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**COMMENTS OF EDISON ELECTRIC INSTITUTE
ON FEDERAL TRADE COMMISSION GUIDES FOR THE USE OF
ENVIRONMENTAL MARKETING CLAIMS**

January 25, 2008

The Edison Electric Institute (EEI) submits the following comments in response to the Announcement of Public Workshop; Request for Public Comment, the “Carbon Offset Workshop – Comment, Project No. P074207,” *72 Fed. Reg.* 66094 (Nov. 27, 2007), and Request for Public Comment; Announcement of Public Meetings, “Green Guides Regulatory Review, 16 CFR part 260, Comment, Project No. P9545501,” *72 Fed. Reg.* 66091 (Nov. 27, 2007).

EEI is the association of U.S. shareholder-owned electric companies. EEI’s members serve 95 percent of the ultimate consumers in the shareholder-owned segment of the industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has as Affiliate members 81 international electric companies and as Associate members 192 industry suppliers and related organizations.

The power sector is responsible for about 40 percent of the carbon dioxide (CO₂) emissions in the U.S. and about one-third of all greenhouse gases (GHGs). Our industry has been committed to reducing, avoiding and sequestering GHGs since 1994, and it has been the national leader in voluntary programs such as the Climate Challenge and Power PartnersSM under Climate VISION. Accordingly, EEI and our member companies have been developing and implementing a full suite of supply- and demand-side technologies and measures to reduce, avoid and sequester

GHGs. These programs include nuclear energy, renewable energy, advanced coal technologies with carbon capture and storage (CCS), and energy efficiency and demand-side management (DSM) – as well as GHG offsets.

EEI has substantial interests in both carbon offsets¹ and renewable energy certificates (RECs). With regard to carbon offsets, EEI member companies and the electric utility industry have been reporting entity-wide and project-based GHG emissions and GHG reductions, avoidances and sequestrations under the Department of Energy's (DOE's) and Energy Information Administration's (EIA's) Energy Policy Act (EPA) of 1992 section 1605(b) program since 1994. The more than 1,600 power sector projects reported in 2005 included GHG offsets addressing reductions, avoidances and sequestrations. Moreover, the power sector comprised 64 percent of the 420 million metric tons of carbon dioxide-equivalent (MMTCO₂e) GHGs reduced, avoided or sequestered that were reported in the 1605(b) program in 2005.

Our industry has an enormous interest in non-generation and off-system options to reduce, avoid or sequester GHGs. Often, these kinds of options — which may be located outside of a utility's service territory, including out of state or overseas — may be less expensive or more cost

¹ The Federal Trade Commission's (FTC's) second notice appears to focus on carbon offsets rather than GHG offsets, although there are at least six internationally and federally recognized GHGs. The commonly recognized GHGs are: CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. In these comments, we do not distinguish between carbon offsets and GHG offsets, and use the term "offsets" to include all offsets, including those relating to non-CO₂ GHGs.

effective than on-system options. The geographic, economic and operations flexibility that offsets provide to utilities in managing their GHGs and carbon footprint is significant. In addition, our industry is aggressively pursuing CCS technologies and utility-sponsored customer DSM and energy-efficiency programs that could qualify as offsets.

With regard to RECs, nearly 10 percent of the nation's electricity was generated by renewable energy in 2006, much of it from hydroelectric power. As the electricity generated by hydropower is likely to remain constant, the power sector is increasing its emphasis on non-hydro sources of renewable energy, such as wind, solar power and biomass. The power sector's interest in renewable energy is further driven by renewable portfolio standards (RPSs) in 26 states and the District of Columbia, as well as by an increasing focus on generating renewable energy by utilities.

Part One – Comments on Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 66091 (Nov. 27, 2007)

The FTC's authority with respect to environmental marketing claims is derived from section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." Under the Act, all marketers making express or implied claims about the attributes of their product or service must have a reasonable basis for such claims at the time they are made. The FTC has properly recognized that it "does not have the authority or expertise to establish environmental performance standards" (72 Fed. Reg. 66096, col. 1) or "prescribe testing protocols" (*id.* at 66092 n. 3), and does not plan to do so in this proceeding. The FTC has done an admirable job in the Guides for the Use of Environmental Marketing Claims (the Green

Guides)² articulating reasonable substantiation standards to apply to terms in common usage at the time those Guides were issued. The Green Guides also do a reasonable job of advising against the use of excessively vague terms in marketing.

