



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

Bureau of Consumer Protection
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February 5, 2015

R. Jeffrey Behm, Esq.
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Dear Mr. Behm:

This letter communicates the Federal Trade Commission (FTC) staff's concerns with statements your client, Green Mountain Power Corporation (GMP), made to the public about the renewable energy generation facilities it operates. As detailed below, we are concerned that GMP may not have clearly and consistently communicated the fact that it sells Renewable Energy Certificates (RECs) to entities outside of Vermont for most of its renewable generating facilities and, as a result, may have created confusion among Vermont electricity customers about the renewable attributes of their electricity. Although no findings have been made that these claims violate the law, we urge GMP in the future to prevent any confusion by clearly communicating the implications of its REC sales for Vermont customers and REC purchasers.

Vermont Law School Petition

On September 15, 2014, the FTC received a petition from the Environmental and Natural Resources Law Clinic at Vermont Law School, on behalf of several Vermont citizens, urging an investigation into allegedly deceptive trade practices by GMP.¹ In particular, the Petition indicates that GMP, through its promotional materials and other communications, represents that it provides Vermont customers with electricity from renewable sources such as commercial wind and solar projects. According to the Petition, GMP, in fact, sells substantially all of the RECs generated by these renewable facilities to utilities outside Vermont. In the Petitioners' view,

¹ Petition to Investigate Deceptive Trade Practices of Green Mountain Power Company In the Marketing of Renewable Energy to Vermont Customers ("Petition"), September 15, 2014, available at <http://assets.law360news.com/0577000/577562/FTC%20Petition%209%2015%20%281%29.pdf>

GMP's representations have misled Vermont customers by indicating they purchase renewable energy, when in fact, as a result of the REC sales, they have received "'null' electricity consisting of a mix of fossil fuel, nuclear, gas and other 'brown' sources of electricity from the regional grid." Petition at 1. The Petition furnished several examples of allegedly deceptive claims including the following:

"Kingdom Community Wind means clean renewable energy built in Vermont for Vermonters." Petition, Exhibit 6.

"We have always believed that this wind resource would provide a clean, cost-effective energy resource for Vermonters, and this upgrade is helping us achieve that goal." Petition, Exhibit 11.

"At six cents per kilowatt hour, GMP Searsburg wind has been a cost-effective way for us to provide our customers with renewable energy." Petition, Exhibit 12.

GMP Response

In response to the Petition, you submitted an October 14, 2014 letter to the FTC on GMP's behalf. The response contends that the Petitioners founded their request upon mischaracterizations of 13 specific GMP statements made in the context of the development and operation of renewable generating facilities in Vermont. According to the letter: 1) the statements in question do not qualify as marketing likely to alter the decision-making of Vermont electric customers; 2) GMP is acting in furtherance of, and in compliance with, Vermont's energy laws; and 3) Vermont customers have a right to accurate information about the generation facilities their rates support.

The letter also notes that Vermont has no competitive retail electricity market and, as such, consumers there cannot choose their electricity suppliers. Accordingly, in GMP's view, Vermont utilities have no incentive to make misrepresentations about the nature of their electricity. The response adds that GMP made several of the statements before the approval or construction of the facilities and before any decision had been made about REC sales from the facilities. In addition, GMP's website discloses its REC sales as well as a pie chart presenting GMP's "fuel mix" after the REC sales.² Finally, the letter asserts that the Petitioners' real concerns lie with Vermont's current energy laws and programs, which urge Vermont utilities to voluntarily meet specified goals for renewable energy generation but do not prohibit utilities from selling RECs for the same electricity identified to meet the program's goals.

Renewable Energy Certificates, Renewable Energy Claims, and Public Utilities

RECs have become an important tool for the renewable electricity market. Once renewable electricity is introduced into the grid, it is physically indistinguishable from electricity generated from conventional sources. Accordingly, consumers cannot determine the source of

² GMP also offers customers the option of purchasing renewable energy (with RECs attached) at a premium rate.

the electricity flowing into their homes and businesses. However, because electricity transactions can be tracked, entities can “buy” renewable power by purchasing power bundled with RECs. Under the REC system, a renewable electricity generator splits its output into two components: (1) the electricity itself (i.e., “null” electricity); and (2) certificates representing the renewable attributes of that electricity. Generators that produce renewable electricity sell their electricity at market prices for conventionally produced power and then sell the renewable attributes of that electricity through separate certificates. Organizations purchase these RECs to characterize all or a portion of their electricity usage as “renewable” by matching the certificates with the conventionally-produced electricity they normally purchase. By allowing these certificates to be sold separately and not requiring the renewable attribute to remain attached to the generated electricity, the REC approach provides flexibility and efficiency for the renewable electricity market.

Given the unusual nature of RECs, the operation of the renewable energy market relies heavily on the expectation of all market participants that these certificates have not been counted or claimed twice (*i.e.*, double counted). Such double-counting can occur, for instance, through multiple sales of the same REC or through renewable energy claims made by a company that already sold the RECs for its renewable generation. Therefore, any statement by the company that might lead consumers of that electricity to infer that the energy was produced cleanly risks double counting. Such double counting, in turn, not only risks deceiving consumers but also threatens the integrity of the entire REC market. By selling RECs, a company has transferred its right to characterize its electricity as renewable. Accordingly, the FTC’s Green Guides advise that, if “a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.” *See* 16 C.F.R. § 260.15(d).

