws and regulations governing its meaning.

Issue 5, Fuel Source Claims

Claims concerning fuel sources present difficult substantiation issues. NAAG seeks comment on whether marketers should substantiate their fuel source claims with historical data or future projections, what substantiation methods are available, which substantiation methods should be required, and what variances should be allowed between projected and actual performance. Marketers may make representations to consumers with respect to future deliveries of electricity, but it is very difficult to predict exactly the fuel source of the electricity that ultimately will be delivered to the power grid. It also may be difficult to verify for law enforcement purposes the accuracy of fuel source claims in retrospect, and to assess proffered substantiation, because the systems needed for tracking fuel sources are still being developed and implemented. In addition, consumers will have no way to verify that the type of power they paid for was delivered to the power grid.

As with substantiation of other environmental claims, neither the requirements for substantiation nor the level of acceptable variances between claims made and actual performance should be prescribed too narrowly. Defining standards too strictly could cause firms purposely to underestimate their use of environmentally superior products in order to avoid charges of deception, thus misleading consumers and reducing or delaying investment in these products.⁽¹¹⁾ The most difficult problem in substantiating fuel source claims is that marketers cannot state for certain in advance what their exact fuel mix will be. Demand may be higher than anticipated, resulting in the need to supplement an advertised fuel source with another source; weather conditions may affect the delivery of certain

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 from a hydroelectric generator). Other projections, however, may be reasonable, even though a company cannot ultimately deliver what is advertised. For example, a company may advertise its power as 100% wind and own or have contracts with the facilities to produce it, but then purchase a small amount of system power for a short period of time while a facility is under repair or demand is unusually high.

Because of these difficulties, some have suggested that fuel source claims be based on historical data. Historical data, however, are not necessarily a more accurate basis for fuel sources. If a firm planned to use or purchase from the same sources of generation as it did in the previous year, historical data would be a good measure of future performance. But if a firm anticipated changing its fuel mix, historical data could mislead consumers, and would unfairly penalize marketers who were changing to a better environmental mix, or unfairly reward those changing to a less favorable one.

Requiring that only historical data be disclosed would not necessarily avoid any deception because consumers are likely to interpret disclosures of historical fuel sources as a representation about future fuel sources. Thus, permitting or requiring marketers to disclose only historical data, and not to make any projections of future fuel sources, is inadvisable unless consumers are clearly informed that the data are historical and may not necessarily match future generation characteristics. Reliance on historical data alone could deprive consumers of useful information. A better approach is for the Draft Guidelines neither to limit marketers to fuel source claims based only on historical data, nor to prohibit such claims.

Therefore, as discussed in Section IV above concerning substantiation generally, the guidelines may function best if they require marketers to rely on reasonable methods to substantiate that the type of electricity they sold is actually produced and put onto the grid. Because the available tracking methods will vary from state to state, the Draft Guidelines should not specify any one particular method, but they should prohibit selling the same power (or, for tradeable tags systems, power characteristics) more than once.

Issue 6, Emissions Claims

Questions similar to those regarding fuel source claims also arise with respect to how the Draft Guidelines should handle claims about emissions characteristics of electricity generation. The important considerations are essentially the same for both issues, as described in the previous section, with regard to defining standards, using historical or prospective data, and accommodating state disclosure requirements. One difference is that the sources of data for emissions may be state or federal agencies such as EPA, rather than generators themselves, and the data may be incomplete or estimated. It is important to avoid standards that require data that are not available because they would prove costly for generators (and thus ultimately for consumers) and difficult to enforce.

Issue 7, Representations About Price

NAAG's request for comment questioned what standards should govern statements about the price of power that is marketed as having some environmental benefit. Specifically, the request concerned whether marketers should have to justify higher prices in terms of particular environmental benefits, such as costs of new renewable sources or reduced pollution, rather than simply charging more because of higher resource costs, marketing costs, or consumer demand. Such restrictions on price advertising, however, seem contrary to the purposes of restructuring to create a competitive market for electricity.

One basic reason for deregulation of electricity generation is to take advantage of the market mechanism for determining prices. An advantage of market prices, as opposed to regulated prices, is that they provide information to

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,

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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 directed to Gina Schaar Howard by telephone at (202) 326-2982 or by e-mail at "ghoward@ftc.gov".

2. For example, the staff recently submitted a comment on consumer protection issues to the Utah Public Service Commission. The full text of this comment is available on the FTC website at "www.ftc.gov/be/advofile.htm (V980016)."

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

4. The rare exception would be a customer (usually a large, remote industrial user) who is connected directly to a generation source rather than being supplied through the power grid. There probably would be little advertising associated with such exceptional cases.

5. An alternative system for tracking electricity, referred to as a tradeable tags system, also has been proposed. In this system, each characteristic would be assigned a tag, which could be traded separately from the electricity itself. The system would work similarly to the system of sulphur emissions certificates administered by the Environmental Protection Agency. Although no state has yet adopted a tradeable tags system, it could be considered by some states in the future. See "Uniform Consumer Disclosure Standards for New England," National Council on

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. This discussion assumes that the retail power generation market is a competitive market, not an unregulated monopoly.