



**Via Electronic Filing**

Federal Trade Commission  
Office of the Secretary  
Room 113 (Annex J)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501**

**Comments of  
Constellation NewEnergy, Inc. and  
Constellation Energy Projects & Services Group, Inc.**

On October 15, 2010, the Federal Trade Commission (“Commission”) published in the Federal Register its *Proposed Revisions to the Green Guides* (“Revised Green Guides”),<sup>1</sup> noting that public comments on the Revised Green Guides may be filed on or before December 10, 2010. Pursuant to the Commission’s directions, Constellation NewEnergy, Inc. (“CNE”) and Constellation Energy Projects & Services Group, Inc. (“CEPS”) (collectively, “Constellation”) appreciate the opportunity to provide these comments on the Revised Green Guides.

**I. Background on Constellation.**

CNE and CEPS are wholly-owned subsidiaries of Constellation Energy Group, Inc. (“CEG”), a FORTUNE 500 energy company headquartered in Baltimore, Maryland. Through its subsidiaries, CEG owns approximately 9,000 megawatts of generating capacity, and is a leading supplier of energy products and services to wholesale and retail electric and natural gas customers throughout the nation.

CNE is one of the nation’s largest competitive retail electricity suppliers, providing customized energy solutions and comprehensive energy services – including the supply of retail electricity – to customers across the nation. CEPS serves business and institutional customers nationwide, specializing in financial and environmental solutions that can significantly reduce energy consumption and costs. CEPS has technical expertise to, among other activities, develop large scale energy projects, such as solar, biomass and geothermal projects and on- or off-site power generation systems.

In this way, Constellation is not a manufacturer or seller of typical “widgets” that might be created using renewable resources or environmentally-friendly processes for which Constellation may make claims. Instead, Constellation among other things is a supplier of renewable energy products and services and a developer/operator of renewable generation,

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<sup>1</sup> See 75 FR 63552-63607 (2010-10-15).



providing these energy products and services to commercial and industrial customers that may use them in their operations – whether, for instance, serving a governmental function, or producing “widgets.”

## **II. Background on Revised Green Guides.**

The Commission’s October 15, 2010 Revised Green Guides include improvements meant to:

strengthen, add specificity to, or enhance the accessibility of the current guidance on general “green” claims and environmental seals, and claims . . . [and to] propose new guidance regarding emerging claims not currently addressed in the Guides, such as renewable materials, renewable energy, and carbon-offsets.<sup>2</sup>

The Commission included in its Revised Green Guides a list of 18 questions (“Guides Questions”) on which it sought additional comment from interested parties.<sup>3</sup> Much of the Commission’s Revised Green Guides and many of the Guides Questions focus primarily on the claims of product manufacturers and sellers who make claims to consumers in their marketing and advertisement materials regarding the environmental and renewable characteristics of their products including, for instance, the environmental and renewable nature of the manufacturing processes for their products.

Constellation in January of 2008 provided comments to the Commission in a precursor to this proceeding, in order to offer insight into the relevant characteristics of the market, including aspects of the market’s size and then-existing structure.<sup>4</sup> Constellation at that time urged the Commission in developing its guidelines to “strive to strike an appropriate balance that will further its consumer protection objectives, while simultaneously supporting and fostering positive market development.”<sup>5</sup>

## **III. Constellation Comments on Revised Green Guides.**

Constellation applauds the Commission for its latest proposals in the Revised Green Guides, which generally strike an appropriate balance as previously recommended. The Revised Green Guides generally provide appropriate consumer protections with which market participants must abide, particularly when making claims regarding renewable energy products, sales and use. The guidelines in this way create a more level playing field between competitors in the marketplace and discourage anticompetitive conduct, formulating an important regulatory framework which – in Constellation’s industry – enhances rather than

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<sup>2</sup> 75 FR 63552 (2010-10-15) at column 2.

<sup>3</sup> See 75 FR 63597-63599 (2010-10-15).