However, the Guides do not suggest a prohibition against all communications related to a company’s renewable generating facilities where RECs are involved. For instance, they provide an example of a marketer that generates renewable energy, but sells RECs based on 100% of this renewable energy. In this scenario, the Guides advise that the marketer may state, “We generate renewable energy, but sell all of it to others.” *See* 16 C.F.R. § 260.15, Example 5. As the Commission noted in its Statement of Basis and Purpose for the Green Guides,³ this statement represents one, but not the only, way such marketers may non-deceptively communicate a renewable energy generation claim when they have sold the renewable attributes of all their energy. The essential part of this advice is that any generation claim made in this context should be accompanied by a clear disclosure about the REC sales from the facility.

In addressing these issues in the Green Guides, the Commission did not provide specific guidance on the content of REC-related claims made by power producers who generate renewable energy as a substantial portion of their business.⁴ However, it did warn that power providers that sell null electricity to their customers, but sell RECs based on that electricity to

³ See Statement of Basis and Purpose at 224, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf>.

⁴ *Id.* at 225.

another party, should keep in mind that their customers may mistakenly believe the electricity they purchase is renewable, when legally it is not. Accordingly, it advised such generators to exercise caution and qualify claims about their generation by disclosing that their electricity is not renewable.⁵

Therefore, a utility should avoid unqualified or poorly qualified representations that state or imply that its customers will receive renewable electricity from its renewable facilities when, in fact, the utility has sold or will sell RECs from those projects elsewhere. We recognize that public utilities can face particular challenges with regard to these issues. Utilities that construct and operate renewable facilities must communicate with regulatory entities and ratepayers about the details of these projects during siting, construction, and operation. In addition, utility customers in many states do not choose among competing retail suppliers. In these locations, state regulatory decisions largely determine customers' electricity supplier, their conditions of service, and the prices they pay, raising questions about the materiality of utility representations to those customers' purchasing decisions.

Despite these considerations, even those utilities that construct and operate renewable facilities in states with no retail competition should exercise care in their communications about those projects. The special conditions applicable to utilities do not diminish the need for clear communications about renewable facilities and RECs. Although utilities must communicate with the public and regulators about facility construction and operation, they can do so while avoiding misimpressions by adequately qualifying all of their communications. Similarly, although customers in such service areas do not shop for retail electricity, we cannot rule out the possibility that renewable energy statements from their utility company are material to them. For instance, customers may use such information to change the amount of power they consume from the utility, install on-site generation, or switch fuel types (*e.g.*, from electricity to natural gas). Finally, we realize that, in some cases, utility officials may not know whether RECs will be sold for the project at the time it is constructed. However, if the utility subsequently sells RECs from the facility, it carries a particular burden to inform their customers that they are no longer receiving renewable electricity.

Green Mountain Power's Statements

We have not prepared a claim-by-claim analysis of the statements identified in the Petition. We understand that some of these claims (but not all) were made early in the facility development process before any decision had been made about selling RECs and that some involve facilities for which no RECs have been sold. We also recognize that GMP has disclosed its REC sales and the resulting fuel mix on its website.

Nevertheless, some of these unqualified claims raise concerns in light of the principles discussed here. As noted above, public statements about electricity generation, including the development of generating facilities, can lead to consumer misperception if inadequately qualified. Additionally, while GMP's website contains accurate disclosures about GMP's mix of electricity, not all consumers who read the problematic claims disseminated elsewhere will visit

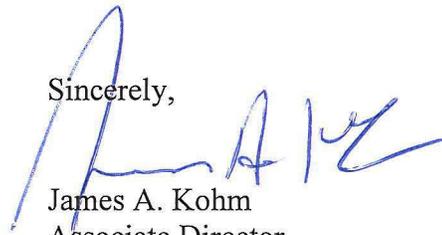
⁵ *Id.*

the website. Finally, while Vermont consumers do not have a choice of electricity providers, they can choose to use less electricity, generate their own electricity at their homes, or switch fuel types. Accordingly, we urge that GMP carefully review its current and future communications to ensure that Vermont customers, and other market participants, clearly understand that GMP sells RECs for many of its renewable facilities and thus has forfeited its right to characterize the power delivered from those facilities as renewable, in any way. If we identify concerns in the future, we reserve the right to take further action.

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The views expressed in this letter are those of FTC staff assigned to enforce the Commission's Green Guides (16 C.F.R. Part 260). This letter represents the views of the staff only and has not been approved by the Commission or by any individual Commissioner. The views provided in this letter are not binding upon the Commission and are provided without prejudice to the right of the Commission later to rescind the positions expressed herein and, when appropriate, to commence an enforcement proceeding. If you have any further questions, please contact me at (202) 326-2640.

Sincerely,



James A. Kohm
Associate Director
Division of Enforcement