The FTC's decision in this proceeding to explore the use of terms such as "carbon offsets," "renewable energy credits" and "sustainability" is timely. EEI's electric utility members have considerable experience developing and reporting GHG offsets under various domestic and international regimes and developing and trading renewable energy and RECs. Utilities also widely participate in important federal government programs that the FTC does not appear to be aware of. EEI's interest in this proceeding is to ensure that the FTC is fully aware of all of the currently accepted uses and ways of measuring GHG offsets and RECs within the power sector. Thus, while the FTC may wish to add appropriate examples to describe issues related to carbon offsets and renewable energy credits, it needs to recognize that there are substantial industry, federal, state and international programs and activities relating to these issues, and that any examples need to be drawn carefully to avoid being inappropriately prescriptive or narrow.

Part Two – Comments on Guides for the Use of Environmental Market Claims; Carbon Offsets and Renewable Energy Certificates; Public Workshop, 72 Fed. Reg. 66094 (Nov. 27, 2007)

I. RECs

The term "renewable energy" encompasses electricity produced from hydroelectric, wind, solar, biomass, geothermal, tidal and wave energy, and waste resources, *inter alia*. There is no

² *Id.* at 66091, col. 2.

standard definition of “renewable energy” in the electric utility industry. A wide range of generating technologies qualifies as renewable energy in the power sector. Indeed, even among the 26 states and the District of Columbia that have RPSs, a wide variety of different energy sources are permitted to qualify (see attached chart). Since the FTC is not in the business of establishing environmental standards or testing protocols, it should give marketers and advertisers wide latitude to substantiate the determination that a source of electricity is renewable.

The FTC notice correctly recognizes that the sale of renewable energy to consumers is made through renewable energy credits or RECs, as well as purchase power transactions. This occurs because it is physically impossible to ensure that electricity used by a particular consumer came exclusively from any particular generation source or supply and because the intermittent nature of many renewable sources precludes assuring a firm energy supply exclusively from renewable sources at any given time. Rather, the electric industry can and does track, at the wholesale level, the financial transactions that occur as power is supplied to the electric grid so that it can reasonably be said that the customer’s ultimate power purchase results in electricity from a source having specified characteristics being placed into the grid.³ Obviously, the renewable

³ See Testimony of Elaine D. Kolish, Associate Director for the Division of Enforcement, Bureau of Consumer Protection, FTC, before the House Commerce Committee, Subcommittee on Energy and Power at 4-5 n. 8 (May 26, 1999) (describing a way to use and track RECs).

characteristics of each block of electricity generated by a particular source of power can only be sold to one customer at a time.⁴

While a REC is a property right that can be transferred at the wholesale level, and thus used to substantiate claims about the attributes of electricity, when the electricity is used by an ultimate consumer, the REC becomes an attribute of the electricity used, rather than a “property right” in and of itself.

Current practices in the electric utility industry, through use of RECs, provide a method of reasonable substantiation for a claim that electricity is renewable – in the sense that it represents an amount of renewable electricity being generated and placed in the grid. Ultimately, a REC represents an avoidance of emissions. Since the vast majority of the nation’s electricity is produced from GHG-emitting, fossil fuel-fired power plants, without RECs CO₂ from such plants would have been emitted to the atmosphere. Without the underlying renewable energy generation, more GHGs would have been emitted. While a REC may not represent a direct offset of another CO₂ emissions source, claims related to RECs do represent a reduction in the CO₂ that would have been emitted without the underlying renewable energy generation.

⁴ While the notice states that “[g]enerally, one REC represents the right to describe one megawatt of electricity as ‘renewable’” (72 Fed. Reg. at 66095 n. 7), the correct reference is to a megaWatt-hour (MWH), which takes into account both the amount of electricity sold and the time period during which it is provided. This is the more appropriate way to look at the attributes of a REC because consumer use is measured by taking both factors into account. Electricity sales are measured in kiloWatt-hours (KWH). A thousand KWH equal one MWH.