<sup>4</sup> See *Constellation Energy Comments Re: Carbon Offset Workshop*, Commission Project No. P074207 (filed Jan. 25, 2008) (“Constellation 2008 Comments”).

<sup>5</sup> Constellation 2008 Comments at p.2.



hampers further innovation and development of renewable energy products, to the ultimate benefit of consumers.

Guides Question 16<sup>6</sup> poses the issues most relevant to Constellation’s business, though not necessarily directly applicable to the specific products and services that Constellation provides. Nevertheless, Constellation herein provides its comments on Guides Question 16 and the relevant portions of the Revised Green Guides to which its subparts refer.

***Guides Question 16: How, and under what circumstances, should marketers qualify “made with renewable energy” claims to avoid deception?***

By way of background, Constellation does not technically sell products that are “made with renewable energy”; rather, we sell renewable energy products. Constellation’s retail energy offerings to consumers include sales of energy coupled with renewable energy certificates (“RECs”), as well as development, ownership and operation of behind-the-meter and stand-alone renewable energy (typically, solar photovoltaic (PV)) generation projects located at customers’ commercial, governmental and industrial sites. In the case of solar projects, Constellation generally sells a project’s energy off-take to the customer hosting the site, and retains and/or markets separately the project’s renewable off-take – the solar RECs (“SRECs”) – through its REC trading and sales portfolio. In some instances, the host-customer may seek to purchase both the energy and the SRECs from a project in order to correctly make claims of renewable energy purchases.

Notwithstanding the particular products and services which Constellation provides to its customers, Constellation agrees with the Commission’s position that claims regarding renewable energy – whether by energy producers/marketers or by manufacturers who use renewable energy resources in making their products – *must* be qualified so as to avoid customer confusion.<sup>7</sup> In the case of the sale of renewable energy products, for instance, where a retail energy supplier offers a combination of energy and RECs to a consumer, the supplier should clearly and appropriately qualify its products’ characteristics, including the generation source (e.g., wind, solar, etc.) and what a “REC” represents.

Of note, the Commission explains in its analysis of qualifiers for environmental claims that:

websites cannot be used to qualify otherwise misleading claims that appear on labels or in other advertisements because consumers likely would not see that information before their purchase. Any

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<sup>6</sup> 75 FR 63598 (2010-10-15) at column 3.

<sup>7</sup> See, e.g., 75 FR 63562 (2010-10-15) at column 3 (stating that “the Commission proposes advising marketers not to make unqualified general environmental benefit claims”), 75 FR 63563 (2010-10-15) at column 2 (where the Commission states that “marketers may be able to effectively qualify these claims to focus consumers on the specific environmental benefits that marketers could substantiate”), and 75 FR 63564 (2010-10-15) at column 1 (explaining that “the Commission proposes to emphasize the current Guides’ advice on qualifying general environmental benefit claims” and that “marketers must use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit”).



disclosures needed to prevent an advertisement from being misleading must be clear and prominent and in close proximity to the claim the marketer is qualifying.<sup>8</sup>

Constellation agrees that consumers must be provided necessary qualifiers regarding renewable energy products “before their purchase,” but points out that, for retail energy contracts, states often require retail suppliers and it is standard industry practice to provide all terms and conditions of the product prior to a customer’s purchase, including for purchases made through a supplier’s website. In this situation, where a consumer is accessing a supplier’s website in order to shop for energy supply, a retail energy supplier should be permitted to include its qualifiers for a renewable energy product on its website, as consumers will be provided all such clear disclosures “before their purchase.”

***Guides Question 16.a: Does disclosing the source of the renewable energy adequately qualify the claim and prevent deceptive implications that the advertised product is made with renewable or recycled materials? Why or why not? Are there other disclosures that would adequately qualify a “made with renewable energy” claim? Please describe such disclosures. Please also provide any relevant consumer perception evidence.***

Constellation agrees with the Commission that disclosing the “source of the renewable energy (e.g., wind or solar energy)”<sup>9</sup> is an important piece of information that marketers should convey to qualify their “made with renewable energy” or other renewable energy claims. While the specific generator does not provide useful information to assist in the consumer’s understanding of a renewable energy claim, the source – or mix of sources – provides a necessary clarification that helps a consumer’s understanding. For instance, some consumers may find value in and assume they are purchasing products made along with wind REC or SREC purchases rather than products made along with purchases from “hydro” or “clean-coal” resources, both of which may also be eligible to generate RECs, depending on the jurisdiction or other authority.