Other electric generation sources that do not release GHGs to the atmosphere, such as nuclear energy and coal-based generation with CCS, should be considered for a similar market equivalent as a REC.

II. Carbon Offsets

A. The FTC Must Recognize the Importance of at Least Two Federal Regulatory Programs.

Before addressing the propriety of claims involving “offsets,” the FTC must fully understand the regulatory landscape. Contrary to the notice’s suggestion that there is no federal regime, a major federal role has developed through the EPCRA 2005 section 1605(b) guidelines promulgated by DOE in 1994 and implemented by DOE, EIA and the Department of Agriculture (USDA), as well as through the Department of State’s groundrules for the U.S. Initiative on Joint Implementation (USIJI) under the United Nations’ Framework Convention on Climate Change (FCCC).⁵ In light of the regulatory guidance provided by these longstanding programs, it is incorrect for the FTC to assert that “[i]n this voluntary market, no federal agency currently has a comprehensive environmental regulatory program.” *72 Fed. Reg.* 66095, col. 3.⁶

DOE, in consultation with EPA, USDA and EIA, first promulgated the 1605(b) guidelines in 1994 to govern voluntary GHG reporting under EPCRA 1992. EIA promulgated reporting forms

⁵ This treaty was ratified by the U.S., with the advice and consent of the Senate, in 1992.

⁶ Footnote 12 refers to the Environmental Protection Agency’s (EPA) Green Power Partnership, but overlooks the DOE-EIA-USDA and State Department voluntary reporting programs. A more appropriate reference might be to EPA’s Climate Leaders program, which we understand has a reporting component.

for the 1605(b) program in 1994. In consultation with the aforementioned agencies, DOE revised its guidelines in 2006, and EIA is in the process of establishing revised reporting forms and software.

While there has been criticism directed at 1605(b) program, we ask the FTC to consider these two important factors: First, with the possible exception of EPA's Climate Leaders program, the DOE-EIA 1605(b) program is the only federal voluntary GHG registry in operation at this time. Second, the DOE guidelines were substantially revised in 2006 to include reporting and entity-wide registration tiers, and any critics of the old program should consider the new guidelines.

The revised guidelines are incorporated by reference in 10 C.F.R. Part 300, and thus have the force of regulatory guidance. See 71 *Fed. Reg.* 20784 *et seq.* (Apr. 21, 2006). In their original published form, the General Guidelines were 139 pages. Because of their voluminous length (310 pages), the Technical Guidelines were published separately. In addition, because of their unique technical nature as well as their length, the Agricultural Guidelines (12 pages) and Forestry Guidelines (280 pages) were published separately. The Technical, Agricultural and Forestry Guidelines do not appear in the aforementioned notice, but are incorporated by reference in the *Code of Federal Regulations*. **We single out the forestry and agricultural guidelines because of their direct applicability to carbon offsets, and the FTC would be well served by studying those guidelines in some depth.** Forestry offsets are particularly important to the 50 power generators that are participating in the UtiliTree Carbon Co. and PowerTree

Carbon Co. programs. Since 1995 these initiatives have invested about \$7 million in 15 tree-planting projects and two forest management efforts.

Moreover, in 1994 the State Department published “groundrules” to govern activities implemented jointly (AIJ) under the FCCC, which is the law of the land in the U.S. Thus, while the U.S. never ratified the Kyoto Protocol, it remains bound by the FCCC and implementing regulatory guidance such as the State Department’s 1994 groundrules. See *59 Fed. Reg. 28442 et seq.* (June 1, 1994). Those groundrules cover international project-based offsets for U.S. entities. Because of the importance of international offsets as well as domestic offsets, we also strongly recommend that the FTC become familiar with this regulatory guidance.

International projects are important to the 10 utilities who participated in the International Utility Efficiency Partnerships (IUEP) and who are now participating in the International Power Partnerships (IPP). The IUEP and IPP projects amount to \$8 million in investments in international offsets projects addressing renewables, energy efficiency and power generation.⁷ From 1996-2007, IUEP and IPP projects in operation have reduced, avoided or sequestered about 79 MMTCO₂e, and projects under construction are projected to reduce, avoid or sequester more than 152 MMTCO₂e over their project lives.

⁷ The total capital investment in a variety of hydroelectric, wind, natural gas combined cycle, methane recovery and other projects from 1996-2007 was more than \$600 million. The \$8-million figure represents investment in GHG reduction feasibility studies, FCCC-related activities and the like.

B. The FTC Must Address Definitional and Scoping Issues.

DOE's 1605(b) guidelines cover the full range of entity-level and project-based reporting – including offsets – for GHG emissions and GHG reductions, avoidances and sequestrations. The FTC notice refers to “greenhouse gas emission reduction products” (72 *Fed. Reg.* 66094, col. 1) and “greenhouse gas reduction credits (commonly referred to as ‘carbon offsets’).” *Id.* at col. 3. However, the FTC does not otherwise appear to define offsets (or carbon offsets).

The FTC cannot begin to consider addressing the validity of claims about offsets without providing greater definitional clarity. In the first place, the scope of offsets should include reductions, avoidances and sequestrations of GHGs. Avoided emissions, which would include such power generation as renewable energy and nuclear energy, are specifically recognized in the DOE 1605(b) guidelines. 71 *Fed. Reg.* 20799. From a policy perspective, the federal government has found it appropriate to include both renewable energy and nuclear energy in the 1605(b) program, and the FTC should acknowledge this as well.

The DOE guidelines also specifically recognize that offsets can include utility-sponsored customer DSM and energy-efficiency programs. *Id.* at 20801, col. 3. Again, from a policy perspective, it is entirely appropriate for the federal government, including the FTC, to include utility-sponsored customer DSM and energy-efficiency programs that reduce GHGs. Utilities are engaging in a number of programs to reduce GHGs by enhancing the efficiency of their customers' energy activities or promoting customer energy-savings programs.

As indicated on pages 2-3 of these comments, the key to analyzing offsets programs for utilities is to determine if they are either non-generation or off-system activities. Non-generation activities – such as improved transformer efficiencies and decreased transmission and distribution line losses; on-system forestry and tree-planting activities; etc. – can be legitimately counted as offsets, because their contributions to GHG reductions, avoidances and sequestration cannot otherwise be accounted for. Similarly, off-system activities – such as international forestry, renewable and energy-efficiency projects; landfill methane and coal-bed methane capture projects; customer utilization of coal combustion projects (fly ash) as a substitute for Portland cement⁸; purchased power of renewables; utility-sponsored customer DSM and energy-efficiency projects; etc. – can also be legitimately counted as offsets, because their contributions to GHG reductions, avoidances and sequestrations cannot otherwise be accounted for. The only concern with such off-system activities is to avoid double-counting of offsets credits by utilities and others (*e.g.*, customers, appliance manufacturers), which can be addressed by contract terms and reporting rules.⁹

C. The FTC Should Not Address Additionality.

The FTC has raised additionality as a potentially related policy issue. *72 Fed. Reg.* 66096-97; see also section III.A, question 7. EEI strongly recommends that the FTC steer clear of the issue for two reasons:

⁸ See *71 Fed. Reg.* 20799, col. 2; *id.* at 20800, col. 3.

⁹ The DOE guidelines define offset, but not in a manner that is likely to be useful in this context. See 10 C.F.R. section 300.2 (1996) as published in *71 Fed. Reg.* 20807, col. 2.

First, offsets are not the usual kind of product that the FTC regulates with respect to deceptive or unfair trade practices. As discussed previously, the FTC's jurisdiction to address unfair or deceptive environmental marketing claims is narrowly circumscribed, and it does not include establishing underlying environmental standards or testing protocols. Offsets are not a tangible or visible product to most consumers, but instead involve "credence claims" (as opposed to factual claims). See statement of Alan Levy, Food and Drug Administration, FTC Transcript at 22 ("credence claims [are] where consumers [have] little or no ability to verify the claim based on their own experience and they [m]ay only have to rely on trust") (Jan. 8, 2008).