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<sup>8</sup> 75 FR 63557 (2010-10-15) at column 3.

<sup>9</sup> 75 FR 63607 (2010-10-15) at column 1.

***Guides Question 16.b: Should the Commission advise marketers to qualify a “made with renewable energy” claim if the advertised product is not made entirely with renewable energy? If so, should marketers qualify such claims if all or virtually all significant processes used in making a product are powered by renewable energy? Why or why not? Please provide any relevant consumer perception evidence.***

Proposed 16 C.F.R. § 260.14 addresses concerns with respect to “made with renewable energy” claims.<sup>10</sup> Constellation raises issues only with respect to the Commission’s discussion regarding one of the examples used in the guidelines for 16 C.F.R. § 260.14(d). Constellation agrees in principle with the guideline that:

If a marketer generates renewable electricity but sells [RECs] for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.<sup>11</sup>

However, Constellation disagrees with part of *Example 2*, which the Revised Green Guides use to clarify this guideline. 16 C.F.R. § 260.14(d) Example 2 provides that:

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 [RECs] based on the renewable attributes of all the power it generates. Even if the company uses the electricity generated by the solar panels, it has, by selling [RECs], transferred 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 that it “hosts a renewable power facility” because reasonable consumers likely would interpret this claim to mean that the company uses renewable energy.**<sup>12</sup>

Constellation agrees with the first part of this Example 2 which explains that the store may not claim that its products are “made with renewable energy” where the applicable SRECs have been sold. As a REC represents the renewable attribute of generation, splitting off and selling such attribute removes any ability to claim use of such attribute.

However, the second part of this Example 2 removes a claim that – if properly qualified – represents an important value to the store, that such store should be able to convey. Constellation’s customers who agree to host solar projects on their sites represent a significant and necessary piece of the puzzle to states’ and companies’ renewable goals, as *siting* is one of the most important obstacles faced by new generation projects – whether using fossil or renewable resources. Without willing host-customers, Constellation may have difficulty finding and obtaining rights to readily accessible areas on which to develop solar

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<sup>10</sup> 75 FR 63606-63607 (2010-10-15).

<sup>11</sup> 75 FR 63607 (2010-10-15) at column 1.

<sup>12</sup> 75 FR 63607 (2010-10-15) at column 1 (*emph. added*).



projects. Moreover, the term “hosting” is well-understood in the industry, and should not automatically convey the notion of “using” renewable energy.

In order to make sure that a store’s customers begin to understand the differences between “hosting” and “using,” rather than disallowing use of the term – thereby eliminating the true and unique value owned by the store – the store should be allowed to state that it “hosts” a solar generating facility provided that the store qualifies that it does not use the solar energy produced by such facility.

Said another way, while a Constellation host-customer may not own the SRECs that we generate on its site, and while the host-customer in turn *should not retain* the ability to claim that its products are “made with renewable energy,” the host-customer *should retain* the ability to communicate to the marketplace the important role that it is playing as a host, so long as such role is appropriately qualified in communications.

#### **IV. Conclusion.**

Constellation appreciates this opportunity to submit its comments to the Commission and is available for continued discussions on these and any new issues raised in the Commission’s consideration of improved guidelines regarding renewable energy and environmental claims. The Commission’s Revised Green Guides have added important clarity, and Constellation is confident that its recommendations herein will further promote continued development of innovative solutions and applications of renewable energy while maintaining high levels of consumer protection, for the ultimate benefit of consumers around the nation.

Respectfully submitted,

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*On behalf of Constellation NewEnergy, Inc. and  
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