Second, defining additionality is a conceptual thicket. Without attempting to define additionality, the notice alludes to the so-called "but for" test, and in the January 8 workshop FTC staff spoke of "regulatory additionality." Additionality also has been raised by environmental groups in the guise of environmental (or emissions) additionality, project additionality and financial additionality. In its 1605(b) guidelines, DOE does not define additionality. Because the U.S. is subject to the FCCC, the State Department in its AIJ groundrules and the preamble thereto has addressed additionality. *59 Fed. Reg.* 28445-46, 28443-44. However, the groundrules and accompanying preamble on this topic are exceedingly complex, and the FTC would be well advised to avoid this morass.

If the FTC attempts to address this issue, we recommend that offsets simply be subject to the "but for" test and to monitoring and measurement for substantiation, with optional third-party or

independent verification.¹⁰ Renewable energy, nuclear energy, coal-based generation with CCS and other zero-emitting generation sources should not be subject to the additionality test. The treatment of zero-emissions generation in this fashion is supported by the World Resources Institute's "Guidelines for Quantifying GHG Reductions from Grid-Connected Electricity Projects," which states that grid-connected project activities involving zero-emissions technologies will by definition have lower emissions than a standard baseline emissions rate. The policy implication is that any zero-emissions project activity would automatically be credited with GHG reductions, even if it is not "additional." Thus, all zero-emissions projects should qualify as offsets regardless of whether the additionality/"but or" test is met or not.

Any further encumbrance on qualifying offsets projects based on additionality would create confusion and be a barrier to GHG reductions, avoidances and sequestration from a policy standpoint. Here's what a commentator from the Carnegie Endowment for International Peace said recently:

One of my criticisms about the Clean Development Mechanism is that it is skewed towards providing incentives to the more expensive measures. And that's a consequence of the so-called principle of additionality. The Kyoto treaty wanted to ensure that people weren't getting money, getting credits for doing things that would have happened anyway. It's an understandable motivation, but, in fact, that means that if something makes sense anyway, like in energy efficiency investment, you can't really easily get a credit for it. And I think that's a mistake because it drives up the total cost of cutting emissions, what is in fact what we really want to do.

W. Chandler, Financing Energy Efficiency in China as reported in E&E TV, OnPoint Transcript (Dec. 17, 2007).

¹⁰ The issue of third-party or independent verification is further discussed in section II.D below.

D. The FTC Should Not Require Independent or Third-party Verification.

Mandatory independent or third-party verification of offsets is another issue that the FTC should avoid. Such issues should be left for either Congress to address in legislation or agencies dealing with the creation or management of offsets to address in regulations, as warranted. For example, the DOE guidelines essentially take the position that such verification should be optional. See 10 C.F.R. section 300.11, Independent Verification, and the relevant preamble. *72 Fed. Reg.* 20802, cols. 2-3; 20815-16. The FTC should not specify verification requirements in its marketing guidelines.

Instead, the FTC should use the same standard that it employs for other types of advertising, namely, reasonable substantiation. If an affected marketer or advertiser thinks that it has reasonable verification, it need not seek third-party verification. That should be up to the affected marketer or advertiser, as it is for any other advertiser or marketer.

E. Other Programs

1. State programs

It is incorrect for the FTC to assert “there are no current mandatory markets for carbon offsets in the United States. . .” *72 Fed. Reg.* 66095, col. 3. Mandatory GHG regulations exist in at least four states – Massachusetts, New Hampshire, Washington and Oregon – not including pending implementation of the Regional Greenhouse Gas Initiative (RGGI) in the first two of those states and eight others, and forthcoming regulation in California and other states. Each of the four

mandatory programs noted above incorporates the use of offsets. GHG regulations in Washington and Oregon involve allowing covered entities (including utilities) to pay into a fund, to be used in part for offset projects, for any emissions from a new generation source that exceed the state regulations. GHG regulations in the Massachusetts and New Hampshire allow for the use of offsets to help meet the GHG emissions reductions obligations. Other states are planning to utilize offsets.

RGGI is a 10-state¹¹ CO₂ cap-and-trade program covering power sector emissions that will commence on January 1, 2009. Each of the 10 states involved in RGGI either has enacted, or is in the process of enacting, regulations to govern the state's participation in the program. In addition, the 10 states agreed to a draft memorandum of understanding (MOU) outlining the basic tenets of the RGGI program. Both the state regulations and draft MOU allow covered entities to use credits from offsets projects, with certain limitations, in meeting their emissions reductions targets. The RGGI offsets provisions outline clear requirements for proving the validity of the offsets.

RGGI also allows for the reduction of available carbon allowances based on RECs purchases. This mechanism provides for a direct conversion of RECs to a carbon credit equivalent. RGGI states have recognized the importance of renewable energy, and have endorsed a conversion mechanism under RGGI that would provide for a REC to be utilized as a direct carbon offset.

¹¹ The RGGI states are: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware and Maryland.

The FTC may want to review the state and regional programs noted above, since the states have addressed some of the issues raised by the FTC in their state GHG regulations and clearly have an interest in ensuring the validity of the offsets used in those programs.

2. International programs

In addition, the FTC may want to examine ISO¹² 14064: Part II – Project Reporting, which is one of the international standards for the reporting of project-based emissions reductions. The standard contains specific requirements for the measuring, monitoring and verification of project-based reductions, which are often used for offsets. As such, ISO has addressed some of the issues raised by the FTC in the standard.

F. Responses to Specific FTC Questions

We have previously addressed in these comments several questions raised in the FTC notice. Workshop question 6 (third-party verification) is addressed in section II.D above. Workshop question 7 and question 7 in the FTC's second set of questions (additionality) is addressed in section II.C. above. Workshop question 8 (RECs and carbon offsets) and question 3 in the FTC's second set of questions (property rights and RECs) are addressed in section I above.

With regard to other questions in the FTC's second set of questions, EEI responds as follows:

1. Questions 3 and 4 (carbon offsets, property rights and perception of purchase)

¹² International Organization for Standardization, commonly referred to as ISO.

The question of property rights with respect to offsets is a complex one. Generally, emissions allowances do not have property rights. See section 403(f) of the Clean Air Act (a sulfur dioxide “allowance does not constitute a property right”). Thus, allowances, carbon credits and offsets have value, but not necessarily “property rights” *per se*. Legislation and the common law are the appropriate vehicles for addressing the issue of “property rights” and offsets.

So what do purchasers of offsets think that they are buying? One GHG offset represents a reduction, avoidance or sequestration of one ton of CO₂-equivalent GHG emissions, which, in accordance with the discussion in section II.B above, originate from non-generation or off-system programs. This construct works for electric utility sellers and purchasers of offsets, but admittedly needs to be simplified for retail market consumers of offsets.

2. Question 6 (non-immediate carbon emission reductions)

Utility purchasers of offsets understand that some activities supported by carbon offsets programs do not result in immediate carbon emission reductions, avoidances or sequestration, but retail market consumers may not have that understanding, with one exception. Purchasers of carbon offsets tied to tree-planting, forestry and agricultural programs probably understand that carbon sequestration occurs incrementally and over a longer time horizon, not immediately. Regardless of the purchaser’s understanding of whether an offset occurs immediately, the issue of immediacy is not significant so long as there is a reasonable basis to expect that the offset will occur and be substantiated.

III. Conclusion

With respect to Green Guides, the FTC has recognized that it does not have the authority or expertise to establish environmental performance standards or testing protocols. EEI's primary interest in these proceedings is to ensure that the FTC is fully aware of all of the currently accepted uses and ways of measuring GHG offsets and RECs within the power sector.

A wide range of generating technologies qualifies as renewable energy in the electric utility industry. Current practices in the power sector, through use of RECs, provide a method of reasonable substantiation for a claim that electricity is renewable.

With respect to carbon or GHG offsets, the FTC must recognize the importance of at least two federal regulatory programs, DOE-EIA's EPCRA 1992 section 1605(b) program and the State Department's groundrules for international project-based offsets. The FTC also must address definitional and scoping issues, recognizing that offsets comprise reductions, avoidances and sequestrations of GHGs. In the power sector, the key to analyzing offsets programs is to determine if they are either non-generation or off-system activities.

Moreover, the FTC should avoid the morass of additionality issues. Offsets are not the usual kind of product that the FTC regulates. Offsets are not a tangible or visible product to most consumers, but instead involve "credence claims" instead of factual claims. If the FTC takes the plunge into the additionality thicket, offsets simply should be subject to the "but for" test and to monitoring and measurement for substantiation. Finally, the FTC should not require mandatory